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HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 2099 of 2023**

Gajju Lal Fenkar, Son of Late Bisru Fenkar, Aged About 65 Years
Resident of Sisdevri, Thana - Palari, District - Balodabazar-Bhatapara,
Chhattisgarh.

---- Appellant

Versus

State of Chhattisgarh Thorough Police Station - Palari, District -
Balodabazar-Bhatapara, Chhattisgarh.

---- Respondent

(Cause Title taken from Case Information System)

For Appellant : Mr. Saurabh Dangi, Advocate.

For Respondent/State : Mr. Sangharsh Pandey, Govt. Advocate

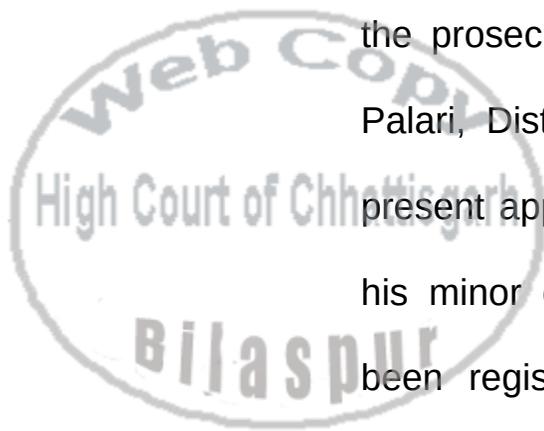
Hon'ble Mr. Ramesh Sinha, Chief Justice**Hon'ble Mr. Ravindra Kumar Agrawal, Judge****Judgment on Board****Per Ramesh Sinha, Chief Justice****03.04.2024**

1. Appellant – **Gajju Lal Fenkar** has preferred this appeal under Section 374(2) of Code of Criminal Procedure, 1973 (for short, 'CrPC') questioning the impugned judgment dated 18.07.2023 passed by the learned Additional District & Sessions Judge, FTSC (POCSO Act), Balodabazar (C.G.) in Special Criminal Case No.29/2022 (**State of Chhattisgarh Vs. Gajju Lal Fenkar**), whereby the trial Court has convicted the appellant under Section 450 of the IPC and Section 4(2) of the Protection



of Children from the Sexual Offences Act, 2012 (for short 'the POCSO Act') and sentenced him to undergo rigorous imprisonment for 5 years and fine of Rs. 500/-, in default of payment of fine, additional RI for 6 months and rigorous imprisonment for 20 years with fine of Rs. 1,000/-, in default of payment of fine, additional rigorous imprisonment for 01 year with a direction to run both the sentences concurrently.

2. Case of the prosecution, in brief, is that the complainant father of the prosecutrix had made an oral report before Police Station, Palari, District – Balodabazar, alleging that on 25.02.2022 the present appellant entered into his house and committed rape on his minor daughter. On aforesaid allegation, FIR (Ex.P-1) has been registered in Crime No. 97/2022 against the accused/ appellant under Section 376, 450 of the IPC and Section 4 of the POCSO Act.
3. During the course of investigation, a spot map of the incident site was prepared. Regarding providing a visual map of the incident, a memo was written and a visual map was prepared by the Patwari. Underwear/panties and frocks were confiscated from the victim and the accused. Regarding the age of the victim, a memo was written to the head of the Primary School, Sisdevari and the dismissal register was confiscated and given on the original certificate. For examining the genital of the victim, consent was



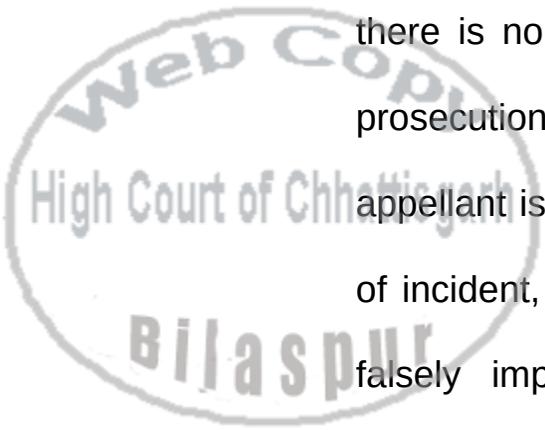


taken from the victim and her parents and a memo was written to the Women's Medical Officer, Community Health Center, Palari and the report was obtained. A memo was filed for underwear testing related to the victim and the accused and its report was obtained. After the genital examination and underwear examination of the victim and the accused, a memo was written as per Ex.P-27 for the final report to be given to the State Forensic Science Laboratory, the acknowledgment of which was received vide Ex.P-28 and the final FSL report was obtained vide Ex.P-29.

4. After completion of investigation, the police submitted the police report alongwith charge-sheet against the appellant/convict before the Additional District & Sessions Judge, FTSC (POCSO Act), Balodabazar (C.G.), where the case was commenced for trial in Special Case No. 29/2022 and charges were framed under Sections 450, 376(3) of the IPC and Section 6 of the POCSO Act.
5. Statement of accused was recorded under Section 313 of the Cr.P.C. in which he denied all the circumstances appearing against him and stated that he is innocent and has been falsely implicated. He has not examined any witness in his defence.
6. The prosecution in order to bring home the offence examined as many as 12 witnesses and exhibited 29 documents (Exhibits P-1 to P-29).



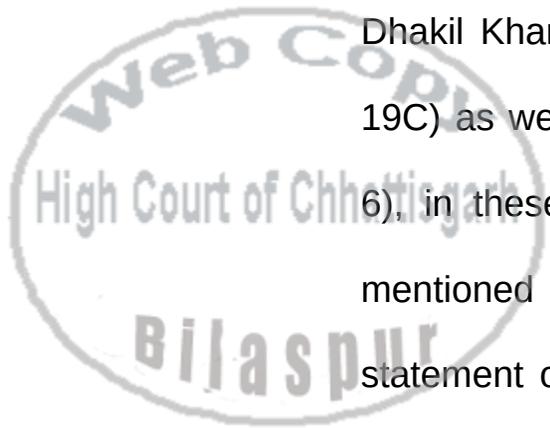
7. The trial Court after completion of trial and after appreciating oral and documentary evidences available on record, by the impugned judgment dated 18.07.2023 convicted and sentenced the appellant in the manner mentioned in the opening paragraph of this judgment, against which this appeal under Section 374(2) of the CrPC has been preferred by them calling in question the impugned judgment.
8. Mr. Saurabh Dangi, learned counsel for the appellant submits that there is no evidence against the appellant and the case of the prosecution is based on surmises. He further submits that the appellant is an old man aged about 65 years on the alleged date of incident, he has not committed any offence and he has been falsely implicated in the crime in question, there was no eyewitness and that too the victim is also not mentally fit she used to go here and there along with anybody in the village therefore, the statement given by the prosecutrix is not admissible. There is no legally admissible evidence in support of the age of the prosecutrix show her to be minor on the date of incident. Even the document i.e. Dakhil Kharij Register and halafnama panji, based on which the prosecution has tried to prove the prosecutrix to be minor on the date of incident, has not been proved as required under the law. No bone age examination of the prosecutrix was conducted to ascertain her bone age. Thus, there





is no authentic proof of the age of the prosecutrix and as such, the impugned judgment of conviction and order of sentence is liable to be set-aside.

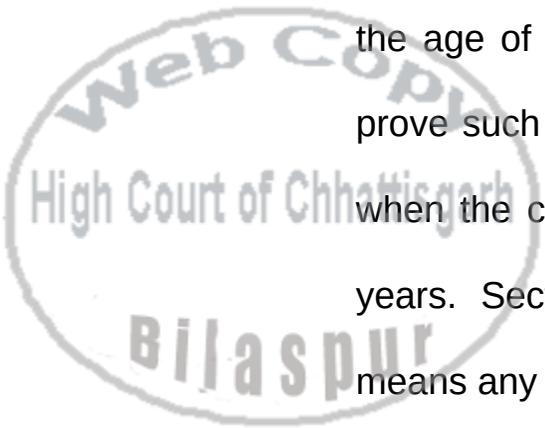
9. On the other hand, Mr. Pankaj Singh, learned Panel Lawyer appearing for the State/respondent submits that the appellant has committed a heinous crime of rape against a minor girl aged about 13 years 07 months and 21 days, who is also not mentally fit and the same has been duly proved by the prosecution as per Dhakil Kharij Register (Ex.P-18C) and Halafnama Panji (Ex.P-19C) as well as progress report of Class-V of the victim (Ex.P-6), in these documents date of birth of the victim has been mentioned as 04.07.2008, which has been certified by the statement of PW-1, father of the victim. He also submits that though the age of appellant is stated to be 65 years of age, but as per the report Ex.P14 and the opinion of Dr. Pankaj Verma (PW7), the appellant was capable of sexual activity and sexual intercourse that too the MLC is positive and in the FSL report also human sperm was found in the underwear of the accused appellant, as such, the judgment of conviction and sentence awarded by the learned trial Court is just and proper warranting no interference.





10. We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.
11. ***The first question for consideration before this Court would be, whether the trial Court is rightly held that on the date of incident, the victim was minor?***
12. When a person is charged for the offence punishable under the POCSO Act, or for rape punishable in the Indian Penal Code, the age of the victim is significant and essential ingredients to prove such charge and the gravity of the offence gets changed when the child is below 18 years, 12 years and more than 18 years. Section 2(d) of the POCSO Act defines the “child” which means any person below the age of eighteen years.
13. In ***Jarnail Singh Vs. State of Haryana, reported in (2013) 7 SCC 263***, the Hon'ble Supreme Court laid down the guiding principles for determining the age of a child, which read as follows :

“22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice





(Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under :

“12. Procedure to be followed in determination of Age.?” (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the





Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub- rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”





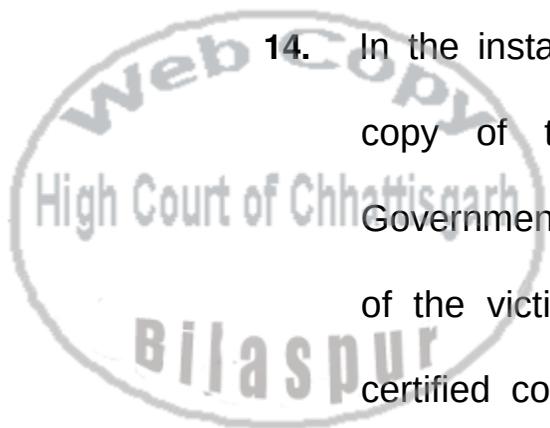
23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the





absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.”

14. In the instant case, the prosecution has presented a certified copy of the Dakhil Kharij Register (Ex.P-18C) of the Government Primary School, Sisdevri, in which the date of birth of the victim is mentioned as 04.07.2008. Apart from this, certified copy of Halafnama Panji (Ex.P-19C) has also been presented, in which her date of birth is mentioned as 04.07.2008. In this regard, the Headmaster of the school (PW-09), appeared in the Court and displayed the original Dakhil Kharij Register (Ex.P-18) and Halafnama Panji (Ex.P-19), in which the date of birth of the victim is mentioned as 04.07.2008. In the cross-examination of this witness, the defence brought only the fact that Ex.P-18 and Ex.P-19 have not been entered by him, which has been accepted by the witness. Although according to the judicial precedent of the Hon'ble Supreme Court and Section 35 of the Indian Evidence Act, the evidentiary





value of the Dakhil Kharij Register (Ex.P-18C) gets weakened in the absence of an entrant, but the Halafnama Panji (Ex.P-19C) has also been presented by the prosecution, which confirmed the Dakhil Kharij Register (Ex.P-18C). Prosecution has also presented progress report of the victim of Class-V in which also the date of birth of the victim is mentioned as 04.07.2008.

15. The defence has not presented any oral or documentary evidence to refuse the said date of birth, therefore, there is no reason to disbelieve the date of birth of the victim, as 04.07.2008 hence, the trial Court has rightly held that the date of birth of the victim is 04.07.2008 and on the date of incident, she was minor and her age was 13 years 07 months and 21 days.

16. ***The next question for consideration before us is whether the appellant has committed rape on minor victim?***

17. In this regard, the statement of the the victim (PW-2) is most important. She has stated that she recognize the accused. On the date of incident, when she was wearing clothes after taking bath, the accused pressed her mouth and caught hold her hand, gave her Rs. 2/- and then made her lie down and after that the accused climbed on top of her and did wrong things with her. At the time of incident, her parents had gone out, her grandmother had gone to the fields, her maternal uncle had gone to work and her younger sister (PW-6) was with her at home. The accused



pressed her hand hardly. The accused had her sleep on the floor, after which the accused removed her clothes and had also removed her underwear and pressed her chest. Younger sister (PW-6) had seen the accused going, but not coming. At the time of incident, she was eating food when the accused came. PW-6 had seen the accused going to her house. As the victim was not able to tell the whole story, the Public Prosecutor has declared her hostile and after getting permission from the Court, when leading questions were put to the victim, she narrated about the whole incident. In her cross-examination, though she has admitted that there are two or three people's house next to her house and the accused's house is next to it. She screamed at the time of incident. She shouted to PW-6, she automatically stated that the accused had pressed her mouth. She admitted that there is a road in front of her house where people keep coming and going. She also admitted that she used to laugh and joke with the accused before the incident. She also admitted that she had told PW-6 about the incident in school. She denied the suggestion that the accused has not done any wrong to her.

18. PW-6, who is younger sister of the victim, has stated that the incident happened at 8 o'clock in the morning. Her sister (victim) came home after taking bath, thereafter she went to



take bath. There was a tap in the courtyard of the house. She went there to take bath, when she was to dry her clothes after taking bath, she saw the accused leaving from *Parchi*. When she went inside the room, her sister (victim) was wearing her clothes. Her sister, the victim has told that the accused gave her two rupees, after that both of them had gone to school after having food, then in the school, the victim told her that the accused had done wrong by having physical relations with her, then after coming back from the school, they told their grandmother about the incident. In the leading question put by the Public Prosecutor, she admitted that in her police statement, she had told that when she had gone to urinate with the victim in school, she had seen that blood was coming out from the place where the victim was urinating. In her cross-examination, she denied the suggestion that the accused did not come to their house on the date of incident, she said on her own that he had come. She also admitted that her sister the victim is little mentally weak, she keeps wandering in the village. The victim keeps roaming in the school also.

19. Ramcharan (PW-1), who is the father of the victim and informant of the present case, has stated that her younger daughter (PW-6) called him on phone and told that the elder daughter, the victim, was bleeding from her private parts. She had also told



his wife over the phone that Gajju, who lives in the neighbourhood, had come and committed wrong with the victim and ran away. He further stated that when he and his wife reached back home and interrogated the victim, she told that after taking bath when she was wearing clothes and her younger sister (PW-6) was taking bath, at the same time the accused came and raped her by pressing her mouth. In his cross-examination, he admitted that in his police statement, he had described the victim as being mentally retarded. He denied the suggestion while giving the statement to the police, he did not tell that his younger daughter had told him on the phone that blood was coming out from the genitals of the victim. He also denied that the accused has not committed any incident with the victim.

20. PW-3, mother of the victim, has also stated the same version as stated by PW-1, father of the victim that her younger daughter (PW-6) had informed them on phone that accused Gajju had committed wrong with her elder daughter, the victim. In her cross-examination, she admitted that in her police statement she had told that the victim is little mentally retarded.
21. PW-4, maternal grandmother of the victim, has also stated that both the victim and her younger sister (PW-6) had told her about the incident that the accused Gajju had committed wrong with



the victim. She also admitted that the victim is mentally retarded.

22. PW-5, maternal uncle of the victim, has stated that on coming home, his mother and PW-6 had told him that the accused Gajuu had raped the victim. In his cross-examination, he also admitted that the victim is little mentally retarded.

23. Dr. Pankaj Verma (PW-7), who had medically examined the accused had stated that on examination he found that the accused was capable for sexual activity and sexual intercourse. His report is Ex.P-14. In his cross-examination, though he admitted that he is not a sex expert, but denied that a person above 70 years of age cannot be able to have sexual intercourse.

24. Dr. Minal Kharat (PW-11), who who had medically examined the victim on 27.02.2022, has stated that at the time of examination the condition of victim was normal and was understanding everything. According to the victim, the incident happened at her house on 25.02.2022 between 8.00 to 9.00 am. She further stated that biological symptoms of the victim were normal. On physical examination, she found that there was an injury mark of 0.5 x 05 cm on the right side of her stomach. There was a 2 x 2 cm injury mark on the back. The said injuries occurred within a



period of seven days. Her secondary sexual characteristics included the presence of breast buds. Auxiliary and pubic hair were in less quantity. The victim's menstruation had not started. On genital examination, she found that there was redness in the libia, vulva and vagina. The hymen was torn and bleeding was coming. She opined that there were marks of immediate struggle or injury on the body of the victim which shows that there was immediate forceful sexual intercourse with the victim. In her cross-examination, though she had admitted that on scratching the vaginal part can cause redness, but she automatically said that the hymen of the victim was found to be torn and there was bleeding. She further stated that in during her test she had found that the sexual intercourse was committed with the victim within about 72 hours.

25. Pramod Kumar Singh (PW-12) is the investigating officer who had conducted the investigation and in his deposition had explained the sequence of events and the manner of investigation.
26. In the cross-examination of the witnesses by the defence, it was suggested that the victim was mentally unwell and kept wandering here and there. Father of the victim (PW-1), mother of the victim (PW-2), maternal grandmother (PW-4), maternal uncle of the victim (PW-5) and sister of the victim (PW-6) have



admitted in cross-examination that the victim was mentally weak and was wandering here and there. Even if it is accepted for some time that the victim was mentally weak and was wandering here and there, this still does not give the accused the defence that he is not guilty of rape. Apart from this, the witness who examined the victim, Dr. Minal Kharat (PW-11), while examining the victim, said that the victim was in a normal condition and was aware of everything. The victim has also presented clear evidence regarding the incident in his statement. In such a situation, it cannot be said that the victim is presenting evidence against the accused due to being mentally weak.

27. In her statement, the victim has said that the accused raped her after giving her two rupees. The statement of the victim is confirmed by the statement of her sister (PW-6). The said witness is a witness to the immediate aftermath of the incident and she saw the accused coming out of the house immediately after the incident and blood coming out from the victim's private parts. In the cross-examination of the above two witnesses, the defense has failed to bring such facts which could refute the statement of the witnesses. The statement of the said witnesses is also confirmed by the statement of victim's parents, maternal grandmother and maternal uncle, who were witnesses

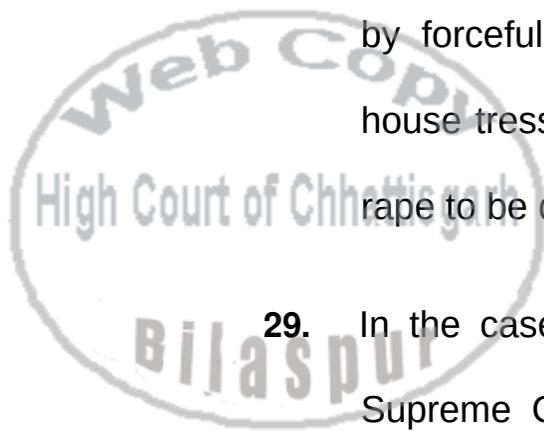


immediately after the incident and who were told about the incident by the victim. Similarly, bleeding from the genitals of the victim after the incident is confirmed by the statement of her sister (PW-6) and medical witness Dr. Minal Kharat (PW-11). The above fact confirms that there was blood from the victim's private parts due to the forceful rape by the accused.

28. Analysis of witnesses and documents has proved that the victim is a minor below 16 years of age, the accused raped the victim by forceful intercourse with her and the accused committed house tress by entering the victims residential house to commit rape to be done.

29. In the case of **Ganesan v. State**, (2020) 10 SCC 573, the Supreme Court observed and held that that there can be a conviction on the sole testimony of the victim/prosecutrix when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and her evidence is of sterling quality.

30. In the case of **State (NCT of Delhi) v. Pankaj Chaudhary**, {(2019) 11 SCC 575}, it was observed and held that as a general rule, if credible, conviction of accused can be based on sole testimony, without corroboration. It was further observed and held that sole testimony of prosecutrix should not be doubted by court merely on basis of assumptions and surmises.





31. In the case of ***Sham Singh v. State of Haryana***, {(2018) 18 SCC 34}, the Supreme Court observed that testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It was further observed that seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

32. Applying the law laid down by the Supreme Court in the cases (supra) to the facts of the case on hand and as observed hereinabove, we see no reason to doubt the credibility and/or trustworthiness of the victim. She is found to be reliable and trustworthy. Therefore, without any further corroboration, the conviction of the accused relying upon the sole testimony of the victim can be sustained.

33. The view taken by the learned trial Court that the appellant is the author of the crime is a pure finding of fact based on evidence available on record and we are of the opinion that in the present case, the only view possible was the one taken by the learned trial Court.



34. From the above analysis, we are of the considered opinion that the prosecution has been successful in proving its case beyond reasonable doubt and the learned trial Court has not committed any legal or factual error in arriving at the finding with regard to the guilt of the appellant/convict.
35. Accordingly, the appeal being devoid of merit is liable to be and is hereby **dismissed**.
36. The appellant/convict is stated to be in jail. He shall serve out the sentence awarded by the trial Court by means of the impugned judgment and order dated 18.07.2023.

Sd/-
(Ravindra Kumar Agrawal)
Judge

Sd/-
(Ramesh Sinha)
Chief Justice



Head-Note

Surmises and assumptions cannot be the sole basis to doubt the credibility of victim under POCSO Act.

POCSO अधिनियम के तहत पीड़िता की विश्वसनीयता पर संदेह करने का एकमात्र आधार अनुमान और धारणाएं नहीं हो सकती हैं।

