IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 189 of 2014

Judgment Reserved on : 8.9.2015

Date of Decision : September 30, 2015

Subhash …Appellant

Versus

State of Himachal Pradesh …Respondent

Coram:

The Hon'ble Mr. Justice Sanjay Karol, Judge.

The Hon'ble Mr. Justice P. S. Rana, Judge.

Whether approved for reporting?[1] *Yes.*

For the appellant : Mr. Lovneesh Kanwar, Advocate, as Legal Aid Counsel for the appellant-accused.

For the respondent : Mr. Ashok Chaudhary, Addl. Advocate General with Mr. J. S. Guleria, Asstt. A.G. for the appellant-State.

Sanjay Karol, J.

Assailing the judgment dated 21.11.2013/29.11.2013, passed by learned Sessions Judge, Solan, District Solan, H.P., in Sessions Trial No. 18-S/7 of

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Whether reporters of Local Papers may be allowed to see the judgment?

2011, titled as State of Himachal Pradesh vs. Subhash, whereby accused stands convicted of the offence punishable under the provisions of Section 376 (2) (f) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and pay fine of ₹20,000/- and in default thereof to further undergo simple imprisonment for a period of two years, present jail appeal has been preferred by him under the provisions of Section 374 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that as a tenant of Ram Lal (DW-1), Rinku (PW-3) was residing at Sanwara, P.S. Dharampur, with his wife Sonu Devi (PW-2) and two children i.e. the prosecutrix, aged eight and son aged six. Rinku was running a dhaba at Sanwara. Accused was also a tenant of Ram Lal and residing in the very same building. Rinku was occupying one room and the adjoining room was occupied by the accused who was working in a dhaba at Dharampur and his wife was employed in a School at Sanawar. On 24.7.2011, prosecutrix and her brother went to the room of the accused for watching television, where accused subjected her to rape. At about 3.00 p.m. when mother of

the prosecutrix noticed her taking off her underwear having some dark spots, which smelled of urine, prosecutrix disclosed that by taking off her underwear, accused inserted his finger and after rubbing his penis against her private parts urinated. Sonu Devi narrated the incident to her husband Rinku and police was informed. SI Kshama Dutt (PW-15) went to the spot and recorded statement of Sonu Devi (Ext. PW-2/A) under the provisions of Section 154 Cr.P.C., which led to registration of F.I.R. No. 117 of 2011, dated 25.7.2011 (Ext. PW-12/A) against the accused at Police Station Dharampur, Distt. Solan, H.P., under the provisions of Section 376(2)/511 of the Indian Penal Code. Prosecutrix was got medically examined from Dr. Simmi Sharma (PW-13) who issued MLC (Ext. PW-13/A). The vaginal smear slide, vaginal swab and underwear of the prosecutrix were sealed and sent for chemical analysis. The blood samples for DNA profiling of the prosecutrix as well as the accused were taken by the police. Police also took into possession bed sheet, underwear of the accused and his semen sample. MHC Praveen Kumar (PW-12) kept the samples in safe custody. The samples were sent to the

Forensic Science Laboratory, Junga and as per report (Ext. PW-14/A) human semen was found on the bed sheet, underwear of the prosecutrix, underwear of the accused as also vaginal swab and vaginal smear slide. Record pertaining to the age of the prosecutrix was taken by the police. The radiological age of the prosecutrix was found to be below 12 years. Opinion (Ext. PW-1/A) of the Radiologist Dr. J. P. Kaushik (PW-1) was taken on record. With the completion of investigation, which revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 376 (2)(f) of the Indian Penal Code to which he did not plead guilty and claimed trial.

4. In order to prove its case, in all, prosecution examined as many as sixteen witnesses and statement of the accused under Section 313 Cr. P.C. recorded, in which he took plea of innocence and false implication. Accused also examined one witness in his defence.

5. Appreciating the material on record, including the testimonies of the witnesses, trial Court convicted the accused of the charged offences and sentenced as aforesaid. Hence, the present appeal.

6. We have heard Mr. Lovneesh Kanwar, learned Legal Aid Counsel, on behalf of the appellant as also Mr. Ashok Chaudhary learned Addl. A.G. and Mr. J. S. Guleria, learned Asstt. A.G., on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find the findings returned by the trial Court to be based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice. Prosecution has been able to prove its case, beyond reasonable doubt.

7. Through the testimony of Ram Lal (DW-1), accused wants the Court to believe that on 24.7.2011, at the time of the incident he was not home and the

prosecutrix and her brother were playing out in the open. Hence no incident in question took place. Having perused the same, we are of the considered view that no such fact can even be remotely inferred. Ram Lal is running a grocery shop in the very same building in which he had let out rooms to the accused and father of the prosecutrix. As per this witness, accused works at a Dhaba in Dharampur and his wife is working in the Pinegrove School at Sanawar. He admits that the tenanted premises are below his shop. His version that prosecutrix was playing with her brother cannot be said to be inspiring in confidence for he admits to be a busy shop keeper and he is not sure as to whether at the relevant time, children were playing in front of his shop which incidentally happens to be a National Highway. Also he admits that from his shop, rooms occupied by the tenants are not visible. From his shop he is not in a position to ascertain what would transpire in the tenanted premises. He is not able to disclose the place of work of the accused. Presence of the accused at Dharampur throughout the day, could have been proved by the employer. Incidentally none came forward to depose such fact. Also even from the

suggestion put by the accused such defence cannot be said to have been probablized.

8. The incident took place in the afternoon/evening on 24.7.2011. At midnight (00:50 hours), matter was brought to the notice of the police and F.I.R. (Ext. PW-12/A) registered. There is no delay. During the night intervening 24th and 25th July, 2011, prosecutrix was got medically examined from Dr. Simmi Sharma (PW-13) who, on physical examination observed tenderness in the vaginal parts. Seminal fluid was also present on labia minora. She issued MLC (Ext. PW-13/A). Initially prosecutrix disclosed to the Doctor that accused had inserted his finger inside her vagina. However, such version stands clarified by the Doctor that the child was subjected to sexual assault. Human semen was detected on the underwear of the prosecutrix. Also blood detected on the vulval swab and vaginal smear was due to insertion of penis in the private parts of the prosecutrix, resulting into trauma in the vaginal part. In her uncontroverted testimony she has clarified that efforts of inserting penis in the private part was made. She

has explained sexual assault to be a wider term, inclusive of sexual intercourse.

9. Independent of medical evidence, the question which needs to be considered is as to whether the ocular version, through the testimonies of the prosecutrix and her mother, inspires confidence or not.

10. At this juncture we deem it appropriate to deal with the statement of law on the point.

11. In *Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23.10.2014, In Re,* (2014) 4 SCC 786, the Apex Court has highlighted the need for having an effective State police machinery for curbing the menace of rape, for such crime is not only in contravention of the domestic laws, but is also in direct breach of obligations under International Law, treaties whereof stand ratified by the State, which is under an obligation to protect its women from any kind of discrimination.

12. The Apex Court has highlighted the need for prompt disposal of cases of crime against women and

children. (*Rajkumar v. State of Madhya Pradesh,* (2014) 5 SCC 353).

13. In *Shyam Narain v. State (NCT of Delhi)*, (2013) 7 SCC 77, the Apex Court held as under:

> "27. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court."

14. In *Narender Kumar v. State (NCT of Delhi)*, (2012) 7 SCC 171, the apex Court has cautioned the Court to adopt the following approach:

> "The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character."

15. The Apex Court in *Munna v. State of Madhya Pradesh,* (2014) 10 SCC 254, has reiterated the principle that testimony of prosecutrix is almost at par with an immediate witness and can be acted upon without corroboration.

16. The Apex Court in *Madan Gopal Makkad v. Naval Dubey and another,* (1992) 3 SCC 204, has held as under:

> "34. A medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by explaining the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the court.

35. Nariman, J. in *Queen v. Ahmed Ally,* (1989) 11 Sutherland WR Cr 25, while expressing his view a on medical evidence has observed as follows:

> "THE evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion."

36. Fazal Ali, J. in *Pratap Misra v. State of Orissa*, (1977 3 SCC 41, has stated thus:

> "... [I]t is well settled that the medical jurisprudence is not an exact science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused ... as to the exact time when the appellants may have had sexual intercourse with the prosecutrix."

37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty-first Edition) at page 369 which reads thus:

> "THUS to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that

> there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one. "

38. In Parikh 's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

> "SEXUAL intercourse. In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

39. In Encyclopedia of Crime and Justice (Vol. 4 at page 1356, it is stated:

> "... [E]ven slight penetration is sufficient and emission is unnecessary."

40. In Halsbury's Statutes of England and Wales, (Fourth Edition), Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse within the meaning of S. 44 of the Sexual Offences Act, 1956. Vide (1) *R. v. Hughes*, (1841) 9 C&P 752, (2) *R. v. Lines and R. v. Nicholls*, (1844) 1 Car & Kir 393.

41. See also Harris's Criminal Law, (Twenty-second Edition) at page 465.

42. In American Jurisprudence, it is stated that slight penetration is sufficient to complete the crime of rape. Code 263 of Penal Code of Califomia reads thus:

> "RAPE; essentials Penetration sufficient. The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."

43. The First Explanation to S. 375 of Indian Penal Code which defines 'Rape' reads thus:

> "EXPLANATION.PENETRATION is sufficient to constitute the sexual intercourse necessary to the offence of rape."
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> 44. In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High courts have taken a consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial. Reference may be made to (1) *Natha v. Emperor,* (1925) 26 CrLJ 1185, *(2) Abdul Majid v. Emperor*, AIR 1927 Lah 735(2), *(3) Mst. Jantan v. Emperor,* (1934) 36 Punj LR 35, *(4) Ghanashyam Misra v. State,* 1957 CriLJ 469*, (5) Das Bernard v. State*, 1974 CriLJ 1098. In *re Anthony,* AIR 1960 Mad 308 it has been held that while there must be penetration in the technical sense, the slightest penetration would be sufficient and a complete act of sexual intercourse is not at all necessary. In Gour's The Penal Law of India, 6th Edn. 1955 (Vol. II), page 1678, it is observed, "Even vulval penetration has been held to be sufficient for a conviction of rape." ”

17. Also, it is a settled principle of law that absence of injuries on the external or internal parts of the victim by itself cannot be a reason to disbelieve the testimony of the prosecutrix. (See: *Mukesh v. State of Chhattisgarh,* (2014) 10 SC 327); *State of Haryana v. Basti Ram,* (2013) 4 SCC 200; *O.M. Baby (Dead) by Legal Representative v. State of Keral,* (2012) 11 SCC 362; and *State of U.P. v. Chhotey Lal,* (2011) 2 SCC 550).

18. The Apex Court in *Puran Chand v. State of Himachal Pradesh,* (2014) 5 SCC 689, observed that even

non-rupture of hymen itself would be of no consequence and rape could be held to be proved even if there is slight penetration.

19. Mere fact that hymen is intact or that there is no actual wound on the private part of the prosecutrix is not conclusive of the fact that prosecutrix was not subjected to rape. (*Radhakrishna Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688).

20. Reiterating its earlier view in *Mohd. Iqbal v. State of Jharkhand,* (2013) 14 SCC 481; *Narender Kumar v. State (NCT of Delh),* (2012) 7 SCC 171, the Apex Court in *Mukesh v. State of Chhattisgarh,* (2014) 10 SC 327, has held that sole testimony of prosecutrix is sufficient to establish commission of rape, even in the absence of any corroborative evidence.

21. In *Radhakrishna Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688, the apex Court held as under:

> “33. It will be useful to refer to the judgment of this Court in the case of O.M. Baby v. State of Kerala, (2012) 11 SCC 362, where the Court held as follows:-
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> > "17. ..... ‘16. 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.'

18. We would further like to observe that while appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Such a view has been expressed by the judgment of this Court

in the case *of State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 and has found reiteration in a recent judgment in *Rajinder @ Raju v. State of H.P.*, (2009) 16 SCC 69, para 19 whereof may be usefully extracted:

> ‘19. In the context of Indian culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.’ "”

22. In *Rameshwar v. The State of Rajasthan,* AIR 1952 SC 54, the Supreme Court has held that previous statement of the raped girl to her mother, immediately after the occurrence, is not only admissible and relevant as to her conduct, but also constitutes corroboration of her statement under the provisions of section 157 of the Evidence Act. In

order to come to the aforesaid conclusions, illustration (j) to section 8 of the Evidence Act was relied upon. In that case, the victim, named Purni, was 7/8 years old. She was not administered oath, but was held to be competent witness and, therefore, duly examined and believed.

23. In *State of Punjab versus Jagir Singh* (1974) 3 SCC 277 the apex Court held that:-

> "A criminal trial is not like a fairy tale wherein one is free to give fight to one's imagination and fantasy. 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."
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> (Emphasis supplied)

24. The Apex Court in *State of Rajasthan versus N. K.* THE ACCUSED (2000) 5 SCC 30 has held that:-

> "... ...It is true that the golden thread which runs throughout the cobweb of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal Courts which gives rise to the demand for death sentence to the rapists. The Courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women."
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> (Emphasis supplied)

25. It is also a settled position of law that victim of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. If for some reason Court is

hesitant to place implicit reliance on the testimony of the victim 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 victim must necessarily depend on the facts and circumstances of each case. If the totality of the circumstances appearing on the record of the case disclose that victim does not have a strong motive to falsely involve the person charged, Court should ordinarily have no hesitation in accepting her evidence. [*State of Maharashtra versus Chandraprakash Kewalchand Jain,* (1990) 1 SCC 550 and *O. M. Baby (dead) by Legal Representative vs. State of Kerala*, 2012 (11) SCC 362].

26. The Apex Court in *State of Punjab versus Gurmit Singh and others,* (1996) 2 SCC 384 has held that:-

> "… …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 ?

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“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 women'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 - 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 Court, 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." ... ...
>
> (Emphasis supplied)

The Court again reiterated its view in Siriya @ Shri Lal vs. State of Madhya Pradesh, (2008) 8 SCC 72.

27. In *State of M.P. v. Dharkole alias Govind Singh and others,* (2004) 13 SCC 308 the Apex Court has held that:-

> "9. ... Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with

the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.”

“10. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case?

> "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

“11. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused

persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case."

[Emphasis supplied]

28. In *Dattu Ramrao Sakhare v. State of Maharashtra* (1997 (5) SCC 341) it held that:

'5. .....A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the 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'. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court

> may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

29. In *Radhu v. State of Madhya Pradesh,* (2007) 12 SCC 57, the Apex Court has held that "... Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age" and "There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case".

30. Law with regard to testimony of a child witness is now well established. In *Golla Yelugu Govindu* vs. *State of*

AndhraPradesh (2008) 16 SCC 769, while reiterating its earlier view the Apex Court held that:-

> “11. 6.Indian Evidence Act, 1872 (in short the 'Evidence Act') does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in Wheeler v. United States (159 U.S. 523). The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See Surya Narayana v. State of Karnataka (2001 (1) Supreme 1).

31. In *State of Himachal Pradesh vs. Suresh Kumar* (2009) 16 SCC 697, the Apex Court was dealing with a case where victim was ravished by the accused on 15.3.2000

which incident was narrated by the victim to her sister later during the day. She also narrated the incident to her parents the following day and later on to the Doctors. Court accepted the statement of the sister, parents and the doctors while holding the accused guilty. Importantly, Apex Court reversed the finding recorded by the High Court wherein it was held that statement of the victim being minor was not worthy of credence.

32. The apex Court in *Radhakrishna Nagesh Versus State of Andhra Pradesh,* (2013) 11 SCC 688 had an occasion to deal with a case of a child victim. After considering its earlier decisions, the Court held that Court must examine the evidence of the prosecution in its entirely and then see its cumulative effect to determine whether offence of rape stands committed or not.

33. The apex Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat,* (1983) 3 SCC 217 has held as under:

> “9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with

lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the western society that a female may level false accusation as regards sexual molestation against a male for several reasons such as :-

(1) The female may be a 'gold digger' and may well have an economic motive- to extract money by holding out the gun of prosecution or public exposure.

(2) She may be suffering from psychological neurosis and may see an escape from the

neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.

(3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win sympathy of others.

(8) She may do so upon being repulsed.

10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :- (1) A girl or a woman in the

tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred, (2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours, (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husbands' family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the

incident regardless of her innocent. (12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the-risk of being disbelieved, act as a deterrent.

11. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the Court's in the western world (obeisance to which has perhaps become a habit presumably on account of the colonial hangover). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities- factor'

> does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification : Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self preservation. Or when the 'probabilities-factor' is found to be out of tune."

[Also: *State of H.P. v. Asha Ram,* (2005) 13 SCC 766]

34. We shall now discuss the evidence in view of the aforesaid settled proposition of law.

35. Prosecutrix (PW-4) who was examined, without oath, has clearly deposed that she alongwith her brother had gone to the house (here she means room) of the accused to watch the television. Accused put his finger in her private part and then urinated in her underwear. She narrated the incident to her mother. Even previously accused had committed such act which she did not disclose on account of fear, so instilled in her mind by the accused of being beaten up by her mother. The witness has fully withstood the test of cross examination and we do not find

her version to be shaky, unbelievable or uninspiring in confidence. Only when she went back to her house and on queries put by her mother did she disclose the incident to her. Her admission that other tenants used to reside in the adjoining quarters would in no manner render her testimony to be false or doubtful for it is not her case that she cried and none came forward to help her or the accused out of fear could not have performed such an act. Also her brother was very young, perhaps unable to understand or notice the events taking place around him.

36. Sonu Devi (PW-2) states that on 24.7.2011 at about 3.00 p.m., when prosecutrix came home, she saw her change her underwear. When queried, she informed of having urinated in her underwear. She found some dark spots. When confronted, prosecutrix became perplexed. Affectionately, after comforting her and assuring her of not being beaten up, she was told that it was the accused and not her who had urinated in her underwear. She further disclosed that by taking off her underwear, accused put his finger and also rubbed his penis against her private part and threw some substance like urine, of which her

underwear got wet. She also disclosed that even earlier he had done the same and had asked her not to disclose it to anyone, lest she be beaten up by her mother. Witness noticed private parts of the prosecutrix to be reddish in colour. She informed her husband and after he came home at about 6.00 p.m., the matter was reported to the police. In the meanwhile Neelam wife of accused also arrived and hearing the incident fell unconscious. She further states that police took into possession the bed sheet and wrapped it into a parcel which was sealed.

37. We find that even this witness has withstood the test of cross examination. We find her version to be clear, cogent and consistent with that of the prosecutrix. Witness admits that accused was employed at a Dhaba at Dharampur but however she does not state that all throughout the day he was at his place of work and was not present in his room, more particularly at the time her children had gone to watch the television in his room. Wife of the accused was not home at that time.

38. Version of Sonu Devi stands corroborated by her husband Rinku (PW-3).

39. Thus in our considered view prosecution has been able to establish by leading clear, cogent, convincing and inspiring piece of evidence, establishing the charged offence.

40. We find that oral version stands corroborated by link evidence. Inspector Pritam Singh (PW-14) immediately recorded the incident and police swung into action. SI Kshama Dutt (PW-15) rushed to the spot and recorded statement (Ext. PW-2/A) of the mother of the prosecutrix. The incriminating articles i.e. bed sheet and the clothes of the prosecutrix as also the accused, vaginal swab and smear, were recovered and sealed. The accused was got medically examined and sample of his blood and semen obtained. The sealed articles were kept in safe custody and sent for chemical analysis to the laboratory. Result of DNA profiling (Ext. PW-14/B) revealed the blood and the semen found on the body and the clothes of the prosecutrix as also other clothes/articles to be that of the accused. Doctor has proved that the charge of sexual assault is made out.

41. From the material placed on record, it stands established by the prosecution witnesses that the accused

is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

42. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that accused raped the prosecutrix.

43. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality,

irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeal is dismissed.

Appeal stands disposed of, so also pending application(s), if any.

Records of the Court below be immediately sent back.

(Sanjay Karol),
Judge.

(P. S. Rana),
Judge.

September 30, 2015 **(PK)**