Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A. No. 2 of 2019

Date of Decision: 30.01.2020

Marbet Nongsiej Vs. State of Meghalaya

Coram:

Hon'ble Mr. Justice Mohammad Rafiq, Chief Justice

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. S. Wahlang, Adv.
For the Respondent(s) : Mr. N.D. Chullai, AAG. with
Mr. S. Sengupta, Addl. PP.
Mr. A. Kharwanlang, GA.

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

Per W. Diengdoh, 'J'

1. On 15.11.2014 an F.I.R. was lodged by one Smt. Makdalin Khardewsaw of Nongspung-Nongkynjoin before the Officer-in-charge Nongstoin Police Station to the effect that a complaint was made against one Marbet Nongsiej of Nongspung who had raped her daughter (hereinafter known as victim) on 11.11.2014 at around 12.00 noon in the house of her cousin sister.

2. Taking cognizance of the said F.I.R., the police have accordingly registered a case being Nongstoin P.S. Case No. 163(11) 2014 under Section 3(a)/4 of the POCSO Act, 2012, and accordingly investigation was launched.

3. The said Marbet Nongsiej was arrested by the police in connection with the said case and was forwarded to the Court of the District & Sessions Judge, West Khasi Hills District, Nongstoin.

4. The Investigating Officer after completion of the investigation has filed the charge-sheet being C.S. No. 18/15 dated 16.03.2015 under Section 3(a)/4 of the POCSO Act, 2012.

5. Relating to the prosecution story in the charge-sheet, it is said that on 15.11.2014 a written report was received from the complainant alleging that the victim was raped by the accused Marbet Nongsiej when she was all alone in the house of the cousin sister where she was engaged for baby-sitting.

6. It is also said that the delay in reporting the incident was due to the fact that the victim was staying with her cousin sister and did not get the time to go home and inform the matter to her parents and moreover, she was threatened by the accused.

7. The I.O has further stated that the statement of the complainant and the victim were recorded under Sections 161 and 164 Cr.P.C. and the statement of available witnesses were also recorded under Section 161 Cr.P.C.

8. The victim, being a minor was also medically examined at Civil Hospital, Nongstoin where the medical officer has opined that *"Hymen ruptured with irregular margin, no fresh injury"*. "*Signs of recent sexual*

activity cannot be elicited as there are no signs of fresh injuries, minor or major on her private part or any part of her body".

9. The I.O has again noted that the accused during interrogation has admitted to have committed the offence though he stated that it was with the consent of the victim.

10. Finding that there exists a prima facie case under Section 3(a)/4 of the POCSO Act, 2012 against the accused, the I.O. has sent the above named accused for trial before the Court.

11. Thereafter, on 09.09.2015 the learned Special Judge (POCSO) Nongstoin had framed charges against the accused under Section 3(a)/4 of the POCSO Act, 2012 and after the same being read out and explained to the accused, he pleaded not guilty and claimed to be tried.

12. The prosecution then examined six witnesses including the victim as P.W.1, the complainant/informant as P.W. 2, Relative of the minor victim as P.W. 3, the Doctor as P.W.4 as well as Sub-Inspector as P.W. 5 and the I.O as P.W.6. In course of examination of the witnesses, five documents were exhibited and one paper-mark which is the proof of age of the minor victim was produced.

13. The statement of the accused under Section 313 Cr.P.C. was also recorded and no defence evidence was adduced by the accused.

14. The learned Special Judge, after hearing the argument of the prosecution as well as the defence counsel and also relying on the written

arguments filed before the Court have accordingly passed the impugned judgment and order coming to a finding that the accused Shri. Marbet Nongsiej had committed penetrative sexual assault on the victim and is, therefore, guilty of committing an offence under Section 3(a) of the POCSO Act, 2012 which is punishable under Section 4 of the said POCSO Act, 2012.

15. On 13.08.2018 the learned Special Judge, after hearing the submission of the prosecution as well as the defence counsel has returned a sentence of imprisonment for a period of 10 years and a fine of ₹ 20,000/- (Rupees twenty thousand) only and in default of payment, to undergo an additional one year imprisonment against the accused, Shri. Marbet Nongsiej.

16. Taking into account, the period of detention undergone by the said accused, the Court has calculated the remaining period of detention to be 9 years 6 months and 16 days.

17. The appellant/accused has assailed the impugned judgment and order dated 31.08.2018 by way of this instant appeal, inter-alia on the ground that the learned Special Judge have erred in law as well as in facts in failing to appreciate the facts and materials on record to come to a perverse finding without any supporting cogent and trustworthy documents and evidence.

18. The delay in filing of the FIR by the complainant without satisfactory explanation of the same of about 4 days or 90 hours after the occurrence of the offence was also one of the grounds raised by the appellant, inasmuch as, the fact that the victim after the alleged offence could not meet or inform the

complainant due to her busy schedule and purportedly because of the threat from the accused/appellant, even though it was evident from the statement of the complainant (P.W. 2) that the distance from the place of occurrence to her house is only about 15 minutes' walk, the reason for the delay in filing of the FIR was also not recorded by the Police in the FIR Form at Serial No. 8, was not noticed by the learned Special Judge.

19. Another ground raised by the appellant/accused is that the learned Special Judge has failed to properly examine and appreciate the fact that the medical report of the victim clearly indicates that there are no signs of recent sexual activity as there are no signs of fresh injury, minor or major on the private part or any part of the body of the victim. Further, the medical report also suggests that there are no signs of penetrative sexual assault, but in spite of the finding by medical examination as stated above, the learned Special Judge had passed the impugned judgment without considering the evidence and the contradictions thereto.

20. The learned counsel for the appellant, Mr. S. Wahlang in his oral argument as well as written submission has submitted that the findings of the learned Special Judge (POCSO) Nongstoin at paragraph-16 of the impugned judgment, wherein the Court while appreciating the evidence of P.W-1 (minor victim girl) has noted that the P.W. 1 has stated *"…the incident of rape happened 3 or 4 days before I informed my mother…",* has failed to take notice of the aforesaid belated F.I.R and has never mentioned in the findings that the distance from the place of occurrence to the house of the

complainant (P.W. 2) who is the mother of the victim is only about 15 minutes' walking distance.

21. The learned counsel for the appellant has also sought to bring out the contradiction in the findings of the learned Special Judge when it was pointed out that in the impugned Judgment it is noted that *"....the victim has confirmed that the accused has already entered the house when she went inside and the accused locked the door and caught hold of her…",* however, the victim in her cross-examination has stated that "…*during that time of incident there was nobody at home except myself and the accused person. I and the accused person were in different rooms and while I was collecting clothes the accused closed the main door and suddenly entered my room and raped me."*

22. Again, the learned counsel for the appellant has submitted that the learned Special Judge has come to the conclusion that the appellant had committed the offence only on the basis of the medical report, whereas in the medical report, it was stated that signs of recent sexual activities cannot be elicited as there are no signs of fresh injury minor or major on her private part or any parts of the body. Even the Doctor in his evidence as P.W. 4 has stated that *"....if hymen rupture within four days, recent injury signs will still be detected…"*

23. The learned counsel for the appellant has further submitted that the learned Court below relying on the evidence of the I.O. (P.W. 6) who, in her evidence has stated that *"....I filed the charge-sheet against the alleged*

accused person based on the statements of the alleged victim and the medical report of the victim", is contrary to the medical report as pointed out above.

24. The fact that the Confessional Statement of the appellant/accused was not recorded by the Court was also pointed out by the learned counsel for the appellant in his argument as a denial of his right which has prejudiced his case.

25. On the denial of the appellant/accused on the commission of the said offence, the statement of the appellant/accused recorded under Section 313 Cr. P.C. wherein he has referred to the existence of the pigsty was also not investigated into, has resulted in deprivation of the right to fair trial which is against Article 21 of the Constitution of India, submits the learned counsel for the appellant.

26. Finally, the learned counsel for the appellant has submitted that the findings of the learned Court below when it was held that *"... though it is seen from the evidence that there are some discrepancies in the statement of the witnesses, these discrepancies did not shake the basic version of the prosecution in this case being the offence of penetrative sexual assault..."* would show that the learned Court below has not gone into the depth of the evidence relating to the offence of penetrative sexual assault and the materials on record, such observations and in the light of the evidence of P.W. 4 (the Doctor), no reliable evidence exists and as such, the case is not proved beyond reasonable doubt and therefore, is not tenable in the eye of

law. Accordingly, he prays that the impugned judgment and order and sentence dated 31.08.2018 is liable to be set aside.

27. In support of his submission, learned counsel for the appellant has placed reliance on the following judgments:-

i) ***Prahlad v. State of Rajasthan: 2018 SCC Online SC 2548.***

ii) ***Noor Aga v. State of Punjab & Anr: (2008) 16 SCC 417 Para 58 Page 450.***

iii) ***Bhaiyamiyan Alias Jardar Khan & Anr v. State of Madhya Pradesh: (2011) 6 SCC 394 Para 9 Page 395.***

iv) ***Satnam Singh & Ors v. State of Uttaranchal (now State of Uttarakhand) Para 14 in Criminal Appeal No 219 of 2003.***

28. On the other hand, the written submission filed by the learned counsel for the State respondent, would show that the respondent had referred to the evidence of the P.W. 1 (minor victim) which was recorded on 08.10.2015 before the learned Trial Court. Mr. S. Sengupta, learned Additional PP for the State respondent has submitted that the prosecutrix in her deposition has stated that on 15th November, the year which she could not remember, she had informed her mother (P.W. 2) that the accused Shri. Marbet Nongsiej had raped her. The learned Additional PP has also submitted that the prosecutrix have also deposed that on the date of occurrence the accused (the appellant herein) had first asked if he could kissed her, but she refused. After the incidence, the prosecutrix had informed the wife of the accused (appellant) and thereafter had also informed her

mother about the rape. He further submits that the evidence of the prosecutrix could not be shaken in her cross-examination.

29. It is further submitted by the State respondent that the evidence of the prosecutrix is worthy of credence and being a minor in age, her evidence does not suffer from any infirmity.

30. The learned Additional PP has also submitted that the statement of the prosecutrix under Section 164 Cr.P.C was recorded by the learned Magistrate but in cross-examination, the defence had not made any reference to the statement of the prosecutrix under Section 164 Cr.P.C. and, as such, the defence has not tried to rebut the statement of the prosecutrix with regard to the offence committed on her by the accused person, the statement of the victim under Section 164 Cr.P.C as well as the evidence recorded during the course of trial are consistent with regard to the factum of rape.

31. The State respondent through the learned Additional PP has submitted that the law on the issue as far as the statement of the prosecutrix is concerned is well-settled by the Hon'ble Supreme Court in several decisions to the effect that the statement of the prosecutrix if it is cogent, reliable, requires no corroboration and the accused person can be effected on the sole testimony of the prosecutrix.

32. As regard the evidentiary value of the testimony of the sole prosecutrix, the State respondent has referred to the case of ***Vijay @ Chineev. State of Madhya Pradesh: (2010) 8 SCC 191*** at paragraphs

9,10,11,12, 13 and 14 as well as the case of ***Raju & Ors. v. State of Madhya Pradesh: (2008) 15 SCC 133*** at paragraphs 9 and 10.

33. Another point raised by the learned Additional PP in his written submission is that the accused/appellant is the brother-in-law of the prosecutrix and, as such, nothing has been brought on record that there was any enmity or dispute among the accused person and the family members of the prosecutrix and, as such, there is no reason for the prosecutrix to make any false allegation against the accused person.

34. As far as the evidence of the P.W. 2 (mother of the prosecutrix) is concerned, the learned Additional PP has submitted that the P.W. 2 in her evidence has proved the F.I.R as well as the age of the prosecutrix and her evidence is also consistent with what has been stated in the F.I.R as well as the statement under Section 164 Cr.P.C.

35. As to the medical evidence, the learned Additional PP quoting the evidence of the Doctor (P.W. 4) has submitted that the P.W. 4 had conducted the medical examination of the prosecutrix in presence of the family and staff nurse. The general examination is normal and the opinion of the doctor is that there are no signs of recent sexual activity as there are no signs of fresh injury, minor or major, on her private part or any part of her body (referring to the victim).

36. Again, pointing to Exhibit-5 which is the medical report, the learned Additional PP has submitted that the Doctor (P.W. 4) in his cross-examination has stated that *"the rupture of the hymen cannot be ascertained*

whether this is due to the sexual intercourse or some other injury. In normal sexual intercourse unusually there is no injury. Rupture with irregular margin it can be caused by sexual intercourse, fingering, cycling etc. If the hymen is ruptured within four days recent injury signs will still be detected. For example bleeding point, tenderness etc. There is no external injury mark on the body of the minor victim girl", however in cross-examination P. W. 4 has stated that it cannot ascertained whether this is due to the sexual intercourse or some other injury and that the ruptures with irregular margin can be caused by sexual intercourse, fingering, cycling, etc. P.W. 4 has further stated that in normal sexual intercourse usually there is no injury.

37. Therefore, the learned Additional PP has submitted that the contention of the defence counsel that the medical evidence does not support the case of the prosecution is of no consequence, inasmuch as, though the medical evidence is a corroborative piece of evidence, but when the medical evidence does not support the otherwise clinching and trustworthy ocular evidence of any material witness, then the testimony of such ocular evidence will prevail on the medical opinion and not the vice-versa.

38. In this regard, the case of ***Ranjit Hazarika v. State of Assam: (1998)8 SCC 635*** was referred to by the learned counsel for the State respondent who has submitted that in the aforesaid decision, the Hon'ble Supreme Court has held that *"We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and*

there is no requirement of law which requires that her testimony cannot be accepted unless corroborated".

39. It is the contention of the learned counsel for the State respondent that the prosecutrix was only 14 years' old at the time of occurrence and records will reveal that she is a disabled girl. The accused person being related to her should be seen as the guardian or father, but taking advantage of the helplessness of the victim girl, has committed an act of rape which on every action and without exception is a crime of power, more than one of lust and when committed on a child is brute and unrelentingly savage expression for which, no clemency or mercy whatsoever can be shown to the perpetrator of such act. The case of ***State of Himachal Pradesh v. Gian Chand: (2001) 6 SCC 71*** where the Hon'ble Supreme Court dealing with the case involving rape committed by the accused relative on the minor has awarded a sentence of imprisonment of 10 years' along with fine, was also cited by the State respondent in this regard.

40. Coming to the statement of the accused (appellant) recorded under Section 313 Cr.P.C where the accused person had completely set up a new defence, the learned Additional PP has submitted that there is nothing on record to suggest that the accused person had sought to defend himself on what has been said by him in his statement under Section 313 Cr.P.C., and since he has failed to come out with an explanation when the opportunity was afford to him to explain his circumstances that are shown to exist against him, therefore keeping silent without any expression would lead to an adverse inference against him when the opportunity was accorded to him

as a matter of right in cross-examination as well as in his statement under Section 313 Cr.P.C. The case of ***Manu Sao v. State of Bihar: (2010) 12 SCC 310*** was referred to in this regard by the learned counsel for the State respondent.

41. As to the contention of the defence that there was a delay in filing of the FIR, the learned Additional PP has submitted that the incident of rape committed by the accused person on the minor victim on 11.11.2014 was informed to the mother of the minor victim (P.W. 2) on 15.11.2014 and when P.W. 2 came to know about the said incident, she discussed the same with the wife of the accused person who told her to take necessary steps against the accused person and accordingly, an F.I.R was lodged on 15.11.2014 and for a delay of three or four days in lodging of the F.I.R, considering the facts and circumstances of the case, the same is not fatal.

42. Reference is placed on the decision of the Hon'ble Supreme Court in the case of ***Tulshidas Kanolkarv. State of Goa: (2003) 8 SCC 590*** and in ***Satyapal v. State of Haryana: (2009) 6 SCC 635*** to support the contention of the learned counsel for the State respondent in this regard.

43. In conclusion, the learned counsel for the State respondent has submitted that the learned Trial Court having considered the evidence and materials adduced by the prosecution has rightly passed the impugned judgment of conviction against the appellant which calls for no inference.

44. Apart from the cases cited by the learned counsel for the appellant, the learned counsel for the State respondent has furnished a list of cases to support its case. The said list is reproduced as under:-

i) State of Himachal Pradesh v. Sanjay Kumar @ Sunny: (2017) 2 SCC 51.

ii) Bharwada Bhoginbhai Hirgibhai v. State of Gujarat: (1983) 3 SCC 217.

iii) B.C. Deva v. State of Karnataka: (2007) 12 SCC 122.

iv) Narendra Kumar v. State (NCT of Delhi): (2012) 7 SCC 171.

45. We have carefully considered the submissions and contentions of the rival parties as noted above. What can be understood is that the appellant has assailed the impugned judgment and order mostly on the following counts:

(i) That the delay in filing the FIR has prejudiced the appellant, inasmuch as, the learned Special Judge has not considered the fact that the victim has stated that due to her busy schedule and purported threat from the accused, she could not inform the complainant (P.W. 2) about the incident and the same was informed to the complainant only after 4 (four) days, inspite of the fact that the place of occurrence and the house of the complainant is only 15 minutes' walk.

(ii) That the discrepancies in the evidence of the victim as to the actual occurrence of the offence where she has stated that *"the accused had already entered the house when she went inside*

and the accused locked the door and caught hold of her hands and legs and committed rape on her," and in another portion of her evidence, where the victim has stated that *"during the time of incident, there was nobody at home except myself and the accused person. I and the accused were in different rooms and while I was collecting clothes the accused closed the main door and suddenly entered my room and raped me,"* and again when the victim has stated in her evidence that *"she went to collect the dry clothes from outside the house,"* are considered vital discrepancies for which the learned Special Judge has ignored the same and has come to the conclusion that "*Though it is seen from the evidence that there are some discrepancies in the statement of the witnesses, however, these discrepancies did not shake the basic version of the prosecution in this case being the offence of penetrative sexual assault."*

(iii) That the medical evidence as related by Dr. K. Kharumnuid (PW. 4) who has stated that *"signs of recent sexual activity cannot be elicited as there are no signs of fresh injuries, minor or major, on her private part or any part on her body.* "In his cross-examination PW. 4 has also stated that *"If the hymen is ruptured within four days, recent injury signs will still be detected,* "would show that there is no medical evidence to prove a case of penetrative sexual assault.

46. What can be observed above is that the main consideration before this Court would be whether the delay in lodging the FIR would be fatal to the prosecution's case and also whether the evidence of the minor victim, vis-à-vis the medical report would afford the accused of the benefit of doubt.

47. The complainant (P.W.2) in her evidence has stated that her minor daughter had informed her on 15.11.2014 that the accused/appellant had raped her on 11.11.2014 at around 12:00 noon in the house of her (complainant) cousin sister. The complainant had then went to the house of her cousin sister and met the wife of the accused person where she discussed the incident of rape with the wife of the accused person who told her (P.W. 2) to take necessary steps against the accused person following which an FIR was lodged at Nongstoin Police Station.

48. In her cross-examination, this witness (P.W. 2) has stated that *"It is not a fact that I lodged the FIR on 15.11.2014 due to my busy schedule, but I came to know of the incident on the very day itself".*

49. The victim in her deposition has stated that on *"15th November, the year however I could not remember, I informed my mother that the accused Marbet Nongsiej had raped me. The incident of rape happen three or four days before I informed my mother and at that point of time, I was staying in the house of my relatives taking care of her baby."*

50. The victim has also stated that *"After the date of incident, I first informed about the rape of the accused on me to the accused's wife and after*

that, I informed my mother after which my mother spoke to the accused's wife and later went to the Police Station and took me along with her".

51. On the delay of filing of the FIR, the learned Special Judge in the impugned judgment had observed that *"It is also not uncommon especially for simple and illiterate villagers especially children to hesitate or pause in reporting a crime of rape as it leaves them initially in a state of dilemma"*. It is only after the victim could meet her mother on 15.11.2014 that she could informed to her about the commission of rape on her.

52. In the case of ***Tulshidas Kanolkar v. State of Goa: (2003) 8 SCC 590*** at paragraph 5 relied upon by the State respondent, the Hon'ble Supreme Court in dealing with the issue of delay of filing of the FIR has observed as follows:-

> ***"5.*** *We shall first deal with the question of delay. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstances for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of the first information report does not in any way render the prosecution version brittle."*

53. Again in the case of ***State of Himachal Pradesh v. Sanjay Kumar Alias Sunny: (2017) 2 SCC 51,*** the Hon'ble Supreme Court dealing with the case of a minor victim of sexual assault who had withheld the disclosure of the said incident for about three years and after the same was found out, the mother (P.W. 1) after sharing the information with her husband had lodged a complaint after three days on receipt of the said information. The Hon'ble Supreme Court at paragraph 29 of the same has held that:

> ***"29.*** *Likewise, delay of three days in lodging the FIR by PW-1, after eliciting the information from her daughter PW-2, is inconsequential in the facts of this case. It is not to be forgotten that the person accused by the prosecutrix was none else than her uncle. It is not easy to lodge a complaint of this nature exposing the prosecutrix to the risk of social stigma which unfortunately still prevails in our society. A decision to lodge FIR becomes more difficult and hard when accused happens to be a family member. In fact, incestuous abuse is still regarded as a taboo to be discussed in public. This reticence hurts the victims or other family members who struggle to report. After all, in such a situation, not only the honour of the family is at stake, it may antagonise other relations as well, as in the first blush, such other members of family would not take charge of this nature very kindly. We also find that the so-called dispute between the parties was so trivial in nature that it would not have prompted PW-1 to lodge a false complaint, putting her minor daughter of impressionable age to risks of serious kinds, as pointed out above."*

54. On the issue of delay in filing the FIR, the learned counsel for the appellant had referred to the case of ***Bhaiyamiyan Alias Jardar Khan & Anr. v. State of Madhya Pradesh: (2011) 6 SCC 394*** wherein at paragraph 9 of the same, the Hon'ble Supreme Court has observed that:

> ***"9.*** *We have examined the evidence in the light of the above principle. We first see that the first information report had been lodged after about 60 hours of the incident. The prosecution case is that PW.1 accompanied by her parents had gone to Police Post Pathriya attached to Police Station Unarasital immediately after the incident but had found no police official*

present therein and had then gone to Police Station Sironj and lodged a report at 12 noon the next day. We find that the explanation for this delay is somewhat difficult to believe. A police post may have a few police officials posted in it, but Police Station Unarasital was a full-fledged police station which would invariably be manned. Moreover, even if no one was found in the police post on the first day at that particular point of time, the effort of the prosecutrix ought to have been to lodge a report later at Police Station Unarasital, but she chose to go to Police Station Sironj and recorded her statement and the investigation was thereafter referred to Police Station Unarasital."

55. From the materials on record and from what has been put forth by the prosecution taking into account the evidence of the complainant (P.W. 2) as well as the victim (P.W. 1) the fact that the victim is a minor girl of 14 years at the time of the incident, it is, but natural that her reaction and response as far as information of the said incident to her mother (P.W. 2) is concerned, could not be reported immediately. However, it is also in the evidence of the victim (P.W. 1) that she had first reported about the incident to the accused's wife. It cannot be contemplated that the victim would insist on reporting the matter to the police and as such, the fact that she had reported the same to her mother (P.W. 2) and the mother (P.W. 2) had immediately reported the same to the police is a viable explanation as far as the delay in filing the FIR is concerned.

56. The case cited by the learned counsel for the appellant i.e. ***Bhaiyamiyan Alias Jardar Khan & Anr. v. State of Madhya Pradesh (supra)*** would not help the appellant, inasmuch as, the facts and circumstances and the reasons for delay in filing the FIR are not similar in nature to the case in hand.

57. We are therefore of the considered view that the delay in filing the FIR would not materially affect the merits of the case of the prosecution.

58. Another contention raised by the learned counsel for the appellant is with regard to the medical report and the evidence, as regard the factum of rape committed on the victim.

59. The learned counsel for the appellant in the written submission has assailed the observations and findings of the learned Special Judge by contending that the reliance on the statement of the victim and the medical report has led to the conclusion reached by the learned Special Judge, which is based on casual observation and not supported by evidence and as such, the guilt of the accused cannot be proved beyond reasonable doubt. This case is therefore not tenable in the eye of law.

60. In support of his case on the issue of medical report, the learned counsel for the appellant had cited the case of ***Prahlad v. State of Rajasthan: 2018 SCC Online SC 2548,*** wherein at paragraph 13 of the same, the Hon'ble Supreme Court has opined as follows:

> ***"13.*** *In the Examination-in-Chief itself, the doctor PW10 who conducted the post-mortem examination has deposed that the genital organs of the victim were normal. The doctor further opined that the death of the deceased was caused due to acute hemorrhage. Post-mortem report is at Ex. P15. In the cross-examination, the doctor has admitted that all the aforementioned five injuries are simple in nature and they are likely to be caused by falling. Fracture on the left rib nos. 10 and 11 mentioned in the post-mortem report can be caused by falling on a stone. PW10 further stated that the genital organs of the deceased were healthy and no marks of any injury were present on the private parts of the deceased.Signs of sperm ejaculation were also not found on the external skin near the genital organs*

of the deceased. No injury was present on the head of the deceased. The doctor further deposed that when forcible sexual intercourse is committed upon a tender girl, there is a possibility of her vagina getting ruptured and bleeding from her genitals. There is no such mention in the postmortem report. The FSL report regarding vaginal swab which was sent for examination is not helpful for the prosecution to prove the offence under Sections 3 and 4 of the POCSO Act. Prosecution, practically relies upon the doctor's evidence only for proving the offence under Section 4 of the POCSO Act. No other material is placed on record by the prosecution to prove the offence under Section 4 of the POCSO Act. However, the evidence relating to penetration into the vagina, mouth, urethra or anus of a child etc. or any part of the body is not found. The Trial Court as well as the High Court have not gone into the depth of the evidence relating to offence of penetrative sexual assault, in detail. Certain casual observations are made which are not supported by the evidence led by the prosecution. In light of the aforementioned evidence of PW10 doctor, and in view of the fact that no other reliable evidence exists to prove the charge of penetrative sexual assault, i.e. any of the acts as detailed in Section 3 of the POCSO Act, it is our considered opinion that the Trial Court and the High Court are not justified in convicting the accused for the offence under Section 4 of the POCSO Act. We find from the judgment of the High Court that absolutely no reason, much less any valid reasons were assigned for convicting the accused for the offence punishable under the POCSO Act. Since no reliable material is available against the accused for the aforementioned offence of the POCSO Act, the benefit of doubt would go in the favour of the accused. After scanning through the entire materials on record in order to satisfy the conscience, and having regard to the seriousness of the charge, we conclude that the accused needs to be given the benefit of doubt in so far as the offence punishable under Section 4 of the POCSO Act is concerned."

61. In the case of ***Noor Aga v. State of Punjab & Anr: (2008) 16 SCC 417,*** in a case under the Narcotic Drugs and Psychotropic Substances Act, 1985, the Hon'ble Supreme Court at paragraph 58 while dealing with the question of "standard of proof" has held that the "standard of proof" required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt, but it is "preponderance of probability" on the accused.

62. In this regard, the learned Special Judge in the impugned judgment has discussed the evidence of the Doctor (P.W. 4) and has come to a finding that "*However PW. 4 has stated that in normal sexual intercourse usually there is no injury. So what has been confirmed is that rupture of the Hymen can be occurred due to sexual intercourse, fingering, cycling etc., but the Defence had not brought out anything in the evidence of the victim that she used to play and ride bicycle and considering the close proximity between the evidence of the victim and witness about commission of rape by the accused and the Medical Report which shows Ruptured Hymen, the ruptured hymen can be attributed to past sexual activity which pinpointed towards the accused as the one who had committed the offence."*

63. On going through the medical report issued by the Doctor (P.W. 4) as regard the medical examination of the victim, the genital examination, more particularly of the hymen would show that the same was ruptured with irregular margin, no fresh injury.

64. It is also the opinion of the Doctor (P.W. 4) that the victim was examined four days after the incident and the opinion reached after the said examination is that *".....signs of recent sexual activity cannot be elicited as there are no signs of fresh injuries, minor or major, on her private part or any part on her body……."*

65. Notwithstanding the medical examination and opinion, it would be prudent for this Court to examine the import of the evidence of a child witness.

66. In the case of ***Prem Bahadur @ Bhoj Bahadur v. State*** passed in Crl.A. No. 888 of 2017, the Hon'ble High Court of Delhi vide judgment dated 22.07.2019 at paragraph 46 of the same had elaborately spelled out and discussed the aspect of evidentiary value of a child witness. For ready reference, paragraph 46 is reproduced herein below:-

> ***"46.*** *On the evidence of a child witness, and its value during trial, this Court has,* ***in Sanjay Kumar Valmiki v. State, 2018 SCC Online Del 9304****, had occasion to observe thus:*
>
> > ***—57.*** *The child witness, like the child himself, has ever remained, criminologically speaking, a jurisprudential enigma. The judicial approach, to such evidence, has, at times, advocated wholesome acceptance of such evidence, subject to the usual precautions to be exercised while evaluating any other evidence; however, the more prevalent approach appears to prefer exercise of cautious consideration by the Court, while dealing with such evidence. The raison d' etre for advocating such an approach, as is apparent from the various authorities on the point, is that child witnesses are usually regarded as susceptible to tutoring; consequently, Courts have consistently held that, where the Trial Court is satisfied, on its own analysis and appreciation, that the child witness before it is unlikely to be tutored, and is deposing of his own will and volition, it cannot treat such witness, or the evidence of such witness, with any greater circumspection, than would be accorded to any other witness, or any other evidence. As has been often emphasised by courts in this context, no express, or even implied, embargo, on a child being a witness, is to be found in Section 118 of the Indian Evidence Act, which deals with the competency of persons to testify, and reads as under:*
> >
> > > ***—118. Who may testify. –***
> > >
> > > *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 those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.*

Explanation. – A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

58. *Statutorily, therefore, it is clear that there is no prohibition on children being witnesses, whether in civil or criminal cases, irrespective of the nature of the offence. The only circumstance in which the statute proscribes reliance on such evidence, is where the child is prevented from understanding the questions put to him, or from giving rational answers to such questions, by reason of his age. A duty is, therefore, cast, by the statute, on the judge faced with the responsibility of taking a decision on whether to allow, or disallow, the testimony of the child witness, to arrive at an informed decision as to whether the said evidence is vitiated on account of the child having failed to understand the questions put to him, or to provide rational responses thereto. If the answer, to these two queries, is in the negative, there is no justification, whatsoever, for discarding, or even disregarding, the evidence of the child witness.*

59. *This Court has, in a recent decision in* ***Latif v. State, 2018 SCC OnLine Del 8832****, observed as under, with respect to the evidence of child witnesses:*

> ***—16****. At this stage, it is necessary to recapitulate the law regarding the appreciation of the evidence of the child witness. In* ***Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341*** *the Supreme Court explained:*
>
> > *—A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent*

witness and there is no likelihood of being tutored."

***17**. In **Ranjeet Kumar Ram v. State of Bihar, 2015 (6) SCALE 529**, it was observed:*

> *—Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one."*

***18.** In **Nivrutti Pandurang Kokate v. The State of Maharashtra, (2008) 12 SCC 565**, the Supreme Court highlighted the importance of the trial Judge having to be satisfied that the child understands the obligation of having to speak the truth and is not under any influence to make a statement. The Court explained:*

> *"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 the 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 that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken 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.*
>
> *(Emphasis supplied)*

***60.** In **Yogesh Singh v. Mahabeer Singh, (2017) 11 SCC 195**, the Supreme Court held thus, with respect to the evidence of child witnesses:*

> ***—22****. It is well settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law.*
> *(See* ***Prakash v. State of M.P., (1992) 4 SCC 225, Baby Kandayanathil v. State of Kerala, 1993 Supp (3) SCC 667, Raja Ram Yadav v. State of Bihar, (1996) 9 SCC 287, Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341, State of U.P. v. Ashok Dixit, (2000) 3 SCC 70 and Suryanarayana v. State of Karnataka, (2001) 9 SCC 129****.*
>
> ***23****. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. (vide* ***Panchhi v. State of U.P., (1998) 7 SCC 177****)*
>
> *(Emphasis Supplied)*

61*. One of the cardinal principles to be borne in mind, while assessing the acceptability of the evidence of a child witness, is that due respect has to be accorded to the sensibility and sensitivity of the Trial Court, on the issue of reliability of the child, as a witness in the case, as such decision essentially turns on the observation, by the Trial Court itself, regarding the demeanour, carriage and maturity of the concerned child witness. An appellate court would interfere, on this issue, only where the records make it apparent that the Trial Court erred in regarding the child as a reliable witness. Where no such indication is present, the appellate court would be loath to disregard the evidence of the child witness, where the Trial Court has found it to be credible, convincing and reliable. [****Ref. Satish v. State of Haryana, (2018) 11 SCC 300****]*

62*. In* ***State of Madhya Pradesh v. Ramesh, (2011) 4 SCC 786****, the following principles, regarding assessment of the evidence of child witnesses, have been enunciated:*

> ***—7****.* ***In Rameshwar v. State of Rajasthan, AIR 1952 SC 54*** *this Court examined the provisions of Section 5 of the Oaths Act, 1873 and Section 118 of the Evidence Act, 1872 and held that (AIR p. 55, para 7) every witness is competent to depose unless the court*

considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the court considers otherwise. The Court further held as under: (AIR p. 56, para 11)

> ***—11**. ... it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate.*

***8.** In **Mangoo v. State of M.P., AIR 1995 SC 959**, this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.*

***9.** In **Panchhi v. State of U.P., (1998) 7 SCC 177**, this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that:*

> *"the evidence of a child witness would always stand irretrievably stigmatised. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring"*

10. *In* ***Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565****, this Court dealing with the child witness has observed as under: (SCC pp. 567-68, para 10)*

> ***—10****. ... 7. ... 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 the 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 that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. 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.*

11*. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him. (vide* ***Himmat Sukhadeo Wahurwagh v. State of Maharashtra, (2009) 6 SCC 712****)*

12. *In* ***State of U.P. v. Krishna Master, (2010) 12 SCC 324****, this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his*

memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

***13**. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (vide **Gagan Kanojia v. State of Punjab, (2006) 13 SCC 516.**)*

***14**. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.*

(Emphasis supplied)

***63.** The following guiding principles, governing the admissibility and reliability of the evidence of child witnesses, are readily discernible from the above cited judicial pronouncements:*

(i) There is no absolute principle, to the effect that the evidence of child witnesses cannot inspire confidence, or be relied upon.

(ii) Section 118 of the Indian Evidence Act, 1872 discounts the competence, of persons of tender age, to testify, only where they are prevented from understanding the questions put to them, or from giving rational answers to those questions, on account of their age.

(iii) If, therefore, the child witness is found competent to depose to the facts, and is reliable, his evidence can be relied upon and can constitute the basis of conviction.

(iv) The Court has to ascertain, for this purpose, whether (a) the witness is able to understand the questions put to him and give rational answers thereto, (b) the demeanour of the witness is similar to that of any other competent witness, (c) the witness possesses sufficient intelligence and comprehension, to depose, (d) the witness was not tutored, (e) the witness is in a position to discern between the right and wrong, truth and untruth, and (f) the witness fully understands the implications of what he says, as well as the sanctity that would attach to the evidence being given by him.

(v) The presumption is that every witness is competent to depose, unless the court considers that he is prevented from doing so, for one of the reasons set out under Section 118 of the Indian Evidence Act, 1987. It is, therefore, desirable that judges and Magistrates should always record their positive opinion that the child understands the duty of speaking the truth, as, otherwise, the credibility of the witness would be seriously affected, and may become liable to rejection altogether.

(vi) Inasmuch as the Trial Court would have the child before it, and would be in a position to accurately assess the competence of the child to depose, the subjective decision of the Trial Court, in this regard, deserves to be accorded due respect. The appellate court would interfere, therewith, only where the record indicates, unambiguously, that the child was not competent to depose as a witness, or that his deposition was tutored. Twin, and to an extent mutually conflicting, considerations,

have to be borne in mind, while ascertaining the competency of a child witness to justify. On the one hand, the evidence of the child witness has to be assessed with caution and circumspection, given the fact that children, especially of tender years, are open to influence and could possibly be tutored. On the other hand, the evidence of a competent child witness commands credibility, as children, classically, are assumed to bear no ill-will and malice against anyone, and it is, therefore, much more likely that their evidence would be unbiased and uninfluenced by any extraneous considerations.

(vi) It is always prudent to search for corroborative evidence, where conviction is sought to be based, to a greater or lesser extent, on the evidence of a child witness. The availability of any such corroborative evidence would lend additional credibility to the testimony of the witness."

67. It is also well settled that under the given facts and circumstances, conviction on sole testimony of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration, the Court may convict the accused on the sole testimony of the prosecutrix.

68. Discussing this legal issue, the learned counsel for the State respondent has placed reliance in the case of ***Vijay Alias Chinee v. State of Madhya Pradesh: (2010) 8 SCC 191*** at paragraph 9 to 14, wherein the Hon'ble Supreme Court has observed as follows:

> ***"9.*** *In State of Maharashtra v. Chandraprakash Kewalchand Jain AIR 1990 SC 658, this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under:-*
>
> > *"16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot*

be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction 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."

10. *In State of U.P. v. Pappu,(2005) 3 SCC 594, this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under: (SCC p. 597, para 12)*

"12. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands at a

higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do."

11. *In State of Punjab v. Gurmit Singh & Ors. AIR 1996 SC 1393, this Court held that in cases involving sexual harassment, molestation etc. the court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under: (SCC pp. 394-96 & 403, paras 8 & 21)*

"8. ……The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. .....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. ....Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to injury. ....Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances…….

21. ……The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

12. *In State of Orissa v. Thakara Besra & Anr. (2002) 9 SCC 86, this Court held that rape is not mere a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.*

13. *In State of Himachal Pradesh v. Raghubir Singh (1993) 2 SCC 622, this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by this Court in Wahid Khan v. State of Madhya Pradesh (2010) 2 SCC 9, placing reliance on earlier judgment in Rameshwar v. State of Rajasthan AIR 1952 SC 54.*

14. *Thus, the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence*

and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

69. Again coming to the aspect the value of medical evidence in rape cases, the Hon'ble Supreme Court in the case of ***Ranjit Hazarika v. State of Assam: (1998) 8 SCC 635*** at paragraph 5 has opined as follows:

> ***"5.*** *The argument of the learned counsel for the appellant that the medical evidence belies that testimony of the prosecutrix and her parents does not impress us. The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any injury on her private parts. To constitute the offence of rape, penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on "no reasons".*

70. This is similar to the facts and circumstances of this instant case as regard the factum of rape vis-à-vis the non-rupture of the hymen nor the absence of injuries on her private parts. Therefore, in the said case of ***Ranjit Hazarika v. State of Assam (supra)*** the Hon'ble Supreme Court at paragraph 6 has recorded it satisfaction that the evidence of the prosecutrix inspires confidence. Paragraph 6 of the same is reproduced herein below:

"6. *The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated. In State of Punjab v. Gurmit Singh (1996) 2 SCC 384, to which one of us (Anand, J.) was a party, while dealing with this aspect observed: (SCC pp. 395-96, para 8)*

> *"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the*

sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

71. In appreciation of the evidence of the prosecutrix in this instant case and the response of the accused/appellant as far as cross-examination is concerned, it is seen that the victim has been consistent in her assertion that the accused/appellant had raped her as was held by the learned Special Judge. Some discrepancies in the evidence may be there as far as the presence of the accused/appellant in the room (place of occurrence) is concerned, however, the factum of rape has not been proved to the contrary. Therefore, applying the principles as culled out from the above, cited judgments as far as testimony of the sole prosecutrix is concerned, we are satisfied that the testimony of the victim (P.W. 1) is trustworthy and could be relied upon as was done so by the learned Special Judge (POCSO) Nongstoin.

72. Again, with regard to the conflict of evidence as far as medical evidence and ocular evidence is concerned, the case cited in this regard would reinforce the belief of this Court in a case of sexual assault, especially that of a minor victim, due weightage is to be given to the ocular evidence as opposed to medical evidence.

73. On this count too, we find that the case of the prosecution is well supported as far as the finding of the learned Special Judge is concerned.

74. Another contention raised by the learned counsel for the appellant is that, the accused was not given the opportunity to have his statement recorded under Section 164 Cr.P.C which has prejudiced his case.

75. It may be seen that this point was not raised before the learned Trial Judge and as such, has not figured in the impugned judgment.

76. The appellant in his memo of appeal has simply made one averment that his statement under Section 164 Cr.P.C has not been recorded. However, nothing has been pointed out in the grounds of appeal as to how the same has prejudiced the accused in this case.

77. A look at this Section 164 Cr.P.C. reveals that it is divided into two parts, one with regard to “confession” which is found in sub-sections (1) to (4) and the other is with regard to “statement” (other than confession), which referred to in sub-section (5) thereof. Sub-section (6) of Section 164 Cr.P.C. provides that the Magistrate recording a confession or statement under this Section shall forward it to the Magistrate by whom the case is to be inquired

into or tried. While confession of the accused under Section 164 Cr.P.C. is recorded when he has turned approver and is granted pardon in terms of Section 306 Cr.P.C. which was not the case in the present matter. Thus argument of the learned counsel for the accused/appellant is, therefore, wholly without any substance.

78. In view of the detailed analysis of evidence and overall consideration of the facts and circumstances of the case, this Court finds that the impugned judgment and order does not suffer from any infirmity and the same is hereby upheld.

79. This appeal is accordingly dismissed. However, no costs.

(W. Diengdoh)
Judge

(Mohammad Rafiq)
Chief Justice

Meghalaya
30.01.2020
"D. Nary, PS"