
(2023) 08 GAU CK 0075

Gauhati High Court

Case No: Criminal Appeal No. 149 Of 2020

Sirish Das

APPELLANT

Vs

State Of Assam And
Anr

RESPONDENT

Date of Decision: Aug. 30, 2023

Acts Referred:

- Indian Penal Code, 1860 - Section 376, 376AB
- Code Of Criminal Procedure, 1973 - Section 161, 164
- Protection Of Children from Sexual Offences Act, 2012 - Section 4, 6

Citation: (2023) 08 GAU CK 0075

Hon'ble Judges: Kalyan Rai Surana, J; Kardak Ete, J

Bench: Division Bench

Advocate: N. Barman, D. Das, N. Mili

Final Decision: Dismissed

Judgement

Kardak Ete, J

1. Heard Mr. N. Barman, learned counsel for the appellant. Also heard Mr. D. Das, learned Addl. PP as well as Ms. N. Mili, learned counsel for the informant.

2. This appeal has been preferred by the appellant against the judgment and order dated 20.02.2020, passed by the learned Court of Special Judge,

Nalbari in Special (P) Case No. 22/2019 whereby the appellant has been convicted under section 376(AB) of Indian Penal Code read with Section 6

of the POCSO Act and sentenced to undergo rigorous imprisonment for life with fine of Rs. 10,000/- and in default, to undergo simple imprisonment

for 6 (six) months.

3. The case of the prosecution, in brief, is that the informant (PW-2) Parijat Das lodged an ejahar on 22.02.2019 stating that on 20.02.2019 at around

4:00 pm, the accused person Sirish Das called her daughter (victim) aged about 10 years, from outside to his room and after removing her clothes had

raped her. The victim girl came back to her home and narrated the incident. On receipt of ejahar, the I/C Kamarkuchi Outpost made Kamarkuchi OP

GD entry No. 412 dated 22.02.2019 and recorded the statement of informant and witness at the Kamarkuchi outpost and sent victim girl to SMK Civil

Hospital, Nalbari for medical examination and visited the place of occurrence, drew sketch map of the place of occurrence, recorded statement of

witnesses and seized some items, made search for the accused persons, but the accused was not found. The In-Charge of Kamarkuchi outpost sent

the ejahar to the Officer-in-Charge, Nalbari Police Station.

4. On receipt of ejahar, Officer-in-Charge, Nalbari PS registered FIR being Nalbari PS case no. 124/19 under section 376 IPC read with Section- 4 of

the POCSO Act. Investigating Officer visited the house of informant again and recorded the statement of victim girl and produced the victim girl

before the Court to record her statement under section 164 Cr.PC and seized one birth certificate of the victim girl and recorded statement of the

witnesses. Thereafter, I/O collected the medical report of victim and after completion of investigation submitted the charge-sheet against the accused

Sirish Das under section 376 IPC and Section 4 of the POCSO Act on 23.05.2019.

5. On receipt of the charge sheet, cognisance was taken, the accused surrendered before the Court. Thereafter, copies of the charge-sheet were

furnished to the accused. Accordingly, charges were framed against the accused Sirish Das under section 376(AB) IPC and section 6 of the POCSO

Act and the charges were read over and explained to the accused, to which he pleaded not guilty and claimed to be tried.

6. During the course of trial, the prosecution examined in all 10 witnesses including the Medical Officer and Investigating Officers of the case and

exhibited 9 (nine) numbers of documents viz., Ext.1- Statement of victim recorded under section 164 Cr.PC; Ext.2- Ejahar; Ext.3- Seizure list of birth

certificate; Ext.4- Seizure list of wearing apparels of victim; Ext.5- Medical report; Ext.6- Laboratory report; Ext.7- X-ray report; Ext.8- Sketch map

of the place of occurrence; Ext.9- Charge-sheet. After closure of the evidence of the prosecution, statement of the accused Sirish Das was recorded

under section 313 Cr.PC wherein the accused plea is of total denial and adduced evidence of himself and Taizuddin Ahmed in support of his defence

plea.

7. After consideration and scrutiny of the evidences and the materials available on record, the learned Special Judge concluded that the prosecution

was fairly able to bring home the charges under section 376(AB) and charges under Section 6 of POCSO Act against the accused Sirish Das beyond

reasonable doubt and accordingly convicted and sentenced the accused Sirish Das as aforesaid.

8. Mr. N. Barman, learned counsel for the appellant submits that the victim had given contradictory statements during her deposition regarding

disclosing of the incident. In her statements recorded under Section 164 Cr.P.C. before the concerned Magistrate she stated that her aunt told her

mother about the incident whereas in the deposition she had stated that she had told her mother about the incident. She had stated that after the

incident she came back to her house and her mother gave a bath and took her to school after 3 pm which indicated that she is narrating a fake story

relating to the incident. It is to be mentioned here that in the FIR, the informant (PW 2)/mother of the victim stated that the victim informed about the

incident to her but in the statements of victim, it was not clear. The entire evidence on record has been wrongly appreciated by the learned Trial

Court.

9. Mr. N. Barman, learned counsel submits that PW-2, the informant, i.e., mother of the victim, had stated in her written FIR that the victim girl was

called by the accused/appellant to his home and took off her clothes and raped her and thereafter the victim girl informed her mother about the

incident after reaching home. But in her deposition, she stated that she used to reside in a rented house situated at Biguli Chowk whereas the alleged

incident took place in her parent's house situated at Bihdia which is far from informant house. Further, the PW-2 stated in her deposition that the

victim/daughter disclosed to her the alleged incident after she asked her stoutly whereas the victim girl in her recorded statement under section 164

Cr.PC stated that her aunt told about the incident to her mother/informant.

10. He submits that the informant has not explained the reason of delay in lodging FIR after the incident as the incident took place on 20.02.2019 but

the FIR was lodged on 22.02.2019. In her cross examination she stated that the victim/daughter told about the incident after three days from the date

of incident which itself is contradictory and create doubt about the incident and the prosecution failed to establish the incident/story beyond reasonable

doubt and therefore the accused/appellant is entitled to get benefit of doubt. However, the learned Trial Court relied heavily upon the evidence led by

PW-2 and erroneously and without any appreciation of evidence convicted the accused/appellant.

11. Mr. N. Barman, learned counsel referring to the deposition of PW-3 who is the father of the victim submits that he stated that he neither has seen

the incident nor was present at the time of incident at Bihdia. In his cross examination he disclosed that after the incident he and his wife/informant

were not at the place of occurrence, after three days, he along with his wife came to the place of occurrence and lodged the FIR. His wife was with

him in the rented house situated at Bijuli Chowk which materially contradicts with the statements of all the other PWs.

12. Mr. N. Barman, learned counsel submits that PW-4, who is an independent witness, had stated that he was not aware about the boundary dispute

between the family of victim girl and the accused/appellant. The evidence of PW-4 shows that he only came to know about the incident from other

and the police did not record his statement under section 161 of Cr.PC. As such, the statement of the PW-4 is not relevant. PW-5, who is also an

independent witness had stated that he came to know about the incident from the victim's grandfather. PW-6 is also a hearsay witness. PW-7,

who is the grandmother of the victim girl, had stated that she came to know about the alleged incident from her relatives. Therefore, the evidentiary

value of aforesaid PWs are not at all relevant for the prosecution story.

13. Mr. N. Barman, learned counsel while referring to the statement of PW-8, the Medical Officer, submits that he stated that there was no injury

seen on private part and in the laboratory investigation there was no vaginal swab showing sperm. It was further stated that in genital examination, it

shows swelling and tenderness positive on mons pubic and labia majora and minora. Hymen not seen, probably ruptured, tenderness present. Vagina

admits only tip of little finger. In her cross examination, it was stated that hymen rupture and tenderness may be caused due to fall from bicycle on

ground or injury caused by any other objects. As such, the medical evidence does not prove the prosecution story beyond reasonable doubt. Hence, the

accused/appellant is entitled to get benefit of doubt.

14. Mr. N. Barman, learned counsel submits that the evidence of the I/O in preliminary investigation (PW-9) and the evidence of I/O (PW-10) is also

irrelevant and materially contradicts with the statements of the other PWs.

15. Mr. N. Barman, learned counsel submits that the learned Trial court has failed to appreciate the evidence on record in its proper perspective and

arrived upon erroneous findings which resulted in serious miscarriage of justice. The learned trial court threw out the material discrepancy and

contradiction of the evidences adduced by the prosecution side and pre-determined for conviction of the accused/appellant under the charge levelled

against him. The story of the prosecution in spite of so many discrepancies, the Court below did not give any value of doubt to the accused person. He

further submits that the statement under section 164 of Code of Criminal Procedure has been considered by the learned court below as the substantive

piece of evidence which is in the teeth of the various decisions of the Hon'ble High Courts and Hon'ble Supreme Court in a catena of cases.

16. Mr. N. Barman, learned counsel submits that the learned court below ignored the material discrepancies, omission and exaggeration of stories

adduced by the PW-2 at the time of appreciation of prosecution evidence. There was not a single prosecution witness who supported the version of

the informant's story. The prosecution has miserably failed to bring a single witness before the learned Trial court in support of their case rather

the prosecution witnesses deposed before the learned court totally against the story of the prosecution. That the learned court while appreciating the

evidences on record explained negatively against the prosecution witness blaming them for not standing for the informant and the victim girl. The story

of the PW-2 is contradictory to each other to her allegation and evidence. As per the version of the informant, there were available independent

witnesses on the day of occurrence who knew the occurrence and its subsequent events as per her statement but the Investigating Officer failed to

bring them before the learned Trial court as witness in support of the case. The I/O of the case was examined and cross-examined where he admitted

his failure to make those people as witness of the case.

17. Mr. N. Barman, learned counsel submits that the Investigating Officer had mechanically investigated the case and filed charge-sheet against the

accused person. The charge-sheet is full of omission and lacuna. The investigation is full of procedural defect caused by its Investigating Officer as

such the information was provided to Nalbari P.S. after three days of the occurrence but failed to seize the wearing apparel of the victim at the time

of alleged rape and to send it for chemical examination. There were so many material contradictions in the part of evidence adduced by the informant

with her own statement made at the time of investigation. The contradictions were confirmed by the Investigating Officer of the case.

18. Mr. N. Barman, learned counsel submits that the statement made by the PW-1 is not only contradictory to 164 statement of evidence but also

contradictory with the statement of PW-2 (informant), thus, in spite of so many contradictory statements between the witnesses, the learned court

below convicted the accused ignoring the major discrepancies.

19. Mr. N. Barman, learned counsel submits that since the time of first instant the defence has been developing another aspect simultaneously with

the prosecution story in relating to mens rea of lodging FIR against the accused person by the informant. The defence case was that there was a

dispute regarding boundary between the accused/appellant and the family of the informant for long time and there would be no solution so long the

accused/appellant is survived. So, the informant used her daughter to trap the accused by the present FIR with a fake story. He submits that none of

the ingredients as contemplated in section 376(AB) of the Indian Penal Code and Section 6 of POCSO Act are present against the accused/appellant.

20. Mr. N. Barman, learned counsel submits that the learned Trial Court completely disregarded and rejected the cross examination of the PWs and

the DWs as well as the suggestions put forward by the defence side on all material and vital occasions, facts and propositions of law in deciding the

guilt of the accused/appellant under the appropriate sections and provisions of the Indian Penal Code and as such, the same is liable to be set aside.

21. Mr. N. Barman, learned counsel for the appellant submits that the order and judgement passed by learned Court of Special Judge, Nalbari is full of

erroneous and not based on legal principle. The learned court at the time of passing the order and judgment gave up the established principle of

criminal jurisprudence and criminal justice i.e., uniformity of statement of witnesses, doubtful statements of PW- 1, 2 and 3 who are vital witnesses in

the case, and rather the same is passed on emotional values and presumption which has no value at all. That the prosecution failed to proof the fact

beyond reasonable doubt and as such the same is liable to set aside and quashed.

22. In support of his submission, the learned counsel for the appellant relied on the following judgments;

23. K. Venkateshwarlu V. State of Andhra Pradesh reported in (2012) 8 SCC 73 the Hon'ble Supreme Court has held, which is quoted herein

below:

“9..... The evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion

that the child understands the question put to him and he is capable of giving rational answers. A child witness, by reason of his tender age, is a pliable

witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attendant circumstances do

not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if

the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of

truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving

evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he

has been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the evidence of a child witness in the

background and context of other evidence on record is a must before the court decides to rely upon it.”

24. State of Uttar Pradesh V. Naresh and Others reported in (2011) 4 SCC 324 wherein the Hon'ble Supreme Court has held, which is quoted

herein below:

“26. The High Court has disbelieved Balak Ram (PW.5), who had suffered the gun shot injuries. His evidence could not have been brushed aside

by the High Court without assigning cogent reasons. Mere contradictions on trivial matters could not render his deposition untrustworthy.

27. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is

generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The

testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends

support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The

witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence.

Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major

contradictions and discrepancies therein.

25. *Abhijit Dutta Vs. State of Assam and Anr* reported in 2019 (1) GLT 17, the Hon'ble High Court has held, which is reproduced herein below:

“ 25. In the context of law, although absconding is one of the factors to be considered in an offence against the allegation but the same is to be

considered along with other facts and circumstances of the case. We are aware that in a case of rape/sexual assault the court need not ponder over

corroboration if the statement of the victim inspires confidence and accepted by the court as credible on proper appreciation of all the facts and

circumstances of the case. But in the present case the evidence of the victim as well as the informant is found suffering from serious infirmities,

inconsistencies with other material aspects and the victim has deliberately improved her statement on material part, creating doubt about the

authenticity of the allegation. Although a victim of sexual assault, particularly when she is a minor, cannot be discarded because such minor child has

no such hostility of her own towards an accused for false implication, but the same is equally true that such minor child also can be tutored by their

guardian for their own purpose. In the given case where there is a background of quarrel between the informant and the landlady where the informant

and the accused stayed and the informant was asked to vacate the tenanted premises, vested interest on the part of informant for false implication

cannot be denied. The victim in her cross-examination stated that she was offered a mobile phone by her mother(informant) on the day of giving such

evidence which indicates that the victim was tempted to give evidence.Ã¢â¬â¸

26. Refuting the submissions of the learned counsel for the appellant, Mr. D. Das, learned Addl. PP submits that the statements of the victim as well

as the other witnesses particularly PW-2 are consistent right from the lodging of the ejahar till the deposition before the court which narrates the same

factum of incident. He submits that conviction can be based solely on the testimony of the prosecutrix without there being any other corroboration. In

the present case, the testimony of the victim is corroborated by PW2 and PW3. The prosecution had established the guilt of the accused beyond

reasonable doubt.

27. Mr. D. Das, learned APP submits that the victim though she is a minor, her statements u/s 161 & 164 Cr.PC and the deposition before the court

are consistent. Moreover, her deposition is duly corroborated by the medical examination report vide Ext-5 which has been proved in evidence by PW-

8.

28. He submits that so far as the age of the victim (PW-1) is concerned, it has been proved in evidence vide Ext-3 (seizure list of birth certificate) and

Ext-7 (X-ray report) besides oral evidence beyond any doubt.

29. Mr. D. Das, learned APP submits that though by way of cross examination of PW-1, the defence had tried to raise a story of previous enmity

between the family of the accused and the victim's family centring around land dispute, from the evidence of DW-2 it has come to the light that the

said dispute or animosity between the two families was already settled in a village meeting by preparing a document.

30. Mr. D. Das, learned APP submits that evidence of PW-1 (victim) is duly corroborated by other evidence on record. He submits that with regard

to the contention of the appellant on the point of delay in lodging the FIR, delay being 48 hours, in such case the parents of the victim have to think

about the future of the minor girl. The moment the FIR is lodged, the incident becomes public which would leave a stigma in the future of the victim.

Therefore, the delay of 48 hours in lodging the FIR is not fatal to the prosecution case. He, therefore submits that the learned trial court has not

committed any error in convicting and sentencing the accused/appellant for the offence he was charged.

31. We have considered the submissions advanced by the learned counsel for the parties and materials available on record.

32. Now, we would proceed to appreciate the testimony of the witnesses.

33. PW-1, the victim girl had deposed that the accused called her to his house from her courtyard and took her into his room, removed her panty,

inserted and rubbed his penis into her vagina. The incident took place in the evening time. The accused after rubbing his penis in her vagina gagged

her mouth using his hand. Thereafter, accused gave her one rupee coin. The accused after committing the aforesaid incident with her had left his

home. After the incident she came home and told her mother, PW2, about the whole incident. Her mother gave her bath and took her to school. She

had deposed that her mother lodged a case. Police recorded her statement and she was produced before Doctor and thereafter produced before the

Court where she made statement before the Magistrate. (Ext-1 is the statement under section 164 CrPC of the victim).

In her cross examination victim stated that she made statement before the Magistrate that her mami disclosed the incident to her mother. She had

stated one incident of fighting took place between her family and accused family and accused is her adjacent neighbour.

In her statement under section 164 Cr.PC she stated that the accused took her to his house, removed her panty and then inserted and rub his penis

into her vagina. She in her evidence before the Court as well as in her statement under section 164 Cr.PC stated that accused gagged her mouth by

using his one hand and after committing the offence accused gave her one rupee coin and left his home.

34. PW-2 had deposed that her victim daughter is residing at Bihdia at her parent's house and she is residing in a rented house at Bijuli chowk.

She stated that on the date of incident, the accused called her daughter to his house. Thereafter, he took her daughter to his bedroom, removed her

panty and inserted his penis into vagina of victim, and daughter-in-law of accused told her about the incident to which she asked her daughter and then

her victim daughter disclosed the incident to her that accused after removing her panty inserted his penis into her vagina. She in her ejahar and

deposition consistently stated that accused took her daughter from outside her house to his house where incident of rape was committed. In the ejahar,

PW-2 stated that accused took victim to his house. She stated that taking her daughter the accused removed her daughter's panty, inserted his

penis into her vagina. PW-2 specifically stated the place of occurrence which is the house of accused and accused took her daughter from her

parent's house, whose house is near accused house. Thus, there is no contradictions as the statement of the informant made in the ejahar, before

police and court clearly shows only one place of occurrence which is accused house where the incident of sexual offence took place.

35. Evidence of PW2 is that accused took his daughter to his bedroom, removed her panty and inserted his penis into vagina of victim and daughter in-

law of accused told her that her victim daughter was rubbing her vagina with the panty, to which she asked her daughter and then her victim daughter

disclosed the incident to her that accused after removing her panty inserted his penis into her vagina. Police seized birth certificate of her daughter and

dress. Ext.2 is the ejahar, Ext.3 and Ext.4 are seizure list of birth certificate and wearing apparel of the victim. In cross she stated she lodged the

ejahar after coming to know about the incident on the third day and knowing the incident she checked her daughter's private parts and found

reddish colour. She noticed white discharge in the panty of her daughter. In her cross she stated that there is boundary dispute between her paternal

family and accused family and after lodging the ejahar, accused came to attack her mother and another quarrel took place and at that time she was

present at her parent's house and prior to lodging the ejahar there was a quarrel between her parent's family and accused family but that time

she was not present. She denied lodging of ejahar due to land dispute. Such statements are not fatal to the prosecution case even if there is minor

contradiction in a case like the present one when all other testimony is credible and trustworthy.

36. PW-3, Satish Das is the father of the victim girl. He had deposed that after coming home he came to know from his wife and mother-in-law that

accused raped his daughter, so he asked his wife to lodge the ejahar. In his cross he stated that he and his wife reside in a rented house and his victim

daughter stayed at his father-in-laws house and when he was informed by his wife about the incident, his daughter was at her maternal uncle's

house and during those days, from the date of incident till the date of his knowledge he did not meet his daughter. After coming to know about the

incident, he went to his father-in-law's house, asked mother-in-law why she did not report incident to him, then her mother-in-law told him

accused is neighbour of mother-in-law and his mother-in-law is thinking of mutually settling the incident, so she did not inform the incident to him. He

deposed that his daughter was taken to the hospital after lodging of the ejahar and when he asked his daughter, his daughter told him accused Sirish

made her naked and did beya kam.

37. PW-4 is declared hostile by the prosecution. Before declaring him hostile PW-4 stated that before the present incident, one quarrel over boundary

dispute took place and he heard about an incident of making love by the accused with a girl on the date of incident and accused is his brother.

38. PW-5, Sunil Das had deposed that he knows accused and heard from victim that accused raped the victim. In cross, he stated that he heard the

incident from grandmother of victim and there was a quarrel on the date of incident and previous date and in the evening he went to the house of

accused Sirish to inquire about the incident but did not find the accused and left his house and police recorded his statement in the courtyard of

accused.

39. PW-6, Dipak Kalita had deposed that he heard from PW-7 Nilima Das, grandmother of the victim that accused raped victim and neighbour of

accused hurling Nilima and Nilima sought help from him. He deposed that police came and seized dress of victim girl and he puts his signature in

Ext.4. His cross is that he has no idea about quarrel between accused and informant family. Village people compromised the dispute between the

parties and he found the girl in good health.

40. PW-7, Nilima Das had deposed that she was first informed by one of the relative of accused that accused Sirish raped victim and she asked the

victim, rebuked her and then victim disclosed that accused committed rape on her. In her cross she stated that generally they have good relationship

with accused family however except sometimes some altercation took place. She has no bad feelings and has settled the dispute and she further

stated that presently victim is in good health.

41. PW-8, Medical Officer, had deposed that on 22/02/2019 she examined the victim and on examination she found her external genitalia was healthy,

hymen not seen, probably ruptured, tenderness present, vagina admits only tip of the little finger, vaginal swab taken but no sperm found. X-ray was

advised for age determination and estimated age as per radiological examination was between 10 to 12 years and in her opinion no evidence of recent

sexual intercourse. In her cross, she stated hymen ruptured and tenderness may be caused due to some other reason such as fall from bicycle on

ground or injury caused by other objects.

42. PW-9, one of the IO, had deposed that on 22.02.2019 he was working as I/C, Kamarkuchi OutPost and on receipt of written ejahar from

informant he made GD entry vide No. 412 dated 22.02.2019 and forwarded the ejahar to O/C, Nalbari PS to register a case and recorded statement

of informant and one witness at the Kamarkuchi OutPost and sent victim girl for medical examination. Thereafter, he visited the place of occurrence

and drew sketch map of the place of occurrence, recorded statement of witnesses, seized one green colour doll printed panty and one yellow colour

floral printed gown(skirt) and recorded statement of seizure witnesses, made search for accused but the accused was not found. O/C, Nalbari PS

registered Nalbari PS case no. 124/19 under section 376 IPC read with section 4 of the POCSO Act and endorsed WSI Rajashree Buragohain to

investigate the case and he handed over the MCD to O/C, Nalbari PS. He was not cross examined by defence.

43. PW-10, another IO, had deposed that after taking charge of investigation, she visited the house of informant and recorded statement of victim girl

at her house and produced the victim girl before the Court to record her statement under section 164 Cr.PC and seized birth certificate of victim from

mother of the victim and gave zimma of the original birth certificate to mother of the victim and recorded statement of seizure witnesses. She had

deposed that she made search for accused for 3 days to apprehend but was not found and on 07.05.2019 accused surrendered before the court and

taking permission from Court she interrogated the accused inside the District Jail, Nalbari. She collected medical report of the victim and on

completion of investigation and finding incriminating materials submitted the charge-sheet against the accused under section 376 IPC read with section

4 of the POCSO Act.

44. Taking plea of innocence he adduced his evidence and evidence of one witness Taijuddin Ahmed. Accused as DW-1 in his evidence stated that

for last three years quarrel took place between his family and in-laws family of Satish Das over boundary dispute and on the date of incident

altercation took place with the in-laws family of Satish Das in the same matter and he does not have visiting terms with each other's family and

lodge the case against him at the instigation of other people. In his cross he stated that children do not come to his house only his 8 months old

grandchild is present. He stated that he knows about the lodging the ejahar against him and surrendered before the court after submission of charge-sheet.

45. DW-2 Taijuddin Ahmed stated he knows the informant and the accused and presence of boundary dispute between the families of informant and

accused. He stated that in the village meeting village people mutually settled the land dispute between informant and accused family. In cross by

prosecution, he stated that he was present in the village meeting where Dipak Das was the president of said meeting. His cross is that in the meeting,

boundary land dispute between the parties was settled and meeting also discussed the allegation of rape of victim girl when same was raised on that

very day, the accused was not present in the meeting and when police came to search accused at his house police did not find him.

46. On scrutiny of the statement of PWs including the statement of DW-2, it transpires that one meeting took place in the village to discuss the dispute

between the accused and informant's parents family where the matter of allegation of rape of victim girl by the accused was also raised and same

was also discussed. But in the meeting accused was not present. Thus, it can be seen that one of the reason of the delay is, which is evident from the

evidence of DW-2, that meeting was held but accused was not present.

Informant's parents family wanted to sort out the incident at the village

level, the accused being neighbour of the victim's maternal grandparents and cross examination of PW-3 shows that maternal grandmother of

victim wanted to sort out the matter of incident of rape of his minor victim child at the village level as accused is the neighbour. Victim was staying at

her maternal grandmother house and her parents were residing in different house. Holding of the village meeting to discuss the incident, natural instinct

to discuss the matter at village level, the accused being her neighbour appears to be justified and a reasonable one. PW2 in her statement before police

stated that her husband was not present at home and she was waiting for arrival of her husband to take decision. PW-3 had deposed that he was not

present at the time of incident and after coming to know about the incident he asked his wife to lodge ejahar. He had stated that his daughter was

staying at her maternal grandmother's house and his mother-in-law wanted to settle the dispute at village level the accused being her neighbour.

Therefore, in our considered view, the delay 48 hours in filing ejahar in the facts and circumstances of the present case is not fatal.

47. It is well aware that in sexual offences delay in the lodging of the FIR can be due to variety of reasons such as the reluctance of the prosecutrix or

her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family.

In the present case, from the statements of PW-3 and PW-7, it is evident that grandmother of victim wanted to settle the incident at the village level

as accused is her contiguous neighbour and the statement of PW-2 before the court and the police under section 161 Cr.PC reflects that she waited

for her husband to take decision. Therefore, the delay in lodging ejahar in the facts of the present case is not fatal.

48. The consistent statements of victim that she was called by accused from her courtyard after taking her at his house, he removed the victim's

panty and then insert and rubbed his penis into her vagina in her statement recorded under section 164 Cr.PC and under section 161 Cr.PC are

credible and reliable. Police recorded statement on the date of lodging the ejahar, learned Magistrate recorded her statement on 23.02.2019 and her

evidence was recorded before the court in camera on 26.07.2019 and she in all the stages made same statement that accused by taking her to his

house from her courtyard removed her panty and insert and rubbed his penis into her vagina.

49. The evidence of PW-2 and PW-3 corroborates the statement of victim girl and their evidence is that they got to know about the incident from their

daughter. From the statement of PW-4 Rabin Das, who is the brother of accused, it is also evident that on the date of incident accused was making

love with the victim girl. The statement of PW-4 in respect of accused making love with the victim lends credence to the statement of the victim that

accused committed sexual assault on victim by removing her panty and inserting his penis into her private parts and rubbing his private parts with her

private parts. PW-4 is the own brother of the accused, as expectedly he would refrain himself from saying against his own brother to save him but his

statement of accused making love testifies that accused on the date of incident committed the offence of rape.

50. PW-5 stated that he too heard of the incident from the grandmother of the victim on the date of incident. PW-6 also heard the incident on the date

of incident. PW-7 grandmother of victim girl evidenced that victim disclosed incident to her when she asked victim after hearing the incident from one

of the relatives of accused.

51. We concurred with the learned Trial Court that the testimony of PWs and DWs clearly established that accused left his house after the incident.

Defence plea is that false ejahar has been lodged due to boundary dispute and altercation took place in the morning. Ejahar was lodged 48 hours of the

incident. If this is a false case, the reason for accused leaving his house and hiding himself immediately after the incident when ejahar was not lodged

pointed finger towards the accused that he absconded to save himself from apprehending him after committing the offence. The conduct of the

accused leaving his house after the incident that too before lodging the ejahar lends support to the prosecution case. The defence plea that due to

boundary dispute and quarrel false ejahar has been lodged out of enmity cannot be accepted.

52. Evidence of PW8 states that on examination of the victim, she found her external genitalia was healthy, hymen not seen, probably ruptured,

tenderness positive on monos pubic and labia majora and minora, vagina admits only tip of the little finger, vaginal swab taken but no sperm found. The

mother of the victim girl had seen redness in vagina of the victim and white discharge and hymen not seen cited by doctors probably ruptured and

tenderness present. Defence tried to explain that hymen may be ruptured due to some other reason such as fall from bicycle on ground or injury

caused by any other objects but while cross examining the PW-1, no question was put to her that whether she rode bicycle and fell from bicycle either

on the date of incident or on earlier occasion. Ruptured, swelling and tenderness positive on monos pubic and labia majora and minora indicates sexual

assault on the victim, the absence of semen may be due to medical examination of the victim after 48 days of the incident and washing of her clothes

and her private parts, therefore, absence of semen does not weaken the prosecution case when injury found on the private parts of the victim who is a

girl of 10 years. The oral as well as medical examination established that on the date of incident accused took victim to his house, removed her panty

and insert and rubbed his penis into her vagina, clearly establishes the guilt of the accused. The victim categorically stated that the accused inserted

and rub his penis into her vagina. The victim is a minor and was aged below 12 years, the prosecution has proved the guilt of the accused beyond all

reasonable doubt.

53. The radiological investigation report shows that the age of the victim is estimated above 10 years and below 12 years. As per PWs age of the

victim approx. ranges 7 years to 11 years. PW-10 in her statement confirmed that she collected the birth certificate of the victim and original copy

was returned to the parents after noting date of issue, date of birth of the victim in the seizure list keeping a photocopy and as per birth certificate, date

of birth is 31/12/10, date of incident is 20/02/19 and age is 8 years 1 month 21 days on the date of incident. Therefore, the age of victim has been

proved to be minor and tender age.

54. The Hon'ble Supreme Court has held in the case of State of Punjab V. Ram Dev Singh reported in 2004 (1) SCC 421 that 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 reasonably exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable

doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey,

more so when the victims of crime are helpless females or minor children. The courts have to display a greater sense of responsibility and to be more

sensitive while dealing with charges of sexual assault on women, particularly of tender age and children.

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. She stands at a higher pedestal than an injured witness. In the

latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of

facts finds 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.

Merely because of doctor's hypothetical and opinionative evidence that the victim was not seen with recent sexual intercourse, prosecution version of

rape is not to be discarded easily. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination

would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime.

Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of

the prosecutrix. It will all depend on the facts and circumstances of each case.

55. The Hon'ble Supreme Court has held that delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case

and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to

search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain

the delay and there is possibility of embellishment in prosecution version on account of such delay, the same would be fatal to the prosecution.

However, if the delay is explained to the satisfaction of the Court, same cannot by itself be a ground for disbelieving and discarding the entire

prosecution.

56. In the case of *Ganeshan V. State* reported in (2020) 10 SCC 537, the Hon'ble Supreme Court after considering the number of judgments has

observed and held that there can be a conviction on the sole testimony of the victim/prosecutrix when the deposition of the prosecutrix is found to be

trustworthy, unblemished, credible and her evidence is of sterling quality. As a general rule, if credible, conviction of the accused can be based on sole

testimony without corroboration. Sole testimony of the prosecutrix should not be doubted by the court merely on the basis of assumptions and

surmises. 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. The same observation has been reiterated in the case *Phool Singh V. State of Madhya Pradesh* reported in (2022) 2 SCC

74.

57. In the case of *State (NCT of Delhi) Vs. Pankaj Chaudhary and Ors* reported in (2019) 11 SCC 575 the Hon'ble Supreme Court held that

which is reproduced herein below:

“29. It is now well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix if it inspires confidence. [Vishnu

alias Undrya v. State of Maharashtra (2006) 15 1 SCC 283]. It is well-settled by a catena of decisions of this Court that there is no rule of law or

practice that the evidence of the prosecutrix cannot be relied upon without corroboration and as such it has been laid down that corroboration is not a

sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the 'probabilities factor' does not

render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to

the circumstances of the case, medical evidence can be expected to be forthcoming.Ã¢â¬â¢

58. In the case of Shivasharanappa and Ors V. State of Karnataka reported in (2013) 5 SCC 705, the HonÃ¢â¬â¢ble Supreme Court held which are

reproduced herein below:

Ã¢â¬â¢17. Thus, it is well settled in law that the court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is

credible, truthful and is corroborated by other evidence brought on record. Needless to say, the corroboration is not a must to record a conviction, but

as a rule of prudence, the court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for

placing reliance on the solitary statement of witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on

the ground of lack of corroboration, applies to a child witness who is competent and whose version is reliable.Ã¢â¬â¢

59. In the case of Nawabuddin V. State of Uttarakhand reported in (2022) 5 SCC 419, the HonÃ¢â¬â¢ble Supreme Court has observed and held which

are reproduced herein below:

Ã¢â¬â¢18. Children are precious human resources of our country; they are the countryÃ¢â¬â¢s future. The hope of tomorrow rests on them. But

unfortunately, in our country, a girl child is in a very vulnerable position. There are different modes of her exploitation, including sexual assault and/or

sexual abuse. In our view, exploitation of children in such a manner is a crime against humanity and the society. Therefore, the children and more

particularly the girl child deserve full protection and need greater care and protection whether in the urban or rural areas.

19. As observed and held by this Court in the case of State of Rajasthan Vs. Om Prakash, (2002) 5 SCC 745, children need special care and

protection and, in such cases, responsibility on the shoulders of the Courts is more onerous so as to provide proper legal protection to these children. In

the case of Nipun Saxena v. Union of India, (2019) 2 SCC 703, it is observed by this Court that a minor who is subjected to sexual abuse needs to be

protected even more than a major victim because a major victim being an adult may still be able to withstand the social ostracization and mental

harassment meted out by society, but a minor victim will find it difficult to do so. Most crimes against minor victims are not even reported as very

often, the perpetrator of the crime is a member of the family of the victim or a close friend. Therefore, the child needs extra protection. Therefore, no

leniency can be shown to an accused who has committed the offences under the POCSO Act, 2012 and particularly when the same is proved by

adequate evidence before a court of law.Ã¢â¬â¢

60. Way back in 1951, in the case of Raneshwar V. State of Rajasthan reported in AIR 1952 SC 54 the HonÃ¢â¬â¢ble Supreme Court held which are

reproduced herein below:

Ã¢â¬â¢19. There is a class of cases which considers that though corroboration should ordinarily be required in the case of a grown-up woman it is

unnecessary in the case of a child of tender years. Bishram. v. Emperor(1) is typical of that point of view. On the other hand, the Privy Council has

said in Mohamed Sugul Esa v. The King that as a matter of prudence a conviction should not ordinarily be based on the uncorroborated evidence of a

child witness. In my opinion, the true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind

of the judge. In a jury case he must tell the jury of it and in a non-jury case he must show that it is present to his mind by indicating that in his

judgment. But he should also point out that corroboration can be dispensed with if, in the particular circumstances of the case before him, either the

jury, or, when there is no jury, he himself, is satisfied that it is safe to do so. 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, and in jury cases, must find place in the charge, before a

conviction without corroboration can be sustained. The tender years of the child, coupled with other circumstances appearing in the case, such, for

example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case.

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.

20. I turn next to the nature and extent of the corroboration required when it is not considered safe to dispense with it. Here, again, the rules are

lucidly expounded by Lord Reading in Baskerville's case⁽¹⁾ at pages 664 to 669. It would be impossible, indeed it would be dangerous, to formulate the

kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with circumstances of each case

and also according to the particular circumstances of the offence charged. But to this extent the rules are clear.

21. First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence

in the case, apart from the testimony of the complainant or the (1) [1916] 2 K.B. 658, accomplice, should in itself be sufficient to sustain conviction.

As Lord Reading says--

“Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony.

All that is required is that there must be “some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

22. Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect

or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused

committed the crime. This does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused

with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's

story that the accused was the one, or among those, who committed the offence. The reason for this part of the rule is that:

a man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that

history, without identifying the persons, that is really no corroboration at all...It would not at all tend to show that the party accused participated in it.

23. Thirdly, the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to

corroborate that of another. But of course the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in

those special circumstances a conviction so based would not be illegal. I say this because it was contended that the mother in this case was not an

independent source.

24. Fourthly, the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence

of his connection with the crime. Were it otherwise, “many crimes which are usually committed between accomplices in secret, such as incest,

offences with females"" (or unnatural offences) ""could never be brought to justice.

61. Reverting back to the present case, as noted above, the consistent statements of victim that she was called by accused from her courtyard after

taking her at his house, he removed the victim's panty and then insert and rubbed his penis into her vagina in her statement recorded under section

164 Cr.PC and under section 161 Cr.PC are credible, reliable and trustworthy. Police recorded statement on the date of lodging the ejahar, learned

Magistrate recorded her statement on 23.02.2019 and her evidence was recorded before the court in camera on 26.07.2019 and she in all the stages

made same statement that accused by taking her to his house from her courtyard removed her panty and insert and rubbed his penis into her vagina.

Thus, the prosecution clearly establishes the guilt of the accused. It is well settled principle of law that conviction can be sustained on the sole

testimony of the prosecutrix if it inspires confidence. It is also well settled that there is no rule of law or practice that the evidence of the prosecutrix

cannot be relied upon without corroboration and as such it has been laid down that corroboration is not a sine qua non for conviction in a rape case. If

the evidence of the victim does not suffer from any basic infirmity and the probability factor does not render it unworthy of credence, as a general

rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical

evidence can be expected to be forthcoming. In the present case, apart from the evidence of victim being inspired confidence of the Court, same is

corroborated by other evidences.

62. The evidence of PW-2 and PW-3 corroborates the statement of victim girl and their evidence is that they got to know about the incident from their

daughter. From the statement of PW-4 Rabin Das, who is the brother of accused, it also evident that on the date of incident accused was making love

with the victim girl. The statement of PW-4 in respect of accused making love with the victim lends credence to the statement of the victim that

accused committed sexual assault on victim by removing her panty and inserting his penis into her private parts and rubbing his private parts with her

private parts. PW-4 is the own brother of the accused, as expectedly he would obviously refrain himself from saying against his own brother to save

him but his statement of accused making love testifies that accused on the date of incident committed the allegation of rape. Therefore, as held by the

Hon'ble Supreme Court, no leniency can be shown to accused who has committed the offences under the POCSO Act, 2012 and particularly

when the same is proved by adequate evidence.

63. We would profitably rely and refer to the observation of the Hon'ble Supreme Court in State of Punjab V. Ram Dev Singh (Supra) that 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 reasonably exists. A doubt, as understood in criminal jurisprudence, has to

be a reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the

prowl for easy prey, more so when the victims of crime are helpless females or minor children. The courts have to display a greater sense of

responsibility and to be more sensitive while dealing with charges of sexual assault on women, particularly of tender age and children.

64. 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. She stands at a higher pedestal than an injured witness. In the

latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of

facts finds 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.

65. We would further refer to the observation of the Hon'ble Supreme Court that merely because of doctor's hypothetical and opinionative

evidence that the victim was not seen with recent sexual intercourse, prosecution version of rape is not to be discarded easily. The absence of visible

marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any

injuries or that she had offered no resistance at the time of commission of the crime.

Absence of injuries on the person of the prosecutrix is not

necessarily an evidence of falsity of the allegation on the part of the prosecutrix. It will all depend on the facts and circumstances of each case.

66. From the careful analysis and scrutiny of the evidence of victim and other PWs and in the light of the law laid down by the Hon'ble Supreme

Court as referred to above, we are of the considered view that the evidences are credible, reliable and trustworthy and the conviction can be based on

the testimony of the prosecutrix which is corroborated by the other evidences particularly PW2 and PW3, although conviction can be based on sole

testimony of the prosecutrix which warrants no interference. We have, therefore, no incertitude in holding that the evidence led by the prosecution

establishes the charges brought against the appellant Sirish Das beyond reasonable doubt. Therefore, the learned Trial Court had rightly convicted the

appellant.

67. In view of above discussion and conclusion, the present appeal fails and the conviction and sentence of the appellant Sirish Das is hereby affirmed.

68. Appeal stands dismissed accordingly.

69. Send back the LCR.