HIGH COURT OF TRIPURA
AGARTALA

CRL.A.(J) NO.25 OF 2017

Md. Abu Jalal Miah,
S/O Kala Miah,
Fultali, Matinagar, PS Bishalgarh,
District Sepahijala, Tripura.

----Appellant

Versus

State of Tripura

------Respondents

For appellant(s)	:	Mr. S. Chowdhury, Advocate
For Respondent(s)	:	Mr. A. Roy Barman, Addl. P.P.
Date of hearing	:	**22.05.2019**
Date of delivery of Judgment & Order	:	**31.07.2019**
Whether fit for reporting	:	**YES**

HON'BLE MR. JUSTICE ARINDAM LODH

J U D G M E N T & O R D E R

Heard Mr. S. Chowdhury, learned counsel appearing for the appellant as well as Mr. A. Roy Barman, learned Addl. P.P. appearing for the State-respondent.

2. The appellant, in the instant appeal, being charged with the commission of offence punishable under Section 376 read with Section 511 of IPC was convicted and sentenced to suffer rigorous imprisonment for 5(five) years with fine of Rs.5,000/-(rupees five thousand), and also to suffer simple imprisonment for 3(three) months for the commission of offence punishable under Section 376(2)(i) read with Section 511 of IPC vide judgment and order dated 21.02.2017, passed by the learned Additional Sessions

Judge, Court No.5, West Tripura, Agartala in connection with case No.ST(T-2) 47 of 2015.

3. Pursuant to a written complaint[*Exbt.2, 2(a), 2(b*)], dated 20.10.2010, the Officer-in-charge of Amtali Police Station had registered an FIR(*Exbt.4*) against the accused-appellant, namely Abu Jalal Miah under Section 376/511 of the Indian Penal Code. In the written complaint, one Kashem Miah, the father of the victim-girl, had alleged that, on 15.10.2010 A.D., at about 1.00 pm, the accused, Abul Jalal Miah, aged about 22 years, a neighbour of the complainant, taking the opportunity of the absence of the inmates of his house, took his minor daughter, aged about 7(seven) years in a jungle with the temptation of giving Rs.5/-(rupees five). After taking his minor daughter to the said jungle, the accused-appellant, Abu Jalal Miah removed the wearing apparels of the victim girl and took out his penis with the intention to commit rape upon her. The accused-appellant also embraced her and let her down. His minor daughter cried out, when some of the neighbours went to that place, and at that time the accused-appellant fled away. To explain the delay of 5(five) days in lodging the complaint, the father-complainant has stated in the complaint that, he being a poor person was afraid of the social stigma and thought of about the future of his daughter.

4. On receipt of this complaint, the investigating officer, being endorsed, took up the investigation immediately, recorded the statements of some of the witnesses, who rushed to the spot

after hearing the cry of the victim girl, also arranged to record the statement of the victim-girl under Section 164(5) CrPC and also sent the girl for her medical examination to find out the fact of the rape and the age of the victim.

5. It is revealed from the record that the concerned Judicial Magistrate First Class had recorded the statement of the victim-girl under Section 164(5) of CrPC on 23.10.2010.

6. After completion of investigation, the investigating officer submitted charge-sheet against the accused person. The case was committed to the Court of learned Sessions Judge. Accordingly, charge was framed against the accused-appellant for committing offence under Section 376 read with Section 511 of IPC.

7. In course of trial, the prosecution examined as many as 5(five) witnesses including the victim(PW1), the complainant(PW2) and the investigating officer(PW5). After closure of the prosecution evidence, the accused was examined under Section 313 of CrPC, when he declared the prosecution case as false and denied the evidence led by the prosecution witnesses against him and claimed himself as an innocent. However, he refused to adduce any evidence in support of his defence.

8. The victim-girl was examined as PW1 when she was aged about 13(thirteen) years. Her intelligence was tested by the Court as she was minor. She deposed that the accused-appellant,

Abu Jalal Miah was known to her as he was an adjacent neighbour and she used to call him as '*uncle'*. She also identified the accused in the dock. She stated in her evidence that on 15.10.2010, she was alone at noon time and was playing in front of her house, and at that time she was wearing a pant, and there was no cloth in the upper portion of her body. The accused-appellant called her and paid her Rs.5/-. Thereafter, the accused told her to massage his hairs and thereafter took her inside the jungle. She stated that after reaching to the jungle, the accused-appellant undressed her and the accused also undressed himself. The victim-girl further stated that the accused-appellant inserted his male organ in her vagina. As a result, she sustained injury and cried out. On hearing her cry, one of her neighbours, namely Aleya Begum rushed to the place of occurrence, when the accused fled away. It was Aleya Begum who brought her to her house. She reported the incident to her stepmother, who is residing at Soudi Arab at the time of her deposition. She further stated that when her father returned back to the house in the evening, she narrated the incident to him. The victim-girl stated that at the time of occurrence, she was studying in Class-I and her age was about 7(seven) years. She stated that she was taken to the hospital and the doctor examined her. She further deposed that she gave her statement before the Magistrate. The victim-girl identified her signature in the said statement recorded under Section 164(5) of CrPC which was marked as *Exbt.1, 1(a)* and *1(b)* respectively. She further stated

that she knew Joynal Uddin, Morshid Miah and Hiran Miah, as all of them were her neighbours. She explained in her examination-in-chief that, the witness Joynal Uddin and Hiran Miah had been residing at Soudi Arab and the witness Morshid Miah died about 2/3 months back from the date of her examination. In her cross-examination, I did not find any material contradictions.

9. PW2, the father of the victim, namely Kashem Miah deposed that, the accused Abu Jalal Miah was his neighbour and on the day of incident he went out from the house with his rickshaw in the early morning. When he returned back to home in the evening, her daughter(PW1) narrated the entire incident to him that, when she was playing in front of the house at noon time, the accused Abu Jalal Miah called her and asked to massage his hairs in lieu of Rs.5/- to her. Thereafter, the accused took the victim inside the jungle and undressed her. Later on, the accused also undressed himself and asked the victim to catch his penis. Thereafter, the accused laid over her, when the victim cried out, and on hearing her cry, one Aleya Begum came there and the accused fled away. PW2 further explained that, being ashamed of the incident, he could not lodge the complaint immediately after the incident. Even, he did not go out of his house for five days and after five days he lodged the complaint in writing.

10. PW3, Dr. Shyamal Chandra Sarkar, who was working as Assistant Professor in the Department of Forensic Medicine and Toxicology of Tripura Medical College and BRAM Teaching Hospital,

Hapania, Agartala. He deposed that he examined the victim-girl and from her dental examination it was suggested that the victim was aged below 10(ten) years. He further deposed that from the physical findings nothing was consistent with the sexual intercourse. He identified his report which was marked as *Exbt.3*. In his cross-examination, he categorically stated that in case of any lacerated injury, the injury mark would not be disappeared within five days.

11. PW4, Nirmal Majumder was the scribe of the complaint. He deposed that on being requested by PW2, he wrote the FIR as it was dictated by PW2. He admitted his handwriting.

12. PW5, Ganesh Chandra Das is the investigating officer who deposed that on 20.10.2010 he visited the place of occurrence and prepared the hand-sketch map(*Exbt.5*) of the place of occurrence along with the index(*Exbt.6*). He further deposed that he examined the witnesses, namely Md. Kashem Miah, Nayantara Begum, the victim-girl(name suppressed), Joynal Uddin, Morshid Miah and Hiran Miah and recorded their statements under Section 161 CrPC. PW5 also stated that the victim-girl was taken to the Judicial Magistrate First Class for recording her statement under Section 164(5) CrPC. In his cross-examination, he was confronted as to why Aleya Begum was not examined by him though her name was mentioned in the FIR. But, he could not explain any cogent reason for non-examination of Aleya Begum as one of the witnesses in the instant case.

13. On the basis of the afore-stated evidence, the learned Additional Sessions Judge convicted and sentenced the accused-appellant as indicated above.

14. Being aggrieved by and dissatisfied with the said judgment and order of sentence, the accused-appellant has preferred this appeal before this Court.

15. Mr. S. Chowdhury, learned counsel appearing for the appellant has submitted that there is no eyewitness to support the statement of the victim-girl. The learned counsel further submits that from the medical examination of the victim-girl, it is found that there was no sign of sexual intercourse and the Doctor(PW3) has categorically stated that in case of any lacerated injury, the injury mark would not be disappeared within five days. The learned counsel has strenuously argued that non-examination of Aleya Begum, who, according to the victim, had rescued her, is fatal to the prosecution. The investigating officer could not assign any reason for non-examination of Aleya Begum. On the basis of these grounds, the learned counsel for the appellant has tried to persuade this Court that the appellant is an innocent and he is entitled to be acquitted.

16. Per contra, Mr. A. Roy Barman, learned Addl. P.P. appearing for the State-respondent defending the conviction and sentence against the appellant has argued that it is proved beyond any shadow of doubt that the accused-appellant had raped the

victim-girl and there is no reason to disbelieve the statement of the victim-girl.

17. Section 375 of IPC defines "*rape*" which is reproduced here-in-below:

> ***"375. Rape.**—A man is said to commit "rape" if he—*
>
> *(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
>
> *(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*
>
> *(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*
>
> *(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,*
>
> *under the circumstances falling under any of the following seven descriptions:-*
>
> *First.—Against her will.*
>
> *Secondly.—Without her consent.*
>
> *Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.*

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanations 1.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act;

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

18. Section 511 of IPC speaks about punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment. Section 511 of IPC reads as under:-

> *"511. **Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.**—Whoever attempts to commit an offence punishable by this Code with [imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with [imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both."*

19. The victim girl is found to be very clear about her statements in regard to the nature of offence committed by the accused-appellant. She appears to be very specific to her statement that on the day of occurrence, she was alone in the house and was playing in front of her house. She was only wearing a pant and there was no cloth in the upper portion of her body.

20. It is very natural that a girl of 7(seven) years of age may wear only a pant without any cloth in her upper portion. The victim-girl appears to be very consistent to her statement that the accused-appellant called her and tempted her to massage the

hairs of the accused-appellant in lieu of Rs.5/- and thereafter she was taken to the jungle and undressed her, when the accused also undressed himself. She has categorically stated that the accused-appellant inserted his male organ in her vagina, when she cried out, and on hearing her cry, one of her neighbours, Aleya Begum has rushed to the place of occurrence. In cross-examination, the said statements of the victim-girl remained un-contradicted. The defence could not shake the evidence of PW1 in regard to her statements that she was undressed by the accused-appellant and the accused-appellant also undressed himself and he inserted his male organ inside her vagina. There is nothing to presume that PW1 had any intention to implicate the accused-appellant in a false case. The victim-girl further has stated that she narrated the incident to her stepmother and also her father, PW2 on his returning back to home. The father of the victim-girl has deposed as PW2 and had stated that after his returning home his daughter narrated the entire incident to him. It is also very natural.

21. I do not find any irregularity in lodging the complaint to the police station about the incident of rape upon his daughter. A father always tries to protect his daughter in respect of her chastity and purity. A father always tries that no one can raise finger towards his daughter. In the instant case, PW2, being the father of the victim-girl has stated that out of shame, he did not lodge the complaint, and even, he did not go out of his house for five days, but, after five days, he lodged the instant complaint. In

my considered view, the delay of five days in lodging the FIR is not unnatural to the facts of the instant case.

22. I have given my thoughtful considerations and proceeded cautiously to the evidence of the victim-girl(PW1), since it is true that there is no corroboration of the evidence of PW1 and PW2 regarding the incident of rape upon the victim girl by any independent witness. Firstly, I have given my attention to the conduct of the victim-girl. The victim-girl was alone at noon time and was playing in front of her house and she was wearing a pant, in her body. At that time, the accused-appellant, being an adjacent neighbour, asked her to massage his hairs in lieu of Rs.5/-. Thereafter, she was taken to the jungle, where the accused-appellant committed rape upon her being undressed her and the accused-appellant also undressed himself. Naturally, she cried out and on hearing her cries, one Aleya Begum and other neighbours rushed to the place of occurrence. Aleya Begum took her to her house. She narrated the incident to her stepmother immediately after returning to the house and also narrated the incident to her father when he returned back.

23. The victim-girl appears to be very expressive in explaining the entire incident starting from her playing at noon time in her house, arrival of the accused-appellant at her house, involved in massaging the hairs of the accused-appellant being offered with Rs.5/-, and subsequently commission of rape by the

accused-appellant in the jungle and narrating the incident to her stepmother and also to her father on his returning to home.

24. According to me, the conduct of the victim-girl is very much relevant because of *illustration(j)* of Section 8 of the Indian Evidence Act, which reads as under:-

> *"8(j). The question is, whether A was ravished.*
>
> *The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant."*

25. As per the FIR, lodged by the father(PW2), the victim-girl, after being rescued first met with her stepmother and narrated the incident to her, and immediately after returning back of her father to home in the evening, both the victim-girl(PW1) and her stepmother disclosed the incident of wrong act to the father(PW2). In course of investigation, both of them were examined by the investigating officer. As such, both the witnesses, *i.e.* the stepmother and the father are vital witnesses as contemplated under Section 6 of the Indian Evidence Act, 1872 as they are the *Res Gestae* witnesses. The purpose of incorporating Section 6 in the Act is to complete the missing links in the chain of evidence of the solitary witness. There is no dispute that she had given full and vivid description of the sequence of events leading to the commission of the alleged offences by the appellant. The mother of the victim-girl was not available in the State of Tripura

in course of trial, as according to PW2, she used to reside in other country. Being explained the reasons for non-appearance of the mother Smt. Nayantara Begum, the father was the best person to lend support to the prosecution story invoking Section 6 of the Act.

Section 6 of the Evidence Act reads as under:-

> *"**6. Relevancy of facts forming part of same transaction**.—Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places."*

26. Black's Law Dictionary(Tenth Edition) defines *'Res Gestae'* as under:-

> *"The events at issue, or other events contemporaneous with them. In evidence law, words and statements about the res gestae are usu. admissible under a hearsay exception(such as present sense impression or excited utterance). Where the Federal Rules of Evidence or state rules fashioned after them are in effect, the use or res gestae is now out of place."*

The said evidence, thus, becomes relevant and admissible as *res gastae* under Section 6 of the Act. Section 6 of the Act has an exception to the general rule whereunder, hearsay evidence becomes admissible.

27. In ***Gentela Vijayavardhan Rao v. State of A.P., (1996) 6 SCC 241,*** the Apex Court in paragraphs 15 and 16 has observed as under:- *(SCC pp.246-47, paras 15-16)*

"15. The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae. In R. v. Lillyman, (1896) 2 QB 167, a statement made by a raped woman after the ravishment was held to be not part of the res gestae on account of some interval of time lapsing between the act of rape and the making of the statement. Privy Council while considering the extent up to which this rule of res gestae can be allowed as an exemption to the inhibition against hearsay evidence, has observed in Teper v. R, (1952) 2 All ER 447 thus:

> *"The rule that in a criminal trial hearsay evidence is admissible if it forms part of the res gestae is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the*

> *action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement."*

The correct legal position stated above needs no further elucidation.

16. Here, there was some appreciable interval between the acts of incendiarism indulged in by the miscreants and the Judicial Magistrate recording statements of the victims. That interval, therefore, blocks the statements from acquiring legitimacy under Section 6 of the Evidence Act. The High Court was, therefore, in error in treating Exts. P-71 and P-75 as forming part of res gestae evidence."

28. In ***Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130,*** the Apex Court in paragraphs 33 and 37 observed as under:- *(SCC pp.138 & 139, paras 33 & 37)*

> *"33. As per the FIR lodged by the prosecutrix, she first met her mother Narayani and sister at the bus-stop at Kurukshetra but they have also not been examined, even though their evidence would have been vital as contemplated under Section 6 of the Evidence Act, 1872 (for short "the Act") as they would have been res gestae witnesses. The purpose of incorporating Section 6 in the Act is to complete the missing links in the chain of*

evidence of the solitary witness. There is no dispute that she had given full and vivid description of the sequence of events leading to the commission of the alleged offences by the appellant and others upon her. In that narrative, it is amply clear that Bimla Devi and Ritu were stated to be at the scene of alleged abduction. Even though Bimla Devi may have later turned hostile, Ritu could still have been examined, or at the very least, her statement recorded. Likewise, her mother could have been similarly examined regarding the chain of events after the prosecutrix had arrived back at Kurukshetra. Thus, they would have been the best persons to lend support to the prosecution story invoking Section 6 of the Act.

* * *

37. Section 6 of the Act has an exception to the general rule whereunder hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or immediately thereafter. Admittedly, the prosecutrix had met her mother Narayani and sister soon after the occurrence, thus, they could have been the best res gestae witnesses, still the prosecution did not think it proper to get their statements recorded. This shows the negligent and casual manner in which the prosecution had conducted the investigation, then the trial. This lacunae has not been explained by the prosecution. The prosecution has not tried to complete this missing link so as to prove it, beyond any shadow of doubt, that it was the appellant who had committed the said offences."

29. Relying on the decisions of ***Gentela Vijayavardhan(supra)*** and ***Krishan Kumar Mali(supra)***, a three-Judge Bench of the Apex Court in ***Dhal Singh Dewangan vs. State of Chhattisgarh, (2016) 16 SCC 701*** has categorically dealt with the scopes of invoking Section 6 of the Evidence Act relating to commission of an offence in the manner as follows:-[*SCC p.716, para 24*]

> ***"24**. The general rule of evidence is that hearsay evidence is not admissible. However, Section 6 of the Evidence Act embodies a principle, usually known as the rule of res gestae in English law, as an exception to hearsay rule. The rationale behind this section is the spontaneity and immediacy of the statement in question which rules out any time for concoction. For a statement to be admissible under Section 6, it must be contemporaneous with the acts which constitute the offence or at least immediately thereafter. The key expressions in the Section are "…….so connected……. as to form part of the same transaction". The statements must be almost contemporaneous as ruled in Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130 and there must be no interval between the criminal act and the recording or making of the statement in question as found in Gentela VijayAvardhan Rao v. State of A.P., (1996) 6 SCC 241. In the latter case, it was accepted that the words sought to be proved by hearsay, if not absolutely contemporary with the action or event, at least should be so clearly associated with it that they are part of such action or event. This requirement is apparent from the first illustration below Section 6 which states*

> *"whatever was said or done…. at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."*

30. Thus, for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be any unreasonable interval which would give a chance to any person to fabricate the story. In other words, the statements said to be admitted as forming part of *res gestae* must have been made contemporaneously with the act or immediately thereafter.

31. Admittedly, the mother of the victim-girl being a rustic woman and the wife of a rickshaw puller, it was difficult for her to take any decision in absence of the father of the victim-girl. But, as soon as the father of the victim-girl arrived in the evening, the victim-girl along with her mother narrated the entire incident to Kashem Miah(PW2), the father of the victim.

32. In my opinion, in the facts of the case and the sequence of the events as reflected above, the statements and evidence of the father of the victim-girl(PW2) are contemporaneous and spontaneous and is admissible evidence under Section 6 of the Evidence Act as *Res Gestae*. In furtherance thereof, after careful scrutiny and appreciation of the evidence of PW1 and PW2, this Court is convinced that there was no occasion for concoction or improvement of the statements of both the said two witnesses by any means.

33. PW5, the investigating officer on receipt of the FIR and being endorsed the case on 20.10.2010, immediately took up the investigation and also recorded the statements of the witnesses including the mother of the victim-girl. He also visited the spot where the incident occurred accompanied and identified by the victim-girl and her father(PW2). It is further noteworthy that at the time her statement was recorded under Section 164(5) CrPC, she had narrated the very same facts which she stated to PW2 immediately after his returning back to home. During her testimony, as I said earlier, there was no attempt on the part of PW1 to embellish her statement, or improve upon the facts she narrated to her father and what she stated before the Magistrate. She was cross-examined by the defence, nothing material had emerged therefrom.

34. The argument as canvassed by the learned counsel for the appellant that PW1 being the child witness, her statement should not be relied upon in absence of any corroboration by an independent witness as her father is an interested witness in the instant case.

Mr. S. Chowdhury, learned counsel for the appellant has further submitted that though Aleya Begum who allegedly rescued the girl from the place of occurrence and brought her to her house, though available, was not examined by the investigating officer, and in reply to a query by the Court during his examination, he

answered that he did not assign any reason in his case diary as to why he did not examine Aleya Begum, though her name was mentioned in the FIR.

35. The touchstone for evaluating the testimony of a child witness in cases of sexual assault is well settled. The judicial dicta is that as long as the victim's testimony is found to be credible, trustworthy and rings true, it is sufficient to convict the accused. It is equally true that there is no impediment in accepting the uncorroborated testimony of a child victim. The only precondition is that such a testimony should be carefully scrutinized before accepting or rejecting it.

36. In ***Panchhi vs. State of U.P., AIR 1998 SC 2726***, the Apex Court observed that the evidence of a child witness cannot be rejected outright. However, the said evidence ought to be carefully evaluated and scrutinized with greater circumspection because a child is susceptible to be swayed by what others tell him and can be an easy prey to tutoring. The Court must assess as to whether the statement of the victim is his voluntary expression of what had transpired or was it made under the influence of others. A similar view was expressed in ***Mohd. Kalam vs. State of Bihar, (2008) 7 SCC 257.***

37. In ***State of H.P. vs. Gian Chand, (2001) 6 SCC 71***, the Apex Court observed that the court has first to assess the trustworthy intention of the evidence adduced and available on

record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon, though there may be other witnesses available who could have been examined but were not examined. In the light of this decision, I do not find any force in the submission of learned counsel for the appellant that non-examination of Smt. Aleya Begum is fatal to the prosecution case.

38. In the case of ***State of Rajasthan vs. Om Prakash, (2002) 5 SCC 745***, the Apex Court in a vivacious way expressed the approach that courts must adopt in the cases of child rape which is reproduced here-in-below:- [SCC, p.753, para 13]

> "**13.** *The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is well-settled proposition. In State of Punjab v. Gurmit Singh & Ors.[(1996) 2 SCC 384], referring to State of Maharashtra v. Chandraprakash Kewalchand Jain [(1990) 1 SCC 550] this Court held that 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. It has also been observed in the said decision by Dr. Justice A.S. Anand (as His Lordship then was), speaking for the Court that 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."

39. In ***Mohd. Kalam***(supra), it was argued that the evidence of the child witness in a rape case should not have been accepted in the absence of any corroboration, the Supreme Court dismissed the appeal filed by the accused by observing that the trial court and the High Court had found the evidence of the child witness as cogent, credible, free from any influence and reliable.

40. In ***State of Himachal Pradesh vs. Sanjay Kumar, (2017) 2 SCC 51***, where the prosecutrix at the relevant time was 9 years old and charge was framed against the accused under Sections 376(2)(f) and 506 IPC, the Apex Court made the following pertinent observations:

[SCC, pp.66-67, paras 30 and 31]

*"**30.** By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be*

dealt with all sensitivity that is needed in such cases. In such a situation one has to take stock of the realities of life as well. Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are not strangers. The danger is more within than outside……...

31. *……**By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused**. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole.*

***Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does**. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. 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. 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? ……..". [Emphasis added]

[Also Refer : Mangoo & Anr. vs. State of Madhya Pradesh, AIR 1995 SC 959; Gagan Kanojia and Anr. vs. State of Punjab; (2006) 13 SCC 516, Nivrutti Pandurang Kakote and Ors. vs. State of Maharashtra; AIR 2008 SC 1460, State of Madhya Pradesh vs. Ramesh; (2011) 4 SCC 786 and Rajkumar vs. State of Madhya Pradesh (2014) 5 SCC 353]

41. The plea of the learned counsel of the appellant that PW2, being father is an interested witness, and as such, in absence of corroboration by any independent witness, the version of the minor girl should not be believed, according to me, has no substance. It is, no doubt, a well-settled rule of prudence that the evidence of a related or interested witness should be examined meticulously, but once the court is satisfied that his/her testimony is credible, then, the said evidence can be relied upon even without corroboration. Further, unless it is proved that such a witness harbours some enmity against the accused or he wished to implicate him falsely, for all effects and purposes, he can be treated as an independent witness.

42. In ***Seeman alias Veeranam vs. State, (2005) 11 SCC 142***, the Apex Court had explained the above legal position in the following manner:-

*"**4. It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness or the sole witness, or both, if otherwise the same is found credible.** The*

*witness could be a relative but that does not mean to reject his statement in totality. **In such a case, it is the paramount duty of the court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested sole witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinizing the evidence of the interested sole witness**. The prosecution's non-production of one independent witness who has been named in the FIR by itself cannot be taken to be a circumstance to discredit the evidence of the interested witness and disbelieve the prosecution case. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement."*

(Emphasis added)

43. In the instant case, the investigating officer did not examine Smt. Aleya Begum whose name was transpired in the FIR. In view of the decision in ***Gian Chand*** and ***Seeman(supra)***, I am of the opinion that only for non-examination of Smt. Aleya Begum would not discredit the entire prosecution case. It would be of no consequence that despite availability of independent witness, the investigating agency does not examine him/her or he/she is not produced in course of trial as a witness for the purpose of corroboration when version of a rape victim is found to be trustworthy, credible and unblemished.

44. In ***Waman vs. State of Maharashtra, (2011) 7 SCC 295***, while dealing with the case of a related witness, the law was summarized by the Supreme Court in the following words:-

> *"**20**. It is clear that merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot by itself discredit their evidence. **In other words, the relationship is not a factor to affect the credibility of a witness and the courts have to scrutinize their evidence meticulously with a little care**."*
>
> *(Emphasis added)*

45. The law relating to related/interested witness was distilled by a Division Bench of Delhi High Court in ***Govind Raj vs. The State (NCT of Delhi)***, reported in ***2019 (257) DLT 633***, wherein the conclusion drawn was as follows:-

> *"32. A glance at the above decisions makes it clear that the evidence of an interested and/or related witnesses should not be examined with a coloured vision simply because of their relationship with the deceased. Though it is not a rule of law, it is a rule of prudence that their evidence ought to be examined with greater care and caution to ensure that it does not suffer from any infirmity. **The court must satisfy itself that the evidence of the interested witness has a ring of truth. Only if there are no contradictions and the testimony of the related/interested witness is found to be credible, consistent and reasonable, can it be relied upon even without any corroboration.** At the*

end of the day, each case must be examined on its own facts. There cannot be any sweeping generalisation."

(Emphasis added)

[Also refer: Dalip Singh vs. State of Punjab, 1954 SCR 145; Sarwan Singh vs. State of Punjab, (1976) 4 SCC 369; Kartik Malhar vs. State of Bihar (1996) 1 SCC 614, Jayabalan vs. UT of Pondicherry, (2010) 1 SCC 199 and Raju vs. State of Tamil Nadu, (2012) 12 SCC 701].

46. From the statement recorded under Section 164(5) CrPC(*Exbt.1*), I find that the statement which the victim-girl made in her deposition in course of trial as PW1 is consistent with her statement recorded by the Magistrate. Further, PW2, the complainant-father of PW1 is very categoric to his statement as witness in course of trial, when he deposed that what he stated in the complaint[*Exbt.2, 2(a), 2(b*)] based on which FIR was registered. His deposition also is found to be consistent, credible and reasonable as well. Following the principle enunciated by the Apex Court in ***Seeman*** and ***Waman*** as referred to supra the evidence of PW2 cannot be thrown out just because of the fact that he being the father of the victim is a related or an interested witness.

47. In my considered view, even in absence of Aleya Begum whose name is mentioned in the FIR, the statements made by the victim-girl(PW1) and PW2 should be legally admissible and be used as corroboration in the light and spirit of Section 157 of the Evidence Act, which may be reproduced here-in-below, for convenience:-

> *"**157**. **Former statements of witness may be proved to corroborate later testimony as to same fact**.—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."*

48. True it is, that, deposition of a child witness requires corroboration, but, in case, such deposition inspires the confidence of the Court and in absence of any embellishment or improvement therein, the Court may rely upon the said evidence. There is no hard and fast rule that the testimony of a child witness must be corroborated by the evidence of independent witness. The victim-girl in her evidence has categorically stated that at the time of trial, her stepmother and other witnesses, whose statements were recorded by the investigating officer, were residing in other country. One witness, namely Murshed Miah also died about 2/3 months before the date of her deposition. The defence could not come forward to confront the said facts.

49. Confession is a weak piece of evidence and hence needed to be corroborated. It may be used to corroborate or contradict a statement made in the court in the manner provided under Section 157 and 145 of the Indian Evidence Act. The statement cannot be used for the purpose of corroboration and can be used to contradict by cross-examining the person who made.

50. More so, the learned Judicial Magistrate First Class while recording her statement under Section 164(5) CrPC(Exbt.1) has tested the intellect of the girl and her competence to give statement. Similarly, the trial Judge also had tested her power of understanding the questions might be put to her in her testimony before the court and they found her competent in giving rational answers to the questions that might be proved by her. After meticulous and careful reading of the entire evidence, in my considered view, the statement of the victim-girl carries credibility that inspires confidence of this Court and legally admissible in evidence in view of Section 118 of the Evidence Act. PW2, being the father of the victim-girl in his evidence also seems to be very specific to depose that after returning back to home her daughter *i.e.* the victim-girl narrated the incident of committing rape upon her by the accused-appellant.

51. One most significant aspect, in the instant case, is that in course of cross-examination, PW2, *i.e.* the father of the victim-girl has categorically deposed that what he had deposed in the court, the same was also stated to the investigating officer and he came to know about the fact from his daughter and his wife. The defense could not put forth any material cross-examination to demolish the version of the said witness.

52. The learned counsel for the appellant has loboured heavily in his submission that the father of the victim-girl cannot

be regarded as an independent witness for the purpose of corroboration of the statement made by the victim-girl. It is true that all fathers or mothers may not be sufficiently independent to fulfill the requirements of the corroboration, but, in my opinion, there is no legal impediment to accept the evidence adduced by them, if it conforms the ingredients of Section 157 read with Section 8, Illustration(j) of the Evidence Act. That is, if the statement is made to such witness, as early as can reasonably be expected in the circumstances of the case. In the instant case, the PW2, the father was being informed about the incident of rape upon PW1 as soon as he returned back to his home on the same day after his daily work. In this backdrop, the evidence of such witness corroborating the statement of the victim-girl in her evidence should not be discarded merely on the ground of their relationship following the authoritative decision of the Apex Court in ***Rameshwar vs. State of Rajasthan, MANU/SC/0036/ 1951, AIR 1952 SC 54.***

53. Further, corroboration is not s*ine qua non* for conviction. However, I should not say that corroboration is not at all needed to convict an accused of offence of 'rape' but I must say that the necessity of corroboration may be needed in the rarest of the rare cases. Why should the evidence of the girl or the women who complains of '*rape'* or '*sexual molestation'* be viewed with the birds' eye to find out doubt, disbelieve or suspicion. In this regard, the observation of Vivian Bose, J. in ***Rameshwar S/o Kalyan***

Singh vs. State of Rajasthan, **(39)AIR 1952 SC 54; AIR 57**, (para-19) appears to be very significant and relevant in the perspective of the present case, which reads as follows:-

> *"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……"*

54. The Apex Court in a catena of decisions has held that the physical scar may heal up, but the mental scare will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and necessity of corroborative evidence even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable.

55. Similarly, in the instant case also, after meticulous and careful scrutiny of the evidence of PW2, in no logical terms it can be said that the evidence of PW2 is tainted. There is no cogent reason for PW2 to fabricate any story of rape connecting her 7(seven) years old daughter. Why PW2 should not be regarded as independent witness in absence of any story being projected by the defense that for certain material reason PWs 1 and 2 were possessing animosity against the appellant? In my considered view, in the facts of the case, there being no reason to suggest that there is enmity between PW2 and the appellant, the

father(PW2) should be treated as an independent witness and fulfils the rule of corroboration.

56. In the decision of ***Rameshwar***(supra) at para 37, the Apex Court has observed thus:-

> *"**37.** The next question is whether the mother can be regarded as an "independent" witness. So far as this case is concerned, I have no doubt on that score. It may be that all mothers may not be sufficiently independent to fulfill the requirements of the corroboration rule but there is no legal bar to exclude them from its operation merely on the ground of their relationship. Independent merely means independent of sources which are likely to be tainted. In the absence of enmity against the accused there is no reason why she should implicate him falsely. It is true the accused suggested that they were on bad terms but that has not been believed by anyone."*

57. In the present case also, as I said earlier there is no evidence that there is any enmity between the accused-appellant and the PW1 or PW2. There is no other cogent reason to the father of the victim-girl to implicate the accused-appellant. In his examination under Section 313 CrPC, the appellant has only pleaded that he is innocent.

58. There is yet another aspect which is also necessary to dealt with in view of the submission of Mr. Chowdhury, learned counsel appearing for the appellant, is that whether non-examination of learned Judicial Magistrate, who recorded the

statement of the prosecutrix under Section 164(5) CrPC is fatal to the prosecution case and until and unless the learned Judicial Magistrate confirms the statement by adducing evidence, the said statement cannot be said to be proved in evidence.

59. Now, coming to the question that what would be the effect of the non-examination of the Magistrate concerned who recorded the 164 statement of the victim, herein the prosecutrix. It is settled that a statement under Section 164 CrPC is not a substantive piece of evidence. What is the meaning of the expression "substantive evidence"? The Evidence Act does not define this. It is the creature of Judiciary and its meaning is traceable to the definition of the word “Evidence” in Section 3 of the Evidence Act.

"Evidence" means and includes—(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence."

60. Oral evidence means statements made by a witness in the witness stand on oath in the Court which conducts the inquiry or trial in connection with matters of fact. This is called “substantive evidence”. It should not be confused with the

expression "substantial evidence". "Substantial evidence" falls within the province of appreciation of evidence. Statements of witnesses in the trial Court about facts they have perceived by senses is substantive evidence.

61. A statement under Section 164 CrPC is recorded by a Magistrate during the investigation of a case under Chapter XII of the Code of Criminal Procedure. The Magistrate is not conducting an inquiry in relation to matters of fact like a trial Court. He only records the statement of the persons on a request made by the Investigating Officer.

62. A witness who gave the statement under Section 164 CrPC, should tell the facts known to him/her again as evidence before the trial Court. After narrating the facts, she should depose that he/she had already stated the same thing earlier before the Magistrate. Then, she should tell whether she gave statement under Section 164 statement before the Magistrate being questioned by the trial Court Prosecutor. It is at this stage, the witness has to confirm whether she gave statement about the facts she narrated in course of trial what she stated before the Magistrate and if the witness confirms the statement, then it may be proved as an exhibit. In this case, the statement of the prosecutrix recorded under Section 164(5) of CrPC has been exhibited as *Exbt*-1 and also to signatures therein as *Exbt.*1(a) and 1(b) respectively after the same being proved.

63. The narration of the events by the witness in the trial Court is substantive evidence. Then, his/her further statement before the trial Court that he told the same facts earlier to the Magistrate is also a substantive piece of evidence, his/her 164 statement should be shown and marked and proved through him/her. Why should it be shown and marked through him/her? It is due to Section 157 Evidence Act which states as follows:

> *"157. **Former statements of witness may be proved to corroborate later testimony as to same fact**.—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."*

64. A statement recorded under Section 164 CrPC is definitely a former statement given before the appropriate authority, namely a Magistrate who is legally competent to record the statement by virtue of the power conferred upon him by Section 164 CrPC in order to aid the investigation conducted under Chapter XII of the Code. Section 157 of Evidence Act says that the former statement must be proved. Thereafter, the witness who gave the 164 statement should be made to prove it while marking the statement through him/her. If the witness admits in his evidence before the Court that he gave a former statement to the Magistrate and the statement shown to him is that, then the 164 statement stands proved. In that case, according to me, the

Magistrate who recorded the 164 statement need not be examined.

65. If the witness completely denies that he gave a former statement before the Magistrate, then the prosecutor should dispute it and suggestions should be put to him that he did give a statement and his signature in the statement should be marked. If he denies the signature also, then that also should be disputed and suggestions that the signature found in the 164 statement is that of his should be put to him. In that case, the Magistrate should be examined and the 164 statement should be marked and proved. The Investigating Officer should also say that on his request the Magistrate recorded the statement of that witness on such and such date. Only this will complete the circle in a case where the witness denies everything.

66. Most significant aspect is that even if this process is completed and the 164 statement is proved, then also the 164 statement cannot be treated as substantive evidence and the accused be convicted based on it. The Court can only give a finding that the witness who gave the 164 statement is a liar and take action against him for giving false evidence.

67. It would be apposite to refer the decision of the Apex Court in ***State of Delhi vs. Shri Ram, AIR 1960 SC 490*** where it has been held:

> *"Statements recorded under S.164 of the Code are not substantive evidence in a case and cannot*

be made use of except to corroborate or contradict the witness. An admission by a witness that a statement of his was recorded under S.164 of the Code and that what he had stated there was true would not make the entire statement admissible; much less could any part of it be used as substantive evidence in the case.

A Judge commits an error of law in using the statement of a witness under S.164 as a substantive evidence in coming to the conclusion that he had been won over."

68. A statement under Section 164 is a corroborative piece of evidence. It corroborates the substantive piece of evidence in the Court, namely the evidence of the witness that he told the same facts earlier also to a Magistrate. A corroborative piece of evidence can only corroborate a substantive piece of evidence and not another corroborative piece of evidence. In other words, the 164 statement of 'A' cannot corroborate the complaint given by 'A' to the police that formed the basis for registering the FIR.

69. The credit of a witness can be impeached under Section 155(3) of the Evidence Act by proof of former statements which are inconsistent with any part of his evidence. The procedure to bring on record the contradictions is provided by Section 145 of the Evidence Act which may be reproduced here-in-below, for convenience:

"145. ***Cross-examination as to previous statements in writing****.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in*

question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

70. For example, if the witness has stated in the complaint and 164 statement that 'A' gave the lethal blow on the head but in the witness box, if he says that 'B' gave the lethal blow on the head, then there is contradiction between the complaint and 164 statement on one hand and the substantive evidence in the witness stand on the other hand. Many a time defence counsels remain silent in the fond hope that they can highlight the contradiction by simply reading to the judge and comparing the former statements[Complaint and 164 statement] and the deposition of the witness. This is impermissible. The corroborative evidence, namely the former statement should be put to him and his attention should be drawn to the contradiction between what he stated in the former statement and the substantive evidence. In the above example he should be asked, you have stated in the Court that 'B' inflicted the lethal blow, but in your complaint and 164 statement you have stated 'A' has inflicted the lethal blow, is it not? Defence counsels will get scared to ask this question because of fear that he may explain away. For that sake mandates of Section 145 Evidence Act cannot be jettisoned. If it wants to contradict the witness with a former statement there is no escape route but to take the risk.

71. In view of the settled law that statement under Section 164 recorded by a Magistrate can only be used for the purpose of corroboration or contradiction and, since the said statement, even if proved, cannot be used as substantive piece of evidence, the non-examination of the Magistrate in the instant case can in no way be said to be fatal and there is no legal requirement. In my considered view, it will be against the law to say that in absence of Magistrate, the 164 statement cannot be proved and be marked as exhibit.

72. In the present case, the statement recorded under Section 164(5) CrPC by the Magistrate is legally proved as the said statement was corroborated by the victim-prosecutrix, who also identified her signature. The investigating officer(PW5) has specifically stated that he forwarded the victim-prosecutrix to the Court of learned Judicial Magistrate First Class for recording the statement of the victim under Section 164(5) of CrPC.

73. I also have taken note of the submission of Mr. Chowdhury, learned counsel for the appellant that the medical examination report does not find any injury in and around of the private part of the victim girl, which also supported by Dr. Shyamal Chandra Sarkar(PW3). I find no force in the said submission of the learned counsel.

74. It is no more *res integra* that injury in an around the private parts of a rape victim is not a *sine qua non* to arrive at a

finding as to whether the victim was really raped or not. The PW1, the victim-prosecutrix has categorically stated that the appellant had inserted his male organ into her vagina. It is now well settled that even a slightest degree of penetration constitutes rape and in that case, there may not be any injury. Further, I do not find any infirmity in the evidence of PW1, the victim-prosecutrix. She vividly explained as to how the incident occurred and the offence was committed by the appellant herein which inspires confidence of the Court and the accused-appellant in his defence could not shake the evidence of the PW1, the victim-prosecutrix and, all along, her statement is found to be consistent to her earlier statement.

75. In the light of the principle drawn by the Apex Court, as I discussed in the preceding paragraphs, I find no impediment to convict a person of committing the offence of rape solely on the basis of the testimony of the prosecutrix if it is found that it is trustworthy, without any exaggeration or improvement and inspires the confidence of the Court and having viewed so, the judgment of conviction returned by the learned Addl. Sessions Judge needs no interference.

76. Accordingly, the instant appeal preferred by appellant, Md. Abu Jalal Miah stands dismissed.

77. Send back the LCRs.

JUDGE