

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.04.2021

+ **CRL. A. 716/2017 & CRL. M.A. 40512/2019**

KUMOD MISHRA

..... Petitioner

Versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Ms Manika Tripathy Pandey, Ms Ashutosh
: Kaushik, Advocates.
For the Respondent : Mr Amit Gupta, APP for State.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal, *inter alia*, impugning a judgment dated 25.05.2017, passed by ASJ-01(South), Saket Courts, Delhi, whereby he was convicted for committing an offence punishable under Section 376(2)(n) of the Indian Penal Code, 1860 (hereinafter 'IPC') and Section 4 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter 'POCSO Act'). The appellant also impugns an order on sentence dated 31.05.2017, whereby he was sentenced to undergo ten years of rigorous imprisonment with a fine of

₹20,000/- and in default of payment of fine, to serve simple imprisonment for a further period of three months.

2. The impugned judgment was rendered in connection with a case arising from FIR no. 145/2013 registered with PS Sangam Vihar. The said FIR was registered on the basis of a statement made by the prosecutrix – a girl aged about sixteen years at the material time. In her statement to the police recorded on 07.04.2013, she stated that she had come to Delhi from her village with one Shivani in the month of January 2012. She had been left at the Shakarpur office for work. She stated that she had been placed in a house, where she had worked for six months. Her employers left her at the same office in Shakarpur. She had been taken to an office in Moti Nagar by Shivani to search for her next job. Thereafter, from that office, she was sent to the office of the accused (Kumod Mishra) at Sangam Vihar. She stated that she had spent the night at his office. She further stated that when she was sleeping, the accused came beside her on the bed and when she woke up, she realized that the accused was taking off her clothes. She asked him what is he doing (*bhaiya yeh kya kar rahe ho*) and he told her to continue lying down on the bed and also, threatened to slash her with a knife (*chaku se kaat dunga*). She stated that she had kicked the accused but he slapped her several times and committed wrong acts with her (*mere saath galat kaam kiya hai*). She stated that one boy named Sachin came in the morning and took her to a *kothi* to work there, however, she did not remember the address of this *kothi*. She worked there for about two months and thereafter, Sachin called her back and she came to Sachin's

house and stayed there for two-three days. Thereafter, Sachin handed her over to one Sunil *bhaiya* and Sunil handed her over to Saroj *didi* for the purpose of working at her house on 06.04.2013. She stated that Saroj had asked her as to why is she upset and waking slowly and she, then, disclosed about the aforesaid incident with the accused to her. She stated that Saroj had thereafter, taken her to the police station. She disclosed that Kumod Mishra had forcefully hit her and committed rape on her.

3. In her statement under Section 164 of the Cr.PC recorded on 08.04.2013, she stated that in the month of January, 2012, she had come to Delhi from her village with one Shivani and she had been left at an office that would have found a workplace for her. She stated that one Mishra had committed wrong acts with her about two months back (*Mishra ne mere saath galat kaam kiya hai, do mahine pehle kiya tha*). She stated that the full name of the accused is Kumod Mishra. She stated that he had hit her with his leg and had threatened to kill her with a knife (*Aur mere laath mara fir woh bola chaku se kaat dega*). She also stated that he had committed rape on her (*mere peshab karne vali jagah par usne apni peshab karne vali jagah dali*). She further stated that she was under a lot of pain for about one-two weeks. She also stated that he had raped her twice or thrice on one night.

4. The petitioner was charged with committing offences punishable under Section 376 of the IPC and Section 4 of the POCSO Act.

5. To prove its case, the prosecution examined twelve witnesses and the defence did not lead any evidence. The Trial Court had evaluated the evidence available and had found the appellant guilty of the offences for which he was charged.

Evidence

6. The prosecutrix was examined as PW1. She correctly identified the accused in open court. She deposed that she had come to Delhi in the month of January, 2012 with one Shivani and she took her to an office in Shakarpur. She further deposed that she had been placed in a *kothi*, where she had worked for six months and after they had left, she came back to the same office in Shakarpur and from that office, she was taken to an office in Moti Nagar to search for her next job. She stated that from Moti Nagar, she had been taken to Sangam Vihar in search for a job and she stayed there for a night at the house of the accused (Kumod Mishra). She stated that when she woke up at night, she had found that the accused was removing her clothes and she had asked him as to what is he doing (*bhaiya ye aap kya kar rahe ho*). He had threatened her to keep quiet otherwise he would cut her with a knife (*chup reh, nahi toh chaku se kaat dunga*). She further stated that the accused had raped her two-three times that night. Next morning, one Sachin had taken her to his house and she stayed there for two-three days. She further deposed that Sachin had taken her to the house of one Saroj *didi* to work as a domestic maid. She stated that one day, Saroj *didi* asked her about her weakness and she had disclosed about the abuse/rape to Saroj. She further deposed that Saroj *didi* had called 100

number and the police took her to the police station and thereafter, she was taken to a hospital for her medical examination. She stated that she had also been taken to the court, where she gave her statement in a closed room. She identified her signature at point A on her statement recorded by the police (Ex PW1/A), signature at point A on her statement recorded by the court (Ex PW1/B), signature at point A on the arrest memo (Ex PW1/C).

7. In her cross examination, she stated that Shivani did not bring her to Delhi with the consent of her parents. She also stated that this was her first visit to Delhi. She affirmed that she did not remember the full address of the Shakarpur office. She also affirmed that she did not stay for a long time at the Shakarpur office and thereafter, she was placed in a *kothi*. She stated that she did not remember the address of this *kothi*. She stated that she had been informed by the Shakarpur office that she had to work at the *kothi* for a year, however, since her employers left Delhi after six months, she was taken back to the office in Shakarpur. She affirmed that she did not know any person except Shivani, who had brought her to Delhi. She affirmed that the next day, she was taken to the Moti Nagar office by Shivani in order to search for a job. She stated that in the Shakarpur office, she had stayed for a day with other girls in a separate room, made for girls. She affirmed that there were separate rooms for boys and girls, however, she does not remember the age of the boys present at the Shakarpur office. She affirmed that she had stayed in Moti Nagar for probably one-two days. She stated that Shivani had left her with one Raju at the Moti Nagar office. She denied the

suggestion that the accused (the appellant) had refused to give her work, when she was taken to his house by Raju. She volunteered to state that the accused gave money to Raju and then, Raju had left her at the house of the accused. She affirmed that she did not know how much money had been received by Raju from the accused. She affirmed that she had reached the house of the accused at night, however, she did not remember the time. She stated that she thought the place that she had been taken to by Raju was the office of the accused. She affirmed that no other person had been present at the office of the accused except the accused himself at the time. She affirmed that there was only one room with one bed in the office of the accused. She affirmed that she had slept in the office of the accused and the office was on the ground floor. She affirmed that she did not raise an alarm as the accused had threatened to kill her with a knife (*chaku se kaat dunga*). She stated that it was a long knife. She stated that she had tried to save herself but the accused had put his hand on her mouth. She further stated that she had tried to kick him but he had slapped her hard. She affirmed that she neither knew Sachin from before nor informed him about the rape committed by the accused. She affirmed that she had stayed with Sachin for two-three days and thereafter, she had been taken to a house where she worked as a domestic maid for two-three months. She stated that she neither knew the address of the house where she worked as a domestic maid nor the employer's name. She affirmed that she used to stay indoors at the employer's house. She affirmed that she did not know Saroj *didi* from before. She affirmed that she had complained with the guidance of Saroj *didi*. She denied the suggestion that Saroj *didi* had

told her that she knew the accused from before. She affirmed that the complaint had been lodged on the same day, when she had come to work at Saroj *didi's* house. She stated that the police had come to Saroj *didi's* house, however, she does not remember the number of police officials that had come to her house. She affirmed that the police personnel were male officials. She did not remember the address of Saroj *didi*. She affirmed that the police had not recorded her statement at the house of Saroj *didi*. She also affirmed that the police had not recorded the statement of Saroj *didi* in her presence. She stated that the police had taken her to the police station from the house of Saroj *didi*. She affirmed that a male police official had recorded her statement at the police station. She stated that she had written her name and put her signature on the statement recorded by the police. She stated that she did not remember on how many places had she signed. She affirmed that she had been accompanied by both male and female police officials to the hospital in the vehicle. She denied the suggestion that Saroj *didi* had tutored her for what to say before the police officials. She affirmed that she had told the police that the accused had raped her at his office in Sangam Vihar. She affirmed that she narrated the rape incident to the doctor present at the hospital. She stated that she was not accompanied by anyone to the police station and the hospital. She stated that only the police personnel accompanied her to the hospital. She affirmed that she was not present with the police when they had arrested the accused. She affirmed that she had disclosed the name of the accused and had informed the police that the accused stays in Sangam Vihar. She affirmed that she did not know the full address of the accused. She

stated that she had identified the accused, when he was arrested and brought to the police station. She affirmed that Saroj *didi* had not accompanied her, when she had been waiting at the police station. She also affirmed that she did not meet Saroj *didi* after she had lodged the complaint. She denied the suggestion that no rape had been committed by the accused and she was deposing falsely. She also denied the suggestion that Saroj *didi* had accompanied her to the police to arrest the accused.

8. Dr. Nisha Malik, Sr. Gynecologist AIIMS, deposed as PW2. She stated that on 07.04.2013 at about 05:30 pm, the victim had been produced by a lady constable for her medical examination. She deposed that she had medically examined the victim and on gynecological examination, it had been found that her hymen was torn, however, there was no fresh bleeding or tear. She stated that no samples had been collected as history of sexual intercourse was around two months back. She deposed that she had prepared a detailed report vide MLC (Ex PW2/A). She identified her signatures on the same. PW2 was not cross examined.

9. Ct. Suresh was examined as PW3. He deposed that on 07.04.2013, he had joined the investigation of this case and on that day, the accused had been arrested in his presence vide arrest memo (Ex PW1/C) and personal search had been conducted vide memo (Ex PW3/A). He identified his signatures on the same. He stated that as per the instructions of the IO, he got the accused medically examined and his medical exhibits had been seized by the IO vide seizure memo (Ex

PW3/B). He identified his signature on the same. He also stated that the disclosure statement of the accused (Ex PW3/C) had been recorded by the IO and he identified his signature on the same.

10. In his cross examination, PW3 stated that Ct. Jai Prakash had also accompanied him to the hospital, when he had taken the accused to the hospital. He affirmed that on 08.04.2013, at about 11:30-12 noon, he had taken the accused for medical examination. He volunteered to state that prior to 08.04.2013, the accused had been formally medically examined on 07.04.2013 at Batra Hospital and after the medical examination, they had reached court. He affirmed that he did not remember the name of the Metropolitan Magistrate. He affirmed that the disclosure statement of the accused had been recorded at PS Sangam Vihar by the IO/SI Kamini Gupta, on 07.04.2013, at about 2:00-2:30 pm. He denied the suggestion that the accused had not been medically examined on the date of the arrest or that the accused had been directly produced in court.

11. Ct. Sunita deposed as PW5. She deposed that on 07.04.2013, she had been posted at PS Sangam Vihar and on the said date, she along with the IO/SI Kamini Gupta took the victim to AIIMS Hospital for her medical examination. She stated that the prosecutrix had been medically examined by a lady doctor, who had prepared her MLC report. She stated that thereafter, they had taken the prosecutrix and left her at Prayas and the IO had recorded her statement to this effect.

12. On cross examination, PW5 stated that the prosecutrix had been taken to the hospital from the police station at about 05:00 pm. She affirmed that the IO had not recorded the prosecutrix's statement in her presence. She further affirmed that from the hospital, the prosecutrix had been taken to Prayas, however, she did not remember the time the prosecutrix had been left at Prayas. She affirmed that on 07.04.2013, her statement had been recorded by the IO at the police station.

13. Ms. Chetna Singh was examined as PW 6. She was posted as a Metropolitan Magistrate, South District, Saket Courts on 08.04.2013 and testified that she had recorded the statement of the prosecutrix under Section 164 of the Cr.PC.

14. SI Kamini Gupta was examined as PW7. She stated that on 07.04.2013, she was posted at PS Ambedkar Nagar and on that day, pursuant to the directions of the ACP, she had gone to PS Sangam Vihar. She stated that she had met the victim at the police station and recorded her statement (Ex PW1/A). Thereafter, she got FIR bearing no. 145/13 registered at PS Sangam Vihar. She stated that in the meantime, one counsellor from Prayatan NGO had been called and the counsellor, Garima, had come to the police station to counsel the victim. She stated that the counsellor had given her the report (Mark A-1) and she thereafter, took the victim along with the lady constable to AIIMS Hospital. The victim had been medically examined vide MLC report (Ex PW2/A). She further deposed that the victim was also examined by a gynecological expert. She stated that she had collected the MLC report of the victim and the gynecological report as well. She deposed that

after the medical examination, she had taken the victim to PS Sangam Vihar. She stated that in the meantime, Ct. Suresh had brought the accused and the victim had identified him in the police station and thereafter, the victim had been sent to Prayas. She deposed that she had made inquiries from the accused and arrested him vide arrest memo (Ex PW1/C) and his personal search had been conducted vide personal search memo (Ex PW3/A). She deposed that the accused had been medically examined at Batra Hospital. She stated that on the next day, the accused had been medically examined including a potency test at AIIMS Hospital vide MLC report (Ex PW4/A). She stated that after his arrest, she had recorded the disclosure statement of the accused (Ex PW3/C) and after the potency test of the accused, he had been produced before the court and was remanded to judicial custody. She stated that thereafter, she had sent a lady constable to Prayas, who had brought the victim to Saket Court, for recording of her statement under Section 164 of the Cr.PC. She stated that on the next day, the victim had been produced before the CWC for counselling and the CWC had passed an order to hand over the victim to Short Stay Home, Sangam Vihar. She stated that since there was no age proof of the victim, an ossification test to determine the age of the victim had been conducted at Safdarjung Hospital vide age estimation report (Mark A-2). She stated that she had recorded the statements of the witnesses, namely, Lady Ct. Sunita and Ct. Suresh. She deposed that she had only recorded the supplementary statement of the victim. She identified the accused in open court.

15. In her cross examination, she stated that the initial statement of the victim, on the basis of which the FIR in question had been registered, was recorded by her. She stated that when she had met the victim at the police station, she was alone and Smt. Saroj was not present with her. She stated that the victim had mentioned in her statement that she had disclosed about the incident to one Saroj. She affirmed that she had not recorded the statement of Saroj. She volunteered to state that Saroj had not been found in spite of efforts to trace her. She affirmed that she had not taken the victim to the places, where she had earlier worked. She volunteered to state that the victim belonged to Jharkhand state and was not aware about the places in Delhi. She stated that the victim had stayed in the house of the accused for one night. She affirmed that besides the statement of the victim, she did not collect any other evidence against the accused. She volunteered to state that the victim had named five-six persons but their addresses and whereabouts could not be traced. She affirmed that victim had studied up to fifth standard. She affirmed that she did not collect any evidence regarding the educational qualifications of the victim. On being asked whether she collected any document regarding the age of the victim, she stated that she got the ossification test of the victim, however, she did not collect any other evidence regarding the age of the victim. She affirmed that she had arrested the accused at the police station and he had been brought by Ct. Suresh to the police station. She affirmed that she had recorded the statement Ct. Suresh. She affirmed that when she had brought the victim to the police station after her medical examination, the accused was present at the police station. She

stated that she had prepared a *rukka* after her arrival to the police station and after the medical examination of the victim. She denied the suggestion that at the time of the alleged incident, the age of the victim was more than 18 years.

16. Dr. Amita Malik was examined as PW8. She deposed that on 21.06.2013, she was working as a Senior Specialist, Radiodiagnosis, Safdarjung Hospital, New Delhi and on that day, a Medical Board had been constituted to ascertain the age of the victim and she was one of the members of the said Board. She stated that the Board had examined the victim for her age determination. She deposed that she had examined the X-rays of the plates of the shoulder, wrist and pelvis bones and prepared a radiology report (Ex PW8/A). She stated that as per her examination, she had found the victim's bone age to be more than fifteen years and less than sixteen years on the day of the examination. She stated that after the examination was done by other members of the Board, a report regarding the age estimation of the victim had been prepared (Ex PW8/B). She identified her signatures on the same and the signatures of the other Board members. She stated that the final conclusion of the Board regarding the age estimation of the victim was that she was around fifteen years to sixteen years of age on the date of her examination.

17. In her cross examination, she affirmed that her opinion was on the basis of the appearance and fusion of epiphyses, however, there may be variations in the fusion of epiphyses in different persons and such variation may be up to two years.

18. Dr. Kulbhushan Prasad deposed as PW9. He stated that on 21.06.2013, he was working as an Assistant Professor, Safdarjung Hospital, New Delhi and on that day, pursuant to the request of the IO, a Board of doctors had been constituted to ascertain the age of the victim. He further stated that he had been appointed as the Chairman of the said Board. He also stated that all the doctors had examined the victim to determine her age and after perusal of the reports, the age of the victim, on the day of her examination, had been found to be more than fifteen years and less than sixteen years of age. He identified his signature on the Age Estimation Report (Ex PW8/B) of the victim. He identified the signatures of the other members of the Board as well.

19. In his cross examination, he affirmed that he did not conduct any examination regarding the age of the victim. He volunteered to state that all the medical examinations of the victim were conducted in his presence and under his supervision. On being asked if he could tell on what basis the radiologist, dental surgeon and physiologist estimated the age of the victim, he stated that they had given their reports, after they had examined the victim. He also stated that for giving their respective findings, the radiologist finds the fusion center of the bones, the dental surgeon finds the presence of teeth and the physiologist observes the physical characteristics. And, after observing the external physical characteristics of the subject, whose age is to be determined, the radiologist prescribes the joint X-rays to be done. He affirmed that in the present case, after observing the physical characteristics of the victim, he had been of the view that her age at the material time was

around fifteen-sixteen years. He volunteered to state that only a physiologist can answer this question. He stated that he could not tell as to what basis the radiologist, dental surgeon and physiologist give their reports regarding the estimation of age of a person. He denied the suggestion that at the time of her examination, the age of the victim in the present case was more than eighteen years. He affirmed that he did not know the possible variation of years in the estimated age of a person is, as per the medical jurisprudence, assessed on the basis of ossification and dental tests. He affirmed that the victim had disclosed her age as thirteen years.

20. Dr. Abhishek Sinha was examined as PW10. He stated that on 21.06.2013, he was working as an Assistant Professor, Safdarjung Hospital, New Delhi and on that day, pursuant to the request of the IO, a Board of doctors had been constituted to ascertain the age of the victim. He stated that he was one of the members of the said Board as a physiologist. He stated that he had conducted the physical examination of the victim and mentioned the measurement and description of the victim in the age estimation report (Ex PW8/B). He stated that after due examination by all the doctors, the estimation report had been prepared and it was opined that her age was between fifteen years to sixteen years at the material time. He identified his signature on the said report.

21. In his cross examination, he affirmed that it is possible that a person of twenty years or above has a height of 4.6 ft and weight of around thirty kgs. He affirmed that age estimation has been gathered on the basis of physical examination after considering all the points

mentioned at point X in the report (Ex PW8/B). He affirmed that the age estimation had been opined jointly by all the members of the Board. He denied the suggestion that the age of the victim at the time of the examination had been eighteen years or more. He affirmed that the Chairman of the Board belonged to the Forensic Department. He further affirmed that the Chairman had also examined the victim and analysed the reports prepared by the members of the Board and gave his opinion.

22. Dr. Anurag Jain was examined as PW11. He stated that on 21.06.2013, he was working as a Dental Surgeon, Safdarjung Hospital, New Delhi and on that day, pursuant to the request of the IO, a Board of doctors had been constituted to ascertain the age of the victim. He stated that he was one of the members of the said Board as a Dental Surgeon. He stated that he had conducted the dental examination of the victim. He stated that after due examination by all the doctors, the estimation report (Ex PW8/B) had been prepared and it was opined that her age was between fifteen years to sixteen years at the material time.

23. In his cross examination, he affirmed that the third molars erupt at the age of seventeen years to twenty five years, however, exceptions might be there. He stated that he formed his opinion on the basis of the eruption of all the teeth and their status of root formation as evident from OPG. He stated that he had opined regarding OPG only for the third molars and not about other teeth. He volunteered to state that the same was not needed.

Submissions

24. Ms Pandey, learned counsel appearing for the appellant submitted that the appellant had been falsely implicated in the said case as there are material inconsistencies in the statement of the prosecutrix.

25. Next, she submitted that the deposition of prosecutrix before the court was very detailed and she had materially improved her statement recorded under Section 164 of the Cr.PC, which was short and cryptic.

26. Next, she submitted that the testimony of the prosecutrix is inherently unreliable. The prosecutrix had stayed at the place of the appellant for just one night but remembered the full address and his full name along with his father's name. However, when asked about the names and addresses of the other employers, as mentioned in her deposition, she stated that she did not remember details about the other employers, where she claimed to have spent months and hence, the same is evident that she was tutored.

27. Next, she submitted that there are several inconsistencies in the statements of the prosecutrix.

- (i) As per the prosecutrix's complaint and the FIR, the prosecutrix stated that Raju and Arjun had taken her from the Moti Nagar office and left her at the house of the appellant, however, as per her examination in chief, she had only stated that 'they' took her from the Moti Nagar office to Sangam Vihar in search for a job to the appellant's house. Whereas,

in her cross-examination, she had stated that she was taken to the house of appellant by Raju. She did not mention the name of Arjun in her deposition. Further, neither Raju nor Arjun were examined.

- (ii) There are dissimilarities in the chronology of events regarding her stay at Sachin's house; who took her to the house of Saroj *didi*; and also, as to when she was taken there. Further, Sachin had also not been made a witness to the case.
- (iii) There is an improvement in the prosecutrix's deposition regarding the monetary transaction between Raju and the appellant. She had stated the same for the first time in her cross examination and the same had not been mentioned by her in her statement under Section 164 of the Cr.PC.
- (iv) As per her statement to the police, Saroj *didi* had asked her as to why was she was walking slowly, however, as per her statement under Section 164 of the Cr.Pc, she had stated that she was in pain for about one-two weeks after the incident. Further, her visit to Saroj *didi*'s house was after few months. Thus, the case set up by the prosecution is fabricated.
- (v) As per her statement to the police, Saroj *didi* had taken her to the police. In her statement under Section 164 of the Cr.PC, the prosecutrix had stated that Saroj *didi* had called on 100 number and thereafter, the police had arrived and taken her to the police station.

(vi) As per the deposition of PW5, she along with PW7 had taken the prosecutrix to Prayas NGO after the MLC examination, and left her there. However, as per the deposition of PW7, she had taken the prosecutrix to PS Sangam Vihar after her medical examination and the prosecutrix had identified the accused at the police station and thereafter, she left the prosecutrix at Prayas NGO.

28. She further submitted that neither Saroj was examined nor her statement was recorded by the police. Further, SI Kamini Gupta (PW7) had stated that the statement of Saroj could not be recorded, as she was not traceable because they did not have her address. PW7 also stated that the prosecutrix had mentioned that she had worked at other places, however, she did not remember the names or addresses of her previous employers. This is particularly strange, especially in view of the details stated by her about the full name of the accused, his address and his father's name.

29. Lastly, she submitted that there seems to be a lack of effort on part of the police officials to ensure the joining of material witnesses.

Reasons and Conclusion

30. At the outset, it is necessary to observe that the evidence led by the prosecution in this case has been very economical to say the least. The Investigation Agency has been wanting in coalescing the material

in support of its case. Consequently, the prosecution's case, insofar as the commission of the offence is concerned, rests almost entirely on the oral testimony of the prosecutrix.

31. The prosecution has led evidence to establish that the age of the prosecutrix was below eighteen years at the time when the alleged offence was committed. A Medical Board was constituted comprising of medical experts and its report (Ex.PW8/B), estimates the age of the prosecutrix as more than fifteen years but less than sixteen years on the date of her examination. Each of the medical experts – Dr. Amita Malik, Senior Specialist, Radiodiagnosis, Safdarjung Hospital (PW8); Dr. Abhishek Sinha, Assistant Professor, Department of Physiology (PW10); Dr. Anurag Jain, Dental Surgeon (PW11); and Dr. Kulbhushan Prasad, Assistant Professor, Forensic Department (PW9) – testified to the prosecution's age pursuant to the Bone Ossification Test. The Trial Court accepted their testimony as nothing was elicited in their cross-examination that would lead the Trial Court to doubt it.

32. It was contended on behalf of the appellant that there was a margin of error of two years in fixing the age of the prosecutrix and benefit of the same should be available to the appellant. It is difficult to accept this contention in view of the unimpeachable and unambiguous testimonies of the expert witnesses. However, even if it is assumed that the margin of error of two years in fixing the age of the victim should be accounted for by abundant caution; the age of the prosecutrix would still be less than eighteen years on the date of the

commission of the offence. The prosecutrix was examined by the medical experts for more than two months after the date of the incident. In terms of the report (Ex.PW8/A), her age has been found to be more than fifteen years and less than sixteen years. Thus, even if the margin of two years is taken into account, her age would be atleast few months less than eighteen years on the date of the incident.

33. This Court concurs with the view of the Trial Court that in view of the testimonies of the said expert witnesses, it was established that the age of the prosecutrix was below eighteen years on the date of the commission of the offence.

34. As observed above, insofar as the commission of the offence is concerned, the Trial Court had accepted the testimony of the prosecutrix and convicted the appellant. Thus, the substantial question to be addressed is whether the testimony of the prosecutrix is reliable.

35. The FIR in question was registered at the instance of the statement made by the prosecutrix recorded on 07.04.2013. The prosecutrix is a resident of a village in the State of Jharkhand. She stated that her age was fourteen years and she used to reside with her parents and four siblings. She had done her schooling till fifth standard. She stated that one woman named Shivani used to visit her village regularly and used to take about two or three girls each month to Delhi for getting them employed. She stated that she had accompanied Shivani to Delhi in the month of January last year (that is, January 2012) in search of employment. Shivani had taken her to an office in Shakarpur for

arranging employment for her. She stated that she was employed in a house where she had worked for about six months. However, when her employers were leaving, they had left her at the 'Shakarpur office'. This would presumably be the office of the Employment Agency. Thereafter, Shivani had taken her to Moti Nagar and left her there for securing employment. She stated that one Raju and Arjun had taken her from Moti Nagar to the office of Kumod Mishra (the appellant herein) in Sangam Vihar and left her there. She stated that she remained there for the night. While she was sleeping, "*Kumod Mishra S/o Sunder Kant Misra R/o K-1033, Gali No. 19/12 Ratia Marg, Sangam Vihar*" came and lied down beside her. She stated that she woke up and found that the appellant was removing her clothes. She questioned him "*bhaiya ye aap kya kar rahe ho*". He responded by asking her to keep quiet and threatened that he would slash her with a knife (*bola chup reh, nahi toh chaaku se kaat dunga*). She stated that she tried to push him away with her feet but he slapped her repeatedly; stripped her; and raped her (*mere sath galat kaam kia*). She stated that she wept. In the morning, a boy named Sachin came and he took her to a house (*kothi*) for getting her employed there. She stated that she did not know the location of the said *kothi*. She worked there for about two months. Thereafter, Sachin called her back through someone and took her to his house. She did not know the address of Sachin's house as well but she remained there for two or three days. Thereafter, on 06.04.2013, Sachin left her with one Sunil *Bhaiya* and he brought her to the house of one Saroj *Didi* for getting her employed there. She stated that Saroj *Didi* inquired why she was sad and why she was walking very slowly. She stated that she broke down

and while weeping, narrated the entire incident to Saroj *Didi*. And, Saroj *Didi* took her to the police. She alleged that the appellant had forced himself on her and after threatening and assaulting her, raped her.

36. As mentioned above, the material coalesced by the Investigation Agency is frugal. None of the persons mentioned by the prosecutrix were examined. The woman, Shivani, who had allegedly brought the prosecutrix from her village to Delhi, has not been examined. The record does not indicate that she was contacted or any efforts were made to record her statement. The Investigation Agency seems to be clueless about the identity of Raju and Arjun who according to prosecutrix had taken her to the office of the appellant on the date of the incident. The boy named Sachin, who had picked up the prosecutrix from the premises of Kumod Mishra and handed her over to Sunil, has also not been found or examined. The Investigation Agency has also not been able to ascertain the whereabouts or the identity of Sunil *Bhaiya*, who had arranged for the prosecutrix to be employed with Saroj *Didi*. Although the prosecutrix had stated that Saroj *Didi* had taken her to the police, Saroj *Didi* has not been examined as well.

37. It does not appear that any serious efforts were made to trace the said persons. SI Kamini Gupta, who was examined as PW7, had stated that Saroj's statement was not recorded as she was not traceable and the police did not have the address of Saroj. According to her, the prosecutrix was not familiar with Delhi and could not inform them of

the exact location of the premises and therefore, the said persons could not be traced.

38. Ms. Pandey, learned counsel appearing for the appellant had contended that the said persons named by the prosecutrix in her complaint were material witnesses and the failure of the Investigation Agency to record their statements or examine them is fatal to the case of the prosecution, as it must be assumed that none of the material witnesses were supporting the case of the prosecution.

39. Since, the prosecution's case rests on the testimony of the prosecutrix, it would be necessary to examine the evidence of the prosecutrix in some detail. There is no dispute that the testimony of a sole witness is sufficient to return a verdict of conviction. However, it is necessary that such evidence must be of unimpeachable quality. In ***Rai Sandeep @ Deepu v. State (NCT of Delhi): (2012) 8 SCC 21***, the Supreme Court had set out the qualities of a sterling witness. Consistency between the statements recorded earlier and the testimony of such solitary witness is one of the objective criteria, as indicated by the Supreme Court, to determine whether such testimony of a sole witness could be considered as one of unimpeachable quality. It is thus, necessary to examine this aspect.

40. The contents of the statement of the prosecutrix, on the basis of which the FIR was registered, has been noticed in some detail above.

41. Apart from the above, the statement of the prosecutrix was recorded under Section 164 of the Cr.PC on 08.04.2013. In her statement, the prosecutrix stated that she had accompanied Shivani to Delhi in the month of January 2012. She stated that Shivani had left her at the office, where they arranged employment. She stated that thereafter, she worked with a family consisting of a husband, his wife, their son and a daughter. She stated that Mishra had committed a wrong act with her. He had done so two months ago. She stated that Kumod Mishra was his full name. She stated that he had stripped her and thereafter, kicked her and threatened her that he would slash her with a knife (*chaaku se kaat dunga*). She stated that he had inserted his organ from where he urinates inside her from where she urinates (*mere peshab karne vali jagah par usne apni peshab karne vali jagah dali*). She stated that she felt pain for about one to two weeks while walking. She further stated that he had committed the said act twice or thrice in the night and she wanted to go back to her village.

42. The prosecutrix's statement (Ex.PW1/B) is very brief and does not narrate the sequence of events as recorded by her in her initial statement. There is no mention of any other person other than the appellant in her statement. Whilst the complaint had mentioned the names of several persons – Raju, Arjun, Sachin, Sunil and Saroj – she neither mentioned the involvement of any other person in the sequence of events nor named them in her statement under Section 164 of the Cr.PC.

43. The testimony of the prosecutrix is in greater detail and, except as noted below, is consistent with her statement recorded on 07.04.2013. Ms. Pandey had pointed out certain discrepancies between the said statement and her testimony. Whereas in her initial statement, the prosecutrix had stated that Sachin had picked her up in the morning after the incident, and had taken her to a *kothi* where she had worked for two months. Thereafter, he had called her back through someone. She stayed at the house of Sachin for about two-three days. Thereafter, he had handed over her to one Sunil who took her to the house of ‘Saroj *Didi*’. However, in her testimony, she did not mention that Sunil had taken her to the house of Saroj *Didi*. She testified that Sachin had taken her to the house of Saroj *Didi*. She did not mention Sunil’s name. In addition to the above, her testimony as to how she contacted the police is also in variance with her statement recorded earlier. In her earlier statement, she stated that Saroj *Didi* had taken her to the police. However, in her testimony, she stated that Saroj *Didi* had dialed 100; the police had arrived and taken her to the police station.

44. The prosecutrix was cross-examined. In her cross-examination, she denied the suggestion that the appellant had refused to employ her when she was taken to his house by Raju. She volunteered that the appellant had given some money to Raju and he had left her at the appellant’s house. However, she did not know the amount paid by the appellant to Raju.

45. Ms. Pandey, pointed out that the prosecutrix had not mentioned any transaction relating to money between the appellant and Raju in any of her earlier statements or even in her examination-in-chief. She had introduced this new element in her cross-examination. Apart from the above, her statement that she was taken to the house of Kumod Mishra was also inconsistent with her earlier statement that she had been taken to his office.

46. Undeniably, there are certain inconsistencies in the statement of the prosecutrix and her testimony. However, it must be borne in mind that the statement of the prosecutrix was recorded on 07.04.2013, whereas her testimony was recorded more than a year later on 26.04.2014. Thus, certain inconsistencies in the narration of events are natural.

47. Ms. Pandey also contended that the prosecutrix's statement as well as her testimony should be rejected, as it is, inherently unreliable. She submitted that whereas the prosecutrix had worked for six months with the family immediately on her coming to Delhi in the month of January 2012, she neither re-collected the place where she worked nor the names of her employers. She had been unable to provide any clue as to the whereabouts of the office in Shakarpur or the identity of the persons managing that office. Similarly, she could not provide any details regarding the Moti Nagar office. She did not know the address of the house where she worked for about two months after the incident; she did not know the address or whereabouts of Sachin who had taken

her to his house; and she did not know the address or whereabouts of the house of Saroj *Didi*, where she worked as a domestic maid. However, in her statement recorded on 07.04.2013, she stated not only the name of the appellant but also his father's name and his residential address in full. According to the prosecutrix, she was at the premises for only one night and could re-collect the complete address and other details of the appellant but she was unaware of details of any other person including the details of the family with whom she had worked for six months.

48. In her cross examination, the prosecutrix denied that she knew the details or the address of the appellant. She stated that she knew his name and that he resided in Sangam Vihar. But her statement, on the basis of which the FIR was registered, records not only the complete address of the appellant but also the name of his father.

49. Apart from the above, there are other aspects that are required to be noticed. The MLC (Ex. PW 2/A) of the prosecutrix records that on 07.04.2013 at about 5.30 p.m., the prosecutrix had come to the hospital (AIIMS). It is recorded that she had informed the concerned doctor that *“she came to Delhi from her home at Jharkhand about one year back to earn money by doing house maid work. H/o sexual assault by a man (named Kumod Mishra) who is an agent who distribute works to them. H/o Sexual intercourse by threatening her about two months back. Slapping of girl. No other H/o physical abuse”*. As is evident, the appellant was described as an agent who distributes work to ‘them’

(presumably work as a house maid). However, there is no evidence or material to indicate that the appellant is engaged in any such activity. It does not appear that there is anything on record to indicate the appellant's vocation. Plainly, if he is engaged in the business as an employment agent, it would not be difficult for the Investigation Agency to connect his involvement with the alleged offence.

50. The Trial Court Record also includes the document Mark A-1. The same is a counseling report. Although, the said document has not been proved and therefore, cannot be referred to, it purports to indicate that the appellant had met the counselor at the police station, who had recorded the said report. However, the allegation is that the appellant, referred to as *Mishra ji*, had raped Shivani. But, this may be an error and Shivani's name may have been mentioned instead of the name of the prosecutrix.

51. Undoubtedly, there are questions as to the reliability of the testimony of the prosecutrix, however, it cannot be rejected as completely unreliable. There is a strong assumption of truth in allegations of this nature since levelling of such allegations also casts a stigma on the person making such allegations. However, it certainly would require to be corroborated by some evidence or material. However, in this regard, the prosecution falls completely short of what was required by it.

52. The prosecutrix had mentioned several persons, however, the Investigation Agency did not examine any of them. In her statement

recorded earlier, the prosecutrix had stated that Saroj *Didi* had taken her to the police station. In a statement recorded under Section 164 of the Cr.PC, she had stated that Saroj *Didi* had called at number 100 and thereafter, the police had arrived and taken her to the police station. She had reiterated the same in her examination in chief. At the material time, the prosecutrix was working in the residence of Saroj *Didi*. Thus, there would have been no difficulty for the Investigating Agency to examine Saroj *Didi*, who could have testified as to the events that led to the complaint being lodged. In her examination, the IO (PW7) had testified that Saroj could not be traced, however, this Court finds it difficult to accept the said testimony considering that either Saroj had brought the prosecutrix to the police station to make a complaint (as recorded in the FIR) or had called the police (as per the prosecutrix's testimony). In either event, the police would have been in contact with Saroj. If it is accepted that the police had gone to her house on being called on her dialling 100, there would have been no question as to the location of her residence. Rudimentary enquiries would have revealed the whereabouts of Sachin, who had allegedly picked up the prosecutrix from the premises of the appellant on the morning after the incident. According to the prosecutrix, Sachin had taken her to the residence of Saroj *Didi* to work as a domestic maid.

53. There are also material inconsistencies in the statement and testimony of the prosecutrix concerning the manner in which she was taken to the police station and by whom. According to the statement of the prosecutrix, on the basis of which the said FIR was registered, she

had stated that Saroj had taken her to the police station after she had narrated the incident to her. However, in her examination in chief, she had stated that after narrating the incident to Saroj *didi*, she had called on the number 100 and thereafter, the police arrived and had taken her to the police station and then, to the hospital for her medical examination. And, also as per her cross examination, she stated that the police had come to the house of Saroj *didi* and thereafter, she was taken to the police station. Further, according to the prosecutrix's testimony, she had advertently stated that a male police official had recorded her statement at the police station. However, as per the statement of SI Kamini (PW7), who is, the IO, she stated that she had recorded the statement of the prosecutrix.

54. Further, as per the testimony of the prosecutrix, she had stated that both male and female police officials had accompanied her to the hospital. However, as per the testimony of Ct. Sunita (PW6) and SI Kamini (PW7), they had accompanied the prosecutrix to the police station and there was no mention of any male police official who had accompanied them as well.

55. In view of the above, the sequence of events relating to how she reached the police station and thereafter, the hospital as well as the recording of her statement, remain unclear. The facts and the evidence obtaining in this case do raise certain doubts as to the testimony of the prosecutrix, which is the only foundation on which the case of the prosecution rests.

56. The prosecutrix had stated in her cross examination that “*the accused Kumod Mishra had shown me a knife and threatened me with it. It was a long knife*”. However, no such allegation had been made by the prosecutrix in her statement or her statement recorded under Section 164 of the Cr.PC. Although, the prosecutrix had mentioned that the accused had threatened her, she did not mention that he had shown her a knife.

57. Given the inconsistencies in the statement made by the prosecutrix and her failure to give any details of the previous places that she had worked at and yet disclosing the complete details about the appellant, it would be unsafe to convict the appellant without any material to corroborate her testimony. More so, where the prosecution could have with reasonable efforts, garnered the necessary corroborative evidence.

58. In view of the above, this Court is unable to accept that standard of proof to convict the appellant has been met in this case.

59. The appeal is, accordingly, allowed and the appellant is acquitted of the offence for which he is charged. The pending application is also disposed of.

VIBHU BAKHRU, J

APRIL 6, 2021/pkv