Date: 16-12-2019

IN THE COURT OF THE SPECIAL JUDGE, SIVSAGAR

Present- B. Roy, AJS

Special Judge,

Sivasagar.

Case No. Special (P) 39 of 2019

(Arising out of G.R. No.835 of 2019)

Under section- 376AB of IPC & Sec. 6 of POCSO Act

State

-Vs-

Md. Sahjahan Ali.

Advocates appeared:

For the State : - Sri S. Gogoi.

For the accused : - Sri D.K. Gohain.

Date of evidence: - 27.08.2019, 24.09.2019, 25.09.2019, 26.09.2019, 10.10.2019,

07.11.2019.

Date of argument: - 25-11-2019

Date of judgment: -16.12.2019

<u>JUDGMENT</u>

- 1. The case of the prosecution is that the informant Smti. D. Swargiary, Chairperson CWC, Sivasagar lodged an FIR in the Sivasagar P.S. on 21.05.2019 stating that from reliable source the CWC came to know that one minor girl namely FB(name withheld) aged about 05 years was tortured physically and sexually by her biological father at her own house. The informant further stated that the minor victimgirl was recovered and restored to AHANA Children's Home by the CWC on 21.05.2019.
- 2. The Officer-in-charge of Sivasagar PS received the FIR and registered Sivasagar P.S. case no. 418/2019 u/s 376AB of IPC and section 6 of POCSO Act. The case was investigated

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by WSI (P) Marchila D Sangma. On completion of investigation charge-sheet was submitted against the accused Sahjahan Ali u/s 376AB of IPC and section 6 of POCSO Act.

- 3. As the accused was in jail, legal-aid-counsel was engaged to defend the case of the accused. The copy of relevant documents were furnished to the accused andcharge under sections 376AB of IPC and section 6 of POCSO Act were framed, read over and explained to the accused to which he pleaded not guilty.
- 4. In the course of trial prosecution side examined 8 (eight) witnesses. The defence plea is of denial.
- 5. The accused person was examined under section 313 Cr.P.C.
- 6. Heard the argument of learned counsel of both sides.
- 7. The points for determination in this case are as follows:
 - (i) Whether at the time of the incident the victim girl was aged about 05 years?
 - (ii) Whether the victim girl used to stay alone at night with her father/accused?
 - (iii) Whether the accused has committed the offence as alleged in the FIR?

Discussion, decision and reasons:

8. The PW1 Smti. D. Swargiary Baruah is the informant cum Chairman, CWC, Sivasagar. She stated that she doesn't know the victim personally but after the incident when she was rescued, she came to know about her. She stated that at the time of incident the victim was aged about 05 years. On 21.05.2019 she was working as Chairperson, CWC, Sivasagar. On 20.05.2019 she came to know through Ashma Begum, Anganwadi worker about the incident. On the next day the said worker produced the victim girl before the CWC. Her statement was recorded. As the victim was living with her father alone and the allegation was against her father, she was sent to AHANA Children's Home, Sivasagar. FIR was lodged which is marked as Exhibit 1 wherein Ext. 1(1) is her signature. The victim girl informed the CWC that the accused used to assault her sexually and also threatened her not to shout or tell anyone about the incident.

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9. In cross-examination the PW-1 stated that police did not record her statement. She denied the suggestion that Ashma Begum did not inform the CWC about the incident. She also stated that the statement of the victim girlrecorded by the CWC was not annexed with the FIR.

- 10. PW-2 Kabita Borah, counsellor, District Child Protection Office, Sivasagar stated in her evidence that the victim girl FB was produced before her for counselling. The victim girl told her that as her mother got married another person, she used to live with her father. Her father used to sleep with her at night. The victim girl further informed her that the accused used to remove her panty and made contact of his penis with her vagina. Whenever she shouted the accused scolded her and asked her to remain silent. PW-2 stated that police did not record her statement.
- 11. In cross examination the PW2 stated that the victim girl could not tell her any specific date of occurrence as she is only 05 years old. She did not examine her physically. She did not notice any external injury on the body of the victim. She stated that she was entrusted by the chairperson of CWC for counselling the victim girl. The PW-2 denied the suggestion that the victim girl was tortured by some other person.
- 12. The PW-3 Sahara Khatun stated in her evidence that the accused is her nephew. The victim FB is her grand-daughter. She does not know the informant. The accused lives with his daughter. The victim FB lives in her house during day time and the accused after returning from work used to take her at night. The victim never told her anything about any such incident as alleged in the FIR. She does not know the present address of the victim girl. She is aged about 04 years. Her mother had eloped with another man long ago when FB was about one and half years old.
- 13. In cross-examination she stated that she does not know what had happened in the house of the accused at night. She does not have any personal knowledge about the incident and came to know from others. She stated that the case is false.
- 14. The PW-4 Dr. Laxmi Deori examined the victim FB on 21-05-2019 in connection with Sivasagar P.S. Case no. 418/2019 and she stated that on 21.05.2019 she was working at Sivasagar Civil Hospital as M & HO 1. On that day, at 9.45 p.m. on police requisition, she examined FB in connection with Sivasagar (wrongly typed as Nazira) P. S. Case No. 418/2019 u/s 376AB of IPC r/w sec- 6 of POCSO Act. The victim was accompanied by HG

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Mitali Chetia and attendant namely G. Gogoi and on examination she found as follows:

<u>Identification Mark-</u> (i)mole in back of chest (ii) mole in left cheek.

Brief History-

Alleged H/O of sexual assault.

Age of menarche- not attended

LMP- Marital Status- Unmarried

General History:

General behaviour- Normal, Mental state- Normal

Clothes- Changed Findings- Nil

General physical examination:

Built and nutrition— Average Weight— 13 Kgs.

Height— 3 feet Teeth— E-A/ A-E

E-A/A-E

Development of hair-

Axillary & Pubic hair - Infantile stage

Breast development- Infantile stage. Findings- Infantile stage

Mark of violence on the body– Absent.

Examination of genitalia -

Development of genitalia- Infantile stage

Pubic hair– absent Clitoris– Normal

Labia-majora and minora- Infantile stage

Fourchette- Normal Hymen- Absent.

Vagina- Normal Injury- absent

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Discharge and stains- Absent.

Abdominal Examination: - soft

Internal Examination-

Laboratory investigation: UA done. No spermatozoa seen.

Ultra-sonography – Uterus is normal in size for age.

Radiological examination:

Skiagram of the left elbow joint reveals incomplete fusion of epiphyses.

Skiagram of left wrist joint reveals incomplete fusion of epiphyses, pisiform

epiphysis not seen.

, Opinion: On examination of FB, (i) Her age is below 10 years of age, (ii) On vaginal

smear slide examination, no spermatozoa seen.

Ext. 2 is the report and Ext. 2(1) is her signature.

15. In cross examination she stated that the brief history of the case was given by the

victim. As the victim was minor she did not take her signature, but the signature of the

attendant was taken.

16. The PW-5 FB is the victim girl. She stated that earlier she used to stay with her

father, mother and "nani". While staying with her father, her father used to sleep with her

and inserted/made contact of his "susu" with her "susu". Her father used to bite on her

cheek. She became afraid. She told about the incident to her madam (baidew) at school.

She stated that her father is in jail. She also stated that she narrated about the incident to a

madam in Court. She was also taken to the doctor.

17. In cross-examination she stated that as her mother got married with other person,

she used to stay with her father alone. Her father did not have any quarrel with the madam

whom she told about the incident. She was accompanied with police to the Court at that

time.

18. The PW-6 Ashma Begum stated in her evidence that the accused is known to her. FB

is the daughter of the accused. FB used to come to the Anganwadi Centre for study. At that

time FB was about 04 years old. She knows the informant Smti. D. Swargiary, Chairperson

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of CWC. On 20-05-2019 she came across the guardians in the Anganwadi Centre who were talking about some incident with FB. She heard from the guardians that the father of FB used to commit misdeed with her. Then she called FB in presence of other guardians and enquired about the incident. The owner of the house Bandana Doley was also present. On being asked FB told her that her father use to make contact of his private part (penis) with her private part (vagina). Then she informed the matter to her supervisor Mobina Sultana. She informed the matter to CWC. She was directed to produce the victim before the CWC. She accordingly produced her before the CWC. Her statement was recorded in the CWC. At that time she/PW-6 was not present. She knew this much. Police recorded her statement.

- 19. In cross-examination she stated that she has one daughter and one son. She does not remember the names of the guardians. She denied the suggestion that she did not state before the I.O. as follows: "I came across the guardians in the Anganwadi Centre who were talking about some incident with FB. I heard from the guardians that the father of FB used to commit misdeed with her. Then I called FB in presence of other guardians and enquired about the incident. The owner of the house Bandana Doley was present." She stated that as per her information the mother of the victim girl had already expired. She knew that the accused used to go for work and the victim used to stay alone in the house. She denied the suggestion that she wanted to adopt the victim and in that connection a quarrel took place with the accused. She denied that in order to satisfy her grudge, she taught the victim in such a manner and made out this false case. She stated that she has two children of her own.
- 20. The PW-7 WSI (P) Marchila D. Sangma stated in her evidence that on 21.05.2019 she was working as WSI (P) at Sivasagar P.S. On that day the informant Mrs. DipaliSwargiary lodged an FIR in the Sivasagar P.S. on the basis of which O.C. of Sivasagar P.S. registered Sivasagar P.S. Case No. 418/2019 under sections 376 AB of IPC, read with section 6 of POCSO Act. She was endorsed with the investigation of the case. As the complainant was present in the police station, she recorded her statement. She visited the place of occurrence and prepared sketch map. She recorded the statement of other witnesses. As the complainant is the Chair Person of CWC, she had already sent the victim girl to AAHANA Children's Home. She recorded the statement of the victim girl at AAHANA Children's Home. The victim was taken to Sivasagar Civil Hospital, Joysagar and she was medically examined. Then she was again brought back to AAHANA Children's Home. Thereafter she received information regarding the accused and accordingly apprehended the

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accused Sahjahan Ali and brought him to the police station. On the same day after interrogation, the accused was arrested and on the next day he was forwarded to the Court. She also collected medical examination report of the victim girl. During investigation the family members of the victim could not furnish birth certificate and as the victim did not formally take admission in any school so she could not collect school certificate. Relying on the report of medical officer, on completion of investigation, having found sufficient materials against the accused, she submitted charge sheet U/S 376 AB of IPC, R/W 6 of POCSO Act. Ext. 3 is the sketch map; Ext. 3 (1) is her signature. Ext. 4 Charge sheet; Ext. 4 (1) is her signature.

- 21. In cross-examination she stated that she visited the place of occurrence and AAHANA Children's Home on the date of filing of the FIR. She recorded the statement of the complainant and Kabita Bora on the same date. She denied that she did not record their statements. She denied that she has prepared the case diary in the police station and recorded their statement in the police station. The houses of Mustafa Ali, Idul Ali and Iden Ali are situated surrounding the place of occurrence. In her sketch map she has not mentioned whether the place of occurrence is a house or some other place. She did not record the statement of the neighbouring people as one of them (name not mentioned in the C.D.) expressed his ignorance about the incident. She recorded statement of Ashma Begum. The said P.W. did not state before her as follows "I came across the guardians in the Anganwadi Centre who were talking about some incident with FB. I heard from the guardians that the father of FB used to commit misdeed with her. Then I called FB in presence of other guardians and enquired about the incident. The owner of the house Bandana Doley was present." She denied that she did not investigate the case properly. She denied that she has submitted charge-sheet without any material.
- 22. The PW-8 Smti. Sibani Dutta, JMFC, Sivasagar in her evidence stated that on 22.05.2019 she was working as JMFC, Sivasagar. On that day she recorded the statement of the victim girl FB aged about 05 years in connection Sivasagar P.S. 418/2019 u/s 376 IPC r/w section 6 of POCSO Act. She stated that before recording the statement of the witness, she tested the capacity and competency of the victim girl as a witness and on being satisfied, recorded her statement. The victim girl was produced before her by WHG Mitali Chetia. After recording her statement, the thumb impression of the victim girl was taken and then she put her signature. Ext. 5 is the statement wherein Ext. 5(1) is her signature.

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23. In cross examination PW-8 admitted that the Ext. 5 is not a schedule format. She also admitted that the second line and some part of the third line in the Ext. 5 are crossed/cancelled. She also admitted that in the Ext. 5 she did not mention the questions and the answers which she claimed to have put to the witness for testing her capacity and competency. The victim girl stated before her that she disclosed the incident to one of her neighbours and some other Bihari people. PW-8 admitted that in the Ext. 5 there is no mention of the name of the person/ official and the place at which thumb impression of the victim was taken. She denied the suggestion that she did not record the statement as per the provisions of law.

- 24. On perusal of the Ext. 5which is the statement of the victim girl recorded u/s 164 Cr.P.C. it appears that she used to stay with her father alone. She stated that her father had removed her clothes on many occasions and also used to insert his fingers into her vagina and also used to make contact of his penis into her anus. She stated that her father used to sleep with her in that position and after sometime leave her. She further stated that sometimes her father used to insert his penis into her vagina/anus and she suffered severe pain but he did not allow her to shout. After few days she informed the matter to one of her neighbour whose name she could not recollect. She also stated that she informed the matter to some Bihari people.
- 25. In the examination u/s 313 Cr.P.C. the accused denied the allegations, but admitted that he used to bring the victim/ his daughter with him at night from the house of PW-3 Sahara Khatun. He also admitted that his daughter is aged about 5-6 years. The accused further admitted that his daughter used to attend Anganwadi Centre and her age was 04 years.
- 26. The Hon'ble Supreme Court of India in AIR1983SC753-Bharwada BhoginbhaiHirjibhai-Vs-State of Gujarat while dealing with the point of appreciation of evidence of in a rape case held as follows:
- "(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
- (2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of

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surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

- (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.
- (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
- (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person,
- (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.
- (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.
- 8. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses.

9. It is now time to tackle the pivotal issue as regards the need for insisting on corroboration to the testimony of the prosecutrix in sex-offences. This Court, in Rameshwar v. The State of Rajasthan MANU/SC/0036/1951: 1952CriLJ547 has declared that corroboration is not the sine qua-non for a conviction in a rape case. The utterance of the Court in Rameshwar may be replayed, across the time-gap of three decades which have whistled past, in the inimitable voice of Vivian Bose, J. who spoke for the Court-

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

The only rule of law is that this rule of prudence must be present to the mind of the Judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.

- 10. And whilst the sands were running out in the time-glass, the crime graph of offences against women in India has been scaling new peaks from day to day. That is why an elaborate rescanning of the jurisprudential sky through the lenses of 'logos' and 'ethos', has been necessitated.
- 11. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focused on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to translate it on the Indian soil regardless of the altogether different

atmosphere, attitudes, mores, responses of the Indian Society, and its profile. The identities of the two worlds are different."

The Hon'ble Supreme Court in The state of Punjab vs Gurmit Singh & others reported in 1996 AIR 1393 observed as follows:

"...The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a

certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra Vs. ChandraprakashKewalchand Jain (1990 (1) SCC 550) Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words:

"A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

We are in respectful agreement with the above exposition of law. In the instant case our careful analysis of the statement of the prosecutrix has created an impression on our minds that she is a reliable and truthful witness. Her testimony suffers from no infirmity or blemish whatsoever. We have no hesitation in acting upon her testimony alone without looking for any 'corroboration'. However, in this case there is ample corroboration available on the record to lend further credence to the testimony of the prosecutrix..."

The Hon'ble Supreme Court in The state of Rajasthan vs N.K. Accused reported in (2000) SCC (Crl.) 898 observed as follows:

"...It is true that the golden thread which runs throughout the cob-web of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on prowl for easy preys, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists. The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women. In BharwadaBhoqinbhaiHirijibhaiVs. State of Gujarat 1983 Crl.L.J. 1096 this Court observed that refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. This court deprecated viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelief or suspicion. We need only remind ourselves of what this court has said through one of us (Dr. A.S. Anand, J. as His Lordship then was) in State of Punjab Vs. Gurmeet Singh &Ors., 1996 (2) SCC 384.

..A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

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The questions arising for consideration before us are: Whether the prosecution story, as alleged, inspires confidence of the court on the evidence adduced? Whether the prosecutrix, is a witness worthy of reliance? Whether the testimony of a prosecutrix who has been a victim of rape stands in need of corroboration and, if so, whether such corroboration is available in the facts of the present case? What was the age of the prosecutrix? Whether she was a consenting party to the crime? Whether there was unexplained delay in lodging the F.I.R.?

It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would do. Reference may be had to a long chain of decisions, some of which are Rameshwar 1952 SCR 377, SidheshwarGanguly AIR 1958 SC 143, Madhoram&Anr. (1973) 1 SCC 533, State of Maharashtra Vs. ChandraprakashKewalchand Jain (1990) 1 SCC 550, Madam Gopal Kaddad (1992) 3 SCC 204 Shri Narayan AIR 1992 (3) SCC 615, Karnel Singh 1995 (5) SCC 518, BodhisattwaGautam 1996 (1) SCC 490 &Gurmit Singh (supra). We may quote from the last of the above said decisions where the rule for appreciating the evidence of the prosecutrix in such cases has been succinctly summed up in the following words:-

If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix 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 sexual molestations..."

27. In the light of the above observations of the Hon'ble Supreme Court of India let me examine the evidence adduced by the prosecution witnesses in this case.

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28. The PW-1 Dr. Laxmi Deori in her evidence stated that on 21-05-2019 she examined the victim who gave her a history of sexual assault. On examination she found her age below 10 years. No spermatozoa was seen on the vaginal smear slide. The hymen of the victim was found absent. The PW-3 Sahara Khatun is the grand-mother of the victim and she stated that the victim girl is aged about 04 years. The PW-7 (I.O.) stated that as the family members did not furnish birth certificate of the victim, she relied on the medical report. In his examination under section 313 Cr.P.C. accused who is the father of the victim admitted that at the relevant time FB was aged about 04 years. So the admitted age of the victim by the accused who is also her biological father was 04 years at the relevant time. So it is proved that the victim girl was about 4/5 years at the time of the incident.

- 29. The PW-2 who had counselled the victim stated in her evidence that the victim girl told her that she used to live with her father as her mother got married with some other person. The PW-3 is the grand-mother of the victim. She stated that the victim girl used to stay at her house during day time but in the evening after returning from work, the accused used to take her with him and kept her during night with him. The PW-5 (victim) stated that she used to stay with her father alone as her mother got remarried. In his examination under section 313 Cr.P.C. the accused also admitted that the victim/his daughter used to stay with him at night in his house and during day time she used to stay in the house of the PW-3. So it is proved that the victim girl used to stay in the house with the accused who is also her biological father.
- 30. The third point to be decided is whether the accused committed the offence as alleged in the FIR. The PW-4 Dr. Laxmi Deori in her evidence stated that on 21-05-2019 she examined the victim who gave her a history of sexual assault. On examination she found her age below 10 years. No spermatozoa was seen on the vaginal smear slide. The hymen of the victim was found absent. In her cross-examination the PW-4 affirmed that the history of the case was given by the victim girl.
- 31. The PW-5 FB stated in her evidence that earlier she used to stay with her father, mother and "nani". While staying with her father, her father used to sleep with her and inserted/made contact of his "susu" with her "susu". Her father used to bite on her cheek. She became afraid. She told about the incident to her madam (Baidew) at school. In cross-examination she affirmed that as her mother got married with other person, she used to stay with her father alone.

32. The PW-6 Ashma Begum is the said madam (Baidew)who stated in her evidence that FB used to come to the Anganwadi Centre to study. On 20-05-2019 she came across the guardians in the Anganwadi Centre who were talking about some incident with FB. She heard from the guardians that the father of FB used to commit misdeed with her. Then she called FB in presence of other guardians and enquired about the incident. On being asked FB told her that her father use to make contact of his private part (penis) with her private part (vagina). Then the matter was informed to the CWC.

- 33. Though the PW-6 did not state in that manner before the I.O. but that in no way makes the prosecution case doubtful because on the basis of her information, FB was produced before the CWC and then the FIR was lodged. Then the victim was produced before the Id. JMFC, Sivasagar who recorded her statement. As discussed already, the victim girl clearly implicated the accused in her statement. She also narrated the incident in the similar manner before this Court.
- 34. Another important aspect of the matter is that while cross-examining the PW-6, the defence suggested that she wanted to adopt the victim girl and in that connection a quarrel took place with the father of the victim. So she tutored her and made out this false case. But the PW-6 stated that she has two children of her own and so the plea taken by the defence is not substantiated by the facts on record. The PW-6 did not have any such intention. Of course her evidence suffers from some exaggeration but those are not fatal to the prosecution case.
- 35. Section 29 of the POCSO Act, 2012 provided that where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved. In the instant case the prosecution has adduced sufficient evidence through the victim girl whose evidence is found fully reliable, in the facts and circumstances of the case. The other witnesses also supported the prosecution case. Though the PW-3 stated that the case is false but her evidence on that point is not at all relevant because she herself admitted that she had no knowledge about the happenings in the house of the accused at night.
- 36. In the instant case though the charges were framed under sections 376AB of the IPC read with section 6 of the POCSO Act, but from the evidence of the victim girl and the evidence of the medical officer, it appears that it is a case falling under section 9 of the POCSO Act, 2012. The victim girl stated that her father used to make contact of his penis with her vagina and also used to bite her on the cheek. Though the medical officer stated

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that the hymen of the victim was found absent but at the same time she also stated that no injury mark was seen on her private parts. Hence by exercising the power conferred under section 222 Cr.P.C. the accused Sahjahan Ali is held guilty for commission of offence under section 10 of the POCSO Act, 2012.

- 37. I have considered the applicability of section 3 & 4 of the Probation of Offenders Act in this case. The accused is aged about 30 years. The victim was aged about 4/5 years at the time of the occurrence. The accused is the biological father of the victim. The mother of the victim girl had eloped with some other person. So her father was the only support for the unfortunate minor girl who even did not know what the accused was doing with her. The act committed by the accused is not only heinous crime but it also puts a big question mark on the safety of the girl child who is not safe even in the hands of her own father. A father plays a very important role in the life of a girl child/daughter because she relies on her father emotionally and also seeks her ultimate security in his care and protection. But if the father commits such heinous act, then on whom she will rely. So I do not find the accused fit to get the benefit under the said provision of law.
- 38. Heard the accused on the point of sentence. His statement is recorded in a separate sheet. I have also heard the ld. advocates of both sides.

The Hon'ble Supreme Court on the point of sentencing in a rape case observed as follows in ShyamNarain-vs-State(NCT of Delhi) reported in (2013)7 SCC 77:

"18. In State of Andhra Pradesh v. BodemSundra Rao[6], this Court noticed that crimes against women are on the rise and such crimes are affront to the human dignity of the society and, therefore, imposition of inadequate sentence is injustice to the victim of the crime in particular and the society in general. After so observing, the learned Judges had to say this: -"The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's crime for justice against such criminals. Public abhorrence of the crime needs a reflection through the Court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment."

19. In State of Punjab v. Gurmit Singh and others[7], this Court stated with anguish that crime against women in general and rape in particular is on the increase. The learned

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Judges proceeded further to state that it is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection of the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. Thereafter, the Court observed the effect of rape on a victim with anguish: -

"We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault – it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female."

20. In State of Karnataka v. Krishnappa[8], a three-Judge Bench opined that the courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. It was further observed that to show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency is wholly misplaced.

21. <u>In Jugendra Singh v. State of Uttar Pradesh</u>[9], while dwelling upon the gravity of the crime of rape, this Court had expressed thus: -

"Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu."

22. Keeping in view the aforesaid enunciation of law, the obtaining factual matrix, the brutality reflected in the commission of crime, the response expected from the courts by the society and the rampant uninhibited exposure of the bestial nature of pervert minds, we are required to address whether the rigorous punishment for life imposed on the appellant is excessive or deserves to be modified. The learned counsel for the appellant would submit

that the appellant has four children and if the sentence is maintained, not only his life but also the life of his children would be ruined. The other ground that is urged is the background of impecuniosity. In essence, leniency is sought on the base of aforesaid mitigating factors. It is seemly to note that the legislature, while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended up to life. The legislature, in its wisdom, has left it to the discretion of the Court. Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilized society. The age old wise saying "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mind-set that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are

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bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court. The mitigating factors put forth by the learned counsel for the appellant are meant to invite mercy but we are disposed to think that the factual matrix cannot allow the rainbow of mercy to magistrate. Our judicial discretion impels us to maintain the sentence of rigorous imprisonment for life and, hence, we sustain the judgment of conviction and the order of sentence passed by the High Court."

- 39. Keeping in view the facts and circumstances of the case and the manner of commission of the offence and the nature of the offence, I am of the opinion that the accused does not deserve leniency.
- 40. Accordingly the accused Sahjahan Ali is sentenced to undergo rigorous imprisonment (RI) for 07(seven) years for committing the offence punishable under section 10 of the POCSO Act, 2012 and also to pay a fine of Rs. 1,000/- (one thousand) only, in default, to undergo simple imprisonment for of one month.
- 41. Considering the fact of imposing minimum amount of fine due to poor financial back ground of the convict, no order is passed for payment of compensation to the victim U/S 357 Cr.P.C.
- 42. Considering the fact and circumstances of the case, I am of the opinion that it is a fit case for referring the matter to DLSA, Sivasagar for granting compensation to the victim.
- 43. The convict is entitled for the benefit of Section 428 Cr.P.C. for the period already undergone during investigation and trial.
- 44. Let a free of cost copy of the judgment be given to the convict immediately as per the provisions of Section 363(1) Cr.P.C.
- 45. The convict is informed about his right of appeal against the judgment and order of conviction and sentence either by appointing his own advocate or through legal aid panel advocate or by way of jail appeal.
- 46. Send a copy of the judgment to the District Magistrate, Sivasagar under section 365 Cr.P.C.

Given under my hand and seal of this Court on this 16th day of December, 2019.

Special Judge, Sivasagar.