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

% ***Reserved on: 18.01.2023***
Pronounced on: 01.05.2023

\+ **CRL.A. 1268/2010**

SANJEEV KUMAR ..... Appellant

Through: Mr. L.S. Chaudhary, Dr. Ajay Chaudhary, Mr. Vishesh Kumar, Ms. Vinita & Ms. Monika, Advocates.

versus

THE STATE NCT OF DELHI ..... Respondent

Through: Mr. Naresh Kumar Chahar, APP for State with SI Mohit, P.S. Swaroop Nagar.

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present appeal has been filed by appellant under Section 374 of the Code of Criminal Procedure, 1973 ('Cr.P.C') challenging the impugned judgment dated 22.09.2010 and order on sentence dated 25.09.2010 passed by learned Additional Sessions Judge (North West-04), Rohini, Delhi in case FIR bearing no. 85/2008 whereby learned Additional Sessions Judge has convicted both the accused persons for committing offences punishable under Section 363/365/34 of the Indian

Penal Code, 1860 ('IPC').They were also convicted for committing offence punishable under Section 376 of IPC.

2. At the outset, it is pertinent to note that State had preferred an appeal i.e. Crl. A. 1067/2013 seeking enhancement of sentence to life imprisonment. The co-accused Naresh expired during the pendency of the appeal and his appeal as well as the appeal filed by the State stood abated. The present appeal as well as appeal of the State *qua* appellant Sanjeev Kumar remained pending. The appellant Sanjeev Kumar also passed away on 15.05.2021, however wife of the appellant *vide* Crl.M.A. No. 4464/2022 sought leave of the Court to continue the appeal under provision of Section 394-C of Cr.P.C and the Division Bench of the Court *vide* order dated 13.09.2022 granted leave to the wife of the appellant to continue the present appeal. The present appeal was to be heard by a Single Bench, therefore, the present appeal was directed to be listed before this Bench.

3. Briefly stated, case of the prosecution is that on 24.04.2008, the prosecutrix had lodged a complaint with the police on the allegations that she had visited Hanuman temple at Nangli Puna, Delhi from Mahendipur Balaji, Mandir (Rajasthan) along with her family. Her parents had gone inside the temple while she was left outside along with the luggage in front of a government school. In the meanwhile, a white color car with two boys, one driving the car and other sitting in the rear seat had stopped the car in front of the prosecutrix. The boy driving the car had dragged the prosecutrix inside the car and the petitioner who was sitting on the rear seat had committed sexual assault upon her while the car continued to move. After about two hours, the prosecutrix was

dropped at the same place from where she was dragged inside the car. After that, she had narrated the entire incident to her father who had informed the police. Police had reached at the spot and upon investigation, the car used to commit alleged offence had been found parked near the street and the two boys who had committed rape were also present there. The prosecutrix had identified the boys who were apprehended by the police and they had disclosed their names as Sanjeev Kumar and Naresh. Thereafter, FIR was registered and after investigation, charge-sheet was filed.

4. Learned Trial Court vide order dated 10.09.2008 proceeded to frame charges against the accused persons punishable for offences under Section 363/365/376(2)(g)/34 of IPC. Relevant portion of the order on charge dated 10.09.2008 passed by learned Trial Court is reproduced as under:

> "I have perused the relevant record and I find that prima facie case u/s 363/365/34 IPC and 376(2)(g) IPC is made out against the accused persons.
> Accordingly, charge under Sections 363/365/34 IPC and 376(2)(g) IPC is framed against both the accused to which they pleaded not guilty and claimed trial.
> Case to now come up for prosecution evidence on 7.11.2008. Prosecutrix and other material witnesses be summoned at the first instance."

5. During the course of trial, the prosecution examined 20 witnesses. After completion of trial, the accused persons were convicted *vide* judgment dated 22.09.2010, the relevant portion of the same is reproduced as under:

> "...Thus, in view of the above discussion and observations and having regard to the fact and circumstances of the present

> case, I am of the considered opinion that the prosecution has been able to prove on record, beyond the reasonable doubt that on the day of the incident, both the accused Sanjeev and Naresh in furtherance of their common intention, kidnapped the prosecutrix, a minor girl, from out of the keeping of her parents without the consentparents with intention to secretly or wrongfully confine her and thereafter accused Sanjeev committed rape upon the prosecutrix against her wishes and without her consent. Accordingly, I hold both the accused - Sanjeev Kumar and Naresh Kumar guilty of the offence's punishable u/s- 363/34 IPC & u/s-365/34 IPC and convict them accordingly. Accused Sanjeev Kumar is also held guilty and convicted u/s 376 IPC….".

6. Thereafter, learned Additional Session Judge *vide* impugned orderon sentence dated 25.09.2010, sentenced both the convicts to undergo rigorous imprisonment for three years with fine of Rs. 10,000/- each and in default to undergo simple imprisonment for five months, for the offence punishable under Section 363/34 of IPC and further rigorous imprisonment for five years with fine of Rs.10,000/- each and in default to undergo simple imprisonment for five months, for the offence punishable under Section 365/34 of IPC. They were further sentenced to undergo rigorous imprisonment for 10 years and a fine of Rs. 30,000/-, in default to undergo simple imprisonment for one year, for the offence punishable under Section 376 of IPC.

7. Aggrieved by the impugned judgment and order on sentence passed by the learned Trial Court, the appellant had preferred present appeal.

8. Learned counsel for the appellant vehemently argues that there are major discrepancies in the statement of witnesses and learned Trial Court has failed to appreciate that the story narrated by the prosecutrix

was improbable and was based on inadmissible evidence. It is also argued that the medical evidence and forensic analysis report does not support the prosecution story. It is stated that prosecutrix has given different versions of the incident in the FIR, in her statement under Section 161, 164 Cr.P.C and in her statement before the learned Trial Court, these statements given by the prosecutrix are self-contradictory.

9. Learned counsel for the appellant also argues that the site plan prepared by the Investigating Officer does not even show the alleged temple in question. It is further argued that priest of the temple and father of the prosecutrix were not examined as witnesses by the prosecution. Moreover, it is improbable to believe that there were no passersby, public persons, teachers or students of the government school who had witnessed the alleged offence. It is argued that no enquiry had been conducted at the spot from any public person, etc. which makes the prosecution story doubtful.

10. *Per contra,* learned APP for the State argues that the statement of the prosecutrix herself is sufficient to convict the accused and further states that there are no major discrepancies in the statements of either the prosecutrix or the witnesses and that there is no infirmity or illegality in the order and the appeal is liable to be set aside.

11. I have heard arguments on behalf of both the parties and have gone through the material available on record.

12. Before dwelling into the merits of the case, this court deems it fit to reproduce relevant statutory provisions of law under which the appellant has been convicted in the present case. The same are reproduced as under:

> "...363. Punishment for kidnapping — Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
>
> 365. Kidnapping or abducting with intent secretly and wrongfully to confine person. — Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
>
> 34. Acts done by several persons in furtherance of common intention — When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.
>
> 376. Punishment for rape — (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years…"

13. Before considering the evidence of the prosecutrix, this Court also deems it appropriate to refer to judicial precedents in relation to evidence of the prosecutrix and corroboration with the story of prosecution.

14. In ***Sadashiv Ramrao Hadbe v. State of Maharashtra*** *(2006) 10 SCC 92*, Hon'ble Apex Court reiterated that the sole testimony of the prosecutrix could be relied upon if it inspires the confidence of the Court:

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

15. In ***Santosh Prasad v. State of Bihar*** *(2020) 3 SCC 433*, Hon'ble Apex Court discussed as to who can be said to be a 'sterling witness'. While doing so, it also referred to its previous judgment in ***Rai Sandeep v. State (NCT of Delhi) (2012) 8 SCC 21***, and 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 co-relation 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."

16. In ***Abbas Ahmad Choudhary v. State of Assam*** *2010 (2) JCC 888*, Hon'ble Supreme Court had held that prosecution even in rape cases has to prove the case beyond reasonable doubt. The relevant portion of the decision is reproduced as under:

> "5…We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, **but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell entire story truthfully**".
>
> (Emphasis supplied)

17. The Hon'ble Supreme Court in ***Krishan Kumar Malik v. State of Haryana*** *(2011) 7 SCC 130*, held that no doubt, it is true that to hold an accused guilty 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.

18. This Court has applied the above principles to assess the entire material placed on record meticulously.

19. In the present case at hand, the learned Trial Court has based the conviction of the appellants on the ground that the prosecutrix has made almost consistent statement regarding her kidnapping by the accused persons and despite being cross examined by the learned defence counsel at length her credibility could not be shaken as a witness. It has also been observed by learned Trial Court that there was no need to conduct Test Identification Parade (TIP) since the accused persons were arrested in the presence of the prosecutrix and that the statement of prosecutrix is duly corroborated by circumstantial, forensic and medical evidence. Further, it has been held that the factum of rape is established by medical evidence beyond reasonable doubt and that the defence witnesses have not been able to depose anything about the incident in the present case but have rather only stated that the prosecutrix was being sexually assaulted by her father prior to the incident in the present case, which is not relevant in the facts of the present case.

20. However, a perusal of testimony of the victim reveals that, though the learned Trial Court has held that there are no contradictions in her statement, this Court notes several material contradictions in her

statements. In her statement recorded under Section 161 Cr.P.C on 24.04.2008 (Ex. PW-1A), she had stated that she was alone and sitting outside a government school near Nanglipoona Temple. However, in her statement recorded under Section 164 Cr.P.C on 25.04.2008 (Exhibit PW-6/D), she has stated that she was sitting at an undisclosed location and could not recall the name or area of the place of alleged incident. In the statement recorded under Section 161 Cr.P.C prosecutrix had stated that a car had approached her while she was sitting along with the luggage while her father had gone to the Hanuman Temple, and thereafter the accused who was driving the car had opened the left front door of the car and had closed her mouth and had pulled her inside the car. Thereafter the accused i.e. petitioner herein had driven the car further and committed 'galatkam' with her. Whereas a perusal of the statement under Section 164 Cr.P.C she had deposed that those two strangers/ accused had approached her in a white car, the driver had pulled the prosecutrix inside the car and the accused i.e. petitioner sitting at the rear seat of the car had committed 'galatkam' with her. Meanwhile, the other accused had kept on driving the car and thereafter, had left the prosecutrix back at the same place from where she was kidnapped. It is further noted that the prosecutrix in her statement recorded under Section 161 Cr.P.C had stated that both the accused had been apprehended sitting in the car and had been apprehended by the police from the car parked near Nanglipoona. However, she has made a contrary statement under Section 164 Cr.P.C that the fat man sitting at the rear seat of the car had been apprehended from inside the car.

21. While evaluating the prosecution evidence in light of the relevant sections of law and the judicial precedents laid down by Hon'ble Supreme Court, this Court thus notes that PW-1 i.e. prosecutrix, in her examination in chief before the learned Trial Court has deposed that one day when she along with her parents, two brothers and one sisters had come from Rajasthan and was sitting near Hanuman Mandir with her mother and siblings, her father had gone inside the temple to pray alone. The prosecutrix was also sitting near the school at a distance of 10 to 12 feet from the Hanuman temple along with her family members except her father. Subsequently, a Maruti Zen car came to a halt besides her and the driver unexpectedly opened the front left door and forcefully pulled her inside the vehicle. According to her testimony, a strong-built individual i.e. the present appellant was occupying the rear seat of the car. The prosecutrix was abducted by the accused and had taken to a nearby jungle, where one of the accused, i.e. appellant had sexually assaulted her while the other accused, drove the car. She had recounted how the driver/accused had put his hand over her mouth during her forced entry into the vehicle and kept driving the car while the assault was taking place. The prosecutrix further testified that the rape had been committed while the car was in motion. After committing rape, prosecutrix was left by accused persons in jungle. However, she stated in further part of the testimony that she was sexually assaulted and abandoned at some distance from where she was abducted initially. She had then returned and had found her family members and had promptly informed her father about the sexual assault. Her father had thereafter called the police and reported the incident. When police had arrived,

prosecutrix had led them to the spot where the accused's vehicle was parked. Both of the accused were in the vehicle at that time and had been apprehended by police.

22. However, in her cross examination she stated that she was sitting near a government school along with her mother, two brothers and one sister. Meanwhile, her father had gone to the temple. Suddenly, a car approached her and the driver had pulled her inside from the left front door and in this process prosecutrix had even shouted for help but the driver/accused had then put his hand on her mouth. Thereafter, after sometime one of the accused got down from the car and had committed 'galatkam' with her. When she had come back and had informed her father, her father had immediately taken her to the police station where she was sent for medical examination and that one of the accused i.e. petitioner had been arrested in the afternoon in her presesence. Prosecutrix has further stated that her statement to the police as per the cross examination that petitioner had removed his pant and her clothes and then had committed rape with her. However, none of this had been mentioned earlier in statements recorded under Section 161 Cr.P.C or 164 Cr.P.C neither were ever disclosed in the examination in chief.

23. After going through the evidence as discussed above, it is clear that the prosecutrix had made several contradictory statements regarding the manner in which she had been sexually assaulted. Record also reveals that in her testimony recorded in the Court, she has stated that she had come to Delhi along with her two brothers and sisters and her parents and all of them were sitting outside the school, which is near Hanuman temple. It is her case that while her father had gone alone to

the temple for praying, she along with her mother and four siblings were sitting along with their luggage outside the school. However, the investigation as well as the entire testimonies are silent and it remained unexplained as to why her mother and four siblings did not raise alarm, tried to save her, inform the police, or raise alarm to seek help from school authorities when their daughter was being dragged inside the car in front of them. The testimony of the prosecutrix herself is silent on this aspect. It is unnatural conduct of the mother and siblings. However, further testimonies of her mother even belies the claim of the prosecutrix herself, who gives another version of the story.

24. A careful perusal of the testimony of PW-2, the mother of the prosecutrix, reveals that she had stated that she and her family had visited Rajasthan before arriving at Delhi and had left their belongings near a school. She and her husband had left their children behind to visit Hanuman temple. Upon returning to the area, they discovered that their luggage had been left behind, and that their daughter was missing. The couple had made inquiries with teachers and students at the nearby school, who stated that the prosecutrix had been seen in the area earlier but had since disappeared. The couple returned to the temple and, after some time, saw prosecutrix approaching from the opposite side of the schooland the prosecutrix had informed that she had been sitting near the luggage when two individuals in a white car had abducted her and subjected her to sexual assault. This testimony does not say a word about the rest of the siblings.

25. Following the assault, father of the prosecutrix inquired if she could identify the perpetrators and the vehicle they had used. She had

confirmed that she could identify them and had led her father towards the lane where the said car used in committing the offence was parked. After a short while, they located the vehicle, and the prosecutrix was able to identify it. Two individuals were present inside the car, and the prosecutrix had identified them as the accused. Thereafter, father of the prosecutrix had immediately called the police, and the accused were subsequently arrested. The police had then recorded the statements after their arrest.

26. Thus, as discussed in preceding paragraph the mother of the prosecutrix examined as PW-2 has given a different version of the entire incident and has stated that she was not present at the spot when their daughter was abducted and she had gone with her husband to the temple. She does not even talk about her four other children being left along with the prosecutrix at the alleged spot, though she stated that she along with her husband and children had come to Delhi after visiting a temple in Rajasthan. There are also major discrepancies in the statement of PW-1 and PW-2 on another aspect that PW-1 had stated that when she had come back to the spot from where she was allegedly abducted, she had narrated the incident to her father who had made a phone call to the police and thereafter she along with her parents and police had gone to point out the place of commission of sexual assault. However, PW-2, mother of prosecutrix has given a different story and stated that the prosecutrix had narrated the incident to her and her husband and on her husband asking the prosecutrix as to whether she will be able to identify the accused and the car, she had answered in affirmative and therefore, they had themselves gone in search of accused and the Car. It is her

story that while they had gone inside the 'gali', they had found the car used in the crime and both the accused persons had been sitting in the car and at identification of the prosecutrix, the police were called.

27. It also remains unclear why prosecutrix's father, who had allegedly contacted the police and witnessed the arrest of the accused persons and was witness to the recovery of the Zen Car, has not been examined or cited as a witness.

28. The mother of the victim, PW-2, has testified that upon their return from the temple near the school, they had inquired with the students and teachers about the whereabouts of their daughter. It is curious to note that none of the aforementioned individuals were called upon to testify in the present case. Furthermore, the siblings of prosecutrix were also not produced as witnesses. The circumstances surrounding the alleged incident are to be noted as they are of much importance. The time of occurrence was approximately 1:00 pm on a working day, suggesting that the location would have been bustling with activity, including the presence of teachers and students. Despite this, it is unexplained that the prosecutrix was reportedly abducted from outside the school in the presence of her mother, siblings, teachers, and students, without any commotion or alarm being raised. Neither the witnesses nor the prosecution have provided a satisfactory explanation on this aspect.

29. The prosecutrix has testified that she was sexually assaulted by two persons inside a moving car for about two hours. While it is not necessary that physical injuries be found on the victim of sexual assault, given the circumstances of the present case where a young girl aged 12 to 14 years has allegedly been assaulted by two individuals, one of

whom was described as heavily built, it is surprising that there are no injuries on any part of her body, including the genital area, despite the prolonged assault in a moving car.

30. As per settled legal principles, the testimony of the prosecutrix, if found trustworthy, can form the basis of conviction in a rape case. However, it has to be found to be credible and consistent. Corroboration is not an indispensable requirement for a conviction, and the evidence of a sexual assault victim is at par with that of an injured witness notwithstanding the absence of corroboration. Unless there are circumstances that render the evidence of the victim unworthy of credence, there is no reason to insist on corroboration, except for medical evidence, where it is expected to be forthcoming in the given case. However, the testimony to form basis of conviction has to be blemish less.

31. This Court also notes MLC i.e. Ex.PW-5/A of the prosecutrix dated 24.08.2008 and the deposition of PW-5, the doctor who had medically examined the prosecutrix had stated that girls of her age will have congestion at the genital area if they are raped for two or more hours. However, in the present case there are no congestions to suggest that prosecutrix was forced to have intercourse.

32. There exist additional inconsistencies in the testimonies of witnesses. Specifically, the prosecutrix stated that the driver of the car opened the left door, covered her mouth, and pulled her into the car. However, this account is difficult to accept given that in a moving car, it would be impossible for the driver to have opened the left front door, covered her mouth, and forcefully pulled her inside while the vehicle is

in motion, especially considering that her mother and siblings were present at the scene.

33. Furthermore, the prosecutrix testified that she was sexually assaulted by the person sitting at the rear seat of the moving car. However, she did not explain how she ended up on the rear seat while the car was still in motion. It is worth noting that the prosecutrix was dropped off at the same location where she was initially abducted. According to the prosecutrix's own account, she was kidnapped in the presence of her mother and three siblings. Therefore, it is natural to assume that her family members would have chased the car, raised alarm, notified the police, and searched for their daughter. Additionally, there is no evidence to suggest that the family members took any such actions.

34. The location of the alleged abduction was a bustling government school area with several parents and vehicles, including school buses, present to pick up children at approximately 1:00 pm. Given the busy nature of the area, it seems implausible that the abduction could have gone unnoticed by those in the vicinity. Moreover, the fact that the abduction allegedly took place in the presence of the family of prosecutrix and yet no alarm was raised raises further doubts about the prosecution's version of events.

35. The prosecutrix testified that she was abducted around 1:00 PM and was released two hours later. However, according to DD No. 25A (Exhibit PW7/A), which was recorded based on the information provided by the prosecutrix and her father, the incident was reported at approximately 1:30 PM.

36. No semen stains were found on the seat of the car which was seized within minutes of reporting of the crime in question as per the statement of the prosecutrix and other witnesses themselves.

37. PW-7 HC Mahender Singh, the Duty Officer on duty at the time of the incident, in his testimony stated that he had received a message from PCR about the incident at 1:30 pm on 24.08.2008, which was documented as DD no. 25A and presented as evidence under Ex.PW-7/A.

38. After examining all the facts and circumstances of the case, this Court is of the view that the conviction of the appellant by learned Trial Court was made without proper consideration of the aforementioned factors. The testimony of the prosecutrix suffers from several material inconsistencies and contradictions. Moreover, the medical evidence and the doctor's testimony do not indicate whether there were any indications of forced sexual intercourse.

39. Having regard to the totality of the material on record and facts and circumstances of this case, it is not possible for this Court to agree with the conclusion reached by the learned Trial Court.

40. **However, before parting with this case, this Court is constrained to take note of certain disturbing crucial issues which are apparent from the record of the case**.

41. A perusal of the Trial Court Record reveals that on 19.12.2009, the learned Trial Court was pleased to allow the application for summoning the defence witnesses after a copy of the same had been supplied to learned APP for the State. An order was passed that in view of the application moved and the witnesses mentioned in the application,

the learned Trial Court was allowing the application, this Court presumes that the learned Trial Court would have gone through the application so moved and had only thereafter allowed the application. The application for summoning the defence witnesses itself would have shown to the learned Trial Court that the witness being summoned as defence witness was the counselor who had counseled the prosecutrix who was only 12 years of age at the relevant time.

42. As per catena of judgments of the Hon'ble Apex Court, the right of an accused to adduce evidence in his defence is a crucial right for fair trial which cannot be denied to him. Section 233 Cr.P.C. provides for the procedure for calling upon the accused to enter his defence and adduce evidence in support of his defence. This provision reads as under:

> "233. Entering upon defence.
>
> (1) Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.
> (2) If the accused puts in any written statement, the Judge shall file it with the record.
> (3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

43. As per Section 233(3) Cr.P.C., since the Court is master of the proceedings, it can adjudicate as to whether the application filed by the accused is *bona fide* or not or whether thereby he intends to bring on

record relevant material. Therefore, under Section 233(3) Cr.P.C., a Court can refuse to issue process on the ground that application is vexatious or made for the purpose of delaying or defeating the ends of justice, and such ground has to be recorded in writing by the Trial Court.

44. It appears from the Trial Court Record that no reasons were stated in the application moved for leading defence evidence as to for what purpose the defence witnesses were being called except for mentioning their name. It was also not mentioned as to what will be proved by which witness, so as to have enabled the learned Trial Court to accept or reject the application moved for summoning defence witnesses.

45. Since in the present case, the learned Trial Court mentions that it had gone through the application moved on behalf of the accused and had allowed it only after perusing the same, it can be presumed that the learned Trial Court was aware as to in what capacity or for what purpose the witness was being summoned though the same is not mentioned in either the relevant order or in the application moved by the accused in this regard. In such a situation, this Court is unable to know what weighed in the mind of learned Judge while passing this order, to have allowed the counselor to have been summoned as a defence witness.

46. Be that as it may, this Court notes with strong disapproval that the counselor, who had been called to counsel the 12 years old sexual assault victim immediately after the incident in question at the request of the SHO concerned, had been not only been allowed to be examined as a defence witness, but the confidential report regarding the counseling and as to what had transpired between the counselor and the victim child was

brought in the public domain through an application moved by the accused for leading defence evidence.

47. As far as counseling report Ex.DW2/A is concerned, it mentions that the counselor was called by the SHO of P.S. Bawana on 15.06.2008 for the counseling of one Sh. 'Y' and his three children who were behaving in a restless manner, and subsequently on 25.06.2008 for counseling of the eldest daughter i.e. the prosecutrix. It is, thus, clear that this counseling had taken place, not for the purpose of recording statement of the witness or seeking assistance of the counselor to record her statement or to assist the investigating agency, but for the sole purpose of calming down the victim who was restless after the alleged incident of rape.

48. **Since at the relevant time i.e. in the years 2008-2010, the POCSO Act, 2012 was not in existence, and the prosecutrix in the case was only 12 years of age, the learned Trial Court was to be guided by the then Juvenile Justice (Care and Protection of Children) Act, 2000**. As per the said Act, a child who is in need of care and protection could have been produced before the Child Welfare Committee by the concerned SHO.

48.1. Section 32 of **the then JJ Act**, 2000 provided as under:

> "32. Production before Committee.-
>
> (1) Any child in need of care and protection may be produced before the Committee by one of the following persons-
>
> (i) any police officer or special juvenile police unit or a designated police officer;
> (ii) any public servant;
> (iii) childline, a registered voluntary organisation or by such other voluntary organisation or an agency as may be

> recognised by the StateGovernment;
> (iv) any social worker or a public spirited citizen authorised by the State Government; or
> (v) by the child himself.
>
> (2) The State Government may make rules consistent with this Act to provide for the manner of making the report to the police and to the Committee and the manner of sending and entrusting the child to children's home pending the inquiry."

48.2. Further, the Juvenile Justice (Care and Protection of Children) Rules, 2007 also, while highlighting the principle of confidentiality, provided as under:

> " Chapter - II
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> ***
>
> 3. Xl. Principle of right to privacy and confidentiality:
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> ***
>
> The juvenile's or child's right to privacy and confidentiality shall be protected by all means and through all the stages of the proceedings and care and protection processes."

49. The police officer or the investigating agency in the present case had failed to refer the prosecutrix to the Child Welfare Committee, and the SHO concerned, the prosecuting agency as well as the other defence witnesses did not produce on record as to under what provision the counselor was called for counseling the entire family and thereafter the prosecutrix. The record is also missing. Learned Trial Court also failed to return any finding on this issue.

50. The learned Trial Court was bound to the golden principle of sensitivity and protection of the prosecutrix from further harassment or distress by ensuring that the counseling that had taken place, primarily to calm her as she was restless as can be understood in whatever

circumstances she was in, the report of the counselor could not have been made a part of defence evidence and Trial Court Record, as the same, even at that relevant time, was a confidential document and proceeding.

51. Such circumstances compel this Court to refer to the latin maxim '*Quando aliquid prohibetur ex directo, prohibetur et per obliquum*' which means that what cannot be done directly, should also not be done indirectly in garb of leading defence evidence in this case.

52. It is also astonishing that even before the relevant stage of trial of leading defence evidence was reached, the learned counsel for the accused had a copy of the confidential report of counseling that had taken place at the behest of the SHO concerned, solely for the purpose of supporting the victim of sexual assault,

53. A perusal of the cross-examination of the prosecutrix also reveals that a large bunch of questions had been asked to her about the confidential report wherein she had narrated alleged sexual exploitation by her father. Also, the same had nothing to do with the present case in question, therefore, those questions even in the form of suggestions that the prosecutrix was having physical relations with her own father were not only condemnable, but should not have been permitted to be asked under any circumstances. The relevant portion of this cross-examination is extracted as under:

> "…It is wrong to suggest that I have been meeting 'X' (name withheld by this Court), Director Swan Chetan Society for Mental Health during the pendency of this case.
>
> I was not called by the aforesaid 'X' on 05.7.2008. It is

wrong to suggest that on 5.7.2008 ‘X’ (name withheld by this Court) asked me that I was laughing on that day to which I replied that I was laughing as my father was not present there. It is wrong to suggest that ‘X’ (name withheld by this Court) asked me on what occasion do I laugh and I replied that I laugh on each and every thing. It is wrong to suggest that ‘X’ (name withheld by this Court) asked me as to why I did not use to laugh earlier and I replied that I did not use to laugh earlier as my father used to beat me. It is wrong to suggest that ‘X’ (name withheld by this Court) asked me as to why my father used to beat me and I replied that he used to beat me on each and every thing. It is wrong to suggest that ‘X’ (name withheld by this Court) asked me whether I was not saved by my mother and I replied that my father used to beat my mother also and she ran away from the house. It is correct that my mother is not residing with me at present. It is wrong to suggest that I had told ‘X’ (name withheld by this Court) that as and when I was alone in the house my father used to call me and do 'Galat Kaam' with me and on such occasion my mother also saw it. It is wrong to suggest that ‘X’ (name withheld by this Court) asked me as to when my father used to do 'Galat Kaam' with me and I replied that he used to do 'Galat Kaam' when all other have fallen asleep. It is wrong to suggest that I have told ‘X’ (name withheld by this Court) that my father had done 'Galat Kaam' with me on 2-3 occasions and when I told this fact to my mother, my mother also beaten by my father. It is wroh to suggest that all the aforesaid facts were told by me to ‘X’ (name withheld by this Court) and he reduced the said facts in writing. It is wrong to suggest that the aforesaid facts were read over to me by ‘X’ (name withheld by this Court) and thereafter I put my thumb impression on the said papers on 05.7.2008. It is wrong to suggest that the document Mark-X does not bear my thumb impression at point-A.

***

My father is not residing with me. It is correct that the present whereabouts of my father are not known after the registration of the present case. I am the eldest child of my parents. It is wrong to suggest that I alongwith my father and other brothers and sister was taken to ‘X’ (name withheld by this Court) for counseling on 15.6.2008. It is wrong to suggest

> that my father was having physical relations with me since I was 7-8 years old. It is wrong to suggest that I had told to 'X' (name withheld by this Court) that my father had threatened to kill me if I disclose about the physical relations with me to anyone. It is incorrect to suggest that my father used to beat me as and when I used to refuse to have sex with him. It is incorrect to suggest that my brothers and sisters used to remain under depression due to the beatings given by my father to me. It is incorrect to suggest that I had not disclosed the aforesaid fact regarding the physical relations duel, the fear of my father. It is incorrect to suggest that on 24 4 2008 my father committed rape with me and he asked me to falsely implicate the accused persons to extort money from them. It is incorrect to suggest that thereafter my father ran away from the counseling from 'X' (name withheld by this Court). I am not aware whether 'X' (name withheld by this Court) recommended the registration of the criminal case against my father or not. It is correct that my father has ran away from the house Volunteered he ran away due to the beatings given by the police officials. It is incorrect to suggest that the copy of the counseling report of 'X' (name withheld by this Court) is Mark-Y.
>
> ***
>
> It is incorrect to suggest that I have roped the accused persons in this case on the asking of my father. It is incorrect to suggest that the present case has been made against the accused persons by my father to extort money.

54. The learned Trial Court should have not only disallowed the questions which were not relevant to the case before it but, also should have been vigilant that a confidential report of the counselor regarding counseling of the prosecutrix should not have been allowed to be brought in public domain. The confidential report had not only been brought on record in this case but even the counselor had been examined and cross-examined in the case which was neither required nor permissible in law even in the year 2010. Learned Trial Court could

have also resorted to the provisions of Section 152 of Indian Evidence Act, 1872 which provides as under:

> 152. Questions intended to insult or annoy.— The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form."

55. The Trial Courts while summoning witnesses, either under Section 233 Cr.P.C. or under Section 243 Cr.P.C. in case of Trial by a Magistrate, need to pass order with circumspection, keeping in mind the relevant provisions of law and to apply their mind as to for what purpose the defence witnesses is being called and as to whether they are relevant to the facts of the present case and to reach just decision of the case. This Court is not undermining the powers of the Trial Courts in deciding applications under Section 233 or 243 Cr.P.C., however, Courts cannot be mute spectators, especially in cases of sexual assault, and they should ensure that the witnesses and the material brought in the form of defence evidence is not vexatious or irrelevant to the extent of further causing harassment or infringing upon the privacy of the matters irrelevant to the controversy in question,

56. In the particular case in hand before the learned Trial Court, even at the relevant point of time, as this Court has already discussed above, the Trial Court was bound by its duty of conducting trial with sensitivity. However, in this case, the confidential report of the counselor has been allowed not only to be brought on record but the defence counsel had been allowed to ask numerous questions about the very tragic internal turmoil and unfortunate life of the prosecutrix who was being allegedly

sexually exploited by her father, though she later refuted the said claim and stated that she had never made this statement.

57. This Court itself feels the anxiety and the discomfort that the child of 12 years of age would have felt. Even in case her father was exploiting her, she was under tremendous pressure of being beaten by her father. This Court cannot know as to under what circumstances she had denied the allegations later and whether such allegations were actually made or not earlier before the counselor. In her testimony before the Court, what disturbs the conscience of this Court is the fact that her sexual exploitation, if any, by her father which was the subject matter of the alleged counseling session, it was in fact an expression of her tragic life and the suffering that she was disclosing to the counselor in confidence, which under no circumstances, should have been brought in the public domain by way of examination and cross-examination of the counselor and putting the counselor's report to the prosecutrix.

58. India has come a long way as far as protecting and examining the vulnerable witnesses in the country is concerned, especially with the enactment of POCSO Act, 2012 and Rules of 2012, as well as guidelines framed thereunder.

59. However, even before the enactment of POCSO Act and subsequent judicial precedents thereto, there had been efforts in past on part of Hon'ble Apex Court as well as this Court in ensuring a safe environment for examination of vulnerable witnesses such as a child rape victim.

60. The Hon'ble Supreme Court in ***State of Punjab v. Gurmit Singh*** *(1996) 2 SCC 384*, while underlining the importance of *in camera*

proceedings and protecting the identity of a victim of sexual assault, had laid down several guidelines.

61. Further, in ***Sakshi v. Union of India*** *(2004) 5 SCC 518*, the Hon'ble Apex Court had laid down the following guidelines in relation to child rape victims. The same are reproduced as under:

> "34. The writ petition is accordingly disposed of with the following directions:
>
> (1) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.
>
> (2) In holding trial of child sex abuse or rape:
>
> (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
> (ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
> (iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.
>
> These directions are in addition to those given in State of Punjab v. Gurmit Singh…"

62. This Court in ***Virender v. State of NCT of Delhi*** *2009 SCC OnLine Del 4413* had also culled out the guidelines in relation to examination of a child victim or child witness. The relevant portion of these guidelines are reproduced as under:

"IV COURT

(i) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.(Ref : Court on its Own Motion v. State)

(ii) In case of any disability of the victim or witness involving or impairing communication skills, assistance of an independent person who is in a position to relate to and communicate with such disability requires to be taken.

(iii) The trials into allegations of commission of rape must invariably be "in camera". No request in this behalf is necessary. (Ref : State of Punjab v. Gurmit Singh)

(iv) The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the chargesheet. (Ref : ((2007) 4 JCC 2680 Court on its Own Motionv. State)

(v). The child witness should be permitted to testify from a place in the courtroom which is other than the one normally reserved for other witnesses.

(vi) To minimise the trauma of a child victim or witness the testimony may be recorded through video conferencing or by way of a close circuit television. If this is not possible, a screen or some arrangement be made so that the victims or the child witness do not have to undergo seeing the body or face of the accused. The screen which should be used for the examination of the child witness or a victim should be effective and installed in such manner that the witness is visible to the trial judge to notice the demeanour of the witness. Single visibility mirrors may be utilised which while protecting the sensibilities of the child, shall ensure that the defendant's right to cross examination is not impaired. (Ref : Sakshi v. UOI).

(vii) Competency of the child witness should be evaluated and order be recorded thereon.

(viii) The trial court is required to be also satisfied and ought

to record its satisfaction that the child witness understands the obligation to speak the truth in the witness box. In addition to the above, the court is required to be satisfied about the mental capacity of the child at the time of the occurrence concerning which he or she is to testify as well as an ability to receive an accurate impression thereof. The court must be satisfied that the child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to express in words or otherwise his or her memory of the same. The court has to be satisfied that the child witness has the capacity to understand simple questions which are put to it about the occurrence.
There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court.

(ix) As far as possible avoid disclosing the name of the prosecutrix in the court orders to save further embarrassment to the victim of the crime; anonymity of the victim of the crime must be maintained as far as possible throughout.

(x) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing. (Ref : Court on its Own Motion v. State of N.C.T. Of Delhi)

(xi) The court should be satisfied that the victim is not scared and is able to reveal what has happened to her when she is subjected to examination during the recording of her evidence. The court must ensure that the child is not concealing portions of the evidence for the reason that she has bashful or ashamed of what has happened to her.

(xii) It should be ensured that the victim who is appearing as a witness is at ease so as to improve upon the quality of her evidence and enable her to shed hesitancy to depose frankly so that the truth is not camouflaged on account of embarrassment at detailing the occurrence and the shame being felt by the victim.

(xiii) Questions should be put to a victim or to the child witness which are not connected to case to make him/her

comfortable and to depose without any fear or pressure;

(xiv) The trial judge may permit, if deemed desirable to have a social worker or other friendly, independent or neutral adult in whom the child has confidence to accompany the child who is testifying (Ref Sudesh Jakhu v. K.C.J.).
This may include an expert supportive of the victim or child witness in whom the witness is able to develop confidence should be permitted to be present and accessible to the child at all times during his/her testimony. Care should be taken that such person does not influence the child's testimony.

(xv) Persons not necessary for proceedings including extra court staff be excluded from the courtroom during the hearing.

(xvi) Unless absolutely imperative, repeated appearance of the child witness should be prevented.

(xvii) It should be ensured that questions which are put in cross examination are not designed to embarrass or confuse victims of rape and sexual abuse (Ref : Sakshi v. UOI).

(xviii) Questions to be put in cross examination on behalf of the accused, in so far as they relate directly to the offence, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing. (Ref : Sakshi v. UOI)

(xix) The examination and cross examination of a child witness should be carefully monitored by the presiding judge to avoid any attempt to harass or intimidate the child witness.

(xx) It is the duty of the court to arrive at the truth and subserve the ends of justice. The courts have to take a participatory role in the trial and not act as mere tape recorders to record whatever is being stated by the witnesses. The judge has to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective that is the truth is arrived at. The court must be conscious of serious pitfalls and dereliction of duty on the part of the prosecuting agency.

Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, the judge must exercise the vast powers conferred under section 165 of the Evidence Act and section 311 of the CrPC to elicit all necessary materials by playing an active role in the evidence collecting process. (Ref : Zahira Habibulla H. Sheikh v. State of Gujarat)

(xxi) The judge is expected to actively participate in the trial, elicit necessary materials from the witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. The judge has uninhibited power to put questions to the witness either during chief examination or cross examination or even during re-examination for this purpose. If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross examination. (Ref : (1997) 6 SCC 162 : AIR 1997 SC 1023 (para 12) State of Rajasthan v. Ani alias Hanif)

(xxii) The court should ensure that the embarrassment and reservations of all those concerned with the proceedings which includes the prosecutrix, witnesses, counsels may result in camouflage of the ingredients of the offence. The judge has to be conscious of these factors and rise above any such reservations on account of embarrassment to ensure that they do not cloud the truth and the real actions which are attributable to the accused persons.

(xxiii) The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposition. In making the record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance “gandi harkatein” or “batamezein” have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that what those words mean to her and what is intended to be conveyed are sensitively brought out.

(xxiv) The court should ensure that there is no use of aggressive, sarcastic language or a gruelling or sexually explicit examination or cross examination of the victim or

child witness. The court should come down with heavily to discourage efforts to promote specifics and/or illustration by any of the means offending acts which would traumatise the victim or child witness and effect their testimony. The court to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings.

(xxv) In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record.

(xxvi) The victim of child abuse or rape or a child witness, while giving testimony in court should be allowed sufficient breaks as and when required. (Ref : Sakshi v. UOI)

(xxvii) Cases of sexual assaults on females be placed before lady judges wherever available. (Ref : State of Punjab v. Gurmit Singh)
To the extent possible, efforts be made that the staff in the courtroom concerned with such cases is also of the same gender.

(xxviii) The judge should be balanced, humane and ensure protection of the dignity of the vulnerable victim. There should be no expression of gender bias in the proceedings. No humiliation of the witness should be permitted either in the examination in chief or the cross examination.

(xxix) A case involving a child victim or child witness should be prioritised and appropriate action taken to ensure a speedy trial to minimise the length of the time for which the child must endure the stress of involvement in a court proceeding. While considering any request for an adjournment, it is imperative that the court considers and give weight to any adverse impact which the delay or the adjournment or continuance of the trial would have on the welfare of the child."

63. This Court by way of this judgment reminds that the judicial precedents of this Court and of the Hon'ble Apex Court and several workshops conducted by this Court to sensitize judges as to how to

examine vulnerable and child witnesses at no point of time, be forgotten while one is dealing with vulnerable witnesses. The child who was being examined in the case at hand was in the category of a child witness who is vulnerable, and it was not a new phenomenon in the criminal jurisprudence even in the year 2009-2010, as even at that point of time, there were numerous judgments and guidelines as to how a child witness especially in a sexual assault case was to be examined.

64. **Therefore, this Court by way of this judgment once again reiterates that, though the State and administration can provide the necessary and modern infrastrucuture to the judges as well as vulnerable witness deposition complexes, it cannot generate a sensitive heart of a judge. It has to be developed by the judge himself as part of his duty bound by his oath to the constitution and service to the citizens of the country. It is also the duty of every Court to not only have a heart which is sensitive but also a mind which is alert while recording and conducting trial,** especially in sexual assault cases, so that the trial is not diverted to a direction which is totally unconnected, uncalled for and causes further trauma or humiliation or brings into public domain, the internal agony and trauma that a child might have discussed or shared with someone she had thought will keep to himself i.e., the counselor.

65. In view of the previous discussion, this Court is of the view that the material brought on record by the prosecution was insufficient to return a finding of guilt against the present appellant and the prosecution had failed to establish its case beyond reasonable doubt.

66. Accordingly, the impugned judgment dated 22.09.2010 and order on sentence dated 25.09.2010 passed by learned Additional Sessions Judge (North West-04), Rohini, Delhi in case FIR bearing no. 85/2008 is set aside. Bail bond, if any, stands cancelled. Surety stands discharged.

67. Accordingly, the present appeal stands disposed of.

68. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

MAY 1, 2023/kss