Damber Singh Chettri Vs State of Sikkim

Crl. A. No. 05 of 2017

Court: Sikkim High Court

Date of Decision: July 9, 2018

Acts Referred:
Protection of Children from Sexual Offences Act, 2012 â€" Section 3, 5, 5(1), (m), 6, 7, 8, 9, 9(1), (m), 10, 33(7)#Indian Penal Code, 1860 â€" Section 10, 34, 71, 302, 351, 354, 354A(i), 376(2), 376(2)(i), (n), 396, 404, 460#Indian Evidence Act, 1872 â€" Section 101, 118, 155#Madhya Pradesh (Dacoity Vihavaran Kshetra) Adhiniyam, 1981 â€" Section 11, 13#Code Of Criminal Procedure, 1973 â€" Section 161, 164, 173, 313#Constitution of Indian 1950 â€" Article 20(3)

Hon'ble Judges: BHASKAR RAJ PRADHAN, J

Bench: Single Bench

Advocate: Udai P. Sharma, Kusan Limboo, Amar Bhandari, Mahendra Thapa, Madhukar Dhakal, S. K Chettri

Judgement

Bhaskar Raj Pradhan, J

1. The Learned Special Judge (POCSO), South Sikkim at Namchi (the Learned Special Judge) in his judgment dated 29.12.2016 while convicting the

Appellant for the offences under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) Act and Section 354 of the Indian

Penal Code, 1860 (IPC) has also acquitted the Appellant for the offences under Section 6 and 10 of the POCSO Act as well as Section 376 (2) of the

IPC. Mr. U.P. Sharma, Learned Counsel for the Appellant would thus submit that the very fact that the Learned Special Judge would disbelieve the

victimÃ¢â‚¬â„¢s deposition and acquit the Appellant of the offences under Section 6 and 10 of the POCSO Act as well as Section 376 (2) of the IPC

should have been adequate ground to give the benefit of doubt to the Appellant with regard to the offences for which the Appellant has been

convicted. falsus in uno fulsus in omnibus.

2. Mr. U.P. Sharma would rely upon the maxim-falsus in uno fulsus in omnibus. This would be the pivotal submission of the Learned Counsel for the

Appellant which would thus merit immediate consideration. It is said that the origins of the doctrine of the falsus in uno, falsus in omnibus is the

common law dating back to the late seventeenth century. It was at one time a mandatory presumption that a witness was unreliable if he had

previously lied while offering testimony. During the nineteenth century the English Courts began to advice that such a presumption is not mandatory.

3. In India however, this maxim has not been accepted.

4. In the year 1965 itself in re: Ugar Ahir & Ors. vs. The State of Bihar AIR 1965 SC 277 the Supreme Court would hold:

Ã¢â‚¬Å“7. The maxim falsus in uno, falsus in omnibus (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly

one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is,

therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it

cannot obviously disbelive the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the

rest. That is what the courts have done in this case. In effect, the courts disbelieved practically the whole version given by the witnesses in regard to

the pursuit, the assault on the deceased with lathis, the accused going on a bicycle, and the deceased wresting the bhala from one of the appellants and

attacking with the same two of the appellants, the case that the accused attacked the witnesses, and the assertion of the witnesses of their being

disinterested spectators. If all this was disbelieved, what else remained? To reverse the metaphor, the courts removed the grain and accepted the

chaff and convicted the appellants. We, therefore, set aside the conviction of the appellants and the sentence passed on them.Ã¢â‚¬â€‹

5. In the year 1972 the Supreme Court would once again reiterate in re: Sohrab v. State of M.P. (1972) 3 SCC 751 that :

Ã¢â‚¬Å“8. Ã¢â‚¬Â¦ This Court has held that falsus in uno, falsus in omnibus is not a sound rule for the reason that hardly one comes across a witness whose

evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked

about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main

incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be

consideredÃ¢â‚¬Â¦.Ã¢â‚¬â€‹

6. In the year 2002 the Supreme Court would have occasion to examine the doctrine of falsus in uno, falsus in omnibus in re: Gangadhar Behera v.

State of Orissa (2002) 8 SCC 381 and hold:

Ã¢â‚¬Å“15. To the same effect is the decision in State of Punjab v. Jagir Singh [(1974) 3 SCC 277 : 1973 SCC (Cri) 886] and Lehna v. State of Haryana

[(2002) 3 SCC 76 : 2002 SCC (Cri) 526] . Stress was laid by the appellant-accused on the non-acceptance of evidence tendered by some witnesses to

contend about desirability to throw out the entire prosecution case. In essence prayer is to apply the principle of falsus in uno, falsus in omnibus (false

in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is

sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other coaccused persons, his conviction can be maintained. It is the

duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an

accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material

witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno, falsus in omnibus has no application in India and

the witnesses cannot be branded as liars. The maxim falsus in uno, falsus in omnibus has not received general acceptance nor has this maxim come to

occupy the status of the rule of law.

It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The

doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called

Ã¢â‚¬Å“a mandatory rule of evidenceÃ¢â‚¬. (See Nisar Ali v. State of U.P. [AIR 1957 SC 366 : 1957 Cri LJ 550]) Merely because some of the accused

persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary

corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted

from those who were convicted. (See Gurcharan Singh v. State of Punjab [AIR 1956 SC 460 : 1956 Cri LJ 827] .) The doctrine is a dangerous one

especially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is

to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however,

true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some

respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of

law that it must be disregarded in all respects as well. The evidence has to be sifted with care.

The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or

at any rate exaggeration, embroideries or embellishment. (See Sohrab v. State of M.P. [(1972) 3 SCC 751 : 1972 SCC (Cri) 819] and Ugar Ahir v.

State of Bihar [AIR 1965 SC 277 : (1965) 1 Cri LJ 256] .) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the

grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably

mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution

completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto.

(See Zwinglee Ariel v. State of M.P. [AIR 1954 SC 15 : 1954 Cri LJ 230] and Balaka Singh v. State of Punjab [(1975) 4 SCC 511 : 1975 SCC (Cri)

601].) As observed by this Court in State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593] normal discrepancies in evidence are those

which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the

time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal,

and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do

not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi v. State of Bihar

[(2002) 6 SCC 81 : 2002 SCC (Cri) 1220] . Accusations have been clearly established against the appellant-accused in the case at hand. The courts

below have categorically indicated the distinguishing features in evidence so far as the acquitted and the convicted accused are concerned.Ã¢â‚¬â€‹

7. It is thus clear that the maxim- falsus in uno, falsus in omnibus has no application in India and witnesses cannot be branded as liars. The Indian

Courts have consistently declined to apply the maxim as a general proposition of law. Even if major portion of the evidence is found to be deficient, in

case residue is sufficient to prove guilt of an accused, his conviction can be maintained. This maxim at the most is merely a rule of caution involving

the question of weight of evidence which a Court may apply in a given set of circumstances but not what may be called a mandatory rule of evidence.

Keeping in mind the Indian context the doctrine if applied could be dangerous. Each case must be examined as to what extent the evidence is worthy

of acceptance. The maxim Ã¢â‚¬" falsus in uno, falsus in omnibus is not a sound rule and definitely not in the Indian context for hardly one comes across

any witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment.

Appreciation of evidence - Need for the Courts to ascertain the truth

8. The Supreme Court would have occasion to assert the need for the Courts to perform the task of ascertaining the truth from the materials before it

and the observations and findings therein would be apt to the present case and therefore reproduced hereunder.

9. In re: State of Uttar Pradesh v. Krishna Master & Ors .(2010) 12 SCC 324 the Supreme Court would refer to the criteria for appreciation of oral

evidence and hold:

Ã¢â‚¬Å“15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral

evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a

ring of truth. Once that impression is found, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the

deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of

the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not

touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance

to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence

as a whole.

16. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the

witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless the

reasons are weighty and formidable, it would not be proper for the appellate court to reject the evidence on the ground of variations or infirmities in the

matter of trivial details. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the

police are meant to be brief statements and could not take place of evidence in the court. Small/Trivial omissions would not justify a finding by court

that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a

shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to

insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the

latter, however, no such benefit may be available to it.

17. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be. These discrepancies are due to

normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and

threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit

foolishly. Therefore, it is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the

chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so

confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the

evidence of eyewitnesses examined in this case proves the prosecution case.Ã¢â‚¬‹

10. In re: State of Karnataka vs. Suvarnamma & Anr. (2015) 1 SCC 323 the Supreme Court would hold:

Ã¢â‚¬Å“10. The court dealing with a criminal trial is to perform the task of ascertaining the truth from the material before it. It has to punish the guilty and

protect the innocent. Burden of proof is on the prosecution and the prosecution has to establish its case beyond reasonable doubt. Much weight cannot

be given to minor discrepancies which are bound to occur on account of difference in perception, loss of memory and other invariable factors. In the

absence of direct evidence, the circumstantial evidence can be the basis of conviction if the circumstances are of conclusive nature and rule out all

reasonable possibilities of the accused being innocent. Once the prosecution probabilises the involvement of the accused but the accused takes a false

plea, such false plea can be taken as an additional circumstance against the accused. Though Article 20(3) of the Constitution incorporates the rule

against self-incrimination, the scope and the content of the said rule does not require the court to ignore the conduct of the accused in not correctly

disclosing the facts within his knowledge. When the accused takes a false plea about the facts exclusively known to him, such circumstance is a vital

additional circumstance against the accused.

11. It is also well settled that though the investigating agency is expected to be fair and efficient, any lapse on its part cannot per se be a ground to

throw out the prosecution case when there is overwhelming evidence to prove the offence.Ã¢â‚¬â€‹

11. In re: Suvarnamma (supra) the Supreme Court would also have occasion to consider its various judgments which may be reproduced hereunder

for clarity on the settled position of law:-

Ã¢â‚¬Å“12. We may refer to the well-known observations from decisions of this Court:

12. 1.Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : (1974) 1 SCR 489] : (SCC p. 801, para 8)

Ã¢â‚¬Å“8. Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits

have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be

applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that

variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the

veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered.

The learned Sessions Judge has at some length dissected the evidence, spun out contradictions and unnatural conduct, and tested with precision the

time and sequence of the events connected with the crime, all on the touchstone of the medical evidence and the post-mortem certificate. Certainly,

the court which has seen the witnesses depose, has a great advantage over the appellate Judge who reads the recorded evidence in cold print, and

regard must be had to this advantage enjoyed by the trial Judge of observing the demeanour and delivery, of reading the straightforwardness and

doubtful candour, rustic naivetÃƒÂ© and clever equivocation, manipulated conformity and ingenious inveracity of persons who swear to the facts before

him. Nevertheless, where a Judge draws his conclusions not so much on the directness or dubiety of the witness while on oath but upon general

probabilities and on expert evidence, the court of appeal is in as good a position to assess or arrive at legitimate conclusions as the court of first

instance. Nor can we make a fetish of the trial Judge's psychic insight.Ã¢â‚¬â€‹

12.2. Bharwada Bhoginbhai Hirjibhai v. State of Gujarat [(1983) 3 SCC 217 : 1983 SCC (Cri) 728] : (SCC pp. 222-23, para 5)

Ã¢â‚¬Å“5. Ã¢â‚¬Â¦ We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor

discrepancies painstakingly highlighted by the learned counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The

reasons are obvious:

(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 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 takes 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 the 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

subconscious 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 himÃ¢â‚¬"perhaps it is a sort of a psychological defence mechanism activated on the spur of

the moment.Ã¢â‚¬â€‹

12.3. Appabhai v. State of Gujarat [1988 Supp SCC 241 : 1988 SCC (Cri) 559] : (SCC pp. 246-47, para 13)

Ã¢â‚¬Å“13. Ã¢â‚¬Â¦ The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not

shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation

should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of

men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a

doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so

as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their

testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise

trustworthy. .Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦.Ã¢â‚¬â€‹

12.4. State of Haryana v. Bhagirath [(1999) 5 SCC 96 : 1999 SCC (Cri) 658] : (SCC pp. 100-01, paras 8-11)

Ã¢â‚¬Å“8. It is nearly impossible in any criminal trial to prove all the elements with a scientific precision. A criminal court could be convinced of the guilt

only beyond the range of a reasonable doubt. Of course, the expression Ã¢â‚¬Å“reasonable doubtÃ¢â‚¬¬ is incapable of definition. Modern thinking is in favour

of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the Judge.

9. Francis Wharton, a celebrated writer on criminal law in the United States has quoted from judicial pronouncements in his book Wharton's Criminal

Evidence (at p. 31, Vol. 1 of the 12th Edn.) as follows:

Ã¢â‚¬Å“It is difficult to define the phrase Ã¢â‚¬Å“reasonable doubtÃ¢â‚¬¬. However, in all criminal cases a careful explanation of the term ought to be given. A

definition often quoted or followed is that given by Chief Justice Shaw in the Webster case [Commonwealth v. Webster, 5 Cush 295 : 59 Mass 295

(1850)] . He says: Ã¢â‚¬Å“It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some

possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the

jurors in that consideration that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.Ã¢â‚¬â€‹Ã¢â‚¬Å“

10. In the treatise The Law of Criminal Evidence authored by H.C. Underhill it is stated (at p. 34, Vol. 1 of the 5th Edn.) thus:

Ã¢â‚¬Å“The doubt to be reasonable must be such a one as an honest, sensible and fair-minded man might, with reason, entertain consistent with a

conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. A vague conjecture or an inference of the

possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence

in a fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there

remains in the minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt.Ã¢â‚¬â€‹

11. In Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : (1974) 1 SCR 489] this Court adopted the same

approach to the principle of benefit of doubt and struck a note of caution that the dangers of exaggerated devotion to the rule of benefit of doubt at the

expense of social defence demand special emphasis in the contemporary context of escalating crime and escape. This Court further said: (SCC p.

799, para 6)

Ã¢â‚¬Å“6. Ã¢â‚¬Â¦ The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs

through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt.Ã¢â‚¬â€‹

12.5. Leela Ram v. State of Haryana [(1999) 9 SCC 525 : 2000 SCC (Cri) 222] : (SCC pp. 532-33, paras 9-10)

Ã¢â‚¬Å“9. Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in

the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be

some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material

dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties

cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of

eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. In this context, reference may be made to

the decision of this Court in State of U.P. v. M.K. Anthony [(1985) 1 SCC 505 : 1985 SCC (Cri) 105] . In para 10 of the Report, this Court observed:

(SCC pp. 514-15)

Ã¢â‚¬Å“10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a

ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the

deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of

the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies

on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence,

attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit

rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general

tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by

the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or

infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of

observation, retention and reproduction differ with individuals.Ã¢â‚¬‹

10. In a very recent decision in Rammi v. State of M.P. [(1999) 8 SCC 649 : 2000 SCC (Cri) 26] this Court observed: (SCC p. 656, para 24)

Ã¢â‚¬Å“24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from

making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts

should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court

is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between

the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.Ã¢â‚¬‹

This Court further observed: (SCC pp. 656-57, paras 25-27)

Ã¢â‚¬Å“25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-

examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the

Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of the section would

indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. The material portion of the section is extracted below:

Ã¢â‚¬Å“155.Impeaching credit of witness.Ã¢â‚¬"The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent

of the court, by the party who calls himÃ¢â‚¬" by proof of former statements inconsistent with any part of his evidence which is liable to be

contradicted;Ã¢â‚¬‹

26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of

the inconsistent statement which is liable to be Ã¢â‚¬Å“contradictedÃ¢â‚¬ would affect the credit of the witness. Section 145 of the Evidence Act also

enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to Ã¢â‚¬Å“contradictÃ¢â‚¬ the witness the cross-

examiner is enjoined to comply with the formality prescribed therein. Section 162 of the Code also permits the cross-examiner to use the previous

statement of the witness (recorded under Section 161 of the Code) for the only limited purpose i.e. to Ã¢â‚¬Å“contradictÃ¢â‚¬‹ the witness.

27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to

discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness (vide

Tahsildar Singh v. State of U.P. [AIR 1959 SC 1012 : 1959 Cri LJ 1231])Ã¢â‚¬â€‹Ã¢â‚¬Å“

12. 6.State of H.P. v. Lekh Raj [(2000) 1 SCC 247 : 2000 SCC (Cri) 147] : (SCC pp. 259-60, para 10)

Ã¢â‚¬Å“10. The High Court appears to have adopted a technical approach in disposing of the appeal filed by the respondents. This Court in State of

Punjab v. Jagir Singh [(1974) 3 SCC 277 : 1973 SCC (Cri) 886] held: (SCC pp. 285-86, para 23)

Ã¢â‚¬Å“23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as

to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of

interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court

has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have

to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time

reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.Ã¢â‚¬â€‹

The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the

accused arraigned. In arriving at a conclusion about the truth, the courts are required to adopt a rational approach and judge the evidence by its

intrinsic worth and the animus of the witnesses. The hypertechnicalities or figment of imagination should not be allowed to divest the court of its

responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping

in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and

order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the

evidence for arriving at the truth. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in

favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by a rational, realistic and genuine approach for

administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a utopian thought but have to be considered as part and

parcel of the human civilisation and the realities of life. The courts cannot ignore the erosion in values of life which are a common feature of the

present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and mankind.Ã¢â‚¬â€‹

12.7 xxxxxxxxxxx

12.8 xxxxxxxxxxx

12.9 Zahira Habibullah Sheikh (5) v. State of Gujarat [(2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] : (SCC pp. 395-97, paras 37 & 40)

Ã¢â‚¬Å“37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant

facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by

their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and

protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect

the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality

of the evidence, oral and circumstantial, and not by an isolated scrutiny.

40. Ã¢â‚¬Â¦ Consequences of defective investigation have been elaborated in Dhanaj Singh v. State of Punjab [(2004) 3 SCC 654 : 2004 SCC (Cri) 851] .

It was observed as follows: (SCC p. 657, paras 5-7)

Ã¢â‚¬Å“5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an

accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is

designedly defective. (See Karnel Singh v. State of M.P. [(1995) 5 SCC 518 : 1995 SCC (Cri) 977])

6. In Paras Yadav v. State of Bihar [(1999) 2 SCC 126 : 1999 SCC (Cri) 104] it was held that if the lapse or omission is committed by the

investigating agency or because of negligence the prosecution evidence is required to be examined dehors such omissions to find out whether the said

evidence is reliable or not, the contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts; otherwise the

designed mischief would be perpetuated and justice would be denied to the complainant party.

7. As was observed in Ram Bihari Yadav v. State of Bihar [(1998) 4 SCC 517 : 1998 SCC (Cri) 1085] if primacy is given to such designed or

negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not

only in the lawenforcing agency but also in the administration of justice. The view was again reiterated in Amar Singh v. Balwinder Singh [(2003) 2

SCC 518 : 2003 SCC (Cri) 641] .Ã¢â‚¬â€‹

12. In re: Bhagwan Jagannath Markad vs. State of Maharashtra(2016) 10 SCC 537 the Supreme Court would hold:

Ã¢â‚¬Å“19. While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep

in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the

core of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when

discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. Section 155 of the

Evidence Act enables the doubt to impeach the credibility of the witness by proof of former inconsistent statement. Section 145 of the Evidence Act

lays down the procedure for contradicting a witness by drawing his attention to the part of the previous statement which is to be used for

contradiction. The former statement should have the effect of discrediting the present statement but merely because the latter statement is at variance

to the former to some extent, it is not enough to be treated as a contradiction. It is not every discrepancy which affects the creditworthiness and the

trustworthiness of a witness. There may at times be exaggeration or embellishment not affecting the credibility. The court has to sift the chaff from

the grain and find out the truth. A statement may be partly rejected or partly accepted [Leela Ram v. State of Haryana, (1999) 9 SCC 525, pp. 532-

35, paras 9-13 : 2000 SCC (Cri) 222] . Want of independent witnesses or unusual behaviour of witnesses of a crime is not enough to reject evidence.

A witness being a close relative is not enough to reject his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The

evidence may be closely scrutinised to assess whether an innocent person is falsely implicated. Mechanical rejection of evidence even of a

Ã¢â‚¬Å“partisanÃ¢â‚¬ or Ã¢â‚¬Å“interestedÃ¢â‚¬ witness may lead to failure of justice. It is well known that principle Ã¢â‚¬Å“falsus in uno, falsus in omnibusÃ¢â‚¬ has no

general acceptability [Gangadhar Behera v. State of Orissa, (2002) 8 SCC 381, pp. 392-93, para Ã¢â‚¬Å“15 : 2003 SCC (Cri) 32] . On the same evidence,

some accused persons may be acquitted while others may be convicted, depending upon the nature of the offence. The court can differentiate the

accused who is acquitted from those who are convicted. A witness may be untruthful in some aspects but the other part of the evidence may be

worthy of acceptance. Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as shock at

the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness.

20. Exaggerated to the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over

the trial not only to ensure that no innocent is punished but also to see that guilty does not escape.Ã¢â‚¬â€‹

13. Certain salutary principles of criminal jurisprudence in appreciating evidence must be noted from the judgments rendered by the Supreme Court.

The Court is mandated to perform the task of ascertaining the truth from the materials before it. The Court has to punish the guilty and protect the

innocent. The investigating agency is required to be fair and efficient. However, any lapse in investigation cannot per se be a ground to discard the

prosecution case when overwhelming evidence is available to prove the offence. It is vital to examine evidence keeping in mind the setting of the

crime. Appreciation of deposition of witnesses must be done keeping in mind this vital aspect. If the scene of crime is rural and the witnesses are

rustics their behavioural pattern and perceptive habits are required to be judged as such. Very sophisticated approach based on unreal assumptions

about human conduct should not be encouraged. Discrepancies and minor contradictions in narrations and embellishments cannot militate against the

veracity of the core of the testimony. However, a trained judicial mind must seek the truth and conformity to probability in the substantial fabric of

testimony delivered. Overmuch importance cannot be given to minor discrepancies. WitnessesÃ¢â‚¬â„¢ do not all have photographic memory and

sometimes, more often than not, are overtaken by events. A witness may also be overawed by the Court atmosphere and the piercing cross-

examination. Nervousness due to the alien surroundings may lead to the witness being confused regarding sequence of events. Witnesses are also

susceptible to filling up details from imagination sometimes on account of the fear of looking foolish or being disbelieved activating the psychological

defence mechanism. Quite often improvements are made to the earlier version during trial in order to give a boost to the prosecution case.

Discrepancies which do not shake the foundation facts may be discarded. Merely because there are embellishments to the version of the witness the

Court should not disbelieve the evidence altogether if it is otherwise trustworthy. It is almost impossible in a criminal trial to prove all the elements with

scientific precision. A Court could be convinced of the guilt only beyond the range of a reasonable doubt. Proof beyond a reasonable doubt is the same

as proof which affords moral certainty to the Judge. Doubt to be reasonable must be of an honest, sensible and fair-minded man supported by reason

with a desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. While appreciating the evidence of a witness the

Court must ascertain whether the evidence read as a whole appears to be truthful. It is only when discrepancies in the evidence of a witness are so

incompatible with the credibility of his version that the Court may discard his evidence. Section 155 of the Indian Evidence Act, 1872 indicates that all

inconsistent statements are not sufficient to impeach the credit of the witness. To contradict a witness must be to discredit the particular version of a

witness. In arriving at the conclusion about the guilt of the accused the Court has to judge the evidence by the yardstick of probabilities, its intrinsic

worth and the animus of witnesses. Even if a major portion of the evidence is deficient, in case the residue is sufficient to prove guilt of the accused

his conviction can be maintained. It is the duty of the Court to separate the grain from the chaff. Exaggerating the rule of benefit of doubt can result in

miscarriage of justice. Just because a close relative is a witness it is not enough to reject her/his testimony if it is otherwise credible. A relation may

not conceal the actual culprit. The evidence can be closely scrutinized to assess whether an innocent person is falsely implicated.

How should the Court deal with cases which violate human dignity in sexual crimes?

14. In re: State of Punjab vs. Gurmit Singh & Ors .(1996) 2 SCC 384 referred to an relied upon by Mr. S. K. Chettri, Learned Assistant Public

Prosecutor for the State the Supreme Court would opine as to how the Court should deal with cases which violates human dignity in sexual crimes and

hold:

Ã¢â‚¬Å“8. Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦... 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 overlook. 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 or 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 on a 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 overlooked 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 v. Chandraprakash Kewalchand Jain [(1990) 1 SCC 550 : 1990 SCC (Cri) 210] Ahmadi, J. (as the Lord Chief Justice then was)

speaking for the Bench summarised the position in the following words: (SCC p. 559, para 16)

Ã¢â‚¬Å“A prosecutrix of a sex offence cannot be put on a 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 on 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.Ã¢â‚¬â€‹

Ã¢â‚¬Å“21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in

all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of

human dignity of the victims of sex crimes. 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 Ã¢â‚¬" 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. 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.Ã¢â‚¬â€‹

15. In re: Bhupinder Sharma v. State of H.P. (2003) 8 SCC 551 the Supreme Court would decry the insistence on corroboration in cases involving of

rape or sexual molestation and hold:

Ã¢â‚¬Å“12. To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice to a

crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is

corroborated in material particulars as in the case of an accomplice to a crime. (See State of Maharashtra v. Chandraprakash Kewalchand Jain

[(1990) 1 SCC 550 : 1990 SCC (Cri) 210 : AIR 1990 SC 658] .) 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? The plea about lack of corroboration has

no substance.Ã¢â‚¬â€‹

16. The Supreme Court thus has categorically held that in cases involving sexual molestation, supposed consideration which have no material effect on

the veracity of the prosecution case or even discrepancies in the statement of prosecutrix should not, unless the discrepancies are such which are fatal

in nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of a woman and her tendency to conceal outrage

of sexual aggression should not be ignored. The testimony of a victim in such cases is vital and unless there are compelling reasons which necessitate

corroboration the Court should find no difficulty to act on the victimÃ¢â‚¬â„¢s testimony alone to convict the accused. The Indian Evidence Act, 1872 does

not mandate that a victimÃ¢â‚¬â„¢s evidence cannot accepted without corroboration.

Appreciation of evidence of a child witness.

17. Mr. U.P. Sharma would also contend that the victim being a child witness it is necessary that her testimony must be approached with great caution

and on examination of the conflicting versions given by the victim as well as her mother (P.W.4) it may not be safe to rely upon the sole testimony of

the victim for the purpose of conviction of the Appellant. To buttress his submission he would rely upon the judgment of Supreme Court In re: Caetano

Piedade Fernandes & Anr. vs. Union Territory of Goa, Daman & Diu Panaji, Goa(1977) 1 SCC 707 . In the year 1977 the Supreme Court would have

occasion to examine a criminal appeal against the judgment of the Additional Judicial Commissioner Goa convicting the Appellant under Section 302

read with Section 34 of the IPC. One of the witnesses of the prosecution was a child witness of 6 years of age. The Supreme Court would hold:

Ã¢â‚¬Å“5. Turning first to the evidence of Xavier, it may be pointed out straightaway that he was a child witness aged only 6 years at the time when he

gave evidence. His evidence is, therefore, to be approached with great caution. He was, according to the prosecution, the only eyewitness to the

crime. We have carefully gone through his evidence, but we are constrained to observe that even after making the utmost allowance in his favour in

view of the fact that he is a child witness, we find it difficult to accept his testimony. There are several contradictions from which his evidence suffers,

such as who had which weapon, but it is not merely on account of these contradictions of a minor character that we are inclined to reject his

evidence. There are serious infirmities affecting his evidence and of them, the most important is that he is supposed to have given the name of

Appellant 2 as the assailant of the deceased even though he had never seen him before the date of the incident. Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦...Ã¢â‚¬â€‹

18. In re: Dattu Ramrao Sakhare & Ors. vs. State of Maharashtra(1997) 5 SCC 341 the Supreme Court in the year 1997 would examine Section 118 of

the Indian Evidence Act, 1872 and the competency and credibility of a child witness and hold:-

Ã¢â‚¬Å“5. The entire prosecution case rested upon the evidence of Sarubai (PW 2) a child witness aged about 10 years. It is, therefore, necessary to find

out as to whether her evidence is corroborated from other evidence on record. A child witness if found competent to depose to the facts and reliable

one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered

under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The

evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should

bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other

competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be

corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the

corroboration to such evidence from other dependable evidence on record. In the light of this well-settled principle we may proceed to consider the

evidence of Sarubai (PW 2).Ã¢â‚¬â€‹

19. In re: Panchhi & Ors. vs. State of U.P. (1998) 7 SCC 177 : the Supreme Court would hold:

Ã¢â‚¬Å“11. Shri R.K. Jain, learned Senior Counsel, contended that it is very risky to place reliance on the evidence of PW 1, he being a child witness.

According to the learned counsel, the evidence of a child witness is generally unworthy of credence. But we do not subscribe to the view that the

evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected,

even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a

child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

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

than of law (vide Prakash v. State of M.P. [(1992) 4 SCC 225 : 1992 SCC (Cri) 853] ; Baby Kandayanathil v. State of Kerala [1993 Supp (3) SCC

667 : 1993 SCC (Cri) 1084] ; Raja Ram Yadav v. State of Bihar [(1996) 9 SCC 287 : 1996 SCC (Cri) 1004 : AIR 1996 SC 1613] and Dattu Ramrao

Sakhare v. State of Maharashtra [(1997) 5 SCC 341 : 1997 SCC (Cri) 685]).Ã¢â‚¬‹

20. In re: Suryanarayan vs. State of Karnataka (2001) 9 SCC 129 the Supreme Court would examine a case in which a child witness would be the sole

witness and hold:

Ã¢â‚¬Å“5. Admittedly, Bhavya (PW 2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not

given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other

person as an eyewitness. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such

evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the

statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a

child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of crossexamination and

there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a

child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for

discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who,

under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating

the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding

tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony

of such witness for the purposes of holding the accused guilty or not.Ã¢â‚¬‹

21. In re: Bhagwan Singh & Ors. vs. State of M.P. (2003) 3 SCC 21 the Supreme Court would examine the evidence of a child witness of a tender age

of 6 years in a case relating to a conviction of the Appellants therein for offences under Section 302/34, 396, 460, 404 IPC and Section 11/13 of the

M.P. (Dacoity Vihavaran Kshetra) Adhiniyam, 1981 and hold:

Ã¢â‚¬Å“19. The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper

opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony

can be relied upon without other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to

tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony. (See Panchhi v. State of U.P. [(1998) 7

SCC 177 : 1998 SCC (Cri) 1561])

20. In the case before us, the trial Judge has recorded the demeanour of the child. The child was vacillating in the course of his deposition. From a

child of six years of age, absolute consistency in deposition cannot be expected but if it appears that there was a possibility of his being tutored, the

court should be careful in relying on his evidence. We have already noted above that Agyaram, maternal uncle of the child, who first met him after the

incident and took him along with his younger brothers to his father's village, has not been produced by the prosecution as a witness in the court. It was

most unlikely that if the child had seen the incident and identified the three accused, he would not have narrated it to Agyaram as the latter would have

naturally inquired about the same. The conduct of his father Radheyshyam who was produced as a witness by the prosecution is also unnatural that

before recording the statement of the child by the police, he made no enquiries from the child.Ã¢â‚¬â€‹

Ã¢â‚¬Å“22. It is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incident and

before there were any possibility of coaching and tutoring him. (See paras 14-15 of State of Assam v. Mafizuddin Ahmed [(1983) 2 SCC 14 : 1983

SCC (Cri) 325] .) In that case evidence of a child witness was appreciated and held unreliable thus: (SCC p. 20)

Ã¢â‚¬Å“14. The other direct evidence is the deposition of PW 7, the son of the deceased, a lad of 7 years. The High Court has observed in its judgment:

Ã¢â‚¬Å“Ã¢â‚¬Â¦ the evidence of a child witness is always dangerous unless it is available immediately after the occurrence and before there were any

possibility of coaching and tutoring.Ã¢â‚¬â€‹

15. A bare perusal of the deposition of PW 7 convinces us that he was vacillating throughout and has deposed as he was asked to depose either by his

nana or by his own uncle. It is true that we cannot expect much consistency in the deposition of this witness who was only a lad of 7 years. But from

the tenor of his deposition it is evident that he was not a free agent and has been tutored at all stages by someone or the other.Ã¢â‚¬â€‹

22. In re: State of H.P. vs. Suresh Kumar (2009) 16 SCC 697 the Supreme Court would find the evidence of two witnesses firm and convincing. It

would also find no reason as to why a child of age 5 to 12 would get an innocent person named for an offence which was undisputedly committed on

her.

23. In re: Yogesh Singh vs. Mahabeer Singh (2017) 11 SCC 195 the Supreme Court would hold:

Ã¢â‚¬Å“Testimony of child witnesses

22. It is well settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of

practical wisdom than of law. (See Prakash v. State of M.P. [Prakash v. State of M.P., (1992) 4 SCC 225 : 1992 SCC (Cri) 853] , Baby

Kandayanathil v. State of Kerala [Baby Kandayanathil v. State of Kerala, 1993 Supp (3) SCC 667 : 1993 SCC (Cri) 1084] , Raja Ram Yadav v. State

of Bihar [Raja Ram Yadav v. State of Bihar, (1996) 9 SCC 287 : 1996 SCC (Cri) 1004] , Dattu Ramrao Sakhare v. State of Maharashtra [Dattu

Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341 : 1997 SCC (Cri) 685] , State of U.P. v. Ashok Dixit [State of U.P. v. Ashok Dixit,

(2000) 3 SCC 70 : 2000 SCC (Cri) 579] and Suryanarayana v. State of Karnataka [Suryanarayana v. State of Karnataka, (2001) 9 SCC 129 : 2002

SCC (Cri) 413] .)

23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child

witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and

thus a child witness is an easy prey to tutoring. (Vide Panchhi v. State of U.P. [Panchhi v. State of U.P., (1998) 7 SCC 177 : 1998 SCC (Cri) 1561]

)Ã¢â‚¬â€‹

24. A perusal of the judgments rendered by the Supreme Court and referred to by Mr. U. P. Sharma it is noticed that all the said judgments related to

child witnesses who were not victims of crime.

25. In re: Satish v. State of Haryana (2018) 11 SCC 300 the Supreme Court in the year 2018 would confirm the conviction of a woman for the murder

of a husband based on the sole testimony of her 12 year old son who witnessed the murder and would observe:

Ã¢â‚¬Å“8. PW 2 was the son of the appellant Anita. He was a school-going child aged 12 years. Both, the trial court and the High Court have found him

to be reliable and convincing. We do not find anything from his evidence to make it suspicious as the result of any tutoring by PW 4. The witness has

clearly mentioned that his mother was present in the room when the assault was taking place and she asked them to leave the room on the bidding of

one of the assailants. We do find it a little strange, according to normal human behaviour, that at the dead of night, the appellant after witnessing an

assault on her own husband, did not rush to the house of PW 1 for informing the same and sent her minor son for the purpose. The fact that she

created no commotion by shouting and seeking help reinforces the prosecution case because of her unnatural conduct. We also cannot lose sight of

the fact that the child witness was not deposing against another family member or a stranger, but his own mother. It would call for courage and

conviction to name his own mother, as the child was grown up enough to understand the matter as a witness to a murder.

9. The witness has clearly identified the other two appellants also in the dock, having seen them during the occurrence. The number of injuries on the

deceased is itself indicative that the assault lasted for some time enabling identification and did not end in a flash. We, therefore, find no reason to

interfere with the conviction.Ã¢â‚¬â€‹

26. Certain salutary observations of the Supreme Court whilst appreciating the evidence of a child witness must be taken note of. The law recognises

the child as a competent witness. The evidence of a child witness can be considered under Section 118 of the Indian Evidence Act, 1872 provided that

such witness is able to understand the questions and able to give rational answers thereof. Keeping this in mind it is incumbent upon the Court to put

questions to them to gauge effectively the childÃ¢â‚¬â„¢s power of comprehension and mental state to speak the truth before the Court. The demeanour

of the child witness must also be ascertained and noted. The Court therefore, should always record their opinion regarding the childÃ¢â‚¬â„¢s ability to

understand the duty to speak the truth. A child witness if found competent to depose to the facts and a reliable one, such evidence could be the basis

of conviction. The tender age of a child witness makes them susceptible to be swayed by what others tell them and may fall easy prey to tutoring and

thus, although not as a general rule to be applied in every case but as a precautionary measure in cases in which there is an element of uncertainty,

corroboration may be sought for and the evidence evaluated carefully. This is a rule of prudence and the evidence of child witness cannot be rejected

per se on the presumption that they are likely to have been tutored. The tender age of a child alone cannot be a ground to discard the evidence of a

child.

Appreciation of evidence of a child victim.

27. In re: Rameshwar vs. The State of RajasthanA IR 1952 SC 54 ; Vivian Bose, J. of the Supreme Court would have occasion to examine the

evidence of a young girl, eight years of age who had been raped by the Appellant therein and hold:

Ã¢â‚¬Å“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([A.I.R. 1944 Nag. 363.]) is typical of that point of view. On the other hand,

the Privy Council has said in Mohamed Sugal Esa v. The King([A.I.R. 1946 P.C. 3 at 5.]) 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.

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([[1916] 2 K.B. 658.]) 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. 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 accomplice, should in itself be sufficient to sustain conviction. As Lord Reading saysÃ¢â‚¬

Ã¢â‚¬Å“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.Ã¢â‚¬ All that is required is that there must be Ã¢â‚¬Å“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.Ã¢â‚¬â€‹

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 thatÃ¢â‚¬

Ã¢â‚¬Å“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 allÃ¢â‚¬Â¦It would not at all tend to show that the party accused participated in

it.Ã¢â‚¬â€‹

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. 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, Ã¢â‚¬Å“many crimes which are usually committed between accomplices in

secret, such as incest, offences with femalesÃ¢â‚¬â€‹ (or unnatural offences) Ã¢â‚¬Å“could never be brought to justice.Ã¢â‚¬â€‹

28. In re: State of H.P. vs. Shree Kant Shekari (2004) 8 SCC 153 the Supreme Court would hold:

Ã¢â‚¬Å“21. 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 on a higher pedestal than an injured witness. In

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

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 suffice.Ã¢â‚¬â€‹

29. In re: Mohd. Kalam vs. State of Bihar (2008) 7 SCC 257 the Supreme Court would hold:

Ã¢â‚¬Å“7. In Panchhi v. State of U.P. [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561] it was observed by this Court that the evidence of a child witness

cannot be rejected outright but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed

by what others tell him and thus a child witness is an easy prey to tutoring. The court has to assess as to whether the statement of the victim before

the court is the voluntary expression of the victim and that she was not under the influence of others.Ã¢â‚¬â€‹

30. In re: Mohd. Imran Khan v. State Government (NCT of Delhi) (2011) 10 SCC 192 the Supreme Court in the year 2011 would hold:

Ã¢â‚¬Å“Evidence of the prosecutrix

22. It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The

prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with

the same amount of suspicion as that of an accomplice. The Evidence Act, 1872 (hereinafter called Ã¢â‚¬Å“the Evidence ActÃ¢â‚¬), nowhere says that her

evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of the

Evidence Act 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. 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. 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.

23. The court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. Rape is not merely a physical

assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the

testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses

may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence. (Vide State of

Maharashtra v. Chandraprakash Kewalchand Jain [(1990) 1 SCC 550 : 1990 SCC (Cri) 210 : AIR 1990 SC 658] , State of U.P. v. Pappu [(2005) 3

SCC 594 : 2005 SCC (Cri) 780 : AIR 2005 SC 1248] and Vijay v. State of M.P. [(2010) 8 SCC 191 : (2010) 3 SCC (Cri) 639])

24. Thus, the law that emerges on the issue is to the effect that statement of the prosecutrix, if found to be worthy of credence and reliable, requires

no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.

25. The trial court came to the conclusion that there was no reason to disbelieve the prosecutrix, as no self-respecting girl would level a false charge

of rape against anyone by staking her own honour. The evidence of rape stood fully corroborated by the medical evidence. The MLC of the

prosecutrix, Ext. PW-2/A was duly supported by Dr. Reeta Rastogi (PW 2). This view of the trial court stands fortified by the judgment of this Court

in State of Punjab v. Gurmit Singh [(1996) 2 SCC 384 : 1996 SCC (Cri) 316 : AIR 1996 SC 1393] , wherein this Court observed that: (SCC p. 395,

para 8)

Ã¢â‚¬Å“8. Ã¢â‚¬Â¦ the courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no selfrespecting 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.Ã¢â‚¬â€‹

26. Similarly, in Wahid Khan v. State of M.P. [(2010) 2 SCC 9 : (2010) 1 SCC (Cri) 1208] , it has been observed as under: (SCC p. 13, para 17)

Ã¢â‚¬Å“17. It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully

aware of the repercussions flowing therefrom. If she is found to be false, she would be looked at by the society with contempt throughout her life. For

an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be

extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the

danger of being ostracised by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward-looking as

the western countries are.Ã¢â‚¬â€‹

31. The settled law which emerges from the conspectus of the afore-quoted judgments of the Supreme Court is that a victim of sexual assault is not

an accomplice to the crime but a victim of another personÃ¢â‚¬â„¢s lust. The victim stands at a higher pedestal than even an injured witness as she/he

suffers from emotional injury. In cases of injured witnesses there is injury on the physical form, while in the cases of an injured victim the injury is

physical, psychological and emotional. A child victim is a competent witness. The Court may convict the accused on the sole testimony of a child

victim if it has no reason to doubt its truthfulness and veracity. Corroboration is only a matter or prudence and not a rule. In a case relating to a child

victim corroboration can be dispensed with if, in the particular circumstances of a case the Court is satisfied that it is safe to rely upon the sole

testimony of a child victim. The advisability of corroboration should always be in the mind of the Court as a matter of prudence. It is not a rule of

practice that in every case there must be corroboration before a conviction. Where the Court deems it proper to seek corroboration it must be kept in

mind that it is not necessary that there should be independent confirmation of every material circumstance. Some additional evidence rendering it

probable may be required to come to the conclusion that it is reasonably safe to act upon the testimony of the child victim as to the guilt of the

accused. The corroboration need not be direct and circumstantial evidence is sufficient if it connects the accused to the crime. Since the victim is a

child and therefore may be susceptible to be swayed by what others tell them the Court must remain conscious and assess whether the statement of a

child victim is the voluntary expression of the victim and that she was not under influence of others.

The POCSO Act.

32. The POCSO Act is a special and landmark legislation addressing the issue of child sexual abuse in India which had been shrouded in secrecy. Due

to negative social conditioning there is hesitation in reporting sexual abuse on children. Child sexual abuse if not dealt appropriately the central purpose

of the POCSO Act i.e. the interest of the child would be jeopardised. It must be well remembered that in every case of child sexual abuse is the story

of the child who has been abused. Who else can relate the story better than the child herself/himself ? Due to the stigma attached as well as the fright

of the unknown it is extremely difficult for a child to come out in the open to narrate the story of her/his abuse. The central narrative and account of

the crime often comes from the child victim. The child victim and the accused are, in most instances, the only ones present when the crime is

committed. In such situation to insist upon yet another direct witness to corroborate the child victimÃ¢â‚¬â„¢s story would result in equating the victim to

an accomplice in crime. It is also to be remembered that a skilful cross-examination is almost certain to confuse a child victim even while telling the

truth which can lead to inconsistencies in their testimony.

Peculiar perspective of the child victim can also affect their recollection but the CourtsÃ¢â‚¬â„¢ duty to assess the evidence in context can only reveal the

actual truth. To unnecessarily stigmatise the evidence of the child victim without proof of influence of tutoring would not fulfil the purpose of the

POCSO Act sought to be achieved. Tutoring is always a question of fact which requires evidence to prove it. There is no reason to presume that a

child would falsely implicate the accused merely because of her/his tender age. However, to the contrary, the POCSO Act prescribes a mandatory

presumption where a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3,5,7 and 9 thereof that such

person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

33. Over the years the world view regarding childrenÃ¢â‚¬â„¢s testimony seems to be changing. The presumption that children are more prone to false

memory reports than adults and therefore their testimony less reliable no longer holds good and it is said that according to current scientific evidence

the principle that childrenÃ¢â‚¬â„¢s testimony is necessarily more polluted with false memories than adults seems to be quite indefensible. In fact it is now

quite convincingly argued that adults are more susceptible to false memories compared to children as children depend more heavily on that part of the

mind which records what actually happened while adults depends on another part of the mind which records the meaning of what happened. The

presumptive unreliability of a child witness and more so a child victim solely on the basis of their tender age therefore, cannot be a general rule for it is

equally true that adults are also susceptible to external influences. Today children are perceived to be generally more honest than adult witnesses.

Credibility assessment of honesty, memory, suggestibility and communication ability must be applied to all witnesses regardless of age. The

development of childrenÃ¢â‚¬â„¢s memory as compared to that of adults may require this assessment to be a little different for a child. This is where the

Court must ensure proper evaluation on examination of the proved circumstances. Continues training of Special Judges manning the POCSO Act

jurisdiction on children psychology amongst other things may lead to deeper understanding of a childÃ¢â‚¬â„¢s behavioral pattern and mental state to

effectively analyze their evidence correctly and with absolute certainty.

Consideration.

34. The FIR dated 29.04.2015 which set in motion the criminal investigation against the Appellant was lodged by the victimÃ¢â‚¬â„¢s mother (P.W.4)

stating that the Appellant had molested her daughter-the victim on 28.04.2015. The investigation resulted in filing of a charge-sheet dated 22.07.2015

concluding the commission of offences under section 354 A (i) of the IPC read with Section 8 of the POCSO Act. It was alleged that the Appellant

touched the private part of the victim and fondled her body with sexual intent. On 25.09.2015 the Learned Special Judge heard the Learned Counsels

for the prosecution as well as the defence on charge. On 19.10.2015 the Learned Special Judge on examination of the charge-sheet and hearing the

Learned Counsel for the prosecution as well as the defense framed two charges under Section 9(l), (m) of the POCSO Act punishable under Section

10 thereof and under Section 354 IPC. Pursuant thereto the trial commenced and summonses were issued to prosecution witnesses for the

examination including the victim. On 18.11.2015 the victim was examined. In the victimÃ¢â‚¬â„¢s examination she also deposed that the Appellant had put

his finger inside her vagina and thus the Learned Special Judge opined that the charges framed are required to be altered from section 9(l), (m)/10 of

the POCSO Act to Section 5 (l), (m)/6 of the POCSO Act and from Section 354 IPC to Section 376 (2) (i), (n) of the IPC. Therefore, on 19.11.2011

the four charges were framed. The first charge alleged commission of aggravated sexual assault on the victim aged about 8 years on 28.04.2015 by

repeatedly putting his hands all over her body including her private parts with sexual intent and thereby committing offence under Section 9 (l), (m) of

the POCSO Act and punishable under Section 10 thereof. The second charge alleged use of criminal force against the victim intending to outrage her

modesty on 28.04.2015 by repeatedly putting his hands on her body including her private parts/molesting her and thereby committing an offence

punishable under Section 354 IPC. The third charge alleged commission of aggravated penetrative sexual assault on the victim on 28.04.2015 by

repeatedly putting his finger inside her vagina and thereby committing offences under Section 5 (l), (m) of the POCSO Act and punishable under

Section 6 thereof. The last charge alleged commission of repeated rape on the victim on 28.04.2015 by inserting his finger inside the victimÃ¢â‚¬â„¢s

vagina repeatedly and thereby committing offence under Section 376 (2) IPC. On the Appellant pleading not guilty the trial ensued. Eight witnesses

including the Investigation Officer were examined and cross-examined. The victim was examined twice, once on 18.11.2015 as P.W.1 and thereafter

on 19.12.2015 as P.W.3. Dr. S. N. Adhikari was also examined as P.W.1 although the victim had already been examined earlier on 18.11.2015 as

P.W.1. The Learned Special Judge must be cautious during trial and while allotting witness numbers for identification and convenience. On

examination of the two depositions of the victim recorded on 18.11.2015 and 19.12.2015 although the examination-in-chief is identical the cross-

examinations have minor variances. The Appellant was then examined under Section 313 Cr.P.C. and after hearing the Learned Counsel for the

parties the Learned Special Judge vide judgment dated 29.12.2016 acquitted the Appellant under Section 6/10 of the POCSO Act as well as Section

376 (2) of IPC but convicted him under Section 354 IPC as well as under Section 8 of the POCSO Act. The Appellant is aggrieved by the order of

conviction and hence the present appeal. The State is however, not aggrieved by the acquittal. The order on sentence dated 29.12.2016 is also under

challenge by which the Appellant has been sentenced to undergo simple imprisonment of 3 years under Section 8 of the POCSO Act and to pay a fine

of â¹10,000/- and in default of payment of fine to undergo further simple imprisonment of 3 months. The Appellant has also been sentenced to undergo

simple imprisonment of 1 year under Section 354 IPC and to pay a fine of Rs.5000/- and in default of the payment of fine to undergo further simple

imprisonment of 1 month. Both the sentences has been directed to be run concurrently and the period of imprisonment undergone by the Appellant if

any was directed to be set of against the period of imprisonment imposed.

35. The victim (P.W.3) in her deposition would state :

Ã¢â‚¬Å“I know accused Damber Singh bajey who is present before this Court. He has a shop at Mazigaon and I often used to buy sweets from there. In

fact, my father had told me that whenever I wanted sweets I could go and take it from the accusedÃ¢â‚¬s shop. On many occasions the accused put his

hands all over my body including my chest and pishab garney (vagina). He used to put his finger inside my pishab garney. I did not tell about it to

anyone. It was only recently that I told my mother about it.Ã¢â‚¬â€‹

36. On examination of the evidence of the victim as well as her mother (P.W.4) the Learned Special Judge would hold:

Ã¢â‚¬Å“17. PW3 is the minor victim and PW4 is the mother of the minor victim. In her evidence minor victim has deposed that as her father had told her

to go to the shop of the accused whenever she wanted to have sweets, she used to visit the shop of the accused. She has deposed that on many

occasions accused put his hands all over her body including her chest and in her private parts. She has further deposed that accused used to put his

finger inside her vagina. The mother of minor victim has also deposed that when she found â¹500/- note in the bag of the minor victim she inquired

about the same and the minor victim told her that it was given by the accused. She has also deposed that minor victim told her that the accused used

to put his fingers in her vagina PW3 and 4 have also proved that their statements were recorded by a Judge at Gyalshing and they have proved their

respective signatures in their statements marked Exhibits 2 and Exhibit-6. In cross-examination Ld. Defence Counsel has not been able to demolished

the above evidence of PWs3 and 4.

18. In the case in hand, the medical report of minor victim marked Exhibit 1 and Exhibit10 does not suggest that minor victim had sustained any injury

in her private parts. There appears no injuries in the vagina of the minor victim which is clear from the medical reports. In the statement given before

the Ld. Judicial Magistrate, West (PW 2) also the minor victim and her mother have not deposed regarding insertion of finger by the accused.

Although minor victim and her mother have deposed regarding insertion of finger in the vagina by the accused, the fact that minor victim (PW 3) and

her mother (PW4) have not stated about insertion of finger into the vagina of the minor victim before Ld. JM, West coupled with the fact that there is

no injury on the private parts of minor victim, it is amply clear that the prosecution has failed to establish commission of penetrative sexual assault by

the accused.

19. However, it is clearly established from the evidence of minor victim (PW 3) and her mother (PW 4) that the accused used to put his hand all over

the body of the minor victim and he used to fondle and touch the body and the private parts of minor victim. This evidence is not demolished in cross-

examination. The evidence of minor victim and her mother regarding the molestation by the accused remains consistent and it is supported by their

statement recorded by PW 2 under section 164 Cr.P.C. Even in the FIR marked Exhibit-8 which is proved by the mother of minor victim (PW 4), the

registering officer (PW7) and the IO of the case (PW8), it is clearly stated that minor victim was molested by the accused and the contents of FIR

duly supports the evidence of PW 3 and PW 4. The fabric of prosecution case as to molestation of the minor victim by the accused is not destroyed

and there is nothing on record to doubt the evidence of the minor victim and her mother so far as molestation of minor victim by the accused is

concerned.Ã¢â‚¬â€‹

37. The primary submission of Mr. U.P. Sharma is that the victimÃ¢â‚¬â„¢s statement is not reliable. To make good the said submission he would take this

Court to the statements of victim recorded under Section 164 Cr.P.C. and point out that in the said statement the victim had nowhere stated about

insertion of the AppellantÃ¢â‚¬â„¢s fingers in her vagina. However, it is pointed out that in the deposition before the Court the victim had categorically

stated so. Mr. U.P. Sharma would also submit that from the deposition of the victim it is quite evident that she was not speaking the truth since she

had in her examination-in-chief as well as in cross-examination stated that she had narrated about the incident to the Ã¢â‚¬Å“Judge MadamÃ¢â‚¬ as well as

the police although from the record of the proceeding under Section 164 Cr.P.C. it is seen that she had not stated anything of that to the Learned

Magistrate (P.W.2) and from the crossexamination of the Investigating Officer (P.W.8) it is also evident that the victim had not in fact stated so either

in the statement recorded by the police under Section 161 Cr.P.C. or by the Learned Magistrate under Section 164 Cr.P.C. Mr. U.P. Sharma would

draw the attention of this Court to the findings of the Learned Special Judge more particularly to paragraphs 17 and 18 thereof and submit that having

found the evidence of the victim regarding insertion of the finger in the vagina of the victim to be unreliable the evidence of the same victim regarding

the Appellant touching her all over her body including her vagina cannot also be believed and ought to be rejected. Mr. U. P. Sharma would also

contend that the victim alleges in her deposition that there was repeated assault on her by the Appellant by insertion of his finger on her vagina. He

would submit if it was so than there would be evidence of that when she was examined two days later. However, the evidence of the Doctor (P.W.1)

read with the Medical Report (exhibit-10) does not reflect that there was any injury on her person including her vagina.

38. The Learned Special Judge has not rejected the evidence of the victim as unreliable. The Learned Special Judge has held that the prosecution has

failed to establish the commission of penetrative sexual assault by the Appellant. The evidence of the child victim fulfilling the ingredients of the

offence remains unimpeached. On examination of the victimÃ¢â‚¬â„¢s deposition it is noticed that the defence has failed to cross-examine the victim

regarding the discrepancy in the statement made by her before the Learned Magistrate under Section 164 Cr.P.C. and the examination-in-chief in

spite of two opportunities to crossexamine the victim. In fact to a suggestion made by the defence the victim has asserted that she had told the

Ã¢â‚¬Å“Judge MadamÃ¢â‚¬â€ as well as the police that the Appellant had inserted his finger in her vagina. A statement of a witness including a victim recorded

under Section 164 Cr.P.C. is not a substantive piece of evidence whereas the deposition in Court tested by cross-examination is. The Learned Special

Judge who has had the opportunity to conduct the trial and observe the demeanor of the witnesses has come to a conclusion that the prosecution has

established the commission of offences under Section 8 of the POCSO Act and Section 354 IPC but has failed to establish the commission of

penetrative sexual assault by the Appellant. The evidence of the victim that the Appellant on many occasions put his hands all over her body including

her chest and vagina has been consistent during the investigation and the trial. The Learned Special Judge has believed the deposition of the victim and

found corroboration from the deposition of the victimÃ¢â‚¬â„¢s mother (P.W.4) and the FIR (exhibit-8). The victim as well as the victimÃ¢â‚¬â„¢s mother

(P.W.4) hails from a humble background. The evidence suggests that the victimÃ¢â‚¬â„¢s mother (P.W.4) and her father were living separately. The

victim, a student of class IV and aged about 8 years was staying with the mother. Social conditioning is an important area for appreciating evidence

given by witnesses. The FIR dated 29.04.2015 lodged by the victimÃ¢â‚¬â„¢s mother (P.W.4) immediately after the incident alleged that the victim had

been molested by the Appellant.

The spontaneity of the FIR itself assures the credibility of the evidence of the victim. Most disclosures in child sexual abuse cases are made to family

members. It was natural of the victim to have disclosed about the incident to the mother who immediately lodged the FIR. The victim was examined

by the Learned Magistrate on 07.05.2015 and her statement recorded under Section 164 Cr.P.C. after just about a week from the lodging of the FIR

in which she categorically alleged that the Appellant put his hand on her private part. Thereafter the victim appeared in Court on 18.11.2015 and

deposed that the Appellant had on many occasions put his hand all over her body including her chest and vagina. The child victim also identified the

Appellant as Damber Singh Ã¢â‚¬Å“bajeyÃ¢â‚¬ (grandfather in Nepali). The records reveal that the victim was examined and cross-examined again on

19.12.2015 on which date she once again deposed that the Appellant had on many occasions put his hands all over her body including her chest and

vagina. She once again identified the Appellant. The identification of the Appellant by the victim as well as other witnesses is not disputed. It is also

not in dispute that the Appellant has a shop from where the victim would often buy sweets. Although the Appellant has denied the factum of the

victim having known him in his statement under Section 313 Cr.P.C. it is the defence of the Appellant that the victim used to take away money from

his shop without his knowledge and when the school informed the victimÃ¢â‚¬â„¢s mother (P.W.4) about the victim having so much money she falsely

implicated the accused. This was a fact asserted by the Appellant and therefore, it was incumbent upon the Appellant to prove it. No evidence

whatsoever has been put forth even to probabilise the said assertion of false implication.

The false defence must also be considered and would provide a vital link. On the very day of the lodging of the FIR the victim was produced before

the Medical Officer, Dr. S. N. Adhikari who also states in cross-examination that the victim had told him that the Appellant had tried to touch her

private part with his finger. The evidence of the Learned Magistrate (P.W.2) who recorded the statement of the victim under Section 164 Cr.P.C.

assures the Court that the victim had also voluntarily given the statement implicating the Appellant of having tried to put his hand on her private part.

There is an element of truth in the natural statement of the victimÃ¢â‚¬â„¢s mother (P.W.4) as to how she first realized that the victim had been sexually

abused by the Appellant by putting his fingers in her vagina. There is no denial by the defence with regard to the same although opportunity of cross-

examination had been availed. In fact there is no denial of the assertion of the victimÃ¢â‚¬â„¢s mother (P.W.4) that immediately after she was informed

by the victim about the incident she had confronted the Appellant after having been pointed out by the victim about the incident and also slapped him.

The victimÃ¢â‚¬â„¢s deposition is adequately corroborated.

39. It is true that P.W.5 the Gynaecologist who examined the victim and gave his Medical Report (exhibit-10) did not find anything to suggest recent

vaginal or anal penetration nor did Dr. S. N. Adhikari find any injury on the person of the victim including her private parts. However, this Court is

reluctant to surmise therefore, that the evidence of the victim is false on the ground that if the victim had been sexually assaulted repeatedly by the

Appellant on her vagina there ought to have been injury. The deposition of the victim relied upon by the Learned Special Judge and found true to

convict the Appellant is the allegation that the Appellant had put his hands all over her body including her chest and vagina. Mere touch would not

result in injury but coupled with sexual intent it would bring home the offence.

40. The Learned Special Judge has correctly scrutinized the evidence carefully and separated the grain from the chaff. The substratum of the

prosecution case and the material parts of the evidence has been believed by the Learned Special Judge. The version of insertion of the

AppellantÃ¢â‚¬â„¢s finger into the vagina of the victim stated for the first time in Court by the victim has been discarded. In such circumstances it may be

extremely difficult to apply the maxim-falsus in uno, falsus in omnibus and ignore the consistent evidence of the victim as well as the victimÃ¢â‚¬â„¢s

mother (P.W.4) from the time of the lodging of the FIR till the end of the trial that it was the Appellant who had on many occasions put his hands all

over the victimÃ¢â‚¬â„¢s body including her chest and vagina. The said maxim-falsus in uno, falsus in omnibus is Ã¢â‚¬Å“neither a sound rule of law nor a rule

of practiceÃ¢â‚¬â€‹.

41. Mr. U. P. Sharma would rely upon a judgment of the Supreme Court rendered on appreciation of the sole testimony of a victim which suffered

from substantial infirmities and inconsistencies and held that on the basis of that conviction cannot be sustained. In re: Sudhir & Anr. vs. State of

Madhya Pradesh (1985) 1 SCC 559 the Supreme Court would hold:

Ã¢â‚¬Å“3. Immediately after the assault Kamal went to a police station but, according to his own admission, though enquiries were made of him at the

police station as to what had happened to him and how he came to receive the injuries, he did not tell the police as to who assaulted him. A few hours

thereafter, he lodged his first information report which is described in the proceedings as a Ã¢â‚¬Å“village complaintÃ¢â‚¬â€. The story narrated by him in the

FIR is that the appellants and one of the other three accused, namely, Premlal, came from behind; that Appellant 1 stabbed him on his back two times;

and that, Appellant 2 and Premlal assaulted him with a danda. The evidence of the doctor shows that there were no injuries on Kamal's person which

could be caused by a danda. In fact, Kamal admitted in his evidence that Appellant 2 did not beat him with a danda and that he had only beaten him

with fists. Kamal has also stated in his evidence, which is contrary to his statement in the FIR, that he had not seen as to which of the accused

persons had caused the knife injuries to him. He gave a plausible explanation of his inability to identify his assailants by saying that since injuries were

caused to him from behind, he could not identify the persons who caused those injuries. Suprisingly, Kamal virtually jettisoned the FIR by saying that

he had stated that two persons were armed with knives while two others had lathis. He admitted that he had not mentioned their names in the FIR,

and that, all that he had disclosed when the FIR was recorded was that he was assaulted with a knife.

4. In view of these infirmities in the evidence of Kamal, whose testimony alone could sustain the conviction of the appellants, the appeal has to be

allowed and the order of conviction and sentence in regard to both the appellants has to be set aside. The bail bonds of the appellants are cancelled.Ã¢â‚¬â€‹

42. The minor discrepancies brought out by clever crossexamination in the present case cannot be equated to substantial infirmities in the evidence of

the victim as pointed out in the afore-quoted paragraphs 3 and 4 of the judgment of the Supreme Court in re: Sudhir & Anr. (supra).

43. Mr. U.P. Sharma would also contend that the Doctor who examined the victim in cross-examination very clearly stated that the victim had stated

before him that the Appellant had tried to touch her private part with his fingers and not that he had actually done so. Dr. S. N. Adhikari was the

Medical Officer at the Primary Health Centre who examined the victim on 29.04.2015 for a medical examination with an alleged history of having

been molested by an elderly person on 28.04.2015. He exhibited his Medical Report (exhibit-1). In the said medical report Dr. S. N. Adhikari had

recorded that Ã¢â‚¬Å“as per the statement of victim, the accused person tried to touch her private parts with his fingerÃ¢â‚¬. In cross-examination the said

Dr. S. N. Adhikari admitted that the victim had stated before him that the Appellant had tried to touch her private part with his finger. Quite cleverly

the defence did not confront the said witness with the discrepancy in the evidence of the victim. When there is a variance between direct evidence of

the victim tested by cross-examination and the evidence of a witness who heard the victim it is the direct evidence which must be given due

weightage. In any event even if the version of Dr. S. N. Adhikari in cross-examination is to be considered alone it would still not take the Appellant

out of the mischief of Section 8 of the POCSO Act as the definition of Ã¢â‚¬Å“Sexual AssaultÃ¢â‚¬ in Section 7 of the POCSO Act would also include the

act of trying to touch the victims private part with his finger which would be covered by the later part of the said Section i.e. Ã¢â‚¬Å“Ã¢â‚¬Â¦.or does any other

act with sexual intent which involves physical contact without penetrationÃ¢â‚¬. The act of trying to touch the victimÃ¢â‚¬â„¢s private part may also involve

physical contact with sexual intent. The act of the Appellant, an elderly shop owner of trying to touch an eight year old girl child victimÃ¢â‚¬â„¢s private

part with his finger when she would visit his shop would itself establish the sexual intent. Section 7 of the POCSO Act reads thus:

Ã¢â‚¬Å“7. Sexual Assault.- Whoever, with Sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis,

anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said

to commit sexual assault.Ã¢â‚¬â€‹

44. Mr. U.P. Sharma would also submit that material witness in the present case have not been examined by the prosecution creating serious doubt in

the prosecution case. He would refer to the statement of the victim recorded under section 164 Cr.P.C. and point out that the victim had stated before

the Learned Magistrate that she had come to meet her father who lived near the river side and that it was her father who introduced her to the

Appellant. She had also stated that she had reported the incident to her father. However, the father of the victim was not examined by the

prosecution. Furthermore, it is submitted that the school authorities from whom the entire story for the prosecution unfolded have also not been

examined by the prosecution. It is submitted by Mr. U. P. Sharma that the victim in her deposition had categorically stated when the Appellant

sexually assaulted her she had cried. However, strangely not a single person from the vicinity or otherwise heard the victimÃ¢â‚¬â„¢s cries.

45. A perusal of the list of witnesses to the charge-sheet filed under Section 173 Cr.P.C. proposed to be examined by the prosecution would reflect

that the father of the victim was not named therein. Thus, it is clear that the prosecution never projected that the evidence of the father would be

material to establish the case against the Appellant. P.W.8 was the Investigating Officer. She was cross examined by the defence. The defence did

not crossexamine the Investigating Officer on the aspect of withholding of the evidence of the father of the victim as being a material witness. The

Principal of the School in which the victim was studying at the relevant time was examined as (P.W.6.). No question was put to the said Principal to

even probabilise the defence version that it was because of the teachers of his school having discovered â‚¹1000/- with the victim that the victim made

a false accusation against the Appellant. The investigation of the case commenced after the lodging of the FIR (exhibit-9) by the victimÃ¢â‚¬â„¢s mother

(P.W.4.). In the said FIR it was alleged that the Appellant had molested her 8 years old daughterthe victim. The prosecution version was that on one

particular day, the victimÃ¢â‚¬â„¢s mother (P.W.4) noticed that her daughter was frequently passing urine which seemed unusual to her, so she asked her

daughter-the victim if she was having any problem. The victim refused to tell anything. The mother checked the childÃ¢â‚¬â„¢s school bag wherefrom she

found two â‚¹500/- notes. When scolded, the victim first said the money came from her father but the mother did not believe her and beat her

whereafter the victim narrated the incident of how she was physically abused by the Appellant. It was not the case of the prosecution therefore, that

the story of the crime unfolded from the teachers at the victim school finding â‚¹1000/- with the victim and reporting it to the victimÃ¢â‚¬â„¢s mother

(P.W.4). This version was a defence version sought to be introduced during the cross-examination of the victim. Similarly, it was the defence version

introduced in cross-examination by a suggestion that the victim would cry out for help during the time when the Appellant used to abuse her. It is trite

that one who alleges must prove the alleged fact. Section 101 of the Indian Evidence Act, 1872 harnesses the burden of proving the existence of facts

which he asserts on the person who asserts the said fact. It was not the case of the prosecution that there were number of shops in the vicinity where

the offence took place and therefore the cry of the victim during the abuse ought to have been heard by people. It was the defence who desired the

Court to give judgment on the existence of the said facts which they asserted and thus it was incumbent upon the defence to discharge the said

burden. This burden cannot be harnessed upon the prosecution which did not assert the said facts. A similar question of the failure of the prosecution

to examine purported material witnesses came up before the Supreme Court in re: Manjit Singh & Anr. vs. State of Punjab & Anr(2013) 12 SCC 746.

. The Supreme Court would examine various judgments rendered by it on the said issue and hold:

Ã¢â‚¬Å“17. The first submission of Mr U.U. Lalit is that the nonexamination of two crucial witnesses, namely, Didar Singh and Malkiat Singh creates a

great doubt in the prosecution version which makes it absolutely incredible. On a perusal of the material on record it is clear that Didar Singh had

come to the spot along with Rajinderpal Singh, PW 2, and had arranged a car to take the deceased and the injured to the hospital and at his instance

the site plan was prepared. As far as Malkiat Singh is concerned, the assertion is that he had carried the deceased and the injured to the hospital but

the evidence in this regard is extremely sketchy. Be that as it may, thrust of the matter is whether non-examination of these two witnesses materially

affects the trustworthiness of the prosecution version or to put it differently, whether it really creates a dent in the testimony of the other eyewitnesses

and the surrounding circumstances on which the prosecution has placed reliance to bring home the guilt of the accused.

18. In this context, a passage from Masalti v. State of U.P. [AIR 1965 SC 202 : (1965) 1 Cri LJ 226] may fruitfully be reproduced: (AIR p. 209, para

12)

Ã¢â‚¬Å“12. In the present case, however, we are satisfied that there is no substance in the contention which Mr Sawhney seeks to raise before us. It is

not unknown that where serious offences like the present are committed and a large number of accused persons are tried, attempts are made either to

terrorise or win over prosecution witnesses, and if the prosecutor honestly and bona fide believes that some of his witnesses have been won over, it

would be unreasonable to insist that he must tender such witnesses before the court. It is undoubtedly the duty of the prosecution to lay before the

court all material evidence available to it which is necessary for unfolding its case; but it would be unsound to lay down as a general rule that every

witness must be examined even though his evidence may not be very material or even if it is known that he has been won over or terrorised.Ã¢â‚¬â€‹

19. In Namdeo v. State of Maharashtra [(2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773] it has been laid down that: (SCC p. 161, para 28)

Ã¢â‚¬Å“28. Ã¢â‚¬Â¦ Neither the legislature (Section 134 of the Evidence Act, 1872) nor the judiciary mandates that there must be particular number of

witnesses to record an order of conviction against the accused. The legal system [in this country] has always laid emphasis on value, weight and

quality of evidence rather than on quantity, multiplicity or plurality of witnesses.Ã¢â‚¬â€‹

20. In Bipin Kumar Mondal v. State of W.B. [(2010) 12 SCC 91 : (2011) 2 SCC (Cri) 150] the Court reiterated the principle stating that (SCC p. 99,

para 31) it is not the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test

is whether the evidence has a ring of truth, is cogent, credible, trustworthy and reliable.

21. In State of H.P. v. Gian Chand [(2001) 6 SCC 71 : 2001 SCC (Cri) 980] it has been ruled that: (SCC p. 81, para 14)

Ã¢â‚¬Å“14. Ã¢â‚¬Â¦ Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record

howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution

should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being

examined in the court and were yet withheld by the prosecution.Ã¢â‚¬â€‹

22. In Takhaji Hiraji v. Thakore Kubersing Chamansing [(2001) 6 SCC 145 : 2001 SCC (Cri) 1070] the Court has opined that: (SCC p. 155, para 19)

Ã¢â‚¬Å“19. Ã¢â‚¬Â¦ It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not

convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by

examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such

a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been

examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other

witnesses would only be a repetition or duplication of the evidence already adduced, nonexamination of such other witnesses may not be material. In

such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itselfÃ¢â‚¬" whether in the facts and

circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet

was being withheld from the court? If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already

examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of

non-examination of other witnesses.Ã¢â‚¬â€‹

23. In Dahari v. State of U.P. [(2012) 10 SCC 256 : (2013) 1 SCC (Cri) 22] while discussing about the non-examination of material witness, the Court

has ruled that when the witness was not the only competent witness who would have been fully capable of explaining the factual situation correctly,

and the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be

drawn against the prosecution. Similar principle has been reiterated in Harivadan Babubhai Patel v. State of Gujarat [(2013) 7 SCC 45 : (2013) 3 SCC

(Cri) 27] .

24. From the aforesaid exposition of law, it is quite clear that it is not the number and quantity, but the quality that is material. It is the duty of the Court

to consider the trustworthiness of evidence on record which inspires confidence and the same has to be accepted and acted upon and in such a

situation no adverse inference should be drawn from the fact of non-examination of other witnesses. That apart, it is also to be seen whether such

non-examination of a witness would carry the matter further so as to affect the evidence of other witnesses and if the evidence of a witness is really

not essential to the unfolding of the prosecution case, it cannot be considered a material witness (see State of U.P. v. Iftikhar Khan [State of U.P. v.

Iftikhar Khan, (1973) 1 SCC 512 : 1973 SCC (Cri) 384]Ã¢â‚¬â€‹

46. The evidence of the father of the victim would at the most be a reiteration of what the victim told her mother who has been examined as a

prosecution witness. This Court is of the view that the evidence on record is trustworthy and inspires confidence and the same has to be accepted and

acted upon and in such a situation no adverse inference should be drawn from the fact of nonexamination of other witnesses. Examination of the

father of the victim, the teachers of the school where the victim was studying who allegedly discovered â‚¹1000/- with the victim and the alleged

persons allegedly in the vicinity of the place of occurrence would not carry the matter further so as to affect the evidence of the victim and her mother

as well as other witnesses examined by the prosecution. This Court is also of the view that the evidence of the persons introduced by the defence in

crossexamination of prosecution witnesses are really not essential to the unfolding of the prosecution case and therefore, cannot be considered as

material witnesses.

47. Mr. U.P. Sharma would further submit that the victimÃ¢â‚¬â„¢s deposition read with the deposition of her mother makes it amply clear that she has

made conflicting and diverse statement regarding the money in her possession by giving an explanation to the mother at one point of time as having

been given by the father and yet in another blaming the Appellant for it. It is submitted that this also makes it evident that the victim was quite in the

habit of making false statement and cumulatively the effect of it would be to render the evidence of the victim unreliable. Let us thus examine the said

evidence of the victim as well as her mother and analyze if it would make any material difference in the prosecution case. The victim did not state

anything about the money during her examination-in-chief. However, in cross-examination the victim admitted the suggestion of the defence and

stated:-

Ã¢â‚¬Å“It is true that during the time of the above incident the school authorities had found â‚¹1000/- with me and they intimated my mother about it. It is

true that my mother had also found â‚¹1000/- in my bag at home. Witness volunteer to say, Ã¢â‚¬Å“the accused used to give me money after sexually

abusing me. It was later found with me in the school and at my house. He gave money on many occasions.Ã¢â‚¬ I was asked about this case by the

police and the Judge Madam. It is true that I had told the police and the Judge Madam that the accused used to give me money after abusing me on

different occasions. It is true that during the time when the accused used to abuse me I used to cry out for help. Besides my mother I had not divulged

about the incident to anyone. It is true that I had stated to the Judge Madam that I had divulged about the incident to my father who, however, did not

listen to me. It is true that when my mother initially asked me why the accused had given me money I told her that he used to abuse me and for that

he gave me money. It is true I had also stated the said fact to the police and the Judge Madam. It is not a fact that the accused person did not abuse

me sexually. It is true that initially I had not divulged about the incident to my mother. It was only when she started hitting me on finding money in my

bag that I told her that the accused had abused me.Ã¢â‚¬â€‹

48. The subsequent cross-examination of the victim on 19.12.2015 being almost identical and having no material difference from the one quoted above

it is not felt necessary to quote the said deposition too. However, this Court has examined and considered the said cross-examination also. The

deposition of the victimÃ¢â‚¬â„¢s mother (P.W.4) was recorded by the Learned Special Judge. In the said deposition contrary to the mandate of Section

33(7) of the POCSO Act the name of the victim has been disclosed which is illegal and unwarranted. The said deposition is required to be quoted

herein. This Court has therefore, withheld the name of the victim as well as her father found in the deposition of the victimÃ¢â‚¬â„¢s mother (P.W.4) to

ensure that the identity of child is not disclosed. The victimÃ¢â‚¬â„¢s mother (P.W.4) in her examination-in-chief itself deposed that:-

Ã, Ã¢â‚¬Å“On 28.04.2015, sometime during the daytime I saw xxx (name of the victim withheld) frequently to the toilet. I asked her if she has any

problem. She did not tell me anything. After sometime when I was checking her bag I found two â‚¹500/- notes in her bag. I asked her about it on

which she told me that her father xxx (name of the father withheld) had given it to her. Since I knew the financial condition of my husband, with

whom I have already separated, I told xxx (name of the victim withheld) that her father could not have given the said money. As she was reluctant to

tell me anything I started beating her on which she told me that one bajey had given her the said money. She also told me that the said bajey used to

put his fingers in her pishab garney. I then told her to show me that bajey on which she took me to the shop of the accused and pointed towards the

accused. Even in front of the accused xxx (name of the victim withheld) told me that he was the one to give her money after putting his fingers in her

pishab garney. I then charged the accused and also slapped him. Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦. Prior to the above incident I had once found a â‚¹1,000/- note in the

hands of xxx (name of the victim withheld). On inquiry she told me that it had been given by her father. I did not inquire further. Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Ã¢â‚¬â¢

49. The victimÃ¢â‚¬â„¢s mother (P.W.4) in cross-examination would state:

Ã¢â‚¬Å“Cross-examination on behalf of the accused

Ã¢â‚¬Å“It is true that on the relevant day (28.04.2015) my daughter came home at around 1:30 p.m. and went to the toilet. It is true that I spent the two

â‚¹500/- notes which were found inside the bag of my daughter on 28.04.2015. It is true that when I found the â‚¹1,000/- note on earlier occasion. I did

not beat my daughter. I asked her about it on which she told me that it was given to her by her father/my husband. It is true that I had stated before

the Judge Madam and the police that my daughter had told me that the accused had inserted his finger into her pishab garney. It is true that the school

authorities had intimated me about my daughter carrying â‚¹1000 in school (on earlier occasion). It is not a fact that on finding the two â‚¹500/- notes I

had straightaway asked my daughter if she had been sexually assaulted by the accused on which she simply answered in the affirmative. It is not a

fact that after lodging the report (Exhibit-8) my daughter told me that she had in fact been taking money from the shop of the accused without his

knowledge. It is not a fact that I am deposing falsely.Ã¢â‚¬â€‹

50. The evidence of the victim during cross-examination regarding the money suggests that during the time of the incident the school authorities had

found â‚¹1,000/- with her and informed the mother about it. The evidence of the victimÃ¢â‚¬â„¢s mother (P.W.4) also corroborates the evidence of the

victim during cross-examination that in fact the school authorities had found â‚¹1,000/- with her and informed the mother about it. The evidence of the

victim in crossexamination also suggests that the mother had also found â‚¹1,000/- in her bag at home. The witness volunteered to say that the Appellant

used to give her money after sexually abusing her and that it was later found with her both in school and at her home. The victim also volunteered to

depose that the Appellant had given money to her on many occasions. The defence did not even take a denial of the aforesaid deposition of the victim.

On a suggestion made by the defence the victim in fact stated that she had told the police as well as the Ã¢â‚¬Å“Judge MadamÃ¢â‚¬ that the Appellant used

to give her money after abusing her on different occasions. The suggestion makes it evident that there was no denial of either the sexual abuse or the

giving of money to the victim by the Appellant after the abuse. Mr. U. P. Sharma would submit that the very fact that the Investigating Officer as well

as the Learned Magistrate who recorded the Section 164 Cr.P.C. statement of the victim did not record the factum of the giving of money by the

Appellant to the victim in the statements recorded would amply reflect that in fact the victim had not made such a statement regarding money either to

the police or to the Learned Magistrate.

The victim was cross-examined by the defence. However, the defence did not deem it necessary to confront the victim with her statement recorded

under Section 161 as well as Section 164 Cr.P.C. The Learned Magistrate who recorded the statement of the victim was examined as P.W.2. She

was cross-examined. She stated that the victim did not mention that the Appellant used to give her money after alleged sexual abuse on her. The

Investigating Officer who conducted the investigation was also cross-examined. She also agreed that the victim had not stated about â‚¹500/- notes

being found in her bag in her statement recorded under Section 161 Cr.P.C. The failure of the defence to confront the victim with the purported

statement recorded under Section 161 Cr.P.C. or the Section 164 Cr.P.C. statement recorded by the Learned Magistrate deprives this Court from

knowing the truth as to why the victim did not state about the money while giving the said statements. The examination of the deposition of the victim

reflects that she did not state anything about money even during her examination-in-chief in Court. However, on the intrusive cross-examination by the

defence she narrated about the money. The victimÃ¢â‚¬â„¢s mother (P.W.4) however, has very cogently deposed that she had discovered two â‚¹500/-

notes in her bag which initially the victim said was given by her father but later on admitted that the said money was in fact given by the Appellant to

the victim after he had sexually abused her. The cross-examination of the victimÃ¢â‚¬â„¢s mother (P.W.4) did not demolish this version. In fact the

victimÃ¢â‚¬â„¢s mother (P.W.4) asserted the truthfulness of the suggestion of the defence that the said two â‚¹500/- notes which were found inside the

victimÃ¢â‚¬â„¢s bag on 28.04.2015 were spent by her. On the suggestion of the defence the victimÃ¢â‚¬â„¢s mother (P.W.4) also asserted that it was true

that the school authorities had intimated her about her daughter carrying â‚¹1,000/- in school on earlier occasion.

The substratum of the prosecution case found proved by the Learned Special Judge is the commission of the offence of sexual assault on the victim as

well as the commission of the offence of assault or criminal force to woman with intent to outrage her modesty. It is the consistent evidence of the

victim that the Appellant had on many occasions put his hands all over her body including her chest and vagina. The defence has not been able to

demolish these facts. The establishment of the factum of the Appellant giving money to the victim after the commission of the crime only fortifies the

case of sexual abuse if proved. The failure to recover the money is of no consequence as on the suggestion of the defence the victimÃ¢â‚¬â„¢s mother

(P.W.4) deposed that she had used the same. The victimÃ¢â‚¬â„¢s hesitation to state about the money and who gave it to her and when confronted by the

victimÃ¢â‚¬â„¢s mother (P.W.4) is understandable. As per the evidence available the victim having been given the money by the Appellant after the

sexual abuse had not disclosed it to her mother. It is quite evident that the victim of sexual abuse by the Appellant having received money was

reluctant to disclose the fact. The minor discrepancies appearing in the evidence of the victim and her mother about the money does not shake the

foundational facts establishing the ingredients of the offence of sexual assault or assault on the victim with intent to outrage her modesty.

51. The Learned Special Judge has also found that the evidence put forth by the prosecution was sufficient to establish a case against the Appellant

under Section 354 IPC. Section 354 IPC reads thus:-

Ã¢â‚¬Å“354. Assault or criminal force to woman with intent to outrage her modesty.Ã¢â‚¬"Whoever assaults or uses criminal force to any woman, intending

to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term

which may extend to two years, or with fine, or with both.Ã¢â‚¬â€‹

52. The ingredients required to be established to bring an accused within the mischief of Section 354 IPC are:- (i) Assault or use of criminal force on a

woman. (ii) The said assault or use of criminal force must be intended to outrage or knowing it to be likely that he will thereby outrage her modesty.

53. Section 10 IPC provides :

Ã¢â‚¬Å“10. Ã¢â‚¬Å“ManÃ¢â‚¬, Ã¢â‚¬Å“WomanÃ¢â‚¬. Ã¢â‚¬" The word Ã¢â‚¬Å“manÃ¢â‚¬ denotes a male human being of any age; the word Ã¢â‚¬Å“womanÃ¢â‚¬ denotes a female

human being of any age.Ã¢â‚¬â€‹

54. Section 351 IPC defines assault as :

Ã¢â‚¬Å“351. Assault.Ã¢â‚¬"Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause

any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an

assault.

Explanation.Ã¢â‚¬"Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning

as may make those gestures or preparations amount to an assault.Ã¢â‚¬â€‹

55. In re: Raju Pandurang Mahale v. State of Maharashtra (2004) 4 SCC 371 the Supreme Court would hold:

Ã, Ã¢â‚¬Å“11. Coming to the question as to whether Section 354 of the Act has any application, it is to be noted that the provision makes penal the assault

or use of criminal force on a woman to outrage her modesty. The essential ingredients of offence under Section 354 IPC are:

(a) That the assault must be on a woman.

(b) That the accused must have used criminal force on her.

(c) That the criminal force must have been used on the woman intending thereby to outrage her modesty.

12. What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the

accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an

attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman,

removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that

modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As

indicated above, the word Ã¢â‚¬Å“modestyÃ¢â‚¬ is not defined in IPC. The Shorter Oxford Dictionary (3rd Edn.) defines the word Ã¢â‚¬Å“modestyÃ¢â‚¬ in relation

to a woman as follows:

Ã¢â‚¬Å“Decorous in manner and conduct; not forward or lewd; Shamefast; Scrupulously chaste.Ã¢â‚¬â€‹

13. Modesty is defined as the quality of being modest; and in relation to a woman, Ã¢â‚¬Å“womanly propriety of behaviour; scrupulous chastity of thought,

speech and conductÃ¢â‚¬. It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. As observed by

Justice Patteson in R. v. James Lloyd [(1836) 7 C&P 317 : 173 ER 141] :

In order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the

prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on

her part. The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on

the part of the accused which would show that he was just going to have sexual connection with her.

14. Webster's Third New International Dictionary of the English language defines modesty as Ã¢â‚¬Å“freedom from coarseness, indelicacy or indecency:

a regard for propriety in dress, speech or conductÃ¢â‚¬. In the Oxford English Dictionary (1933 Edn.), the meaning of the word Ã¢â‚¬Å“modestyÃ¢â‚¬ is given

as Ã¢â‚¬Å“womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding

from instinctive aversion to impure or coarse suggestionsÃ¢â‚¬â€‹.

15. In State of Punjab v. Major Singh [AIR 1967 SC 63 : 1967 Cri LJ 1] a question arose whether a female child of sevenand-a-half months could be

said to be possessed of Ã¢â‚¬Å“modestyÃ¢â‚¬ which could be outraged. In answering the above question the majority view was that when any act done to or

in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of Section 354

IPC. Needless to say, the Ã¢â‚¬Å“common notions of mankindÃ¢â‚¬ referred to have to be gauged by contemporary societal standards. It was further

observed in the said case that the essence of a woman's modesty is her sex and from her very birth she possesses the modesty which is the attribute

of her sex. From the above dictionary meaning of Ã¢â‚¬Å“modestyÃ¢â‚¬ and the interpretation given to that word by this Court in Major Singh case [AIR

1967 SC 63 : 1967 Cri LJ 1] the ultimate test for ascertaining whether modesty has been outraged is whether the action of the offender is such as

could be perceived as one which is capable of shocking the sense of decency of a woman. The above position was noted in Rupan Deol Bajaj v.

Kanwar Pal Singh Gill [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059] . When the above test is applied in the present case, keeping in view the total fact

situation, the inevitable conclusion is that the acts of the accused-appellant and the concrete role he consistently played from the beginning proved

combination of persons and minds as well and as such amounted to Ã¢â‚¬Å“outraging of her modestyÃ¢â‚¬ for it was an affront to the normal sense of

feminine decency. It is further to be noted that Section 34 has been rightly pressed into service in the case to fasten guilt on the accusedappellant, for

the active assistance he rendered and the role played by him, at all times sharing the common intention with A4 and A-2 as well, till they completed

effectively the crime of which the others were also found guilty.Ã¢â‚¬â€‹

56. The evidence of the victim clearly satisfies the commission of assault on the victim to outrage her modesty punishable under Section 354 IPC.

57. This Court is of the firm view that the judgment of conviction dated 29.12.2016 sought to be assailed by the Appellant need no interference.

Accordingly the judgment dated 29.12.2016 passed by the Learned Special Judge, of the POCSO Act South Sikkim at Namchi in Sessions Trial

(POCSO) Case No.16 of 2015 is upheld. However, the provision of Section 71 IPC must be taken into consideration which provides where anything is

an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the

offender shall not be punished with the more severe punishment than the Court which tries it could award for any one of such offences. A perusal of

the evidence proved by the prosecution makes it amply clear that for the same set of facts the Appellant has been sentenced under Section 8 of the

POCSO Act as well as Section 354 IPC which is not permissible. The Learned Special Judge has sentenced the Appellant to undergo simple

imprisonment of 3 years under Section 8 of the POCSO Act and to pay a fine of â‚¹10,000/- and in default of payment of fine to undergo further simple

imprisonment of 3 months which is the more severe punishment compared to the sentence imposed under Section 354 IPC to undergo simple

imprisonment of 1 year and to pay a fine of â‚¹5000/- and in default of payment of fine to undergo further simple imprisonment of 1 month. In view of

Section 71 IPC it is impermissible to impose the sentence under Section 354 IPC since the Learned Special Judge has imposed the sentence under

Section 8 of the POCSO Act which is more severe and therefore, the sentence under Section 354 IPC is set aside. The period of imprisonment

undergone by the Appellant is directed to be set of against the period of imprisonment imposed. The order on sentence dated 29.12.2016 is modified to

the above extent. This Court has examined the order on sentence dated 29.12.2016 relating to the offence punishable under Section 8 of the POCSO

Act and is also of the view that the sentence passed against the Appellant is commensurate with the gravity of the offence proved and hence requires

no interference. The said order dated 29.12.2016 to the said extent is also upheld. The Appellant is in jail and shall continue there to serve out the

remaining sentence as modified.

58. The Learned Special Judge even while coming to the conclusion of the guilt of the Appellant and convicting the Appellant for the offences

punishable under Section 8 of the POCSO Act and Section 354 IPC has not determined the quantum of compensation which ought to have been

granted to the victim under the Sikkim Compensation to Victims or his Dependents Schemes, 2011. The Sikkim State Legal Services Authority is

therefore directed to pay an amount of â‚¹50,000/- to the victim as compensation. The said amount of â‚¹50,000/- shall be kept in fixed deposit in the

name of the victim payable on her attaining majority.