CNR No. WBMD08-001054-2018

District :Murshidabad**.**

IN THE COURT OF ADDITIONAL SESSIONS JUDGE, 1st COURT, LALBAGH, MURSHIDABAD

SUB-DIVISIONAL CHILDREN COURT,LALBAGH

State of West Bengal

……..Prosecutor.

-Vs-

1. CCL

….Accused person.

Under Section 6 POCSO Act

Form – A **Present –** **DEEPTO GHOSH (WB 00841)**
Additional District & Sessions Judge,
1st Court, Lalbagh, Murshidabad
SUB-DIVISIONAL CHILDREN COURT,LALBAGH

Date of the Judgement: 26.07.2023

POCSO 54 of 2018
ST No. 01(09)2018
(CNR-WBMD08-001054-2018)

Arising out of

Murshidabad Police Station Case No. 271 of 2018 dated 11.05.2018

(Details of FIR/Crime and Police Station)

Complainant	State of West Bengal OR Name of the Complainant- (Defacto Complainant-
Represented By	Name of the Advocate- Ranjit Ghosh & Sahana Parvin (Both Special PP)
Accused	1. Name with all Particulars (A1)- CCL
Represented By	Name of the Advocates Nakibuddin

Form – B

Date of Offence	06-05-2018
Date of FIR	11-05-2018
Date of Charge-sheet	30-06-2018
Date of Framing of Charges	26-09-2018
Date of commencement of Evidence	20-09-2018
Date on which Judgment is reserved	05-07-2023
Date of the Judgment	26.07.2023
Date of the Sentencing Order, if any	27.07.2023

Accused Details:

Rank of the Accused	Name of the Accused	Date of arrest	Date of release on Bail	Offenses charged with	Whether acquitted or convicted	Sentence imposed (Substantive)	Period of Detention Undergone during Trial for purpose of Section 428 CrPC
1	CCL	22.06.18	Custody trial	6 POCSO ACT	CONVICTED	Sentenced to suffer Rigorous Imprisonment for twelve (12) years and to pay fine of Rs.50,000/- (Rupees fifty Thousand) in default of payment of fine, to suffer further Rigorous Imprisonment for one (01) year.	5 Years 1 month 5 days.

Form – C

LIST OF PROSECUTION / DEFENCE/ COURT WITNESSES

A. Prosecution:

RANK	NAME	NATURE OF EVIDENCE (EYE WITNESS, POLICE WITNESS, EXPERT WITNESS, MEDICAL WITNESS, PANCH WITNESS, OTHER WITNESS)
PW 1	VG (Name not disclosed)	Victim
PW 2	Susanta Das	Scribe
PW 3		Defacto complainant, Mother of Victim
PW 4	Nirmala Bewa	Independent witness
PW 5	Dr. Nirmal Kumar Sahu	Doctor of the VG.
PW6	Bibi	Relative of the VG
PW7	Sayed	Relative of the defacto complainant
PW8	Maya Dey Dutta	Lady Police Personnel
PW9	Sk	Relative of the defacto complainant
PW10	Shibnath Sanyasi	Investigating Officer
PW11	Dr. Sourav Mondal	Doctor who examined the accused

B. Defence Witnesses, if any: (NIL)

RANK	NAME	NATURE OF EVIDENCE (EYE WITNESS, POLICE WITNESS, EXPERT WITNESS, MEDICAL WITNESS, PANCH WITNESS, OTHER WITNESS)
DW 1		
DW 2		
DW 3		

C. Court Witnesses, if any: (NIL)

RANK	NAME	NATURE OF EVIDENCE (EYE WITNESS, POLICE WITNESS, EXPERT WITNESS, MEDICAL WITNESS, PANCH WITNESS, OTHER WITNESS)
CW 1		
CW 2		
CW 3		

LIST OF PROSECUTION / DEFENCE / COURT EXHIBITS

A. Prosecution:

Sr. No.	Exhibit Number	Description
1	Exhibit-1	Statement of VG U/s 164 of Cr.P.C.
2	Exhibit-1/1 & 1/2	Signature of VG on Ext.1.
3	Exhibit-2	Written complaint.
4	Exhibit-2/1	Signature of PW3 on the written complaint.
5	Exhibit-2/2	Endorsement on the complaint.
6	Exhibit-3	Seizure list dated 11.05.2018.
7	Exhibit-3/1	Signature of PW3 on Ext.3.
8	Exhibit-4	Medical Examination report of the VG.
9	Exhibit-4/1	Signature of PW3 on the Ext.4.
10	Exhibit-5	Formal FIR.
11	Exhibit-6	Medical report of the CCL.
12	Exhibit-6	Formal FIR.
13	Exhibit-7 & 7/1	Rough sketch map with index.
14	Exhibit-8 (Collectively)	Attested copies of Bed head tickets of the VG from Lalbagh SD Hospital.

B. Defence: (NIL)

Sr. No.	Exhibit Number	Description
1	Exhibit D-1/DW 1	
2	Exhibit D-2/DW 2	

C. Court Exhibits: (NIL)

Sr. No.	Exhibit Number	Description
1	Exhibit C-1/CW 1	
2	Exhibit C-2/CW 2	

D. Material Objects: Nil

Sr. No.	Exhibit Number	Description
1	Mat. Exhibit-I	
2	Mat. Exhibit-II	
3	Mat. Exhibit-III	

"Rape is one of the most terrible crimes on earth and it happens every few minutes. The problem with groups who deal with rape is that they try to educate women about how to defend themselves. What really needs to be done is teaching men not to rape. Go to the source and start there."

- Kurt Cobain

1. The factual matrix of this trial is unfortunately related to a sordid and obnoxious incident where an eleven years, old girl was sexually ravished, by the child in conflict with law, herein after referred to as **CCL**, in short, who happens to be her own cousin brother, is what was alleged and for that the CCL faces trial as an adult. The victim-girl suffered ignominy on 06.05.2018. Like the Juvenile offender, the identity of the victim girl, is also kept undisclosed in this POCSO trial, to safeguard the interest of the child throughout, in terms of the provisions, u/s 23 r/w 33(7) of POCSO Act, 2012 and herein after referred to as victim girl (or VG in short).

PROSECUTION-CASE

2. Background facts, sans unnecessary details, are essentially as follows:

3. On receipt of a written complaint, at the instance of one of Elahiganj, Murshidabad, on 11.05.2018, against the CCL, the instant case being, Murshidabad Police Station Case No. 271 of 2018 dated 11.05.2018, under Section 376(2)(i) of IPC read with Section 4/6 of POCSO Act 2012 was initiated, where it was contended that, her 11 years old daughter on 06.05.2018,

at about 11 am, as usual like other day, had been to the house of the CCL, being a neighbourly person and returned back at 11.45 am, crying, where the defacto complainant found her (VG) wearing apparels got drenched in blood. The defacto complainant, was taken aback and she contacted one lady, working in local nursing home, who advised her to admit the VG at Lalbagh SD Hospital and the VG while on being enquired about the incident, disclosed that it was the CCL, who forcibly raped her and threatened her of dire consequence, costing her life by strangulation, if she ever dare to disclose the incident to anybody. Alleging further that the brutal incident of rape, caused bleeding injury at the private part of the VG, which she was still continuing, even at the time of lodging of FIR and as such explaining further that her (VG's) treatment caused delay in bringing the complaint before Murshidabad PS, she lodged a written complaint over the unfortunate incident and on the police case , was initiated against the CCL.

4. Police on receipt of written complaint, swung into action, took up investigation, arrested the CCL as accused, examined available witnesses, visited the place of occurrence, collected medical papers from Lalbagh Subdivisional Hospital, caused medical examination of the victim girl (hereinafter referred to as VG for short) at the hospital and recording of her statement before Judicial Magistrate u/s 164 of Crpc, made seizure and ultimately the investigation culminated in to submission of charge-sheet against the sole accused person, referred as CCL above, being Murshidabad Police Station Charge-sheet no. 346 of 2018 dated 30.06.2018 under Section 376 (2) (i) of IPC read with Section 4/6 of POCSO Act and vide order no. 11 dated 08.08.2018 the then Special Court, Lalbagh transferred the matter to JJB, Berhampore, Murshidabad on finding the accused to be CCL on the date of

the offence. However the later authority, being the Board, in matter JJB 128 of 2018 vide order dated 28.08.2018, upon consultation of Preliminary Assessment Report (PAR) and Psychologist Report in respect of the CCL, in terms of provisions u/s 15/18 of JJ Act, 2015 held that the CCL is in need of being tried as an adult before the Children Court transferred the matter against to this forum being the Children Court and Special Court for POCSO Act, 2012.

5. On 26.09.2018, vide order no. 15, a formal charge was framed against the sole accused - CCL u/s 6 of POCSO Act only. The contents of charge was read over and explained to the CCL person in Bengali, to which he pleaded not guilty and claimed to be tried.

Hence, this trial.

PER-CONTRA

6. The defence case, as it appeared from the trend of cross-examination of the prosecution witnesses and also from the answers given by the CCL in course of his examination under Section 313 Cr.P.C., is basically banked upon the denial of the prosecution story where the CCL abjured his guilt, with a plea of innocence. However no defence witness was adduced in this case.

POINTS FOR RUMINATION:

7.From the rival cases of the respective parties following points have been cropped up for consideration and determination:

1. Has the accused person committed offence punishable under Section 6 POCSO Act ?

2. Is the CCL liable to be convicted for the offence charged with ? And if so, what would be the quantum of punishment ?

EVIDENCE ON RECORD

8. To reserve its right to the judgment, the prosecution has examined as many as five witnesses. They are:

List of witnesses:

a) Victim Girl (VG) as **PW 1** ;

b) Susanta Das as **PW 2** ;

c) (Defacto Complainant) as **PW 3** ;

d) Nirmala Bewa as **PW 4** ;

e) Dr. Nirmal Kumar Sahu as **PW 5** ;

f) Bibi as **PW 6** ;

g) Sayed as **PW 7** ;

h) Maya Dey Dutta as **PW 8** ;

i) Sk as **PW 9** ;

j) Shibnath Sanyasi (I.O) as **PW 10** ; &

k) Dr. Sourav Mondal as **PW 11** ;

9. This apart, following documents have been admitted into evidence on the part of the prosecution:

I]. Statement of VG U/s 164 Crpc : **Exbt. 1** ;

II]. Signatures of VG over the statement U/s 164 Cr.P.C. : **Exbt. 1/1 & 1/2**;

III]. Written complainant : **Exbt. 2** ;

IV].Signature on the Written complaint: **Exbt. 2/1**

V]. Endorsement on the complaint : **Exbt. 2/2**;

VI] . Seizure list : **Exbt. 3** ;

VII]. Signature of PW 3 on seizure list : **Exbt. 3/1** ;

VIII. Medical examination Report : **Exbt. 4** ;

IX]. Signature of PW 3 on seizure list : **Exbt. 4/1** ;

X]. Formal FIR : **Exbt. 5** ;

XI]. Medical Report : **Exbt. 6** ;

XII]. Rough sketch map : **Exbt.7 & 7/1**;

XIII]. Bed Head Ticket : **Exbt. 8 collectively** ;

10. Neither any material has been exhibited from the side of the prosecution nor from the side of the defence any oral or documentary evidence has been produced.

[Fully provided in **Form C** appended with the Judgement]

BACK TO THE BASIC

11. It goes beyond saying that, in a case of present nature, it is imperative for the prosecution to prove the following factors:

> * The sole accused- CCL had intention to commit sexual intercourse with the victim minor girl, who happened to be his neighbour and being in a position of trust or authority over the child, since immediate neighbour and relative as well, while she visiting the house of the accused, the later committed an act upon her, which falls under circumstances falling under any of the seven descriptions specified in Section 375 IPC, to wit committed aggravated penetrative sexual assault, which is within the four corners of offence described u/s 5 of POCSO Act punishable u/s 6 of POCSO Act read with Section 376 of IPC.

12. Now, before entering into the dissection of the evidence on record, let me take some space to say something about the offences complained of -

> The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for "Sexual offences", which encompass Sections 375, 376,

376A, 376 AB, 376B, 376C, 376D, 376DA, 376DB and 376E I.P.C. "Rape" is defined in Section 375 I.P.C. Sections 375 and 376 I.P.C. have been substantially changed by Criminal Law (Amendment) Act, 2013 and 2018, and several new sections were introduced by the new Acts, i.e. 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB and 376E. The fast sweeping changes introduced reflect the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape or '*raptus*' is when a man hath carnal knowledge of a woman by force and against her will (Co.Litt. 123 b); or, as expressed more fully, 'rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will'. (Hale P.C. 628) The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape: (1 Hen. 6, 1a, 9 Edw. 4, 26 a (Hale P.C.628). In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of the male organ of generation (Stephens Criminal Law, 9th Ed., p.262). In "Encyclopedia of Crime and Justice" (Volume 4, page 1356), it is stated "......even slight penetration is sufficient and

emission is unnecessary". In Halsburys' Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation, with violence, of the private person of a woman, an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

Here it is worth to add that, under the " Criminal Law (Amendment) Ordinance, 2013 ", the word *rape* has been replaced with *sexual assault* in Section 375.

Under the 2013 Act, the definition of 'rape' has added penetration other than penile penetration an offence.

This definition not only takes into account forced acts of penile vaginal intercourse, it also includes instances of forced penile/oral, penile/anal, finger/vaginal or object/vaginal within its ambit. The impact of these offences is in no manner less than the trauma of penile/vaginal intercourse. The definition is broadly worded with acts like penetration of penis, or any object or any part of body to any extent, into the vagina, mouth, urethra or anus of woman or making another person do so ; applying of mouth (Oral sex) also included.

The Section has also clarified that penetration means "penetration to any extent " and lack of physical resistance is immaterial for constituting an offence.

Section 376 (2)(i) IPC, on the other hand. refers about rape of a woman when she is under 16 years of age and the perpetrator are to be punished with rigorous imprisonment for a term which shall not be less than 10 years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of the person's natural life and shall also be liable to pay fine.

Thus, Section 375 of IPC should be interpreted in the current scenario, specially with regard to the fact that the child abuse has assumed an alarming proportion in recent times. The word 'sexual intercourse' in Section 375 IPC should be interpreted to mean all kind of sexual penetration of any type of any orifice of the body and not the intercourse understood in the traditional sense. The word 'sexual intercourse' having not been defined in the Penal Code, there was no impediment in the way of the Court to give it a wider meaning so that the various types of child abuse may come within its ambit and the conviction of an offender may be possible u/s 376 IPC. Thus , it is *ipso facto* clear that rape as defined in Section 375 IPC if committed upon a child, it is an offence u/s 4 of POCSO Act, i.e. a penetrative sexual assault by penis into vagina have got all common ingredients but penetrative sexual assault has one more incident (particular)

that the victim should be a child. Thus undoubtedly Section 376 IPC is a minor offence for the offence u/s 4 of POCSO Act. It needs to be mentioned that in the matter of extent of punishment also, Section 376 IPC is a minor offence to Section 4 of POCSO Act. [M.Loganathan vs. State **2017 Cri LJ 633 (Mad) (D.B)** relied on].

13. Thus Child sexual abuse or child molestation is a form of child abuse in which an adult or older adolescent uses a child for sexual stimulation. Form of child sexual abuse include asking or pressurising a child to engaging in sexual activities (regardless of the outcome), indecent exposure of genitals, female sex organs etc, to a child with a intent to gratify their own sexual desire or to intimidate or groom the child, physical sexual contact with a child or using a child to produce child pornography. The new Act of 2012 (POCSO) provides for a variety of offences under which an accused can be punished. It recognizes forms of penetration other than penile-vaginal penetration and criminalises acts of immodesty against children too. The 2013 Amendments to the definition of ' Rape ' are in tune with the requirements of POCSO Act, 2012.

14. Now Section 6 of POCSO Act which is punishment provision of Section 5 of POCSO Act, defining Aggravated Penetrative Sexual Assault, has to be read with section 5(n) and (l) of the Act which is repeated here under for convenience of discussion, since qualifies the offence emphasising its gravity and nature

and status of the victim in relation to the perpetrator of the crime.

> **Section 6** – Whoever commits, aggravated penetrative sexual assault shall be punished with imprisonment for a term which shall not be less than 10 years, but which may extend to imprisonment for life and shall also be liable for fine.

15. As such the essential ingredients which constitutes the offence the offence u/s 6 of POCSO Act are :

1) It is sexual assault ;

2) It is aggravated and penetrative ;

3) It is committed upon a child more than once or repeatedly ;

4) It may happen in the form of sexual assault, on a child taking advantage of the child's mental or physical disability;

5) It may be committed at the instance of a person in a fiduciary capacity ;

16. Section 5 (K) & 5(I) of POCSO Act which are pertinent for this matter, reads as under :-

> (k) whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or .....
>
> ....
>
> (l) who ever commits penetrative sexual assault on the child more than once or repeatedly is said to committed aggravated penetrative sexual assault ;

17. Section 3 of POCSO Act, defines penetrative sexual assault. The Section reads as hereunder :

> 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
>
> (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.

18. As per Section 2(d) of POCSO Act Child means any person below the age of eighteen years.

19. Therefore, in view of the legal provisions discussed as above, to attract penalty under section 6 of the POCSO Act, in this case, the prosecution has to prove the age of the victim to establish that a child suffered penetrative sexual assault as defined under Section 3 of the POCSO Act and too at the instance of a person who happens to be her father, a person who in his fiduciary capacity caused ignominy of her own child by abusing her, ravishing her and later he along with

her family subjected the child and her mother to extreme tormentation in furtherance of such dishonour ;

20. Thus, in every crime there is first intention to commit it, secondly, preparation to commit it; thirdly, attempt to commit it. If the third stage, that is the attempt is successful, then crime is complete. If the attempt fails, the crime is made punishable by the aforesaid provision because every attempt, although it fails of success must create alarm, which, of itself, is an injury and the moral guilt of the offender is the same if he had succeeded.

DECISION WITH REASONS

21. Time has come to pave through the materials on record to fathom out as to how far the prosecution has been able to bring home its case against the present accused person.

FACTS NOT DISPUTED

22. At the very inception of the discussion, I find it provident to select and point out the following factual positions which are not disputed in this case –

A. The victim is a 11 years old girl minor girl, while the accused is her neighbour and relative ;

B. The VG was admitted at the Labour Ward at Lalbagh Subdivisional Hospital, from 06.05.2018 to 13.05.2018 ;

C. Defacto complainant is the mother of the victim, who brought an allegation of rape of her daughter by by the CCL, caused on 06.05.2018 at 11.45 hours, while the FIR was lodged on 11.05.2018 at 11.55 hours;

Point nos. 1 & 2

23. I take the opportunity to discuss both these points together as they are intrinsically related to each other.

24. It needs no emphasis that the physical scar on a rape- victim or whom such an attempt has been made may heal up, but the mental scar will always remain. So it is to be kept in mind that ,when a woman is ravished, what is inflicted is not merely physical injury, but the deep sense of some deathless shame. **An accused can not cling to fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable judicial response to human rights can not be bounded by legal jugglery**. Thus, before entering into the dissection of the evidence of victim girl vis-a-vis the version of other corroborative

evidence, I keep in my mind the watershed observation of the Hon'ble Apex Court in State Of Punjab Versus Gurmit Singh [**1996 (2) SCC 384**], where it has been held that –

> "The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court should find no difficulty to act of the testimony of a victim of a sexual assault alone to convict an accused where **her testimony inspires confidence and is found to be reliable**. Seeking corroboration of her statement before relying upon the same, as a rule, in such case amounts to adding insult to injury." (emphasis by me).

25. Therefore, it is well settled principle of law, as like as noonday, that there is no legal impediment to place reliance on the sole testimony of the evidence of the prosecutrix, **provided such evidence inspires the confidence of the Court and such evidence is free from infirmities, inconsistencies and improbabilities** as rightly contended by Ld. defence counsel. Here it will not be out of context to refer another three Judges Bench authority of the Hon'ble Apex Court in Ganesan Vs. State as reported in **(2020) 10 SCC 573** wherein the Hon'ble Apex Court was again pleased to hold that it is a settle proposition of law that even there can be a conviction based on the sole testimony of the victim however she must be found to be reliable, inspire confidence and absolutely trustworthy, unblemished, **should be of sterling quality.**

26. It is in this context it would be appropriate to extract a sentence from the judgment of this court in Krishan Lal Vs. State of Haryana as reported in **(1980) 3 SCC 159** "**a socially sensitized judge is a better statutory armour against gender outrage than long clauses of a complex section with all the protections writ into it**".

27. Without remaining oblivious of such salutary principles of law let us test the evidences of the witnesses on the touch stone of credibility to fathom out whether the prosecution has been successful in establishing the ingredients of the offence as aforesaid or not. Let us listen to the witnesses as they are the voice and words of justice.

28. Before entering into the boulevard of prosecution witnesses , for the sake of brevity and convenience, I am taking the opportunity to classify the witnesses into four categories and analyse the same in following fashion :-

* *In the first segment* – the versions of the victim as **PW 1**, her mother defacto complainant, Bibi as **PW 3**, her aunt Bibi as **PW 6**, and lastly another distant relative, in the form of Sk as **PW 9** are taken up ;

* *In the second phase* – the versions of independent witnesses, neighbours and co-villagers viz. **PW 4** Nirmala Bewa, VG's relative brother as **PW 7** who is also the maternal brother of the accused, and Sushanta Das as the scribe of the complaint in the form of **PW 2** are analysed ;

* _Then in the third section_– the opinions of expert witnesses being the doctors, who examined the VG and the accused in the form of **PW5** & **PW11** have been elicited ;

&

* _Lastly_ – the testimonies of police personnel and other official witness viz. IO of this case being **PW 8 & 10** are discussed ;

29. Starting the bandwagon is with the version of the victim herself who deposed in this case as PW1 and herein referred to as VG as stated before.

A] The prime witnesses in this case is the **victim herself** who as a minor, deposed as **PW 1**, and after her *voir dire* during her testimony identified the accused as her cousin brother. At the time of her deposition she was a student of Class VII and she recollected the alleged incident, which occurred about six months ago in between 11 to 12 am, when she had gone to the house of his cousin brother Rubel Sk to play with him, who was watching TV in his house and the witness also joined him for watching TV. It was further alleged by the VG that after returning from the house of his cousin brother Rubel Sk, on the way, accused caught hold of her wearing apparels and when she tried to raise alarm then the said accused pressed her mouth with hand (mukh chepe dhorlo) and forcibly, opened her panty and pushed his finger into her private parts first and later also pushed his penis into her vagina forcibly. The witness continued that thereafter somehow she managed to escape from the clutches

of the accused and then he slapped her and threatened her to murder, if she discloses the fact to anybody. The witness sustained severe bleeding injury and pain in her private part due to illegal act of the accused. The witness then stated that, thereafter she rushed to her house and went to the bathroom and found that blood was oozing from her private part, to which she became frightened and thereafter narrated her mother regarding the incident leading to her bleeding from her private part. The witness was medically examined at Lalbagh SD Hospital and also identified signatures on her statement before the Magistrate which are marked **Ext. 1/1** and **1/2** .

During her cross-examination the witness confirmed that the father of the accused and her father are two brothers and they have no visiting terms in the house of the accused. The witness further clarified that she knows both Rahul and Rubel, while the house of Rahul is situated intervened by some houses, from their house while house of Rubel is adjacent to their house, to be precise behind their house and a gully way at the back side of their house leads to Rubel's house and there is a vacant place between the kitchen of Rubel and the kitchen of the VG and there are some other houses surrounding their house and that of the Rubel's. The witness also reconfirmed during her cross-examination that she narrated the incident to the doctor. She denied all other suggestions. [All emphasis by me]

The witness is the sole victim and the key witness to the prosecution case. Now, on scanning the evidence of the victim as PW 1, it transpires that she during her testimony, corroborated the FIR version as well as her statement U/s 164 Cr.P.C dated 16.05.2018, to the extent that she has been raped at the instance of the CCL, for which she got bleeding injury in her private part and she disclosed the incident to her mother and the attending doctor about the alleged incident, on the date of occurrence and the name of the perpetrator, to the extent that it was CCL/relative, who ravished her. The statement of the doctor as PW 5, narrates the same history of her bleeding, per vagina of the VG, as disclosed to him by her mother. While as per FIR, the VG got severe bleeding, from her private part and as per PW 5 and statement of the VG in her statement u/s 164 Crpc, corroborated by her mother/ defacto complainant PW 3 and independent witness PW 4. The versions of other witnesses in the form of PW 7 coupled with that of PW 4 and attending doctor PW 5 regarding medical attendance to the VG at hospital to administration of blood corroborates subsequent events claim of the VG. As such there remains not much of discrepancy in the version of the victim and that of her mother as PW 3 or for the matter of that her rendition of the events before attending doctor PW 5, who recorded the history and the PW 4 and PW 7. How far the said PW 3 , 4 and 7 corroborated their own version before the police, are the factors remains to be seen, in the following discussion.

B] PW3, is the mother of the VG and the defacto complainant, who identified the accused CCL, as the perpetrator of crime. During her testimony on 06.12.19, the witness submitted that about 1 1/2 years ago at about 11.30 am her daughter (VG) went to the house of the CCL, to call his brother Rubel Sk, to play with him and at that time the CCL drove Rubel from the room, caught hold of the hand of the VG, entered the room, locked the door from inside and after putting off her pant, the CCL pushed his finger to the private part of the VG and also put his penis there. When the VG raised alarm, the CCL pressed her mouth, with his hand and threatened her dire consequences, if she discloses the same. The witness continued that thereafter her daughter returned home, in crying condition and the witness found her bleeding from her private part, and she thenceforth informed the matter to one Nirmala Bewa who works in a nursing home and she came, provided first aid and thereafter took her daughter to Lalbagh SD Hospital where the VG was admitted for eight days and got treated. The witness lodged complaint after five days, from the date of the admission of the VG in the hospital. The witness further stated that the statement of the VG was recorded by the Magistrate at Lalbagh Court and the witness handed over the birth certificate of the VG to the police who seized the same by preparation of seizure list. The date of the birth of the VG as per witness is 15.11.2006. The witness

identified her signature in the written complaint and her signatures on the seizure list and medical report, which were marked **Ext. 2/1, 3/1 & 4/1**.

During her cross-examination the witness clarified that, she did not narrate the subject matter of the complaiint to her daughter and naturally she has no knowledge about the contents of the same. which was lodged by the witness. The witness further added that when her daughter returned home after the incident, her wearing apparels were stained with blood and blood was oozing out from her private part. The witness explained that, she did not hand over the blood stained wearing apparels to police, as she threw it out at the hospital campus. The witness continued that three bottles of blood were given to the VG during her treatment where Nirmala assisted the witness during her treatment. The witness continued that her villagers are aware of the incident and on the date of lodging of the complaint police visited her daughter at hospital. The witness confirmed further that she lodged the complaint with her full conscience and she narrated the incident to the doctor with her full conscience. The witness identified the CCL as the son of her elder brother-in-law and he had access to the house of the witness. The witness continued that they had no TV in their house and her daughter used to stay at home and play within the premises of their dwelling house and do no used to mix with others. The witness denied all other suggestions.

[All emphasis by me]

The instant witness is the defacto complainant and the mother of the victim girl, who is the author of this saga and unfolded the prosecution story as a key witness before the police through her FIR. This witness as stated above, is the next important pillar of strength, on which prosecution case hinges, apart from the victim herself. Besides the victim, It is the witness who can divulge the previous and subsequent conducts of victim, as well as the accused, when his daughter, the sole victim herein, allegedly got ravished at the instance of the accused. She is the person to whom the VG first disclosed the alleged incident. The witness during her cross-examination categorically stated that she did not narrate the subject matter of the complaint to her daughter. It is the FIR version of the witness she being the defacto complainant named the perpetrator of the offence, which her daughter disclosed on being admitted at Lalbagh Sub Divisional Hospital but the witness during her testimony before the police u/s 161 Crpc did not disclose the name of the accused as perpetrator of the crime, but specified that she called Nirmala Bewa and admitted the VG to the hospital where she was administered blood and the same phenomenon is in discrepancy with her FIR version as far as rendition of events involving the accused is concerned, though after the alleged incident the spate of events around the VG was corroborated so was the explanation in causing delay in lodging FIR. She also explained during her cross-examination as to why the wearing apparels of the VG could not be preserved for handing over the same to the police. Now except

confronting by reference of few portions of the deposition, nothing is found where the witness was subjected to face with, any statement, before the Court with the one recorded by the police during investigation U/s- 161 Cr.P.C to prove contradiction, omission, improvement or embellishment. Nothing was read over at the instance of the defence from the testimonies of the witnesses to the Investigating Officer vis-a-vis statement of prosecution witnesses U/s-161 Cr.P.C to shake their credential to reveal out the truth as envisaged by the Hon'ble Apex Court in V.K Mishra =Vs.= State of Uttarakhand as reported in **(2015) 9 SCC 588**.

30. Apart from the above two, other relative witnesses, too deposed in this case, to support the prosecution case. Following are the salient portion of their testimonies.

A] PW6, **Bibi** is the sister-in-law of the defacto complainant and identified the VG as the daughter of defacto complainant and contended that they all reside in the same house and identified the CCL as accused. Accoding to her Bibi lodged a complaint against the CCL about 1- 1 1/2 years ago and also stated that she has heard that CCL has raped the VG and she was admitted at Lalbagh SD Hospital and the witness visited the VG at the hospital amd she heard that the VG sustained bleeding injury in her private part. As per witness the incident occurred at the house of the CCL. The witness clarified during cross examination that she

has heard about the incident from the mother of VG i.e. . She denied all other suggestions.

The instant witness is the relative of the defacto complainant as well as the accused and though her version is hearsay but she corroborated, her version which she testfied before the police u/s 161 Crpc.

B] PW9, Sk, identified defacto complainant Bibi, (it appears that the utterance of name being proper nouns and are phonetically similar and as such on some occasions due to inadvertence of the listener Bibi being
defacto complainant, has been wrongly mentioned as) as his aunt and also identified the victim as daughter of Bibi and as such his sister <u>but he</u> <u>has no idea about the compliant filed by Bibi</u> [Emphasis by me]
The witness was declared hostile and he denied all the suggestions put forth by the prosecution except admitting that asked him for money and he gave her the same. The defence chose not to cross- examine her.

The instant witness, though claimed himself to be the relative of the defacto complainant, but on three occasions, he was shown to have identified the defacto complainant, as instead of though it also appears that the utterance of name being proper nouns and are phonetically similar and as such on some occasions due to inadvertence of the listener being defacto complainant, has been wrongly mentioned as and the same is also possible. However, his version, which became hostile, having disclosed nothing has been rendered intoinsignificance.

31. The next to hold the baton, of the prosecution, are found in the next segment of neighbours and/or independent witnesses, and there first comes the version of Nirmala Bewa as **PW4** followed by one relative, from both sides Syed as **PW7,** while the scribe for the complainant was examined as **PW 2**. Following are the salient portions of his testimony.

> **A] PW4**, **Nirmala Bewa** identified the V.G. and her mother as her co-villager and she introduced herself as an employee of Sirajuddala Nursing Home and resident of Elahiganj. According to her about 1 1/2 years ago the mother of the VG called her and told her that the CCL raped her daughter VG and at that time the VG was with her mother, at their house and after putting off her pant the witness and her mother found that blood was oozing out from her private part due to tearing and the witness advised the mother of the VG to take her daughter to hospital for treatment. The witness also accompanied her to Lalbagh Hospital wherein the VG was admitted for 4/5 days for her treatment. The witness continued that during treatment three bottles of blood were provided to the VG at hospital.
>
> During her cross-examination the witness clarified that she went to the hospital on the day of the incident with the VG and her mother at 5 pm and they were interrogated by police at the hospital but they cannot remember on which day they were

interrogated. The witness also confirmed that at the time of incident para people were not aware of the fact but subsequently after admission of VG, the villager came to know about the incident, and police visited the village regarding the incident. The witness denied all other suggestions.

[all emphasis by me]

This witness being an independent witness though corroborated the prosecution version as far as injury to the VG is concerned, her knowledge of the same and her advise to the defacto complainant being the mother of the VG and as such the factum of coming to know about the incident from the defacto complainant about the fact that it was the CCL who raped VG is found in her testimony for the first time before the Court, but like Bibi the defence to prove contradiction, omission, improvement or embellishment did not confront the prosecution witness with her previous version, U/s- 161 Cr.P.C, to shake her credential to reveal out the truth as envisaged by the Hon'ble Apex Court in V.K Mishra =Vs.= State of Uttarakhand as reported in **(2015) 9 SCC 588** . However she some how corroborated the sequence of events explained in more details in her statement u/s 161 Crpc ;

B] Now coming to the testimony of **PW 7**, **Sayed .,** he identified the mother of the V.G. as his maternal aunt while the accused as his maternal brother and as such the VG as his maternal sister. According to the witness about 1 year 7/8 months ago (he was examined on 05.02.2020) the CCL raped VG and the later was admitted for seven days at Lalbagh SD Hospital and on the basis of requisition of Lalbagh SD Hospital the witness collected three

bottles of blood of 'O' group the VG during her treatment at Lalbagh SD Hospital.

During his cross-examination the witness clarified that he has heard the incident of rape from his mami, (defacto complainant) the witness also stated that on the date he visited Lalbagh SD Hospital, he stated everything to police and subsequently he met police at PS that both the CCL and the VG are his maternal brother and sister and also stated to the police that the VG was admitted for seven days at Lalbagh SD Hospital. The witness denied all other suggestions.

The witness is also another common relative of the VG as well as CCL, who corroborated his version of the incident as stated u/s 161 Crpc with a clarification that he heard about the incident from the defacto complainant and his version is hearsay one.

C] PW-2 Sushanta Das, is the scribe of the complaint and according to him on 11.05.2018 he scribed the same as per instruction of Bibi and thereafter read over and explained to her, to which put her signature on the same and the witness also put her signature on the complaint and scribe. The witness identified the same which was marked as **Ext.2**.

During his cross examination the witness clarified that he does not know and he has no personal knowledge of the alleged incident and he

scribed the same at Lalbagh Court Complex being a law clerk at his sherista.

32. Coming to the Expert speak, first crony as **PW5**, was the version **Dr. Nirmal Sahu**, who was the M.O., attached to Lalbagh S.D. Hospital on 11.05.2018 and the same was quite significant, since on that day he issued a certificate in connection with Murshidabad PS case no. 271 of 2018 dated 11.05.2018, U/s 6 POCSO Act, contending that he examined the VG, on 06.05.2018 after her admission, under him, at 7.40 pm . The witness categorically stated that the patient had a history of sexual assault in her own home, at 11 am dated 06.05.2018, **as stated by her mother** in presence of the staff nurse and on examination of the VG the witness found valvo vaginal injury, ruptured hymen i.e. sign of vaginal penetration, resulting severe vaginal bleeding. The witness did not find any other injury over the body of the VG at the time of the examination . On his further examination on recall on 31.01.2023, the witness identified copies of bed head tickets in repsect of the VG, who was admitted under him. As per the witness the VG came with the history of sexual assault and vaginal bleeding and the witness in the bed head ticket made certain advices and in running page no. 23 on 06.05.2018 the witness after examining the patient, after admission found valvo vaginal injury, raptured hymen, vagina full of blood clots and the witness repaired the same with analgesia and local anaethesia . **The witness continued that on 06.05.2018 at 11 am the witness recorded history of her injury as given by the victim's mother named Bibi**(it appears that the utterance of name being proper nouns and are phonetically similar and as such on some occasions due to

inadvertance of the listener being defacto complainant, has been wrongly mentioned as) **, that the victim has been sexually assaulted by the CCL at the home of the CCL himself and the witness recorded the same in his own handwriting.** The witness also stated that on 07.05.2018 at 9 am, he found the patient stable having no vaginal bleeding and as such removed the vaginal pack. recorded the same in his bed head ticket and also advised that continuation of all other advises as stated before and also advised one more unit of blood to be transfused on 08.05.2018 since on 07.05.2018 she was
already transfused with one unit of blood. The witness again revealed that on 10.05.2018, he again found from the bed head ticket of the VG, that she had sudden severe bleeidng per vagina and advised vaginal packing with medicine and also advised blood transfusion on that day again to be removed on 11.05.2018 and the VG was lastly discharged on 12.05.2018 on a note in his own handwriting, which was marked as **Ext.8 series**.

During his cross examination, again the witness categorically stated that had the VG disclosed him anything regarding the alleged incident including the name of the assailant, he would have mentioned the same in the bed head ticket. The witness also stated that spermatozoa can be found if the woman is examined within 12 hours after intercourse but at the same time explained that as it was washed out by the blood when he examined the VG, it was not possible for him to collect vaginal swab for medico legal examination. The witness aslo stated that this kind of injury can happen, due to fall on a sharp or blunt object. Nothing significant revealed during his

cross-examination further, worth mentioning. [all emphasis by me]

This witness is the first independent person whom the mother of the VG confronted and earliest recording of the incident, by any independent authority, when the history of injury was noted by the doctor, in course of his official duty as M.O on duty and noted the same in his own handwriting, which he identified before the Court from the bed head tickets marked Exbt 8 (series). the witness also explained why the vaginal swab, in this facts and circumstance of the case, was not collected at his instance on being questioned by the defence during his cross-examination.

33. **PW-11, Dr. Sourav Mondal,** attached to Lalbagh SD Hospital on 30.06.2018 examined the CCL in connection with Murshidabad PS Case No. 271 of 2018 dated 11.05.2018 and on examination of the CCL in presence of the witness Constable no. 1420 who signed on the report the witness found the CCL have an normal external genetelia and capable of sexual intercourse and he identified his report marked as Ext. 6 as a whole.

34. Now, as far as official witnesses are concerned **PW8, Maya Dey Dutta,** Lady Sub-Inspector recorded the statement of the VG as per norms U/s 161 Cr.P.C following the directions of the Superior at the house of the VG and defence during cross-examination nothing significant revealed worth mentioning.

35. **PW-15**, **Shibnath Sanyasi,** is the I/O of this case and he submitted that on 11.05.2018 he was endorsed with the responsibility of investigation of this case and he identified the formal FIR prepared by Duty Officer Maya Dey Dutta which was marked **Exhibit-5**. The witness also identified the endorsement on the complaint marked **Ext. 2/2**. He caused recording the statement of the V.G through lady officer, visited the P.O, arrested the accused, caused medical examination of the accused while the V.G was admitted at Lalbagh S.D Hospital.The witness also seized the birth certificate of the VG showing date of registration dated 27.12.2006 and the same was marked **Ext.3**. The witness collected medical examination report of the accused marked **Ext. 6**. The witness identified the rough sketch map and index prepared by him on visitation of the P.O. which was marked **Exhibit 12 and 12/1.** The witness also caused recording the statement of the V.G U/s 164 of Cr. P.C which was marked **Ext.1** (formal proof dispensed with). The witness collected, attested copy of relevant bed head tickets in respect of the VG from the hospital which were marked **Ext. 8 collectively.** After completion of the investigation the witness submitted the charge-sheet against the accused person. During his cross-examination the witness stated that he did not examine Rubel and as per sketch map the PO is A and the adjacent room C, which belongs to as per index, one Ersad Sk who has not been examined by the witness. The witness also did not examine Alim Sk and his family members as shown in index as D or San Mohammad and his family members as shown in index as F or Mun Mohammad as per index A. As per the witness the

accused was 17 years old at the time of alleged incident. The witness admitted to have not seized any wearing apparels or seminal stain for forensic examination and did not find any hair, finger print or foot print or other articles of the accused or seized anything from the scene of occurrence. The witness submitted that in the PO there was a cot on which bed was laid but the witness did not seize the bed cover or sheet for forensic examination. Nothing further revealed during his cross-examination worth mentioning.

Upon panoptic resume of the testimony of the aforementioned IO too, except touching some technicalities regarding non examination of neighboring people as per sketch map an index defining the P.O. , quite interestingly nothing is found in the cross examination of the IO where he was confronted with any statement of the vital witnesses say the defacto complainant or the victim, before the Court, with the one recorded by the police during investigation U/s- 161 Cr.P.C, to prove contradiction, omission, improvement or embellishment to shake her credential, to reveal out the truth as envisaged by the Hon'ble Apex Court in V.K Mishra =Vs.= State of Uttarakhand as reported in **(2015) 9 SCC 588**.

36. These are the sum and substance of the evidence from the side of the prosecution.

RIVAL CONTENTIONS

37. Ld. Special Prosecution Counsel – appearing for the State, boostfully, submitted that in the present case the prosecution have been able to prove their contention through 11 numbers of prosecution evidence of which PW1 is the VG herself, being the daughter of the defacto complainant and the mother of the VG, was examined as PW3. VG as per her deposition before the Magistrate and before the Court first reported the matter to her mother, who took help of a nurse, PW4 herein, addressed the emergency situation by rushing the VG to the hospital, narrated the incident to the attending doctor PW5 herein and thereafter attending her daughter's medical emergency she lodged complaint, through the help of the scribe PW2, after elapse of five days of the alleged incident following her disclosure, at the hospital, delay in which she explained properly not only in the FIR but also in her statement before the Court. Referring the evidence of defacto complainant/PW3 the witness maintained the genuinity of the incident where from it transpires that the version of the VG was untutored one. The mother of the VG defacto complainant during her cross-examination as PW3 also explained as to why the wearing apparels of the VG could not be seized by the police and the medical evidence of the attending doctor in the form of PW5 also explained why the vaginal swab of the VG was not collected. Lastly, contending that the CCL though being a 17 years old minor, committed

the heinous offence and tried an a major before this children Court on being transferred from the JJB and where this case the VG identified the CCL as an accused not only before the Court but also during investigation and the evidence of the VG as well as other prosecution witnesses including the defacto complainant are quit consistent enough to bring in charge against the FIR named CCL, who is also a relative of the defacto complainant and the evidence suggests guilt of the accused beyond reasonable doubt. Further reiterating that the law of the land, state that penetration is not necessary to constitute an offence of rape and the said position has been fortified by several authorities right from the Hon'ble Apex Court. In this case the prosecution has meticulously proved all the allegations against the accused as far as discrepancy in the version of place of occurrence amongst the prosecution witnesses.

38. It was the specific contention from the side of the prosecution, that the evidence of the VG was quite elaborate, pointing guilt towards, the accused and his sole testimony is enough. Accordingly, the prosecution prayed for conviction of the accused, considering the incriminating materials on record with which the prosecution was able to prove the charge levelled against the accused, while the later could not shift the burden as onus lied upon him, to establish his innocence. On account of mischief of Section 29 & 30 of POCSO Act also comes against the accused.

39. While entering into defence Ld. Counsel representing the accused, during his short and subtle argument refuted the prosecution contention, rendering it to be so obscure, which is far little enough even to bring home charges against the accused, even prima facie. Since proving beyond reasonable doubt is a distant proposition and by placing argument remonstrated a four pronged defence, which are as follows -

Firstly, showing the Exhibit 12 and 12/1 being the sketch map and index of the PO the Ld Counsel for the defence submitted that while the PO as shown at the instance of the defacto complainant is as per formal FIR and complaint (Ext.5 & Ext.2 respectively) at the house of the CCL at Elahiganj, which was continued by the defacto complainant before the Court as PW3 but as per the VG in her testimony the VG as PW1 stated that while she was returning from the house of her cousin brother Rubel Sk, **on the way** the CCL caught hold of her wearing apparels and ravished her. The VG in her statement before the Magistrate stated a different PO while being examined U/s 164 of Cr.P.C by disclosing that she went to the house of the CCL but as per medical documents marked as Ext4 the VG was ravished in her own home (as history given by her mother Bibi) which is also in discrepancy with the version of the witnesses.

40. **Secondly**, the investigation is flawed in the sense that the IO neither seized the wearing apparels of the VG nor anything from the PO supporting the prosecution case and the entire prosecution story is based on hearsay evidence of all the witnesses including the defacto complainant and none has seen the accused with the VG except one

Rubel, said to be the brother of the accused who was neither cited as a witness in the charge sheet nor he was examined U/s 161 of Cr.P.C by the IO over the alleged incident.

41. **Thirdly**, as per FIR the alleged incident occurred at around 11 am on 06.05.2018 but the VG was taken to Lalbagh SD Hospital at 7.40 pm which means after elapse of more than 8 hours from the alleged incident. Had there been any emergency, the VG would have been rushed by the defacto complainant within hours since Elahiganj is situated just on the opposite side of Ganges and it hardly takes one hour to reach Lalbagh SD Hospital, from the place of the defacto complainant and the same suggests that the story as alleged at the instance of the prosecution causing bleeding injury at the private part of the VG, is shrouded with doubts and there has not any efforts from the side of the prosecution to obfuscate the same.

42. **Lastly**, most astonishingly, the IO did not make any arrangement at the time of investigation for obtaining scientific opinion from the forensic laboratory and did not make any effort towards seizure of wearing apparels of the VG or body fluid or the semen sample of the accused or even record testimony or version of Rubel Sk., the only eye witness immediately before the incident who could testify the same and the investigation was on this aspect incomplete and the same phenomenon itself vesicates the trial and no conviction can be upheld.

LOGOMACHY- CANVASSING & ANALYSIS

43. First in the line of disceptation, is the contention raised from the side of the Ld. Lawyer representing the accused, that there was an unexplained delay on the part of the defacto complainant first to bring the VG to medical attention on the alleged ill fated day and second in lodging FIR on the alleged incident which according to defence dented the prosecution case, questioning its veracity.

44. To discuss the issue let us have the sequence of events as unfolded from the side of the prosecution marshalling the evidence on record.

45. The chain of circumstances vis-a-vis source of the same from the prosecution testimonies, upon panoptic resume of the same, accordingly may be thus summarized as follows:

A] The VG on 06.05.2018, in between 11-00 am to 12 noon (as per statement as PW 1)**, to be precise at about 11-00 am** (as per FIR) **goes to the place of the CCL, being neighbourly resident** (as per FIR), **nd relative cousin brother** (as per PW1/ VG and statement of defacto complainant as PW 1), **to play with her cousin brother Rubel Sk who was watching TV at his house** (as per her statement u/s 164 Crpc as well as statement as PW 1) **along with CCL his elder brother** (as per her statement u/s 164 Crpc **) and she joined to watch TV** (as per her statement u/s 164 Crpc as well as statement as PW 1) ;

B] When the younger cousin brother left and she was about to leave, on way the CCL caught hold of her from her back (as per statement of VG u/s 164 Crpc and statement as PW 1) **fell her down and prevented her to leave** (as per statement u/s 164 Crpc) **and when she tried to raise alarm then CCL pressed her mouth** (as per statement of VG u/s 164 Crpc and statement as PW 1) ;

C] Thereafter the CCL forcibly opened her inner-wear (as per statement of VG u/s 164 Crpc and statement as PW 1) **first pushed his finger into her private part** (as per statement of VG u/s 164 Crpc and statement as PW 1) **wherefrom she urinate** (clarified further in her statement u/s 164 Crpc) **and then pushed his penis inside her genital** (as per statement of VG u/s 164 Crpc and statement as PW 1) **forcibly, slapped her on her face when she tried to escape from the clutches of the CCL and threatened her to cost her life if she ever disclose the incident to anybody** (as per statement of VG u/s 164 Crpc and statement as PW 1) ;

D] The VG felt immense pain in her private part, returned home went to bathroom to personally inspected her private part (as clarified and explained her statement before Magistrate u/s 164 Crpc but in general stated in her statement as PW 1) **and found she is bleeding profusely from her private part due to illegal act of the CCL** (as per statement of VG u/s 164 Crpc and statement as PW 1 but in general stated in her statement as PW 1). **The VG out of fear could not narrate the incident to her mother and told about the incident to her mother at 5-00 pm** (as clarified and explained her statement before Magistrate u/s 164 Crpc but in general stated in her statement as PW 1) ;

E] The subsequent incidents as involved mother /defacto complainant's personal knowledge and her subsequent conduct, in course of same transaction on the same day in proximate time, addressing to the situation of her minor daughter. She being alone, feeling helpless, called up a known lady nurising staff being Nirmala Bewa (PW 4), **after seeing her daughter** (CCL) **in a crying condition in a pool of blood** (as claimed in her statement as PW 3 corroborating the FIR) ;

F] The said Nirmala Bewa, as PW 4, corroborating the version of defacto complainant (PW 3), **continued where the mother of the VG left her the batton, of prosecution contention and submitted that on the ill fated day** (without specifying the time) **she got a call from the defacto complainant, that her daughter VG was raped by CCL and she along with the defacto complainant** (mother of VG) **after putting off her pant found blood oozing out from the private part of the VG, due to tearing and advised the VG to visit Lalbagh SD hospital and she herself accompanied the defacto complainant** [version of the PW 4 which gets corrobortation from the contention of

the defacto complainant as PW 3, who claimed that the VG was provided fast aid by the said Nirmala Bewa, which incident (application of fast aid) , however has no mention in the statement of VG, U/S 164 Crpc and/ or in the complaint or in the version of Nirmala Bewa as PW 4, for the matter of that only] ;

G] The VG claimed to have narrated her ordeal of bleeding from her private part in her testimony before Magistrate at 5-00 pm on the ill fated day and she was later taken to Lalbagh SD Hospital, by her mother and there as per PW 3 / defacto complainant she was admitted for 8 days while PW 4 claimed it was 4/5 days but as per Exbt 8 series the VG was admitted from 06.05.2018 to 13.05.2018 ;

H] The mother of the VG,being defacto complainant gave history of the episode as claimed by PW 5, the attending doctor which was recorded by him, in his own handwriting, that the VG has been sexually assaulted by the CCL, at his home (it was recorded on 06.05.18 at 11-00 am as per Exbt 8/2 by PW 5 as identified by him in photo copy of daily clinical notes of the Lalbagh S D Hospital) a**nd the doctor on examination found ruptutred hymen and sign of penetration and he administered vaginal pack to stop bleeding, transfused blood and he repaired the same and she remained admitted till the aforementioned date** (as stated by the doctor before the Court as PW 5 being a Specialist Gynecologist). **During cross-examination the doctor witness cofirmed, detection of rape of VG** ;

I] The defacto complainant 11.05.2018 at 11-55 Hrs as per Exbt 2, while the VG was still admitted at Labour Ward of Lalbagh SD Hospital and she narrated the reason of delay in the FIR and corroborated the same in her testimony as PW 3 to the extent that she lodged the FIR after 5 days from the date of her dauhgter's admission in the hospital while the VG was admitted for 8 days ;

J] The CCL who resides in the neighbourhood of CCL, at Elahigunj, was arrested as per Inspection Memo on 22.06.18 near BSF Camp at Lalbagh ;

K] The VG was examined before the Magistrate u/s 164 Crpc on 16.05.2018 and she deposed before the Court on 20.11.2018. The statement of VG as PW 1 could not be recorded on the same day as she while narrating the ordeal before the forum felt uneasy on 20.11.2018 and she was examined further and cross-examined on 05.02.2019 ;

L] Another interesting feature, which have mentioned above as well, for the purpose of contradictions and corroborations of the aforementioned events, taken out from different sources, as adverted in brackets, in the entire cross-examinations of prosecution witnesses including the IO, none of them were confronted by the defence, in terms of Section 145 and 155 of Evidence Act, at the instance of defence, to prove contradiction, omission, improvement or embellishment to shake their credential, vis-a-vis their previous statement, to reveal out, which as per the defence, is the truth as envisaged by the Hon'ble Apex Court in V.K Mishra =Vs.= State of Uttarakhand as reported in (2015) 9 SCC 588 ;

46. Thus at the end of the day the VG, if her version is believed, as per her own rendition of ordeal before the magistrate, while recording of her statement u/s 164 Crpc, she made disclosure about the incident at the instance of CCL, her cousin brother, as perprator of the crime at aroud 5 pm. The independent witness, PW 4, whom the mother of the VG the helpless defacto complainant, contacted, in absence of any male member of her family, present at the relevant point of time, in her cross-examination, clarified that, she accompanied the VG and the defacto complainant on the date of the incident, to the hospital at 5-00 pm, while as per **Exbt 8** the VG was admitted at Labour Ward of the Lalbagh S D Hospital at 7-40 pm. As such from the state of events as unfolded through the version of the prosecution in the testimonies of so many witnesses, I do not find any inconsistencies, prima-facie, showing delay, in providing medical attention, to the VG, specially when, it is found, that the mother/defacto complainant, being a rustic lady, alone without a male member available with her at the

relevant point of time, in a singlehanded manner faced the storm, coupled with the fact that the accused is none other than the cousin brother of the VG, being close relative residing in very neighbourhood and the defacto complainant against all such odds, did what she found reasonable for her by calling up a nursing staff, in the form of PW 4, to her immediate help & assisting her rescual of VG/ PW 1, from the situation and the same is found to be enough explanatory, in seeking out medical aid for her daughter VG. Moreover as far VG's role, as aforesaid, in the entire episode, contributing to apparent delay, is concerned, I think it is quite plausible that it will take some time for the survivor VG, to come out of the trauma and reveal the occurrence, specially when she is ravished by a family member brother, as alleged on finding so called protector turn into a predator. Now even during continuation of the indoor treatment of the VG, her mother as defacto complainant, being a rustic village lady and housewife, by taking help of a scribe, a law clerk, conjured up the courage to lodge a written complaint, against her own relative from the side of her husband, who resides in the close vicinity, still she reported the incident before the police keeping the family honour and reputation at stake. Here I place reliance on the observation of the Hon'ble Apex Court in the form of Karnel Singh v. State of M.P, **AIR 1995 SC 2472 = 1995 AIR SCW 3644**; and State of Punjab v. Gurmeet Singh, **AIR 1996 SC 1393 = 1996 AIR SCW 998** where in it has been observed that - In a rape case the prosecutrix remains worried about her future. She remains in traumatic State of mind. The family of the victim generally shows reluctance to go to the police station

because of society's attitude to words such a woman. **It casts doubts and shame upon her rather than comfort and sympathies with her**. Family remains concern about its honour and reputation of the prosecutrix. After only having a cool thought it is possible for the family to lodge a complaint in sexual offence. Similar was the view of the Hon'ble Supreme Court in another instance in State of Himachal Pradesh v. Prem Singh, reported in **AIR 2009 SC 1010 = 2009 AIR SCW 105**, it was also observed as under:

> **"So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault cannot be equated with the case in evolving other offence."**

47. Here I would also like to refer to the reflection of Hon'ble Justice Arijit Pasayat in Tulshidas Kanolkar vs State of Goa – **Criminal Appeal no. 298 of 2003** dated **27.10.2003** where in it has been observed that-

> **In any event, delay per se is not a mitigating per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactory explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to**

her. That being so, the mere delay in lodging of first information report does not in any way render prosecution version brittle.

48. This being the situation, on thread bare analysis of the facts and circumstance of the instance case, the congolmerations of happenings, which the defacto complainant mother endured through, with her victim girl child alone and inspite of the latter remaining admitted in hospital, the way she lodged the complaint, against CCL, single handedly arranging scribe for her, to draft the same, shows little chance of deliberation upon the complaint and to make embellishment or even make fabrications on the same and further the courage and conviction, which she maintained through out, keeping aside the aspect of social stigma attached to the alleged incident, made the way, defeating any chance of the soiling and it seem an untarnished version of the case was presented before the Court, at the earliest instance and as such, I find the delay reason explained by the defacto complainant/ PW 3, is quite rational and explanatory and the defence apprehensions, in this regard are found utterly misconceived, specially when there is no seperate story came up from defence side, to obfuscate the same. Thus, there is nothing on record to doubt about the genesis or genuineness of the prosecution case on account of the alleged delay.

49. At this juncture, coming to the core issue as to what I am to look for, allowing me the indulgence to quote the observation of the Hon'ble Apex Court, in – State of Himachal Pradesh vs. Manga Singh reported in -**(2019) 16 SCC 759,** since, which can act as a polaris and seeking

answer on the guidelines articulated therein, can lead this trial to its logical end. Here it is-

> **19. Observing that there are number of unmerited acquittal in rape case and that Courts have to display a greater sense of responsibility and to be more sensitive while dealing with the charges of sexual assault on woman , in State of Rajasthan Vs N. K.**[reported in (2000) 5 SCC 30 (Para 9 & 10)]
>
> > " **9. …….A doubt, as understood in Criminal Jurisprudence, has to be reasonable doubt and not an excuse for a finding in favour of acquittal . An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittal recorded by criminal Courts which gives rise to the demand for death sentence to the rapists. The Courts have to display a greater sense of responsibility and to be more sensitive while desalting with the charges of sexual assaults on women. In B*harwada Bhoginbhai Hirjibhai Vs State of Gujarat*** [(1983)3 SCC 217] **this Court observed that refusal to Act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, as adding insult to injury. This Court deprecated viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelieve or suspicion. We need only remind ourselves of what this Court has said through one of us** (Dr. A.S. Anand, J as his Lordship then was) **in State of Punjab Vs Gurmit Singh**[(1996) 2 SCC 384- in Page 403, Para-21].
> >
> > > **"21….. [A] Rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such case with utmost sensitivity. The Court should examine the broader probabilities of a case and not to 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."**
> >
> > **10. The question arising for consideration before us are : whether the prosecution story, as alleged , inspires confidence of the Court on the evidence adduced ? Whether the prosecutrix , is a witness worthy of reliance ? Whether the testimony of a prosecutrix who has been victim of rape stands in need of corroboration and if so, whether such corroboration is available**

in the facts of the present case? What was the age of the prosecutrix? Whether she was a consenting party to the crime ? Whether there was unexplained delay in lodging the FIR ?

[emphasis by me]

50. Now, in the light of such observation, setting my journey in quest of proof, I advent again,to the testimony of the victim, marshalling the same with the other evidential *ennui*, I find that, first of all the VG testified against her own cousin brother, CCL herein and not only recorded, her statement before the Judicial Magistrate u/s 164 of Crpc, but also appeared before the Court to vouch the incident on the ill fated day after six months of the alleged incident, all voluntarily. She correctly testified, the date and time of the alleged incident, corroborating the F.I.R version more or less. In this context it should be remembered that she being the victim-girl (VG) is the only eye witness to the incident. The VG, grossly narrated the atrocities perpetrated by the CCL upon her, as described above, which remained consistent with her version u/s 164 Crpc., before the Magistrate, which was recorded, after ten days of the alleged incident. Her explanation, to the manner of occurrence remained concordant, with her statement before the magistrate u/s 164 Crpc. and validate finding of the attending doctor PW 5, who though reportedly examined her on the same day, at evening hours and found, in his own language - valvo vaginal injury, raptured hymen i.e. the sign of vaginal penetration and severe vaginal bleeding, which he explained during his cross- examination that on the basis of valvo vaginal injury finding of rape was detected.

51. Here the victim girl (VG) is none else, but the cousin sister of the CCL, as stated before. She came out to depose against him, not once but thrice – **one before the police, second before the Ld. Magistrate u/s 164 Crpc and lastly before the Court as PW 1**, apart from what she has claimed to have stated on the first occasion to her mother the defacto complainant, here in. Avoiding a rigmarole, if the salient portion of her testimony before the Court is reckoned, she has categorially stated in her testimony that on the ill-fated day in between 11 am to 12 noon, she had been to the house of her cousin brother Rubel Sk, to play with him and she found Rubel watching TV at his house and she joined him and while returning from her house, on her way CCL **caught her wearing apparels** and when she tried to raise alarm then the CCL **pressed her mouth**, **forcibly opened her panty** and **pushed her finger into her private part first** and **then also pushed his penis into her vagina again forcibly** but she somehow managed to escape from the clutches of the CCL, though she was slapped by the later **with a threat of costing her life, if she disclosed the same to anybody**. The VG claimed to have sustained bleeding injury in her private part due to illegal act of the CCL and after rushing home she went to bathroom and found that she was bleeding from her private part, to which **she firstly got frightened on such incident, but thereafter, narrated the same to her mother**. The statement as PW 1, was recorded six months after the incident as stated before [emphasis by me]

52. Now, I ask myself, what she told before the Magistrate during her examination u/s 164 Crpc is

consistent with her later version as PW 1 ? which was marked **Exbt 1 (formal proof dispensed with)** , which was relatively soon after the alleged incident i.e. on 16.05.2018, exactly after the ten days of the incident, to be precise, where defence did not question its authenticity or the manner or mode in which the same was recorded. Recollecting about the ill fated day, VG categorially told that, she had been to the house of her younger brother to call him to play with her and found the CCL being his elder brother watching TV but when the VG tried to follow the younger brother leaving the house of the CCL , the later held her back pulling her wearing apparels, fell her down and when she tried to raise alarm the CCL shut her mouth , removed her panti and inserted his finger in the place wherefrom she urinates (the VG indicated by showing her private part to the lady magistrate, by her hand and identified the part of her body where she got ravished at the instance of the CCL). She also stated that CCL inserted his penis thereafter into her private part after removing the finger and the VG somehow removed the same from her genital and thereafter she got a slap from the CCL where she was threatened by the later that she may cost her life if she discloses anything in the home and thereafter she fled away after rescuing her from the clutches of the CCL and after returning home went to bathroom inspected the place wherefrom she urinates and found that she was bleeding. The VG also stated in her testimony u/s 164 Cr.P.C before the Magistrate that out of fear, she could not at first disclose the incident to her mother initially but around 5 pm told her everything and she was taken to hospital at the instance to her mother

for medical aid where it was found that her genital was ruptured and for the same she got stitches while remaining admitted in the hospital. The VG seems to have in her statement before Magistrate U/s 164 of Cr.P.C not only corroborated her version before the Court as PW1 rather being the earliest recorded version, narrated her ordeal in vivid details and remained consistent through out. Thus it was an elaborate memoir of her version before the Court, where she testified the sequence of events.

53. Here, I must add a note of caution that, the law enunciated by the Apex Court in catena of decisions is that, the child is a competent witness but since there is a chance of tutoring of such child, the Court should accept the evidence of child witness, after carefully evaluating the evidentiary value of such witness and relying on other corroborative evidence.

54. The Apex Court, has categorically, observed that child witnesses are amenable to tutoring and often they live in a world of make believe, though it is established principle that child witnesses are dangerous witness 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 evidence the Court comes to the conclusion that there is an impress of truth in it, there is no bar in accepting the evidence of a child witness and as such it is not desirable that the evidence of child witness should be altogether discarded, on the ground that it is the evidence of a child witness. On the contrary, if the evidence of child witness finds support from subsequent

corroboration of the fact disclosed by the child witness as well as other witnesses and if the evidence of the child witness inspires confidence of the Court then the same may safely be accepted. Reference may be had of from the i). **(2011) 4 SCC 786** (State of Madhya Pradesh v. Ramesh) ii). **(2009) 12 SCC 731** (State of Karnataka v. Shantappa Madivalappa Galapuji) in this regard.

55. The trite position of law, which has been, fortified by several authorities, of the Hon'ble Apex Court, in case of reliability on the testimony of the child witness, is that the evidence of the child witness cannot be rejected Per se, but the Court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality, of the statements and its reliability, base conviction by accepting the statement of the child witness. The fact that the witness being a child witness would require the Court to scrutinize, her evidence with care and caution. If she is shown to have stood the test of cross examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence and there is no point in adding insult to her injury if word to word stringent corroboration is sought. In Suryanarayana v. State of Karnataka reported in **(2001) 9 SCC 129**, the Apex Court solely relied on the evidence of a girl, being the sole witness aged about 4(four) years at the time of incident and 6(six) years at the time of her deposition before the Trial Court and upheld the conviction of the appellant.

56. What is left is now is to fathom out whether the material discrepancies or bit of exaggeration or embellished version of the incident, as pointed out at the instance of the defence, regarding description of P.O. or non-examination of Rubel Sk., the brother of the CCL, as aforesaid, is so animate to discredit the otherwise consistent version of the prosecution case, providing an escape route to the defence or not ?

57. It is well settled principle, as we all know, that Criminal Trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the Courts are required to adopt rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. First of all, the cross-examinations of the PWs do not suggest that they made any contradiction in their respective examination-in-chief, with what they had stated before Police. As we all know that, discrepancies do not necessarily demolish the testimony as held by the Hon'ble Apex Court in Narolom vs. State **AIR 1978 SC 1542**. Discrepancies in the testimony of eye witnesses on material or broad points have to be carefully weighed in arriving at the truth. Relying upon the watershed decision reported in Tahsilder Singh vs. State of UP reported in **AIR 1959 SC 1012**, Hon'ble Apex Court, in the year 2004, has observed that "….. **omission to make a statement in terms of Section 161 Cr.P.C. would amount to contradiction, if same appeared to be significant and otherwise relevant having regard to context in which it occurred**." [Shri Gopal vs. Subhas,

2004(1) Crimes 378 (SC)...relied on]. It is equally true that d**iscrepancy has to be distinguished from contradiction**. The word '**contradiction**' is of a wide connotation which takes within its ambit all material omissions and under the circumstances of a case a Court can decide whether there is one such omission as to amount to contradiction. [State of Maharashtra Vs Bharat Chaganlal Raghani & others, (**2001) 9 SCC 1**... relied on].

58. Needless to mention that, a person witnessing the incident is not supposed to narrate the finer details of the entire incident in a parrot like manner. The normal course of the human conduct would be that while narrating a particular incidence there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot like statements are dis-favoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. The Hon'ble Apex Court in Ousu vs. State of Kerala, **[1974] 3 SCC 767**, **held that minor variations in the accounts of the witnesses, are often the hallmark of the truth of their testimony.** In Jagdish vs.. State of Madhyapradesh reported in **[1981] SCC (Crl.) 676**, the Hon'be Apex Court has held that, when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not

the sole test of truth in the depositions. Apex Court, once again, in State of Rajasthan vs. Kalki & Anr., **[1981] 2 SCC 752** adjudged that in the depositions of witnesses there are always normal discrepancy, however, honest and truthful they may be. **Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like**. Material discrepancies are those which are not normal, and not expected of a normal person.

59. In this monological demonstration, where the VG is seen as a child witness, there is no point in loosing sight of another aspect of her status, where she is also a rape victim and a victim of rape or sexual assault, is not to be treated as 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 [State of Maharashtra vs. Chandraprakash Kewalchand Jain -**(1990) 1 SCC 550** relied on] and as such corroboration of her ordeal from the mouth of different witnesses is not a sine qua non [**AIR 2006 SC 1267** relied on] and banal position of law, requiring no proof further is that, testimony of the victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent even more reliable, entitling more weight absence of corroboration, notwithstanding [**(1996) 2 SCC 384** & **(2000) 5 SCC 30** relied on]. The said position of law, is in over and above the settled principle that children by their inherent nature are honest. Corroboration of the testimony of the child witness is not a rule but a measure

of caution and prudence which is a well-accepted principle [Hari Om v. State of Uttar Pradesh **(2021) 4 SCC 345** relied on].

60. Now coming back to the situation under discussion, in an epoch making authority Ganesan vs. State reported in **(2020) 10 SCC 573**, three Judges Bench of the Hon'ble Apex Court, explained the touch stone on which testimony of sole witness and rape victim is to be testified. Explaining further that where testimony of victim is found to be reliable & trustworthy, unblemished and of **sterling quality,**reliance and conviction on her sole testimony is justified. Then explaining through case law – what is ' **Sterling Witness** ' which must be of very high quality and calibre, whose version is unassailable, the Hon'ble vertex Court referring citation of case of Krishan Kumar Malik v. State of Haryana reported in **(2011) 7 SCC 130**, it is observed and held that- ' to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. Who can be said to be a "**sterling witness**", has been dealt with and considered by this Court in the case of Rai Sandeep alias Deepu v. State (NCT of Delhi), reported in **(2012) 8 SCC 21**. In paragraph 22, it is observed and held as under:

> **"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would**

be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have corelation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

61. On evaluating the deposition of PW1 – victim, on the touchstone of the law laid down by the Hon'ble Apex Court in the aforesaid decisions, it can be safely opined, on the basis of the aforesaid elaborate discussion, that the sole testimony of the PW1 / victim girl is itself, on its own, absolutely trustworthy, consistent and remained

unblemished, in its core spectrum, barring some minor insignificant, prevarication in which the description of PO(place of occurrence) also falls and her evidence ,is of sterling quality in material particulars and stood firm on the anvil like an edifice of truth in terms of the test applied in latest authority of the Hon'ble Apex Court in Phool Singh vs. State of Madhyapradesh reported in **(2022) 2 SCC 74**, as far as, relying on the sole testimony of prosecutrix victim girl (VG), is concerned. Here I am not oblivion that the evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly. [**CRIMINAL APPEAL NO. 1910 OF 2010** - BALU SUDAM KHALDE AND ANOTHER vs. THE STATE OF MAHARASHTRA, relied on in this context]. Here the context in this case, can be identified to a great extent, with the situation prvailing ,in another epoch making authority of the Hon'ble Apex Court, by which I am also heavily inspired, while approaching the situation in the instant matter and the sam is as follows – State of Uttar Pradesh vs. Manga Singh reported in **(2019) 16 SCC 759,** wherein Hon'ble Apex Court, upon finding that a nine year old girl child, staying at her aunt's place, was raped at her tender age, on several occassions, by her cousin brother, where the later used to make her sleep with him at nights and used to take off her clothes and his own and used to insert his private part inside her private part, in such a situation, in absence of even medical evidence or injuries on prosecutrix, on the basis of clear and cogent evidence, even if the same is her sole testimony without corroboration, the conviction can be based on that, unless

there are compelling reasons for the Court which necessitates the Court to insist for corroboration where minor contradictions or small discrepancies should ot be made ground for throwing the evidence of the prosecutrix.

62. In my search, to fathom out, whether the other supporting witnesses co-relate with the version of the VG and the same consistently, match with the version of the other witnesses or not, I find version of PW3 /defacto complainant, mother of the VG, followed by the testimony of PW4 Nirmala Bewa, Nursing staff of a private Nursing Home , independent witness, PW6 Bibi and common relative Syed PW7, corroborated the prosecution version qua the accused apart from the version of the attending doctor (PW 5) and there versions are more or less consistent and trustworthy and minor variance in them does not erode their probative value coming in the way of their acceptability in the light of principles enunciated by Hon'ble Apex Court in – Sukhdev Yadav & ors vs. State of Bihar – reported in **(2001) 8 SCC 86**.

63. Though the mother of the victim, being the defacto complainant, of this case was not an eye witness of the entire episode, but she is the first person, to whom the victim immediately after the incident confided to and her (VG's) arrival to her home and the VG's disclosure of her ordeal to her was simultaneous and spontaneous. Here, I take recluse to the hallowed provision of law as articulated u/s 6 of Evidence Act.

64. The concept of **Res gestae**, as nicely elucidated by the Hon'ble Apex Court, in similar circumstances in an authority reported in Krishan Kumar Malik v. State of

Haryana, reported in **(2011) 7 SCC 130 : (2011) 3 SCC (Cri) 61 : 2011 SCC OnLine SC 869** is extracted below, is worth mentioning -

> **33. As per the FIR lodged by the prosecutrix, she first met her mother Narayani and sister at the bus-stop at Kurukshetra but they have also not been examined, even though their evidence would have been vital as contemplated under Section 6 of the Evidence Act, 1872 (for short "the Act") as they would have been res gestae witnesses. The purpose of incorporating Section 6 in the Act is to complete the missing links in the chain of evidence of the solitary witness. There is no dispute that she had given full and vivid description of the sequence of events leading to the commission of the alleged offences by the appellant and others upon her. In that narrative, it is amply clear that Bimla Devi and Ritu were stated to be at the scene of alleged abduction. Even though Bimla Devi may have later turned hostile, Ritu could still have been examined, or at the very least, her statement recorded. Likewise, her mother could have been similarly examined regarding the chain of events after the prosecutrix had arrived back at Kurukshetra. Thus, they would have been the best persons to lend support to the story invoking Section 6 of th Act.**
>
> **34. We shall now deal with Section 6 of the Act, which reads as under**:
>
> > "**6.Relevancy of facts forming part of same transaction.**— Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places."

35.*Black's Law Dictionary* defines res gestae as follows:

"(Latin: 'things done') The events at issue, or other events contemporaneous with them. In evidence law, words and statements about the res gestae are usually admissible under a hearsay exception (such as present sense impression or excited utterance)."

37. Section 6 of the Act has an exception to the general rule whereunder hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or immediately thereafter. Admittedly, the prosecutrix had met her mother Narayani and sister soon after the occurrence, thus, they could have been the best res gestae witnesses, still the prosecution did not think it proper to get their statements recorded. ….

…………………………………..

[emphasis by me]

65. Now, in this case though the VG is the only eye witness, being the victim injured, but her mother/defacto complainant, followed by the nursing staff Nirmala Bewa i.e. PW3 & 4 are the vital res gestae witnesses, as enunciated by the Hon'ble Apex Court, in Krishan Kumar Malik (supra). With this, again on returning to the her mother's version, as **PW 2**, it is found that, she took up the baton where her daughter concluded. As stated before, the VG on her date of examination as PW1, disclosed more particularly, that she narrated the

incident, leading to her bleeding from her private part, after she personally inspected the same, after going to the bathroom and found blood oozing from her private part, to which she got frightened and the same got further elaboration, confirmation & corroboration, from her testimony, before the Magistrate U/s 164 Cr.P.C, that she confided the same at 5 p.m. on the ill-fated day, to her mother, whereafter her mother/ defacto complainant, rushed her to the hospital. The same spell of events, seeming to be part of the same transaction, where the mother as PW3, disclosed before the Court that she came to know from her daughter that on that ill-fated day at 11.30 am when her daughter, VG herein went to the house of the CCL to call his brother Rubel Sk to play with him at that time the CCL drove Rubel out of the room, caught hold of the VG, locked the door from inside and thereafter put off her pant, first pushed his finger into her private part and there-after, inserted his penis there and when her daughter raised alarm the CCL pressed her mouth and threatened her of dire consequences if she discloses to anybody. However, the witness found her daughter returning home in crying condition and also found her daughter got bleeding injury in her private part. The witness also recounted that she first inform the matter to Nirmala Bewa, who works in a nursing home and she provided first aid to the VG and she was headed to Lalbagh SD Hospital where the VG remained admitted for 8 days. The testimony of the PW2 corroborates the FIR version which was scribed by PW2 at her instance and the witness identified her signature therein. Very vital clarifications, further came during the cross-examination of the defacto complainant, thanks to

the defence, where the defacto complainant, as PW 3 recounted that she did not narrrate the subject matter of the the complaint to her daughter and naturally she has no knowledge about the contents of the complaint and she did not narrate her the same . Such disclosure, itself is a testimony of the fact, that the vivid and sterling quality accounts of events as revealed from the side of VG, child witness, was an untutored version, of the entire saga, which was further affirmed during her evidence as PW 1. The clarifications, from the side of PW3, also gets avowal in the fact that, when the FIR was lodged, the VG as per documentary evidence, in the form **Exbt. 8 (series)** was admitted, in Labour Ward of the Lalbagh SD Hospital and as such there was little scope for consultation and/ or exaggeration. The version of the defacto complainant was recorded after elapse of more than 1½ years, from the date of alleged incident but the same corroborates the version of the VG, detailing subsequent facts, incidents, which occurred immediately after the alleged incident, with the VG. The witness further in her cross-examination avouched, that Nirmala who was later examined as PW 4 assisted her during VG's treatement at the hospital. Another vital revelation as stated above, came out during the cross-examination of the defacto complainant/ PW 3 to the effect that she did not hand over the blood stained wearing apparels to the police as she threw it out of the hospital campus. This phenomenon further explains, why collection of semen sample from wearing apparels of the VG was not possible from the side of the IO or for the matter of that collection of semen of the accused would have been of little consequence, as the innerwear of the VG

was removed due her admission at the hospital immediately after the alleged incident, as a consequence of profuse bleeding and the same was the consistent position of the prosecution side, established further during cross-examination of the attending doctor as PW 5, that as it was washed out by the blood, when he examined the VG, it was not possible for him to collect the vaginal swab of the VG for medico legal examination. This being the situation, I think, these practical medical impediments, as such, can not ruin the otherwise, positive case of the prosecution, only on the ground that the prosecution, during investigation as per norms and protocol, did not or could not, collect vaginal swab of the VG to compare the same with the semen sample, if any, of the CCL. Moreover, it is a trite position of law, requring no further proof, that to establish constitution of offence u/s 6 POCSO Act, proof of any form of penetration, that too by penis, is not the prerequisite. Moreover it is also a trite position of law, that mere technicalities or lack of the same, should not be allowed to stand, in the way of administration of Justice, unless the defence establish that forensic samples were purposefully not collected. The instant case, is different from common situation, in the sense, that, here the VG was so ravished, that her health condition compelled the defacto complainant, a village rustic lady, with the help of PW 4, having no male member available, at wee hours, to rush with her daughter VG herein, to hospital first, before going to PS and, where considering her situation, she was admitted to stop blood oozing from her private part and she was given stiches.

66. There after continuing the bandwagon is the testimony of **PW4,** Nirmala Bewa an independent witness, a nursing staff, who further corroborated and completed the chain of events narrated by the defacto complainant to the extent that from the defacto complainant she came to know that the CCL raped her daughter, VG herein and on her visitation the witness found that blood was oozing from the private part of the VG due to tearing and she advised the defacto complainant mother to take her VG/daughter to hospital for treatment and the witness too accompanied her. She even corroborated her version again, during her cross-examination and she stated that she accompanied the VG and her mother to hospital at 5 pm.

67. Their versions, were further fortified, by the testimonies of common relatives, of both the CCL as well as the VG, in the form of PW7 Syed and PW6 Bibi and most importantly through the version and documentary proof came through the version of attending doctor in the form of PW 5, which I am unfolding in details in the latter part of the discussion.

68. On panoptic resume of the entire gamut of the evidence, I also find that as far as inconsistencies as to the description of place of occurrence, by different witnesses or the manner of occurrence of the alleged crime or for the matter of that her (VG's) reaction to the same, raised by the defence, some little doubt on the prosecution case, but the same, I find are not sufficient enough to obfuscate the prosecution case to be improbable. Here it will be apt to recapitulate that the

first independent recording of the account of the alleged incident was on the date of occurrence itself before the attending doctor of the VG at the Lalbagh Sub- Divisional Hospital and as per his testimony fortified by documentary proof in the form of Exbt. 8/2, recorded by him as history of the alleged incident verbatim from the mother of the VG, that on 06.05.18 at 11 a.m the VG has been sexually assaulted by the CCL, at his own home and the witness confirmed Exbt 8/2 to be his own hand writing and both the documents were marked Exhibit, at the instance of the prosecution, without any objection from the side of the defence, questioning their veracity. Only little bit of variance came when the last account of the incident from the mouth of the VG was recorded in the form of PW 1, after elapse of six month of the same, where the VG while narrating the incident used a cluster of words to describe the PO viz. 'on the way' which the defence took literally to bring the point, as if that the VG herself shifted the venue and identified the PO to be a place, falling on the way and not inside the house of the CCL. It is a trite position of law fortified by several authorities that minor variations or contradictions of this nature do not erode the otherwise reliable version of the prosecution. The minor discrepancies or inconsistencies, which do not go to the root of the matter and do not shake the basic version of the witnesses, can never be annexed with undue importance, more so, when the all important 'probabilities-factor' echoes in favour of the version narrated by the victim-girl. Here I bank upon the observation of the Hon'ble Apex Court, reported in State of Uttar Pradesh vs. Krishna Master & ors. - **(2010) 12 SCC 324**, wherein it has been observed that

discrepancies, inconsistencies, infirmities or deficiencies of minor nature not touching the core of the case, cannot be ground for rejecting the evidence, to separate falsehood from truth , without adopting any hyper technical approach. Moreover when her version was fortified by the evidence of those persons whose presence are most natural to the place and time of the situation.

69. Secondly, here I am not unmindful of the fact that the instant case pertains to allegation of ravishment of a minor girl who turned up before the Court to testify. She as narrated above is the only eyewitness to the incident. She is also a child witness. Considering her tender age and perception of time and thing her testimony can be said to have remained free from blemish. Flabbergasting blisters, from the side of the defence, to erode credibility of the version of a child witness, can not wither away her otherwise trustworthy rendition of events. Words were snatched from her mouth to the effect that the incident occurred on the way and tried to be interpreted, as the same occurred, at a place, which was not at the house of the CCL, and as such absurd. Even her version was fortified by the contemporaneous, evidence of her mother and recording of the history by the doctor, under whom she was admitted and deposed in this case as PW 5 and corroboration is forthcoming from their evidence and minor discrepancies, which are apparently appearing, they are like pebbles which can be easily trodden upon and can not be relegated as insurmountable, boulders in establishing prosecution contention. There versions and presence and the narration of the events to them by

the victim are relevant facts in terms of the provisions under **Section 06** as well as Section **157** of Evidence Act. The defence did not question the presence of the supporting witnesses as sequenced by the prosecution and defence could not shake their credibility. As far the question of failure to adduce other independent witnesses are concerned, specially not calling for the evidence of own brother of CCL viz. Rubel Sk. as CSW , I again reiterate the trite position of law fortified by several authorities right from the Apex Court that – it is not the law, that in every case the version of the prosecutrix, must be corroborated, in material particulars by independent evidence on record. It depends upon the quality of evidence and not quantity of prosecution evidence. If the same is trustworthy, implicitly reliable, conviction can be recorded [**(2006) 1 SCC (Cri) 78** relied on]. Here we must not be oblivious of the phenomenon of law as indoctrinated under the provisions u/s **231** of Criminal Procedure Code, <u>that it is the absolute prerogative and discretion of the prosecutor as to what witness to be called for and Court tread in to the territory and will not interfere to dictate exercise of such discretion</u>, unless it can be shown that the prosecution has been influenced by some oblique motive. Here in this case there is no iota of doubt that Rubel or for the matter of that as per Sketch Map and index, one Ersad Sk., Alim Sk. Mun Mohammad reside in the vicinity of the house of the victim as well as as CCL and the PO , but failure to adduce those neighbouring people can not erode the version of the prosecution. The defence too did not take the risk to adduce the evidence of Rubel,

the brother of the CCL, to disprove the case of the prosecution. Here it will be pertinent to quote the following observations of The Hon'ble Supreme Court made in Krishna Mochi Versus State Of Bihar, 2002 Cr.L.J 2645 (Supreme Court) –

> **It is matter of common experience that in recent times there has been sharp decline of ethical value in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or heir evidence is not found to be credible by Courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high ups in the Government or close to powers, which may be political, economic or other powers including muscle power. A witness may not stand the test of cross-examination which may be sometime because he is bucolic person and is not able to understand the question put to him by the skilful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is found to be imbalance and, therefore, minor discrepancies have to be ignored. These days it is not difficult to gain over a witness by money power or giving him any other allurement or giving out threats to his life and/or property at the instance of persons, in/or close to powers and muscle men or their associates. Such instances are also not uncommon where a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent. It is most unfortunate that expert witness and the investigating agencies and other agencies which have an important role to play are also not immune from decline of value in public life. Their**

evidence sometimes becomes doubtful because they do not act sincerely, take everything in a casual manner and are not able to devote proper attention and time…"

70. This being the ground reality, if the prosecution choose not to adduce, the evidence of so called independent witness, the same is not sufficient to turn the gun to their face, specially when the accused CCL is also a relative of the VG, and Rubel is full brother of CCL. In such circumstances only natural witnesses available to the prosecution are the relatives of the victim, before whom the victim is supposed to disclose her ordeal under natural circumstances. It is a well established position of law, fortified by several authorities right from the Apex court, that testimony of witness otherwise trustworthy, can not be discarded on the ground that he being a relation of the victim is an interested witness. On the contrary it has become a fashion that the public is reluctant to appear and depose before the Court specially in criminal cases because of varied reason starting from being subjected to lengthy cross-examination and harassment of witnesses. In such circumstances only natural witnesses available to the prosecution are the immediate relatives of the victim, who will try to prosecute the real culprit and the last person to screen him to escape unpunished. Here I am placing further reliance on a celebrated decision of the Apex Court S. Sudershan Reddy and others =Vs.= State of A.P, as reported in **(2006)3 SCC (Cri) 503** where it was observed that -

> **Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against the innocent person. Foundation is to be laid if plea of false implication is made.**

71. It is hard to believe, that a neighbourly person, even relatives, in a tradition bound society, will falsely out of vendetta with no apparent reason, will try to settle score, where there is no history of previous animosity between the parties. Regarding member of the relative witnesses It has been held by the Hon'ble Apex Court in State of Himachal Pradesh Vs. Mast Ram **(2004) 8 SCC 660** that evidence of witnesses who were relatives the deceased can not be discarded in the absence of any infirmity in said evidence. The law on the point is well settled, that the testimony of the relative witnesses, can not be disbelieved on the ground of relationship. The only main requirement is to examine their testimony with caution. Their testimony can not be thrown out at the threshold on the ground of animosity and relationship as the same can not be the rule of law (Dharam Pal Vs. State of Uttarpradesh **2008 (1) ALJ 721** relied on). It has been held in Kapildeo Mondal Vs. State of Bihar **AIR 2008 SC 533** that credibility, of eye witnesses not to be judged merely on the basis of his relationship with deceased and strained relation with the accused. It has been further held in Dayal Singh Vs. State of Uttaranchal **2012 Criminal Law Journal 4323 (SC)** that relationship of the witnesses with the deceased can not be a ground to disbelieve his testimony unless his

testimony carries element of unfairness and undue intention of false implication. It has also been held in State of Uttarpradesh Vs. Atul Singh **2009 (4) Supreme 332** that merely because the eye witnesses are family members and their evidence can not perse be discarded. In Namdeo Vs. State of Maharastra **2007 AIR SCW 1835**, the Apex Court held that a witness who is a relative of deceased or victim of the crime can not be characterized as interested, rather a close relative is a natural witness though their evidence has to be scrutinized but can not be doubted. In State of Gujarat Vs Panubhai **1990 Gujarat LR 1251** it has been reiterated that non examination of independent witness is not always fatal but as a matter of satisfaction of judicial conscience. At the same time it should be considered that relationship is not a factor to affect credibility of witness but in case of reliance upon relative witness, the court will have to be cautious in appreciation the same.[Rizaz Vs State of Chatishgarh **2003 Criminal Law Journal 1229 SC**].

72. In this regard, again, reference can be have of the epoch making observation of the Hon'ble Apex Court in Krishna Mochi =Vs.= State of Bihar reported in **2002 SCC (Cri) 1220** wherein it was held that some discrepancy is bound to be present in each and every case which should not weigh by the Court so long it does not materially affect the prosecution case. It was further observed that as long as the discrepancies pointed out are **in the realm of pebbles, the Court should tread upon it, but if it the same are**

boulders, the Court should not make an attempt to jump over the same. (Para-32).

73. Here also, we must not be unmindful to the fact that education, level of perception, endurance, intelligence, profession, wit, memory, retention, wit of the witnesses are all relevant factors to assess the credibility of the witnesses. The prime witnesses, are mostly bucolic and they belonging to weaker section of the society, conjured up the courage to ventilate such ignominy before the society at large, that too against close family member, which the tradition bound society hold as taboo. Thus the witnesses here are people of easy conscience and the power to perceive also differ from man to man. Taking a cue from the observation of the Hon'ble Apex Court, mentioned above, it can be safely concluded here that from the trend of deposition from the side of the prosecution there is no iota of doubt that the same may not be free from little bit of normal or minor discrepancies, but it will not affect it materially and in my view same is not fatal and such hyper- technical stultifying access to justice shall be given an easy exit from the portal of justice as the same is unwarranted. I must at the cost of repetition, again the present discussion, before advancing further with an observation of the Hon'ble Apex Court in this context. In Dinesh @ Bud dha v. State of Rajasthan [**Criminal Appeal no. 263 of 2006**] the Hon'ble Mr. Justice A. Pasayat & S.H. Kapadia jj. have been pleased to observe that -

> **In the Indian Setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A**

girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in Rameshwar v. The State of Rajasthan (AIR 1952 SC 54) were:

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...".

74. This being the position I think the point raised from the side of the defence at the time of argument as to the credibility of the so called interested or relative witness are accordingly answered.

75. Last not the least, the death knell in the coffin, sealing the fate of the already doomed defence attempt to salvage, the situation in favour of the CCL, came with a defining blow in the version of the

attending doctor, in the form of his testimony on recall as PW5. This doctor Nirmal Kumar Sahu attended the VG herein as a patient, under him admitted in labour ward in Lalbagh SD Hospital, even before the instant case was initiated. At that relevant point of time as per Ext.8 collectively and to be precise Ext. 8/2, the PW5 claimed to have in his own handwriting recorded the history of the incident with the victim, as per account given by the mother of the victim and to quote the same in verbatim – **sexual assault by Nadim Sk, S/o Nur Mohammad Sk of Village Elahiganj, Dangapara, PS MSD. Place at the home of Nadim Sk himself at 11 am on 06.05.2018.**

76. Neither the PW5 or for the matter of that the mother of the VG / Defacto complainant as PW3 during their respective testimony were ever confronted on the recording done by the attending doctor, under whom the VG was admitted for her indoor treatment, in his usual and ordinary course of business as a doctor to record the history of the physical assault on the patient admitted, from her accompaniment in terms of the provision **U/s 32 (2)** of the Evidence Act, are relevant facts. Now, coming to the version of the said doctor as PW5 who issued injury report as well marked as Ext. 4 in connection with this case further confirmed in his report prepared in his own handwriting, that the VG was examined by the doctor on admission on 06.05.2018, at 7.40 pm under registration number 12942, who came with a history of sexual assault at 11 am on 06.05.2018 in her own home and the history was given by her mother in presence of staff nurse and the report was prepared on 11.05.2018

with a finding in favour of detection of rape on 06.05.2018 with vulvo vaginal injury, rapture hymen with sign of vaginal penetration with severe vaginal bleeding, with no injury mark however, over other part of the body. On explaining the same during his testimony as PW5, as stated before the witness further elaborated during his cross-examination that, on the basis of sign of vulvo vaginal injury, rape was detected where the patient was admitted till 12.05.2018 and as per his examination on recall he found the rapture hymen and vagina of the VG full of blood clots which he repaired with analgesia and local anaesthesia and also advised her certain medicine, blood transfusion and application of vaginal pack. The propensity of injury was such that the VG was transfused with three units of blood, lastly on 10.05.2018 when from the bed head tickets, the PW5 found that the VG had sudden severe bleeding per vagina and he advised vaginal packing with medicine and also advised blood transfusion on the day again to be removed on 11.05.2018 and her treatment continued till her discharge on 12.05.2018 and the discharge advice was also, signed by the witness as identified him marked Ext. 8/1 to 8/5. The cross-examination from the side of the defence to the doctors was confined that the VG herself did not disclose anything regarding the alleged incident including the name of the assailant, since nothing to that effect has been recorded by the PW5, in his handwriting over Ext. 8 series. The Gynaecologist doctor as witness/PW5 also explained that the spermatozoa can be found if the woman is examined within 12 hours after her intercourse where

even he examined her for the first time on 06.05.2018 at 7.50 pm after admission still, since the same was washed out by the blood when the doctor examined the VG, it was not possible for him to collect vaginal swab or medico legal examination and the same disclosure, as observed before, explained as to why the vaginal swab was not collected or for the matter of that examined by the prosecution through forensic agencies, in this case.

77. At this, discussion will remain incomplete, if another technical aspect remain unaddressed in this case where the attending doctor gynaecologist at Lalbagh S.D.Hospital was a male doctor. Question may arise, medical examination of victim should not have been conducted by P.W.5, a male doctor, is based on section 27(2) of the POCSO Act which states that in case the victim is a woman the medical examination of the victim (P.W.1) in the case in hand, the same should have been conducted by woman doctor. Here in this case the situation is quite different where the VG was first admitted at the instance of her mother at Lalbagh SD Hospital at Labour Ward, as indoor patient even before lodging of FIR, under PW 5. As such there is nothing on record as to how the CCL was prejudiced due to such examination and treatment by male doctor. There is no dispute that the purpose of POCSO Act is to treat the minors as a class by itself and treat them separately so that no offence is committed against them as regards sexual assault, sexual harassment and sexual abuse. The sanguine purpose is to safeguard the interest and well being of the children at every stage of judicial proceeding. Section 27(2) of the POCSO Act

has been designed to protect the girl child from embarrassment and to ensure that she is comfortable, as it was thought to be in the best interest of the girl child. It is not meant to be a safeguard in favour of the accused. Since the learned counsel for the CCL has not been able to show any prejudice has been caused to his client, as because the victim was examined by a male doctor like P.W.5 or that P.W.5 has submitted a wrong report, no importance can be attached to such contention that, come what may, the medical examination of girl child shall be conducted by a female doctor only in all circumstances, the same factum will not enure any benefit in favour of CCL.

78. From the analysis of the evidence of the above prosecution witnesses, starting from VG to corroborations through the testimonies of defacto complainant PW3, co-villagers/common relatives etc. fortified by the independent version of the nursing staff PW 4, who turned up like a saviour to the defacto complainant and the VG and the attending doctor at the Lalbagh Sub Divisional Hospital, PW 5, what transpires is that not all the witnesses can be said to be unreliable. Furthermore, it has never been the requirement of the rule of evidence that an independent witness must be produced. It is a time honoured principle that evidence has to be weighed and not counted and on this very principle stands the edifice of section 134 of Evidence Act, which lays down that in any case, no particular number of witnesses shall be required for proof of any fact in the case. Thus, even if assuming, though not inferring, that the witnesses who deposed in favour of the VG cannot be

relied upon, being hearsay testimonials, the evidence of the injured witness/ victim girl PW 1,duly corroborated by the medical evidences (Exhibits 4 and 8 series) cannot be discarded because as a general rule, a court can act on testimony of a single witness ,even if uncorroborated, in a criminal trial for the simple reason that one credible witness whose version is found trustworthy, consistent with other material and documentary proof and remained unblemished, in its core spectrum at the onslaught of the defence and out-weighs the testimony of other witnesses of doubtful veracity.

79. Here coming to the defence case staring with the discussions with the observations of superior Courts, in Madhu Alias Madhuranatha v. State of Karnataka reported in **(2014) 12 SCC 419**, the Apex Court has observed relying on Nika Ram v. State of H.P. reported in **(1972) 2 SCC 80** and Ganeshlal v. State of Maharashtra) reported in **(1992) 3 SCC 106** that it is obligatory on the part of the accused while being examined under Section 313 Cr.P.C to furnish some explanation with respect to the incriminating circumstances associated with him and the Court must take note of such explanation even in a case of such circumstantial evidence to decide whether or not the chain of circumstances is complete (Musheer Khan v. state of Madhya Pradesh reported in **(2010) 2 SCC 748** and Sunil Clifford Daniel v. State of Punjab reported in **(2012) 11 SCC 205 para 24, 25**.

80. Moreover, the said proposition of law has also been reiterated by the Apex Court in Rohtash Kumar v. state of Haryana reported in **(2013) 14 SCC 434**.

81. It was, therefore, necessary, on the part of the CCL, to explain any circumstance during his examination under Section 313 Cr.P.C., but he has simply tried to avoid the said circumstances by saying that, he had no knowledge about such circumstance or that such circumstances were not true. It is sometimes difficult on the part of the prosecution to prove the actual incident - since the incident remained within the knowledge of the accused and the victim. In order to avoid that situation Section 106 of the Indian Evidence Act may safely be invoked and accordingly it becomes the bounden duty of the accused to explain the circumstance, which were within the special knowledge of the accused here CCL.

82. In the case the CCL or for the matter of that, from the side of did not offer any explanation as to what happened, when the VG went to his place and where he was. The defence Counsel while cross examining the PW 5, tried to extricate opinion from the mouth of the attending doctor that this type of injury may cause due to fall, to be precise during further cross-examination due to fall on a sharp blunt object, but there is nothing on record either from the side of the defence explanation or in the prosecution story or investigation that the VG ever fell on a sharp blunt object and she got injured in her private part. The time gap, was very short and accordingly the CCL, who resides in the neigbourhood of the VG and close relative, but his conduct is not awe inspiring , rather he was arrested after 11 days from the date of FIR and that too from a distance from his residence, near BSF camp Lalbagh Murshidabad at 20-45 hrs., he is definitely duty bound to explain the circumstances as to how and under what circumstances, the victim suffered such sexual assault on her person. The

Hon'ble Apex Court in Phool Singh vs. State of Madhya Pradesh reported in **(2022) 2 SCC 74** has already made it clear, that it is not a sine qua non that, external or internal injury, should be detected in the body of the VG to prove the prosecution case of rape, otherwise it will be treated as consent, rather here the VG is a minor and as such question of consent is inconsequential and at the same time, defence never questioned the VG in her cross- examination, even remotely on such aspect and as such, no such defence proposition of injury in private part, otherwise by sexual assault, is rejected outright . In absence of any such explanation, it would not be justifiable to accept that the VG suffered such injury on her private part due to fall on a sharp or blunt object or CCL family had an existing animosity with the family of the defacto complainant or instant complaint is false one or is out come of such alleged fued, instead of definite conclusion on the basis of entire evidence on record, in most certain terms and without any ambiguity and in all probabilities, that it is the CCL is the author of such crime, in view of the proposition of law as enunciated by the Apex Court in the decisions reported herein above.

83. Now, for what has been discussed hereinabove, it is also but clear that the foundational facts of the offence alleged against the CCL has been established to the hilt. In the present case, the prosecutrix (VG/ PW 1) being a young girl aged 11 years, had no reason to falsely implicate her own cousin brother/ CCL. In the given set of circumstances, based on the well settled principles of law, as recounted before in the body of discussions, it could be safely said that the presumption contemplated by Section 29 of POCSO Act, came into operation and the burden to disprove the

same came staying on the CCL/ defence side ; and it was for him and on his side, to rebut the presumption and to prove that he had not committed the offence, which the defence side miserably failed to discharge the burden and on the principles stated therein and in terms of Section 29 of POCSO Act, the presumption would only lead to the finding of guilt against the CCL.

POST SCRIPT

84. Therefore, after giving a serious cogitation, to the factual aspects of the case, the evidence adduced by the prosecution, this Court fails to find out anything which can divert the needle of guilt from the cousin brother of VG, being the CCL. - as far as charge of offence punishable u/s 6 of POCSO Act is concerned, to any other person or probability. The thread with which the prosecution case is knitted is sufficiently strong to disdain any doubt as to the guilt of the present accused person/ CCL in the commission of the crime where **a cousin elder brother, CCL is found to have gratified his annimated passions and sexual pleasures, by having carnal knowledge of his own cousin sister, VG herein, an innocent girl of tender age, besmiriching a sacred relation of brother and sister in traditional Indian society** and a formidable conclusion can be arrived that the prosecution has been successful in bringing home the guilt of the accused on sexual assault in terms of Section 5 of the POCSO Act **punishable u/s 6 of POCSO Act**. He thus deserves to be convicted in absence of any negative legal evidence and benefit of doubt.

Hence, it is

O R D E R E D

That the **CCL** is found guilty for the offence punishable under **Section 6** of **POCSO Act** and is **convicted** for the above offence in terms of **Section 235(2) Cr.P.C**.

Since there is no scope to give benefit of the provision of Probation of Offenders Act and section 360 of the Cr.P.C and the convict **CCL.**, is in Judicial Custody, he shall remain therein and be produced on **27.07.2023** for receiving sentence. Meanwhile the **convict CCL** be kept in segregation, with special care, till hearing on the point of sentence.

The convict is made aware about the maximum punishment prescribed for the offence, for the commission of which he is convicted above.

Accordingly, convict CCL., be produced on **27.07.2023** for hearing on the point of sentence and further order.

Inform all concerned with the copy of the order.

Dictated & Corrected by me.

Judge, Special Court,
Lalbagh, Murshidabad &
Sub-Divisional Children Court.

Judge, Special Court,
Lalbagh, Murshidabad &
Sub-Divisional Children Court.

Sri Deepto Ghosh,
JO Code-WB00841.
Additional Sessions Judge,
1st Court, Lalbagh, Murshidabad
Sub-Divisional Children Court

POCSO 54 OF 2018

27.07.2023
At 2-05 p.m

The case record is placed before me pursuant to the last order. Sole convict **CCL.** is produced from J/C. Record is taken up for hearing on the point of sentence. I have heard the convict/CCL personally, on the point of sentence, in presence of his Ld. Advocate on record, representing the convict/CCL and Ld. P.P.-in-Charge. The Court has conversed with the CCL, in Bengali, being his mother tongue.

Convict **CCL** submits that :-

> *"He is the middle son of his family, where his parents are indisposed and depend upon the earning of the eldest son, the elder brother of the CCL and the CCL , wants to remain beside his family as a source of sustenance, to support his younger brother as well. He is totally innocent. He prays for mercy."*

Learned Lawyer for the convict/ CCL, submits that the his client is a young man, very recently embraced adulthood and except convict, there would be none, to look after his family and aged parents. He is a law abiding citizen and is a transformed person, since before attaining majority, he has undergoing several, life skill developement training in solitude, during his stay in place of safety. There is no previous conviction or any criminal antecedent against him and so the learned Court may release him on probation, considering his tender age. In the event, the court declines doing so, then minimum prescribed punishment be awarded to

the convict to render proper justice, allowing him to rehabilitate and reintegrate with the society.

Learned Special PP- in Charge, on the other hand submits that. no leniency be extended to the convict/CCL for the heinous offence committed by him, since it falls under the rarest situation, where the perpetrator is the cousin brother, in a fiduciary relation with the VG and as such, the protector has become violator herein and any leniency in punishing the convict, will have a telling effect on the society. Rather, as per Ld. Counsel, he deserves an exemplary punishment and placing reliance upon an epoch making authority – State of H.P vs. Shree Kant Shekhari reported in **(2004)8 SCC 153** submitted that Apex Court has categorically observed in similar situation where a minor was raped at the instance of school teacher, having fiduciary capacity and control upon her that - in sexual violence, apart from being dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity -it degrades and humiliates the victim and where the victim is a helpless innocent child or minor, it leaves behind a traumatic experience. He prayed for awarding the maximum punishment as prescribed for the offence punishable under Section 6 of the POCSO Act.

Let the case record be put up today at **3.30** pm for awarding Sentence in the case.

Typed by me.

Deepto Ghosh Judge, Special Court, Lalbagh, Murshidabad & Sub-Divisional Children Court.	Deepto Ghosh Judge, Special Court, Lalbagh, Murshidabad & Sub-Divisional Children Court.

Later

at 3.30 P.M

Now while taking up the record for awarding sentence, this Court takes the privilege to advance the discussion with this quote –

" **Every saint has a past, every sinner has a future** "

- JUSTICE KRISHNA IYER.

It goes without saying that, concept of JUSTICE is supreme. It is prior to liberty (JUSTITIA Est LIBERATE Prior). Law and Judges are its two limbs. May you be ever so high, the law shall be above you. Upanishad's mandate reminds us that Law is the King of Kings, far more powerful than king. Nothing can be mightier than law by whose strength weak may prevail over the strong. No one is beggar before the Law. The sole aim of Law is approximation of justice. A judge is looked upon as an embodiment of justice. He is known second to almighty. The society which keeps him in high esteem and crowns him with distinct sobriety expects him to live upto its cherished expectations. The last bulwark of a State is its Courts of Justice.

There can be a State, without army but the public confidence in the authority of the State cannot remain, if there are no Courts of Justice, so to run the rule of law with the rule of life. The Court of Justice work with self generated centrifugal force owing to the faith of the people. The stream of administration of justice which is a sacred one like river Ganges emanates from the Constitution which unlike other rivers flowing from the

same source has in itself the potentiality of cleansing mechanism no allowing pollution to overcome it, leading to strengthen the rule of law. Anything which erodes the faith of the people in the rule of law may be not only fatal to the system but may also be dangerous obstruction of justice requiring proper treatment so as to maintain the majesty of law.

I have carefully gone through and considered the submission of the convict / CCL or for the matter of that his Ld. Counsel.

The evidence on record showed that the convict being himself the counsin brother and immediate neighbour, did not allow his sister, the victim girl here in, to enjoy the fruits of the life, given to her by the family, with the dream a young girl to get the love and affection, being the cynosure of her family with all attention, got ruined. The convict, rather preferred to put his sister, to test the dark side of this cruelest world, by gratifying his libido and sexual urge, while having carnal knowledge of his own sister by blood, by himself becoming the violator instead of being protector, of his family members.

Now coming to the point on sentencing issues, there are five distinct goals or philosophies of sentencing :- (1) the punishment should be proportional to the severity of the offence and the offender's culpability, (2) preventing the general public from committing the crime in the future, (3) preventing the offender from committing the same crime again, (4) protecting the society for a period of time by removing the offender from the community and (5) changing the offender's behaviour through treatment or corrective measures to prevent him from committing future crime,

ensuring his rehabilitation and social reintegration and they are all to serve three penology goals- a) reformation b) denunciation by the community or retribution ; and c) deterrence ;

However, the sentencing policy, has been expatiated by the Hon'ble Apex Court in Bajendrasingh vs. State of Madhya Pradesh reported in **AIR 2012 SC 1552** – in the following fashion-

> ***...The law enunciated by this Court in its recent judgements, as already noticed, adds and elaborates the principles that were stated in the case of Bachan Singh and thereafter, in the case of Machhi Singh. The aforesaid judgements, primarily dissect these principles into two different compartments- one being 'aggravating circumstances' while the other being the 'mitigating circumstances' . The Court would consider the cumulative effect of both these aspects normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under the heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balacing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court contemplated under Section 354(3) of Cr.p.c.***

Keeping in mind the said philosophies and keeping in mind the gravity of the offence, I do not think it proper to invoke the provision of S.360 Cr.P.C. in this situation.

Protection of society and deterring the criminal is the avowed object of law and that can only be secured by imposing appropriate sentence.

Finding providence in the observation of the Hon'ble Apex Court in similar circumstances, it will apt to quote relevant

portion of the epoch making authoruity and hereunder salient extract is quoted - Siriya v. State of M.P., reported in **(2008) 8 SCC 72 : (2008) 3 SCC (Cri) 422 : 2008 SCC OnLine SC 864** at page 75

> ***11. The case at hand shows to what bottomless pit of depravation and lust a person can go down. As indicated at the threshold, the custodian of the trust has betrayed the same. The father is supposed to protect the dignity and honour of his daughter. This is a fundamental facet of human life. If the protector becomes the violator, the offence assumes a greater degree of vulnerability. The sanctity of father and daughter relationship gets polluted. It becomes an unpardonable act. It is not only a loathsome sin, but also abhorrent. The case at hand is a sad reflection on the present day society where a most platonic relationship has been soiled by the pervert and degrading act of the father. The evidence on records clinchingly nails the appellant as the offender.***
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> ***12. The next question is whether any lenience in sentence is called for.***
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> ***13. "7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and***
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> ***property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that:'State of criminal law continues to be—as it should be—a decisive reflection of social consciousness of society.' Therefore, in operating the sentencing system, law should adopt the corrective machinery***

or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

8. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed,etc.This position was illuminatingly stated by this Court in Sevaka Perumal v. State of T.N. [(1991) 3 SCC 471 : 1991 SCC (Cri) 724]

9. Criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

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11. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and

mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle McGautha v. State of California [28 L Ed 2d 711 : 402 US 183 (1970)] that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of the crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished."

These aspects were highlighted in Shailesh Jasvantbhai v. State of Gujarat [(2006) 2 SCC 359 : (2006) 1 SCC (Cri) 499] (SCC pp. 361-63, paras 7-9 & 11) and State of Karnataka v. Raju [(2007) 11 SCC 490 : (2008) 1 SCC (Cri) 787 : AIR 2007 SC 3225]

14. In this case, the accused's lustful acts have indelible scar not only physically but also emotionally on the victim. No sympathy or leniency is called for.

Taking a cue, from the observation of the Hon'ble Apex Court, here too the victim had been the subject of lust by her own brother, when the innocent poor child was totally unaware of catastrophe which had befallen, on her. I cannot overlook the pain and suffering of the victim, while she was humiliated and brutally treated in the hands of the convict/ CCL, being her own blood-her family member/ cousin brother, ravished to such an extent that she had to undergo reparment surgery in her private part upon admission in the sub-divisdional hospital, for seven days, where she had to be administered with three bottles of blood, to compensate

blood loss, due to haemorrage from her private part which continued through out the week, inspite of repeated medical intervention, post surgery as well . **In my view standing behind the scene she is also the justice-seeker** . To give a solace to the ignominy the victim girl has already suffered, the court must use the sword of law. Here I am again influenced by the observation of the Hon'ble Apex Court in State of Madhya Pradesh vs. Surendra Singh – reported in **AIR 2015 SC 3980** where in the Hon'ble Summit Court **cautioned the trial Court not to indulge in undue and misplaced sympathy by imposing inadequate sentence which would do more harm to the justice delivery system to undermine the public confidence in the efficacy of law.**

As far weighing the mitigating circumstances are concerned, firstly this Court is bound by the principles enunciated under Section 21 of the Juvenile Justice (Care & Protection of Children) Act, 2015 that – no CCL shall be sentenced to death or life imprisonment, without the possibility of release, for any such offence either under the provision of JJ Act, 2015 or IPC or any other law for the time being in force and further in the reckoning, is the provisional binding under Section 19 of the JJ Act, 2015, ensuring final order, in respect of child offenders, with individual care plan, for rehabilitation of the child, aiming at development of CCL, to respect human relations and his own life, defining his own value in life and as such, indulging him in community service, as a measure of social reintegration, where he can also manage a decent living, as well, in a honest way of leading his livelihood and also develop skill with patience and poise, as such gradually rectify himself with honesty and dignity, distracting himself from baneful activities which is offence

against society, specially when the CCL is a 21 year old young man.

Here, it will not be out of context to mention, that since the offence was constituted on 06.05.18 i.e prior to substitution of Section 6 of POCSO Act, by POCSO (Amdt.) Act, 2019, with effect from 16.08.2019 – we shall be guided by pre amended provision as far as applicability is concerned – where the substantive punishment provision had been rigorous imprisonment, for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

Where as the aggravating circumstance are concerned, here the CCL is tried as an adult. The matter though initiatated as POCSO case no. 28 of 2018, before this Court as POCSO related offence but the same was transferred to JJB, Berhampore, Murshidabad, by my predecessor in office, vide Order no. 10 dated 26.07.2018 but later on in terms of Section 15 of JJ Act 2015 upon finding heinous offence in the nature of, within the meaning of Section 2(33) of the said Act, the instant matter was sent back to this forum, being accepted by my predecessor in office in the capacity of Children Court, U/S 2(20) of the JJ Act, 2015, to try the child as an adult. The matter was renumbered before this Children Court as C Special 54 of 2018. As such in terms of the provision under Section 19 of JJ Act, 2015 read with Rule 13 of JJ Rules, 2017 the CCL was tried following the proceedure prescribed by the Code of Cr.P.C 1973 for trial by Sessions but maintaining a child friendly atmosphere where only restraining provision is the final order which will be subject to the provision of Section 21 of

the JJ Act, 2015 as discussed before. This being the situation a child tried as an adult, is not supposed to be tried under the protective umbrella of Chapter-II of the JJ Act, 2015 where fundamental principles of presumption of innocence, dignity and worth, participation, best interest of the child, family responsibility, safety measures, non-stigmatising semantics or non-waiver of rights, equality and non-discremination, right to privacy and confidentiality, institutional measures as last resort, repatriation and restoration, doctrine of fresh start, diversion and natural justice, come into the protection of the child as mandatory statutory safeguard, since the CCL was found not only, having the mental and physical capacity, prima facie, to commit such henious offence but also had the ability to under stand consequence of the acts in terms of Section 15 of Juvenile Justice (Care & Protection of Children) Act, 2015 .

Moreover, the spirit in which the CCL, should be treated by a Sessions Judge as a children Court has been recapitulated by the Hon'ble Court in its recent authority – State of West Bengal Vs Child in Conflict with Law- **CRR No. 2449 of 2022 dated 16.02.2023** [Reported in **2023 SCC OnLine Cal 338**] in following words, which I take inspiration now : -

> '**29.** Though in the case of **The State of Jammu & Kashmir v. Shubam Sangra (Criminal Appeal No. 1928 of 2022)** decided on 16 November, 2022 the Hon'ble Supreme Court held that the respondent was an adult, at the time of commission of offence of rape, observation by the Hon'ble Supreme Court in paragraph 79 is important and the same is quoted below:
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> > **"79. Before we close this matter, we would like to observe that the rising rate of juvenile delinquency in India is a matter of concern and requires immediate**

attention. There is a school of thought, existing in our country that firmly believes that howsoever heinous the crime may be, be it single rape, gangrape, drug peddling or murder but if the accused is a juvenile, he should be dealt with keeping in mind only one thing i.e., the goal of reformation. The school of thought, we are taking about believes that the goal of reformation is ideal. The manner, in which brutal and heinous crimes have been committed over a period of time by the juveniles and still continue to be committed, makes us wonder whether the Act, 2015 has subserved its object. We have started gathering an impression that the leniency with which the juveniles are dealt with in the name of goal of reformation is making them more and more emboldened in indulging in such heinous crimes. It is for the Government to consider whether its enactment of 2015 has proved to be effective or something still needs to be done in the matter before it is too late in the day."

30. The Parliament has not yet amended the recommendation of the Verma Committee where the committee observed that the age of the child in Conflict in Law ought to be reduced from 18 years to 16 years.
31. I have already mentioned various provisions of 2015 Act the Act prescribed detailed provisions as to the procedure to be followed if a juvenile commits an offence like that of an adult.
32. In the instant case this Court is not in conformity with the decision of the JJB and the court of appeal. **This Court is of the view that the juvenile/opposite party ought to be tried as an adult under the general law and she is not entitled to get benefit of 2015 Act**.'

[All emphasis by me]

Reiterating, again that it is the duty of every Court to award proper sentence, having regard to the nature of the offence and the manner in which it was executed or

committed, the sentencing Courts, are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of offence, keeping in view also the rights of the victim of the crime but also the society at large while considering appropriate sentence, expected a forethought that a meager sentene may run counter productive in the long run and against interest of the society so that it does not shock its conscience and as such striking a proper balance is the order of the day.

Considering all the aspects while abiding by the canon of prudence & circumspection and keeping in mind the guiding principle of the Hon'ble Apex Court as stated above this Court awards and also keeping into consideration the parameters setting rehabilitation of the CCL aiming towards his reforms and social reintegration, as envisaged Under Section 19 of Juvenile Justice Act 2015 & relevant Rules including 13(8) of The West Bengal Juvenile Justice (Care and Protection of Children) Rules 2017, the following sentence to the convicts

Accordingly, it is

O R D E R E D

that the convict **CCL** is sentenced to suffer **Rigorous Imprisonment** for **twelve (12) years** and to pay fine of **Rs.50,000/-**,(**Rupees fifty Thousand**) in default of payment of fine, to suffer further Rigorous Imprisonment for **one (01) year**, for commission of the offence punishable under **Section 6** of the **POCSO Act** ;

In terms of provision u/s **19(2) of the Juvenile Justice (Care & Protection of Children) Act, 2015** & relevant Rules, subjecting the CCL to rehabilitation program, the Superintendent, Berhampore Central Correctional Home, is directed to subject the CCL, **within sentence serving period,** to an **Individual Care Plan,** where his health and nutritional needs are properly taken care of and he may be periodically provided with emotional & psychological support, through authorised Counseling support facility, available with the Correctional Home and he may be involved in leisure creativity and play, self care and individual life skill developement training like Yoga, Meditation, inter-personal relationship mangement counseling and **life skill development educations & professional Counseling with in house vocational training, specially in tailoring, as per wish of CCL and behavioral therapy,under Scheme of the Act & Rules, with active help and support from the facilities extended by Ramakrishna Mission, Sargachi Ashram, Murshidabad and also subject the CCL to free community service, by working as a male assistant, during day time only, as per Jail Code and Manual, in garbage cleaning, management & clearance department, at the dispense of Chairman, Berhampore Municipal Authority, two days in a week, for a period of three years, from the date of reporting, during his entire period of incarceration**, **under active supervision of any social worker/escort to be provided, arranged & funded by District Child Protection Unit, Murshidabad** and follow up by Probation cum after Care Officer, Department of Corll. Admin., Murshidabad, Government of West Bengal.

The period of incarceration, already undergone by the convict, during the course of investigation, inquiry or trial

shall be set off in terms of Section 428 Cr.P.C. against the term of imprisonment under Section 428 Cr.P.C. (not being the imprisonment in default of payment of fine) as imposed above ;

The fine amount if realized, be handed down to the defacto complainant for the treatment & rehabilitation of her victim daughter ;

Abiding by the canon of law set by the Hon'ble Apex Court in **Nipun Saxena** vs. **Union of India W.P. (C) No. 565 of 2012** read with direction of Hon'ble Court in **Bijoy @ Guddu Das** vs. **State of West Bengal** in **CRA No. 663 of 2016** and banking on the principles of law, for awarding compensation at the conclusion of the trial in terms of Section **33 (8)** of **POCSO Act** and **Rule 9(2)** of **POCSO Rules**, **2020** read with Section **357A** of **Crpc**, considering the physical and mental trauma, and scar suffered for the life by VG, with the loss and injury she suffered, as a result of the offence perpetrated upon her, at the instance of her own cousin brother/ CCL, I recommend a compensation amount of **Rs. 2,00,000/- (two lakhs)** only, be also awarded to the victim girl (VG), which as per West Bengal Victim Compensation Scheme, 2017 and to be defrayed at the instance of District Legal Services Authority, Murshidabad, after observing all due formalities in favour of the victim girl ;

Let a copy of this Judgement be forwarded to both, the District Magistrate, Murshidabad under section 365 Cr.P.C., along with a mail/ soft copy to his official e-mail id. and to the Secretary DLSA, Murshidabad for due intimation of the same to the victim of the case as definded under Section 2

(wa) of the Crpc in compliance with solemn direction of the Hon'ble High Court Calcutta passed on **29.03.22** in connection with **CRA 266** of **2020** and also for defrayal of the compensation to the victim girl ;

In view of the amended provisions of Rules 192A & 192B of the Calcutta High Court Criminal (Subordinate Courts) Rules, 1985, and in compliance of the direction of Hon'ble Court in Unkown vs. State of West Bengal in **CRA No. 64** of **2014** dated **20.07.2017** the convict/ CCL is informed, in Bengali language about his right to prefer an appeal against the aforesaid judgment of conviction and sentence and his right to avail legal aid from the District Legal Services Authority, Murshidabad and State Legal Services Authorities, West Bengal under the Legal Services Authorities Act, 1987 to which he declined to prefer any appeal with the aid and assistance of legal aid counsel as he is already under legal guidance of his private Counsel ;

A copy of this judgment be supplied to the convict free of costs, with promptitude, in terms of Section 363(1) and (2) of the Code of Criminal Procedure, i.e. one forthwith immediately after pronouncement of the judgement and a certified copy, on the application of the convict, without delay, free of cost.

Let a copy of this judgement containing finding and sentence be sent to the District Child Protection Unit, Murshidabad & Probation cum After Care Officer, Murshidabad through District Magistrate, Murshidabad, directing them to **submit periodical progress report** with **Follow-up Plan**, in terms of provisions of Rule 76 of Juvenile Justice (Care & Protection of Children) Rules, 2017 & other relevant Rules for evaluation , once every three months from the date of

communication of this order, taking into account the direction of this Court as far as guidelines on Individual Care Plan in respect of CCL is concerned and ensuring its proper implementation in letter and spirit with the help of Berhampore Central Correctional Home Authority and other stake holders and in case of any difficulty in implementation of the same to approach DLSA, Murshidabad for legal aid and assistance and for further clarification to this forum as and when situation so demand.

Let a copy of this Judgment be also sent to the Superintendent of Police, District Murshidabad and Superintendent, Berhampore Central Correctional Home, as per provisions of law, along with a mail/ soft copy, to their official e-mail id, for information and record with a direction to transmit the same, as per Correctional Home Rules & Regulations in the event the covict is tranferred to any other Correctional Home for record.

The Superintendent, Berhampore Central Correctional Home is directed to provide the convict with all possible assistance, if so required, so that he may get legal aid, in preferring appeal, if he subsequently choose to do so, through legal aid assistance .

The Judge-In-charge, Civil Copying Department, Lalbagh is requested to cause supply 5 (five) certified copy of this Judgment and final order, with top priority without fail.

Issue Jail warrant, against the convict/CCL to serve out the sentence.

Let the judgment be kept with the record as part of it. Case alamats be disposed of after expiration of appeal period.

Fix **28.11.2023** for production of CCL along with periodical reports with Follow-up Plan from DCPU & Probation cum After Care Officer, Murhsidabad, Government of West Bengal, for interaction and evaluation of progress & further order.

Superintendent Berhampore Central Correctional Home to ensure collection and collation of reports and submit the same at the time of production of CCL.

Dictated & Corrected
by me.

Judge, Special Court, Lalbagh, Murshidabad. & Subdivisional Children Court	Judge, Special Court, Lalbagh,Murshidabad. & Subdivisional Children Court