IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/CRIMINAL APPEAL (AGAINST CONVICTION) NO. 1149 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE ILESH J. VORA
and
HONOURABLE MR. JUSTICE R. T. VACHHANI

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Approved for Reporting	Yes	No

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KEDARBHAI ISHWARBHAI RATHOD
Versus
STATE OF GUJARAT

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Appearance:
HCLS COMMITTEE(4998) for the Appellant(s) No. 1
MR PRATIK B BAROT(3711) for the Appellant(s) No. 1
MR BHARGAV PANDYA, APP for the Opponent(s)/Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE ILESH J. VORA**
and
HONOURABLE MR. JUSTICE R. T. VACHHANI

Date : 19/01/2026

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE ILESH J. VORA)

1. This conviction appeal is filed by the appellant –sole accused – Kedar Rathod, against the judgment of conviction and order of sentence dated 11.05.2017, passed by the learned Additional Sessions Judge, Bardoli at Surat in Sessions Case No.93 of 2015, wherein the appellants came to be tried for the offences punishable under Sections 363, 365 and 376 of the IPC.

2. At the end of the trial, the appellant came to be convicted and sentenced as tabulated hereunder:

Conviction under Section	Sentence of imprisonment	Fine
S.363 of IPC	RI for 07 years	Rs.1000/-, in default to undergo 1 month simple imprisonment
S.365 of IPC	RI for 07 years	Rs.1000/-, in default to undergo 1 month simple imprisonment
S.376 of IPC	Life Imprisonment	Rs.2000/- in default to undergo 02 months simple imprisonment

The Trial Court ordered the sentences imposed on the appellant to run concurrently.

3. The case of the prosecution leading to conviction of the appellants accused is as follows:

3.1 The appellant-accused was tried and prosecuted for the offence of kidnapping and rape allegedly committed upon the victim aged about 4 years. The offence was occurred on 17.10.2012 to 18.10.2012 between 17:00 hours to 1:30 hours at Village: Pardi, Bardoli. On the next day, the FIR by the father of the victim with the Bardoli Police Station, came to be registered. It is the case of prosecution that, the accused Kedar, resident of Village: Pardi, kidnapped the victim aged about 4 years and raped on the pretext of feeding wafer. The wafer was purchased from the shop of PW.12 – Rajubhai Rathod and the victim was lastly seen by Rajubhai in the company of the accused. in the night hours, the victim was raped and she was abandoned at the secluded place on the roadside of the village. She was seen by PW.4 – Shailesh Rathod and others as he being a tractor driver, was returning back from

the field with other labourers. The victim was profusely bleeding from the private parts and she was taken by the witness (PW.4) from the place and handed over to her father – Champakbhai Rathod (PW.7). The father was in search of victim and after extensive search, before victim could come to house, it was learnt from the witness Rajubhai (PW.12) that, the victim was taken away by Kedar after purchasing wafer from the shop. The investigation of the case was entrusted to PW.14. The I.O. during the investigation, recorded the statements of the witnesses, sent the victim for medical examination at Local Medical Centre and Hospital at Bardoli and obtained necessary blood samples from the body of the victim for chemical analysis. The accused came to be arrested on 07.12.2012. The I.O. after due investigation, filed a chargesheet against the accused for the offences punishable under Sections 363, 366 and 376 of the IPC before Jurisdictional Magistrate.

4. As the case was exclusively triable by Court of Sessions, it was committed to the Court of sessions at Bardoli, District: Surat.

5. The learned Sessions Court framed the charge against the appellant accused which he did not admit the charge and claimed to be tried.

6. The prosecution, in order to prove the charge adduced the following oral as well as documentary evidence in support of its case:

Oral evidence -14

PW 1 – Exh.9	Likhabhai Karsanbhai Rathod, Panch witness
PW 2 – Exh.12	Rameshbhai Somabhai Rathod, Panch witness
PW 3 – Exh.16	Natubhai Lalbhai Dimar, Panch witness
PW 4 – Exh.17	Shaileshbhai Thakorbhai Rathod
PW 5 – Exh.18	Dr. Ramiben Kashiyabhai Choudhari
PW 6 – Exh.25	Dr. alok Shivdayal Goyal
PW 7 – Exh.29	Champakbhai Ganpatbhai Rathod, Complainant
PW 8 – Exh.32	Sathishbhai Rameshbhai Rathod
PW 9 – Exh.33	Girishbhai Rameshbhai Rathod
PW 10 – Exh.34	Shaileshbhai Sureshbhai Rathod
PW 11 – Exh.36	Nimuben Babubhai Choudhari
PW 12 – Exh.37	Rajubhai Sukhabhai Rathod
PW 13 – Exh.39	Victim
PW 14 – Exh.40	Sunil Chandrakant Tarade, IO

Documentary evidence -21

Exh.10	Panchnama of place of offence
Exh.13	Panchnama of clothes of victim
Exh.14	Arrest Panchnama
Exh.15	Panchnama of S.27
Exh.19	Yadi for medical treatment of accused
Exh.20	Medical certificate of accused
Exh.21	Medical certificate of victim
Exh.22	Yadi for medical certificate of victim
Exh.26	Yadi for medical treatment of victim
Exh.27	Medical certificate of victim
Exh.30	Complaint
Exh.41	Forwarding notes
Exh.42	FSL visitation report
Exh.43	FSL visitation report
Exh.44	List
Exh.45	FSL Letter
Exh.46	FSL receipt of articles
Exh.47	FSL forwarding letter
Exh.48	FSL Biological report
Exh.49	FSL Serological report
Exh.50	Copy of articles

7. After closure of the prosecution evidence, the statement of the accused under Section 313 of the Cr.P.C. was recorded to which he stated that, he has been falsely implicated in the offence and he is innocent and has not committed any offence.

8. Though opportunity was extended, no oral evidence being adduced by the accused in his defence.

Trial Court findings:

9. After hearing the parties and upon appreciation of the material evidence, the accused Kedar Rathod held guilty for the offences of kidnapping and rape and was sentenced to undergo life imprisonment and while recording the conviction passing of the order of sentence, the trial court mainly relied on the testimony of the victim (PW.13), supported by other evidence like medical etc. The trial court found the version of the victim credible, truthful, reliable and natural which does not require further corroboration on the aspect of alleged rape and complicity of the accused in the crime.

10. Evidence adduced by the prosecution:

10.1 Shailesh Thakorbhai Rathod (PW.4): This witness, after the incident, saw the victim on the roadside when he was returning back by driving his tractor from the field. At relevant time, the other persons were there in the tractor as they were employed as labourers to carry out the work of loading and unloading of farm produces. It is the case of prosecution that, when the witness had seen the accused near the

body of the victim and he was in a process to run away from the place. However, this witness in his deposition, on the aspect of involvement of the accused did not have supported to the case of prosecution and on the aspect of handing over the victim to his father, has been deposed by the witness. The witness in his chief-examination has stated that, on the day of incident, in the night hours, he along with other labourers were transporting the farm produces in the tractor and after proceeding from the farm, he saw the daughter of Champakbhai Ganpatbhai Rathod near the small canal of the roadside and she was profusely bleeding from her vagina and the blood stains were found on the frock of the victim. The victim thereafter, taken by the witness to her house and handed over her to the grandfather and mother.

10.2 Satishbhai Rathod (PW.8), Girishbhai Rathod (PW.9), Shailesh Rathod (PW.10): All three witnesses being labourers of the tractor belong to PW.4 – Shailesh Rathod, have deposed on the line of PW.4 and on the aspect of presence of the accused at the scene of crime, being not deposed by them and on that particular aspect, they have been declared hostile.

10.3 Dr. Ramiben Chaudhary (PW.5): This witness being a Medical Officer of Community Health Centre at Bardoli, had examined the victim on 18.10.2012 at about 11:00 a.m. in the morning. The witness in her chief-examination has stated that, she has noticed injury over the private part of the deceased and blood was profusely bleeding from vagina and it was painful. The witness after giving a primary treatment to the victim, she was referred to New Civil

Hospital, Surat for further treatment.

This witness had also examined the accused when he was brought on 07.12.2012 and took necessary blood samples and other samples from his body.

10.4 Dr. Alok Shivdayal Goyal: This witness being a Medical Officer of New Civil Hospital, Surat had examined the victim, brought before him on 18.10.2012 with police yadi. On examination, the witness found multiple abrasion marks over her back and upon further examination of the private part, he noticed that, her hymen was torn which extend up to the anal and she had a complaint of pain over the private part. According to opinion of the doctor, the possibility of rape by adult person cannot be ruled out. The doctor had taken necessary blood samples and samples of vaginal swabs and other things for FSL purpose.

10.5 Champak Ganpatbhai Rathod (PW.7): This witness is the father of the victim. He has stated in his chief-examination that, the accused Kedar kidnapped her daughter and then committed rape upon her. It is stated that, the accused took the victim under the pretext of feeding wafer. He has further stated that, he learnt about taking away of his daughter by Kedar from witness Rajubhai (PW.12) as from his shop, the accused Kedar purchased the wafer. The witness – father has further stated that, after knowing the kidnapping of his daughter by the accused, he went to his house, but the accused was not available at home and thereafter, he made extensive search of his daughter. The

witness has further stated that, in the midnight, his daughter was seen by witness Shaileshbhai and others and after taking her daughter, she was dropped at our home by them. The witness has further stated that, due to the incident, the victim was in shock and unable to speak about the incident. The witness then contacted the Village Sarpanch and then, taken the victim at the Village Health Centre, Bardoli and after taking primary treatment over there, as per the advice, she was referred to New Civil Hospital, Surat where she was admitted and remained in the hospital for about 8 to 9 days. The witness has stated that, he being a father, lodged an FIR before Bardoli Police which he produced at Exh.30.

In the cross-examination, the witness – father has admitted that, he has not seen the incident. He also admitted that, before the incident, he had a quarrel with the accused. The witness has denied to the suggestion that, on the basis of suspicion and due to prior dispute with the accused, the false FIR giving his name being lodged with the police. The witness has denied that, her daughter sustained injuries while playing.

10.6 Rajubhai Rathod (PW.12): This witness being an owner of the grocery shop, had sold a wafer pouch to the accused. This witness in his chief-examination has stated that, on 17.10.2012, in the afternoon, the accused came to his shop and purchased a pouch of the wafer and then, he left the shop. The witness has denied that, the accused Kedar along with the victim came to his shop for purchasing a wafer pouch. The witness was declared hostile and in the chief-

examination, he did not admit that, the victim was also with the accused when he purchased the wafer pouch from his shop.

10.7 Victim (Prosecutrix aged about 5 years)(PW.13): On the issue of maturity of the witness to understand the proposed questions and answers, the trial court made inquiry after questioning certain questions to the victim and on the basis of her reply, the court was satisfied that, the witness was competent witness to testify and without giving her oath, her testimony came to be recorded.

The victim in her chief-examination stated that, at the time of incident, she was playing at the play area situated nearby her house and at that time, Kedar came there and gave her wafer and then, she had been taken at the sugarcane field where he did wrong thing with her and then, leaving her alone near the canal of the roadside of the village, he ran away. The victim has further stated that, she was dropped at home by one Dinesh. The victim has further stated that, she has informed her parents about the incident. The victim has identified the accused in the court.

In the cross-examination, it was asked to the victim that, was she being tutored by anyone to depose against the accused. In the response to the said question, the victim has stated that, her father has told her that you have to say in the court what happened to you.

10.8 Sunil Chandrakant Tarde (PW.14): This witness being a Police Inspector, attached with Bardoli Police Station, had investigated the

case and filed a chargesheet against the accused. The witness had stated that, on 18.10.2012, the complainant Champakbhai Rathod lodged an FIR at the C.H.C., Bardoli with respect to the alleged rape of her daughter allegedly committed by the accused Kedar. The witness has further stated that, after registration of the offence, the case was handed over to him for investigation and during the investigation, he prepared the spot panchnama, recorded the statements of the witnesses, sent the victim for medical examination and collected the necessary case papers as well as certificates, sent the muddamal seized articles at FSL, Surat, arrested the accused and after due investigation, he has filed the chargesheet before the court concerned.

In the cross-examination, the I.O. has admitted that, during the investigation, he did not have recorded the statement of the victim which he explained that, due to age of the victim, it could not be recorded. The I.O. has further admitted that, during the investigation, he has not seized the pouch of the wafer. The I.O. has denied to the suggestion that, the accused was arrested on the basis of suspicion and despite of insufficient evidence, he has filed the chargesheet against the accused.

11. Submissions of the parties:

12. Mr.Pratik Barot, learned advocate appearing for and on behalf of the appellant accused while assailing the judgment of conviction and order of sentence, contended that the prosecution has failed to prove its

case beyond reasonable doubt and findings of conviction being recorded on the basis of conjectures and surmises on the basis of the conviction is suspicion and it is settled legal position of law that suspicion however strong cannot basis for conviction.

13. It was submitted that the learned Trial Court grossly erred while convicting the accused without appreciating the evidence in the right perspective.

14. It was further submitted that the prosecution case rested its case mainly upon the evidence of victim PW:13 aged about 4 years and her evidence is full of contradiction and improvement and she cannot be accepted as wholly reliable witness and considering her age, her evidence has to be subjected to close scrutiny and can be accepted if the Court comes to the conclusion that child understands the question put to her and she is capable of giving rational answers. Referring to her testimony, it was submitted that after the incident, she did not disclose about the incident and name of the accused to her parents or anyone and the said facts being admitted by her father PW:7 Champak Rathod. The witnesses who were instrumental in bringing back the victim from the place of occurrence have not stated a single word that the accused was found at the place of incident. The witness PW:12 Rajubhai Rathod did not have stated in his testimony that the accused along with the victim came to his shop for purchasing a wafer pouch. In such circumstances, the sole testimony of child victim does not inspire confidence and her version cannot be accepted as truthful and

reliable because she being a tutored witness, deposed against the accused and at the tender age of five, she could not understand the meaning of intercourse which she had deposed in chief examination. The evidence of child witness does not have corroboration from the medical evidence as to prove the complicity of the accused, no any bloodstain or spermatozoa found from the samples collected. In such circumstances, it was submitted that the uncorroborated testimony of the victim child, it is difficult to accept her version as truthful and in that view of the matter, the conviction as recorded by the Trial Court is not sustainable in law.

15. In view of the aforesaid submissions, learned counsel Mr.Barot submitted that the judgment of conviction and order of sentence are not sustainable in law and the same may be set aside and the appellant be acquitted from all the charges.

16. On the other hand, learned APP Mr.Bhargav Pandya, vehemently opposed the appeal. He submitted that the Trial Court has not committed any error while holding the appellant accused guilty of the offence of rape. The appellant accused is resident of same village where the victim resided with her family and therefore, on the question of identity of the accused, the I.O. has rightly not conducted T.I. Parade. The testimony of child witness was victim of sexual assault is reliable, truthful and does inspire confidence about the act of rape committed by the accused. The victim in her testimony has clearly described the incident and house she was sexually abused by the accused. In the cross examination, she did not have accepted that under

the influence of family members, she deposed against the accused. The defence of the accused about his false involvement on the basis of animosity between him and father of the victim has not been established. The medical evidence proves that the victim was sexually abused and there were serious injuries on her private part and in that view of the matter, corroboration of the victim's statement does not prerequisite and in absence of any corroboration in the form of FSL report, does not discredit victim's version. Thus, therefore, it was prayed that the prosecution has proved charge against the accused by adducing sufficient, cogent and acceptable evidence and thus, it was prayed that there being no merits in the appeal and the same may be dismissed.

17. Having regard to the evidence on record, the only question that arises for our consideration is as to whether the evidence on record is sufficient to record the conviction against the appellant accused and if the answer is yes, then what should be the appropriate punishment to be imposed on the accused.

18. Before the proceed with the analysis of the evidence and dealing with the contentions of the rival parties, we may aptly refer the settled position of law regarding the evidence of child witness and how to appreciate the solitary evidence of the victim of sexually offence.

(1) In **Krishankumar Malik Vs. State of Haryana (2011 (7) SCC 130):**

It was held that to hold an accused guilty for commission of

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.

(2) In **State of Punjab Vs. Gurmitsingh (1996 (2) SCC 384):**

The evidence of victim in a case of rape is of the same value as that of an injured witness and conviction can be made on the basis of sole testimony of victim provided her evidence inspires confidence and it must be relied upon without seeking corroboration of her statement in material particulars and her testimony must be appreciated in the background of the entire case and the Trial Court must be alive to its responsibility and be sensitive while dealing with cases involving in sexual molestation.

(3) In a recent decision in **Raju @ Umakant Vs. State of Madhya Pradesh (2025 SCC Online 997),** the Supreme Court made following observations:

The woman or a girl subjected to sexual assault is not an accomplice but a victim of another person's lust and it will be improper and undesirable to test her evidence with suspicion. All that the law mandates is that the Court should be alive to and conscious of the fact that it is dealing with a person who is interested in the outcome of the charge levelled by her and if after keeping that aspect in mind, if the Court is thereafter satisfied that the evidence is trustworthy, there is nothing that can stop the Court from acting on the sole testimony of the prosecutrix.

(4) Recently, the Supreme Court in **State of Madhya Pradesh Vs. Balvirsingh (2025 Livelaw Supreme Court 243)**, considered a large number of prior decision of the Apex Court to lay down guidelines for appreciation of the evidence of the child witness and test for passing tutored testimony. Paras-25 to 37 are relevant and necessary which reads as under:

> *"25. The High Court, while setting aside the conviction, found the testimony of the child witness, Rani (PW6), to be unreliable and tutored. Before we proceed to undertake the analysis of PW6, Rani's oral evidence it is essential to understand how the testimony of a child witness should be looked into and appreciated.*
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> *26. The Indian Evidence Act, 1872 (in short, the "Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto.*
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> *27. In **Dattu Ramrao Sakhare v. State of Maharashtra reported in (1997) 5 SCC 341** this Court held that as long as a child witness is found to be competent to depose i.e., capable of understanding the questions put to it and able to give rational answers, the testimony of such witness can be considered as evidence in terms of Section 118 of the Evidence Act, irrespective of their tender age or absence of any*

oath. The only additional factor to be considered is that the witness must be found to be reliable, exhibiting the demeanour of any other competent witness, with no likelihood of having been tutored. It further clarified that there is no requirement or condition that the evidence of a child witness must be corroborated before it can be considered, and rather the insistence of any corroboration is only a rule of prudence that would depend upon the peculiar facts and circumstances of each case. The relevant observation reads as under: -

"5. [...] A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record." (Emphasis supplied)

28. Similarly in ***Pradeep v. State of Haryana*** *reported in* ***2023 SCC OnLine SC 777*** *this Court emphasized on the importance of preliminary examination of a child witness. It held that although oat cannot be administered to a child witness under 12-years of age yet, as per Section 118 of the Evidence Act it is the duty of a Trial Judge to conduct a preliminary examination before recording the evidence of the child witness to ascertain if the child is able to understand the questions put to him and that he is able to give rational answers to the questions put to him. It held that the Trial Judge must record its opinion and*

satisfaction that the child witness understands the duty of speaking the truth and state why he is of the opinion that the child understands the duty of speaking the truth. It further held that the questions put to the child in the preliminary examination must also be recorded so that the appellate court can go into the correctness of the opinion of the Trial Court. The relevant observations read as under: -

"8. Under the proviso to sub-Section (1) of Section 4, it is laid down that in case of a child witness under 12 years of age, unless satisfaction as required by the said proviso is recorded, an oath cannot be administered to the child witness. In this case, in the deposition of PW-1 Ajay, it is mentioned that his age was 12 years at the time of the recording of evidence. Therefore, the proviso to Section 4 of the Oaths Act will not apply in this case. However, in view of the requirement of Section 118 of the Evidence Act, the learned Trial Judge was under a duty to record his opinion that the child is able to understand the questions put to him and that he is able to give rational answers to the questions put to him. The Trial Judge must also record his opinion that the child witness understands the duty of speaking the truth and state why he is of the opinion that the child understands the duty of speaking the truth.

9. It is a well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.

10. Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate

questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court."

29. In ***Ratansinh Dalsukhbhai Nayak v. State of Gujarat reported in (2004) 1 SCC 64****, this Court explained that although child witnesses are considered as dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded yet it is an accepted norm that if after careful scrutiny their testimony is found to inspire confidence and truthful, then there is no obstacle in accepting the evidence of such child witness. The relevant observation reads as under: -*

"7. [...] The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

30. In ***Panchhi v. State of U.P****. reported in* ***(1998) 7 SCC 177****, this Court held that the evidence of a child witness should not be outrightly rejected but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what*

others tell him and an easy prey to tutoring. The relevant observations read as under: -

"11. Shri R.K. Jain, learned Senior Counsel, contended that it is very risky to place reliance on the evidence of PW 1, he being a child witness. According to the learned counsel, the evidence of a child witness is generally unworthy of credence. But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

12. Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law."

31. This Court in ***Suryanarayana v. State of Karnataka reported in (2001) 9 SCC 129*** *held that the evidence of a child witness who has withstood the test of cross-examination should not be rejected per se if his testimony is found to be free from any infirmity. It reiterated that corroboration to the testimony of a child witness is not a rule but a measure of caution and prudence. The Court further held that while assessing the evidence of a child witness, courts must rule out the possibility of tutoring. However, in the absence of any allegation of tutoring or an attempt to use the child witness for ulterior purposes by the prosecution, the courts must rely on the confidence-inspiring testimony of such a witness in determining the guilt or innocence of the accused. The relevant observation reads as under: -*

"5. [...] <u>The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement</u>

of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not."

32. In ***Arbind Singh v. State of Bihar reported in (1995) Supp (4) SCC 416*** *this Court found the testimony of the child witness therein to be tutored due to the various inconsistencies and contradiction in her statements as regards the cause of death of the deceased therein, and due to the fact that the child witness was residing with her maternal uncle immediately after the incident occurred. This Court further held that implicit faith and reliance cannot be placed on a testimony that betrays traces of tutoring and the court must look for corroboration before relying on the same. The relevant observation reads as under: -*

"3. The entire case hinges on the evidence of the child witness PW 2 Poonam Kumari, the daughter of the deceased and appellant Arbind Singh. The incident occurred late in the night and she claims she was awakened by the noise of quarrelling. She further claims to have seen her father tying and nailing her mother before hanging her. At the date of the incident she was aged about 5 years. When her evidence was recorded she was aged about 9 years. The learned Trial Judge did not undertake a 'voir dire' before recording her evidence on oath although

he notes that she was capable of understanding and answering the questions. Be that as it may, the fact remains that there was a gap of 4 years between the incident and the date on which her evidence was recorded. Immediately after the incident she was interrogated but as she was weeping her statement was not recorded. Thereafter her statements were recorded on October 25, 1984, October 28, 1984 and November 5, 1984, the last being under Section 164 of the Criminal Procedure Code. In her first statement she did not say that her mother was hanged. Subsequently she said she was hanged by electric wire. She later said she was hanged with the help of a jute string. In her statement recorded under Section 164 of the Code of Criminal Procedure on November 5, 1984, she stated that her father had thrown a jute string around the neck of her mother and killed her. It will, therefore, appear from these statements that she has not been consistent in her version. That apart, we have carefully perused the evidence of this witness and we find traces of tutoring on certain aspects of the case. It appears from her evidence that she was very close to her maternal uncle with whom she was living when her mother had gone to Deoghar for training. Immediately after the incident she was taken away by her maternal uncle who happens to be a fairly important figure. In her evidence she stated that there used to be quarrels between her father and mother and the former used to ill-treat the latter without any rhyme or reason. Then she adds that her father wanted to remarry and, therefore, he was illtreating her mother. Now the case put up was that the husband was ill-treating the wife as he wanted to sell her jewellery to purchase a scooter. Therefore, the statement made by PW 2 that her father was illtreating her mother because he wanted to remarry could only be the result of tutoring. She also tried to involve all the other family members including her uncle Shambhoo whom she could not even recognize in the dock. This she could have done only at the behest of someone else. She also stated that neither her father nor her grandfather met her mother's expense at Deoghar, a fact of which ordinarily a child under five years of age would not be aware. She even tried to involve her father's sister whose name she had not mentioned earlier. There are also certain other statements made in the course of her deposition which would suggest that possibility of tutoring could not be ruled out. Having taken a careful look at the evidence of this child witness we are of the opinion that implicit faith and reliance cannot be placed on her testimony since it is not corroborated by any independent and reliable evidence. It is well-settled that a child witness is prone to tutoring and hence the court should look for corroboration particularly when the evidence betrays traces of tutoring. We, therefore, think that appellant 1 was entitled to benefit of doubt."

*33. Similarly in **Digamber Vaishnav v. State of Chhattisgarh reported in (2019) 4 SCC 522** this Court discarded the testimony of the child witness therein on the ground of being tutored as it found the same to be fraught with inconsistencies and in direct contradiction of the ocular evidence of other prosecution witnesses.*

*34. This Court in **State of M.P. v. Ramesh** reported in **(2011) 4 SCC 786** summarized the principles pertaining to the appreciation of evidence of a child witness as under: -*

(i) First, it held that that a child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him. The evidence of a child witness must reveal that he was able to discern between right and wrong, and the court may ascertain his suitability as a witness through either cross-examination or by putting questions to the child in terms of Section 165 of the Evidence Act or by determining the same from the evidence or testimony of the child itself. The relevant observation reads as under: -

"11. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff crossexamination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him. (Vide Himmat Sukhadeo Wahurwagh v. State of Maharashtra (2009) 6 SCC 712.)"

(ii) Secondly, if the evidence of the child explains the relevant events of the crime without improvements or embellishments, and the same

inspire confidence of the court, his deposition does not require any corroboration whatsoever. The relevant observation reads as under: -

"12. In State of U.P. v. Krishna Master (2010) 12 SCC 324 this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature."

(iii) Thirdly, even if the courts find that the child witness had been tutored, even then the statement of a child witness can be relied upon if the tutored part can be separated from the untutored part and the remaining untutored part inspires confidence. In such cases, the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. The relevant observation reads as under: -

"13. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide Gagan Kanojia v. State of Punjab (2006) 13 SCC 516.)"

(iv) Lastly, it held that an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition. If the deposition of a child witness inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to

tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully and look for corroboration. The relevant observation reads as under: -

"14. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

35. From the above exposition of law, it is clear that the evidence of a child witness for all purposes is deemed to be on the same footing as any other witness as long the child is found to be competent to testify. The only precaution which the court should take while assessing the evidence of a child witness is that such witness must be a reliable one due to the susceptibility of children by their falling prey to tutoring. However, this in no manner means that the evidence of a child must be rejected outrightly at the slightest of discrepancy, rather what is required is that the same is evaluated with great circumspection. While appreciating the testimony of a child witness the courts are required to assess whether the evidence of such witness is its voluntary expression and not borne out of the influence of others and whether the testimony inspires confidence. At the same time, one must be mindful that there is no rule requiring corroboration to the testimony of a child witness before any reliance is placed on it. The insistence of corroboration is only a measure of caution and prudence that the courts may exercise if deemed necessary in the peculiar facts and circumstances of the case.

*36. In **Ratansinh Dalsukhbhai Nayak (supra)** this Court observed that merely because a child witness is found to be repeating certain parts of what somebody asked her to say is no reason to discard her testimony as tutored, if it is found that what is in substance being deposed by the child witness is something that he or she had actually witnessed. It added that a child witness who has withstood his or her cross-examination at length and able to describe the scenario implicating the accused in detail as the author of crime, then minor discrepancies or parts of coached deposition that have crept in will not by itself affect the credibility of such child witness. The relevant observation reads as under: -*

"8. The learned trial Judge has elaborately analysed the evidence of the eyewitness. There is no reason as to why she would falsely implicate the accused. Nothing has been brought on record to show that she or her father had any animosity so far as the accused is concerned. The prosecution has been able to bring home its accusations beyond the shadow of a doubt. Further, the trial court on careful examination was satisfied about the child's capacity to understand and to give rational answers. That being the position, it cannot be said that the witness (PW 11) had no maturity to understand the import of the questions put or to give rational answers. This witness was cross-examined at length and in spite thereof she had described in detail the scenario implicating the accused to be the author of the crime. The answers given by the child witness would go to show that it was only repeating what somebody else asked her to say. The mere fact that the child was asked to say about the occurrence and as to what she saw, is no reason to jump to a conclusion that it amounted to tutoring and that she was deposing only as per tutoring what was not otherwise what she actually saw. The learned counsel for the accused appellant has taken pains to point out certain discrepancies which are of very minor and trifle nature and in no way affect the credibility of the prosecution version."

*37. Similarly in **State of M.P. v. Ramesh** reported in **(2011) 4 SCC 786** it was held that even if the statement of a child witness is found to be tutored it can be relied upon, if the same is found to be believable or*

inspire confidence after separating the tutored part from the untutored portion. The relevant observation reads as under: -

"13. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness."

19. Having considered the principle of law as above, let us now proceed further as to whether the accused appellant had sexually assaulted the victim PW:13 or not.

20. The entire case of the prosecution is rested on the testimony of the PW:13, PW:7, PW:5 and PW:6. These witnesses are victim, father of the victim, the doctors, who had examined the victim as well as the accused.

21. According to the prosecution case, on 17.10.2012, the victim was abducted and was remained with the accused upto midnight 01:30 p.m., dated 18.10.2012. It is not in dispute that in the midnight, i.e. 18.10.2012, the PW:4, and other witnesses saw the victim on the road side of the village and her custody was given to her grandfather and mother. The medical evidence is also not in dispute as she was bleeding profusely from her vagina and the injuries on the private parts which extended upto anal and in that circumstances, the possibility of committing the rape by adult person cannot be ruled out. The accused

Kedar belongs to same village where the parents of the victim are residing and therefore, the accused was not unknown to the villagers and for his identity, there is no need to hold T.I. Parade.

22. We have closely scrutinized the evidence of PW:13 – aged about 4 years. The evidence of grocery shop keeper PW:12 proves that on the day of incident, the accused purchased a wafer pouch from his shop. The victim on this aspect has in clear terms stated that the accused met him at the place of playing and gave her a pouch of wafer and took her towards the Sugarcane Field where she was sexually abused and thereafter, she was dropped near Village Canal and then he ran away and she was dropped by villager Dinesh. We do not find any infirmity in the evidence of the victim about the factum of sexual assault and identity of the accused. We have also examined the possibility of animosity between the accused and father of the victim as the father has admitted in his deposition that prior to the incident, there was a dispute with the accused. It is relevant to note that nothing further elicited from the father of the victim about the nature of dispute and where the dispute was occurred and why the father come up with a false story of being victim of sexual assault, so as to complicate the accused. In such circumstances, the possibility of animosity between the parities has not been established to the point that in order to take revenge, the accused was falsely implicated. It is also admitted position that despite of receiving the serious injuries by the victim over her private parts, there is no evidence in the form of forensic science to prove the guilt of the accused. However, there is no reason why the

victim and her father tell lie against the accused.

23. In the aforesaid discussions, having regard to the nature of evidence and circumstances of the case, the child was able to understand a question put to her and she was capable of giving rational answers and that test being inquired and conducted by the Trial Court and therefore, without administered the oath a testimony being a competent witness recorded by the Trial Court. The victim was sufferer and at the relevant time, she was in trauma and considering the attending circumstances, we do not find any ground or the reason that the victim was acting under the influence of someone and there is ring of truth in the version of the victim about the act of sexual assault allegedly committed by the appellant accused. Thus, the version of the victim about the incident and act of rape committed by the accused is credible, trustworthy and does inspire confidence and in that circumstances, there would be no need for further corroboration to the testimony of the victim on the material particulars. However, the factum of injuries as referred by the treating doctors would further lend support to the version of the victim and therefore, plain version of the victim being seen with all circumstances does inspire confidence and her evidence is worthy of credence so as to hold that the appellant accused after giving wafer pouch, to the victim, she was taken to the secluded place and then, abused sexually her.

24. It was the contention that on the basis of suspicion, the accused was closely implicated in the offence. We do not accept the

contentions as after few hours of the incident, the father came to know from the shopkeeper PW:12 that the victim was lastly seen with the accused when he purchased a wafer pouch from his shop. The accused was known to all the village people and therefore, the defence of false implication appears to be improbable and not acceptable.

25. For the foregoing reasons, the prosecution has proved its case with sufficient oral and documentary evidence, beyond all reasonable doubt and we are satisfied that the trial Court has rightly found the appellant guilty and convicted him under Sections 363, 365 and 376 of the IPC. So far as sentence is concerned, we do not find any reason or scope for interference with the findings of sentence as having regard to the nature of offence, age of the victim and the manner in which the offence alleged to have been committed, we do not find any ground to reduce and/or alter the sentence of life imprisonment awarded by the Trial Court.

26. In the result, present Criminal Appeal stands **dismissed**. The conviction and sentence are upheld. R&P, if any, be sent back to the trial Court forthwith.

(ILESH J. VORA,J)

(R. T. VACHHANI, J)

Rakesh