

(2018) 10 SHI CK 0033
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No.504 of 2016

Himanshu alias Shammi @APPELLANT@Hash State of Himachal Pradesh

Date of Decision : 31-10-2018

Acts Referred:

Evidence Act, 1872 — Section 6, 8, 118, 157
Indian Penal Code, 1860 — Section 376, 506
Protection of Children from Sexual Offences Act, 2012 — Section 4
Code Of Criminal Procedure, 1973 — Section 313
Constitution Of India, 1950 — Article 39

Citation : (2019) 4 CriCC 260 : (2018) 3 SimLC 1680

Hon'ble Judges : Sanjay Karol, J;Sandeep Sharma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sanjay Karol, J.

1. The following important issues arise for consideration in the present appeal:
(a) As to whether the witnesses, being minors, were competent to

testify in the Court in terms of Section 118 of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act) and their depositions

considered for examining the guilt of the accused; (b) As to whether their testimonies necessarily required corroboration; and (c) As to whether

testimonies of the mothers of the victims can be considered, applying the doctrine of res gestae, in view of Section 6 of the Evidence Act.

2. The appellant stands convicted on the testimonies of child witnesses, three in number and their mothers, four in number, based on the corroborative

medical evidence. The correctness of the reasoning and the findings returned by the trial judge are subject matter of consideration before us.

3. Accused-appellant Himanshu alias Shammi (hereinafter referred to as accused) has preferred the present appeal, laying challenge to the judgment

dated 31.8.2016, passed by Special Judge, Chamba, Division Chamba, Himachal Pradesh, in Sessions Trial No.20 of 2015, titled as State of Himachal

Pradesh v. Himanshu alias Shammi, whereby he stands convicted for having committed offences punishable under Sections 376, 506 of the Indian

Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act), and sentenced to

undergo rigorous imprisonment for a period of ten years and pay fine of `10,000/- and in default thereof, to further undergo simple imprisonment for a

period of six months, in relation to offence punishable under Section 4 of the POCSO Act; and rigorous imprisonment for a period of one year and fine

of `1,000/- and in default thereof to further undergo simple imprisonment for a period of one month, in relation to offence punishable under Section 506

of the Indian Penal Code.

4. It is the case of prosecution that an Anganwadi Centre was set up in an accommodation, rented to the State. The accused, being son of the

landlady, had easy access to the said Centre and was sexually abusing the children. He sexually abused four minor victims and also threatened them

of dire consequences. Such fact was discovered, when one of the victims disclosed the same to her mother, who alongwith other victims and their

parents went to the Police Station and lodged FIR No.141/2015 (Ex. PW-1/A), dated 11.4.2015. Investigating Officer SI Sakini Kapoor (PW-18) got

the victims medically examined from Dr. Minakshi (PW-9) and obtained her medical opinion (Ex.PW-9/B, Ex. PW-9/C, Ex.PW-9/D and Ex.PW-9/E).

Investigation revealed that the accused was in the habit of enticing the victims (four in number), on the pretext of giving toffees and after taking them

to his room, subject them to sexual assault. During the course of investigation, statements of victims (Ex. PW-1/B, Ex. PW-2/A & Ex. PW-3/A) and

that of Priyanka (PW-4) mother of the fourth victim, were recorded. Investigation further revealed the victims to be minors. Necessary corroborative

evidence was collected by the Police and with the completion of investigation, challan presented in the Court for trial.

5. Accused was charged for having committed offences punishable under Sections 376 & 506 of the Indian Penal Code and Section 4 of the POCSO

Act, to which he pleaded not guilty and claimed trial.

6. To prove its case, prosecution examined as many as 18 witnesses. Statement

of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took the defence of innocence and false implication, on the ground that father of one of the victims had desired the property to be transferred which was so refused. He chose to lead evidence in his defence and examined his mother Bimla Devi (DW-1) as a witness.

7. Finding the testimonies of the three victims as also their mothers, four in number, to be inspiring in confidence, duly supported by corroborative evidence, trial Court found the accused to be guilty of having committed the charged offences and sentenced him as aforesaid. Assailing the impugned judgment, Mr. Shivank Singh Panta, learned counsel for the accused, with vehemence, argues that the accused himself is a victim of circumstances and stands falsely implicated, for the reason that mother of the accused had refused to accede to the demand of the parents of the victims to sell her land. Also statements of the victims cannot be said to be inspiring in confidence.

8. On the other hand, with equal vehemence, Mr. Ajay Vaidya, learned Senior Additional Advocate General, supports the impugned judgment on the basis of material on record.

9. From the record as also statement of the accused recorded under the provisions of Section 313 of the Code of Criminal Procedure, it is evident that in the house owned by Bimla Devi (DW-1), the State Government had requisitioned accommodation, on rental basis, where an Anganwadi Centre stood established. Also, it was fully operational and functional.

10. Though the accused denies such fact but from the line of his cross-examination, unrebutting and undisputing, it is evident that the victims, four in number, used to play in the courtyard of the said Anganwadi Centre. It also stands admitted that the accused, who is 25-27 years of age, ordinarily resides with his mother in the very same village. Prosecution wants the Court to believe that the accused was residing in the very same building, but according to him, as is evident from the suggestions put to the witnesses, he was residing in a separate accommodation, which was close by, in fact same courtyard. Hence, presence of the victims and the accused on the spot cannot be disputed.

12. We now proceed to examine as to whether the accused has been able to probablize the defence of false implication, so taken in his statement

under Section 313 of the Code of Criminal Procedure, in the following terms, or not:

“All the witnesses deposed false as their houses were abutting to my house. Parents of victims child Lal Singh and Sudershan and approached my

father to sell his land and when my father refused to sell land, thereafter they approached me to execute the sale deed in their favour but I refused to

sell my land and then all the parents of victims conspired to implicate me in a false case, the father of third victim (PW-1) is relative of Sudershan and

Lal Singh and family of PW.1 is tenant of Yogesh and his uncle.”

13. To probablize the same, his mother Bimla Devi stepped into the witness box and deposed as DW-1. In the examination-in-chief part of her

testimony, she does state that Lal Singh, Sudershan and Puran Bhadur, fathers/ relatives of the victims, had been asking her to transfer her land for

construction of house/ toilet/septic tank. By mere statement of such fact, defence cannot be said to have been probablized, for in her testimony she

does not state that parents of the victims had threatened of any false implication of any member of her family or in any manner, ever intimidated them.

There is no history of any complaint or litigation pertaining to any land. When? Where? and in whose presence? such demand was made, remains a

shrouded mystery. Significantly, she admits the parents of the victims to have owned some land. For some reason, she denies the revenue record (Ex.

PX, P-1 & P-2), reflecting the parents of the victims to be owners of 11 biswas of land. It is in this backdrop that we reject the submission of the

accused of having been falsely implicated on account of land dispute.

14. At this stage, we may clarify that this fact has had no bearing in our mind while arriving at our conclusion in deciding the appeal on merits.

15. In the instant case, there are four victims, whom we term as Victim No.1 (PW-1), Victim No.2 (PW-2), Victim No.3 (PW-3) and Victim No.4

(Aged 2½ years, not examined). All the four victims are girls. Victim No.1 is aged 10 years; Victim No.2 is aged 8 years; Victim No.3 is aged 10

years; and Victim No.4 is aged 2½ years.

16. In order to prove the age of the victims, prosecution examined Thakur Singh (PW-11), Secretary of Gram Panchayat, Karian, who has proven

Birth Certificates in respect of Victim No.2 (Ex.PW-11/C), Victim No.3 (Ex.PW-11/D); Victim No.4 (Ex. PW-11/B) and copies of family register, in

respect of Lal Singh, Sudershan Singh & Yogesh (Ex.PW-11/E, Ex.PW- 11/F & Ex.PW-11/G, respectively). He further states that since date of birth

of Victim No.1 was not available, he issued certificate (Ex.PW-11/H) in that respect. Thus the factum of age, in our considered opinion, stands

established, in accordance with law.

17. It has come in the testimony of Dr. Kamaljeet Singh (PW-10) that the accused was got medically examined from him. He found him capable of

performing sexual intercourse. MLC (Ex.PW-10/B), in this respect, is on record. Hence, plea of incapacity stands rejected.

18. It has also come in the testimony of Dr. Minakshi (PW-9) that police got all the four victims medically examined through her. In Court, she has

deposed of having issued MLCs, in respect of Victim No.1 (Ex.PW-9/B), Victim No.2 (Ex.PW-9/C), Victim No.3 (Ex. PW-3/D) and Victim No.4

(Ex.PW-3/E). She states that on physical examination of Victims No.1, 2 & 3, though there were no scars, wounds or injury on body, but there was

redness in the private parts and the hymens were absent. According to the Doctor, injuries on the private parts of Victim No.1 & 2 could be on

account of sexual assault within one month, and that on the private part of Victim No.3 within a period of 15-20 days. With regard to Victim No.4, the

Doctor has opined that in the anal region, there was redness and tenderness. Also, she took the vaginal swabs and slides of all the victims, which were

handed over to the police.

19. From the cross-examination part of her testimony, we do not find her opinion of sexual assault to be rendered doubtful, in any manner. In fact,

suggestion put by the accused of the hymen having been ruptured on account of masturbation with hard object or finger is extremely shocking and

preposterous. In any event, the Doctor has clarified that the victims were not of the age to have performed such an act.

20. Though, it is not the case in hand, but Mr. Shivank Singh Panta argues that medical record is at variance with the ocular version. Hence we

discuss the law on the issue.

21. The Apex Court had the occasion to deal with the case where there was a conflict between medical evidence and ocular evidence of the

prosecution and Dayal Singh v State of Uttaranchal, (2012) 8 SCC 263 (SCC p.283, paras 35036) observed that possibility of some variations in the

exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in

favour the accused. Only where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive

case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a

greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are

perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution.

22. It is also a settled principle of law that where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative

possibilities may not be accepted as conclusive. [Dayal Singh (supra)].

23. After all the expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and

enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own

judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the

medical officer but that of the Court.

24. Also, it is a settled principle of law that absence of injuries on the external or internal parts of the victim by itself cannot be a reason to disbelieve

the testimony of the prosecutrix. (See: Mukesh v. State of Chhattisgarh, (2014) 10 SC 327); State of Haryana v. Basti Ram, (2013) 4 SCC 200; O.M.

Baby (Dead) by Legal Representative v. State of Kerala, (2012) 11 SCC 362; and State of U.P. v. Chhotey Lal, (2011) 2 SCC 550).

25. Reiterating its earlier view in Mohd. Iqbal v. State of Jharkhand, (2013) 14 SCC 481; Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC

171, the Apex Court in Mukesh v. State of Chhattisgarh, (2014) 10 SCC 327, has held that sole testimony of prosecutrix is sufficient to establish

commission of rape, even in the absence of any corroborative evidence.

26. Hence, the contention needs to be rejected.

27. Investigation of the case was conducted by SI Sakini Kapoor (PW-18), who states that on 11.4.2015, pursuant to entrustment of the file to her, she

recorded statements of the witnesses (examined in Court) and completed the

investigation.

28. We now proceed to discuss the other ocular evidence. Essentially there are two set of witnesses. The first being the child witnesses and the

second their mothers. We proceed to discuss the latter first. But before we do so, let us discuss the law with regard to admissibility of their

statements, for they are in the nature of hearsay.

29. Section 6 of the Evidence Act reads as under:-

â??6. Relevancy of facts forming part of same transaction.â?"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.â? In *Rameshwar v. The*

State of Rajasthan (AIR 1952 SC 54), the Supreme Court has held that the previous statement of the raped girl to her mother, immediately after the

occurrence, is not only admissible and relevant as to her conduct, but also constitutes corroboration of her statement under the provisions of section

157 of the Evidence Act. In order to come to the aforesaid conclusions, illustration (j) to section 8 of the Evidence Act was relied upon. In that case,

the victim, named Purni, was 7/8 years old. She was not administered oath, but was held to be competent witness and, therefore, duly examined and

believed.

30. The Apex Court in *Sukhar versus State of U.P.*, (1999) 9 SCC 507 has held that Section 6 of the Evidence Act is an exception to the general rule

whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to

be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. Also â??the

statements sought to be admitted, therefore, as forming part of *res gestae*, must have been made contemporaneously with the acts or immediately

thereafter. The aforesaid rule as it is stated in *Wigmore's Evidence Act* reads thus : ""Under the present Exception [to hearsay] an utterance is by

hypothesis, offered as an assertion to evidence the fact asserted (for example that a carbrake was set or not set), and the only condition is that it shall

have been made spontaneously, i.e. as the natural effusion of a state of excitement. Now this state of excitement may well continue to exist after the

exciting fact has ended. The declaration, therefore, may be admissible even

though subsequent to the occurrence, provided, it is near enough in time to allow the assumption that the exciting influence continued.

32. Sarkar on Evidence (Fifteenth Edition) summarises the law relating to applicability of Section 6 of the Evidence Act thus:

1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they

accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent

thereto unless such facts are part of a transaction which is continuous. 2. The declarations must be substantially contemporaneous with the fact and

not merely the narrative of a past. 3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the

declarations of the victim, assailant and by-standers. In conspiracy, riot &c. the declarations of all concerned in the common object are admissible. 4.

Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters

stated.

33. Earlier the Apex Court in *Gentela Vijayavardhan Rao v. State of A. P.*, (1996) 6 SCC 241, considering the law embodied in Section 6 of the

Evidence Act held that the principle of law embodied in the said Section 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, in exception to the general rule that hearsay evidence is not admissible. The rationale in

making certain statement or fact admissible under Section 6 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*.

34. Further in *Rattan Singh v. State of H. P.*, (1997) 4 SCC 161 the Court examined the applicability of Section 6 of the Evidence Act to the statement

of the deceased and held thus (SCC p.167, para 16)

.....The aforesaid statement of Kanta Devi can be admitted under Section 6 of the Evidence Act on account of its proximity of time to the act of murder. Illustration 'A' to Section 6 makes it clear. It reads thus:

“(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.”

Here the act of the assailant intruding into the courtyard during dead of the night, victim's identification of the assailant, her pronouncement that appellant was standing with a gun and his firing the gun at her, are all circumstances so intertwined with each other by proximity of time and space that the statement of the deceased became part of the same transaction. Hence it is admissible under Section 6 of the Evidence Act.

35. In *Balram Prasad Agrawal versus State of Bihar and others*, (1997) 9 SCC 338, the Apex Court reiterated the principle laid down in the case of J.

D. Jain v. Management of State Bank of India, AIR 1982 SC 673: (1982) 1 SCC 143 wherein a Bench of three learned Judges speaking through

Baharul Islam, J. in paragraph 10 of the Report has made the following observations : (AIR p. 676, para 10: SCC p.148, paras 21 and 22)

“The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person

declares on information given by someone else. (See *Stephen on Law of Evidence*). The Privy Council in the case of *Subramaniam v. Public*

Prosecutor, (1956) 1 WLR 965 observed:

“Evidence of a statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when

the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to

establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is frequently

relevant in considering the mental, state and conduct thereafter of the witness or some other persons in whose presence these statements are

made’.”

36. Applying the aforesaid principles, we find the testimonies of the parents, even if hearsay in nature, being in close proximity to the time of crime and

relating to the act which is in issue, substantially contemporaneous to the acts in issue to be proven as a fact, can be referred to and relied upon for

establishing the prosecution case. From the discussion hereinafter if we find the same to be inspiring in confidence we would not hesitate in relying

thereupon for ascertaining the truthfulness of the genesis of the prosecution case.

37. From the ocular version of Shakuntla (PW-5), it is evident that the incident was first brought to her notice by her daughter i.e. Victim No.1. This

was on 11.4.2015. The Victim informed that 15 days ago, while she was playing with Victim No.4 in the courtyard of the Anganwadi Centre, the

accused, on the pretext of giving toffees, enticed them and after taking both of them inside the room, subjected them to sexual assault. Further, the

accused had also committed such act on Victim No.2 and Victim No.3. As such, she immediately informed the parents of other victims, whereafter

they all went to the Police Station and reported the matter.

38. We do not find the version of this witness to have been shattered in any manner, in the cross-examination part of her testimony. Accused laid

emphasis more on false implication, than the witness or victims telling lies. Suggestion that the victims did not face any difficulty while urinating is of

no consequence. We find the witness to be worthy of credence and the veracity of her testimony to be unimpeachable.

39. We notice that version of Anju Devi (PW-6), mother of Victim No.3, and Kaushalya Devi (PW-7), mother of Victim No.2 is on similar lines. In

fact, Kaushalya Devi, in her unrebutted testimony, has explained the reason why the victims had not earlier disclosed the incident to their parents,

which was so done only with such fact having revealed on 11.4.2015.

40. Version of another parent namely Priyanka (PW-4), mother of Victim No.4, is also on similar lines. It was only on 11.4.2015 that she was

informed about the incident by the mother of Victim No.1. It is true that in the cross-examination part of her testimony, she was confronted with her

previous statement, wherein it never stood disclosed that one month prior to the incident she had got her daughter medically examined for having

suffered some infection in her private parts, but then this fact, in our considered view, would have no bearing, for otherwise her statement of sexual

assault is corroborated by Kaushalya Devi. That part, in her unrebutted testimony, to a Court question, she categorically states that when enquired, her

daughter informed that she had been sexually assaulted by the accused. We reproduce the question and answer as under:

â??COURT QUESTION

Did you ask or inquire your daughter when you came to know from mother of Victim No.2 (name withheld) that your daughter has been sexually assaulted by the accused?

Ans: Yes Sir. She responded pointing out towards her private part with her hands.â??

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

â??The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a

case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial

character.â??

42. Hence we see no reason to disbelieve the testimonies of parents.

43. In cases involving sexual molestation and assault require a different approach â?" a sensitive approach and not an approach which a court may

adopt in dealing with a normal offence under penal laws. Child rape cases are cases of perverse lust for sex where even innocent children are not

spared in pursuit of sexual pleasure. It is a crime against humanity. In such cases, responsibility on the shoulders of the courts is more onerous so as to

provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our

country. They are the countryâ??s future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the

modes of her exploitation is rape besides other modes of sexual abuse. These factors point towards a different approach required to be adopted. It is

necessary for the courts to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is

likely to be lifelong. A special safeguard has been provided for children in the Constitution of India in Article 39. This is what stands laid down by

Honâ??ble the Apex Court in *State of Rajasthan versus Om Prakash*, (2002) 5 SCC 745.

44. In *Shyam Narain v. State (NCT of Delhi)*, (2013) 7 SCC 77, the Apex Court

held that the youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court.

45. In this backdrop we proceed to discuss the testimonies of the child witnesses. But before that the issue with regard to their competence.

46. Section 118 of the Evidence Act 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."

47. In *Dattu Ramrao Sakhare v. State of Maharashtra*, (1997 (5) SCC 341), held that: (i) A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. (ii) Even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. (iii) The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. (iv) 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. (v) The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge

who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his

capacity and intelligence as well as his understanding of the obligation of an oath. (vi) This precaution is necessary because child witnesses are

amenable to tutoring and often live in a world of make beliefs. (vii) Though child witnesses are pliable and liable to be influenced easily, shaped and

moulded, but 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.

48. In *Golla Yelugu Govindu vs. State of Andhra Pradesh*, (2008) 16 SCC 769, the Apex Court while reiterating its earlier view held that:-

“11. 6. Indian Evidence Act, 1872 (in short the 'Evidence Act') does not prescribe any particular age as a determinative factor to treat a witness to

be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court

considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender

years, extreme old age, disease whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has

intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in *Wheeler v. United*

States (159 U.S. 523). The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such

evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See *Surya*

Narayana v. State of Karnataka (2001) 1 SCC 1.”

49. Recently, in *State of Himachal Pradesh v. Sanjay Kumar alias Sunny*, (2017) 2 SCC 51, the Apex Court held as under:

“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. Most of the time, acquaintance rapes, when the culprit is a family member, are not even reported for various reasons, not difficult to fathom. The strongest among those is the fear of attracting social stigma. Another deterring factor which many times prevent such victims or their families to lodge a complaint is that they find whole process of criminal justice system extremely intimidating coupled with absence of victim protection mechanism. Therefore, time is ripe to bring about significant reforms in the criminal justice system as well. Equally, there is also a dire need to have a survivor centric approach towards victims of sexual violence, particularly, the children, keeping in view the traumatic long lasting effects on such victims.

31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. 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? The plea

about lack of corroboration has no substance {See Bhupinder Sharma v. State of Himachal Pradesh, (2003) 8 SCC 551}. Notwithstanding this legal

position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.â??

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

â??33. It will be useful to refer to the judgment of this Court in the case of O.M. Baby v. State of Kerala, (2012) 11 SCC 362, where the Court held

as follows:-

17. â?|.. â??16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act

nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under

Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and

caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the

court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled

by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice

incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is

hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of

corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must

necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a

conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

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

51. Thus the children examined in Court were competent to depose as a witness in the Court.

52. When we peruse the testimonies of these victims, we find them to have fully narrated the incident of sexual assault committed by the accused.

53. Victim No.1 (PW-1), who studies in a Government Primary School, states that the accused, after enticing her and Victim No.4, took them to a

room where he committed sexual assault. She understands the meaning thereof and is categorical about such fact. She states that the accused

inserted his â??Peshawali Jagaha into her Peshawali Jagahaâ?, as a result of which she felt pain. Accused gave her toffees as also threatened her

not to disclose the incident to her parents, lest he would kill them. It was only after a few days that she disclosed the incident to her mother. Accused

also committed such type of acts on other victims (Victim No.2 & Victim No.3), which fact was disclosed to her by the victims. After the incident

was made public, parents of the victims met and the matter was reported to the police.

54. Veracity of her statement is sought to be impeached in the cross-examination part of her testimony, with the suggestion that the insertion of his

private part by the accused in the anal/vagina is not recorded in the FIR. Well, this cannot be a reason to disbelieve a witness, for FIR is not a

narration of facts or encyclopedia of prosecution case. It is in conformity with the prosecution case of the victim having been subjected to sexual

assault by the accused. The witness has clarified that on the date of the incident, sister of the accused was not present at home and that his mother

was in another room. It is not the case of this witness that she raised hue and

cry, so as to attract attention of someone in the neighbourhood.

55. One cannot ignore the fact that all of the witnesses (victims) hail from the rural background and that too the remotest corner of the State. They

hail from socially and economically backward strata and area of the society and have taken the courage of speaking the truth in the Court, of which

we have no doubt.

56. Similarly, Victim No.2, who was a student of third class, states that the accused used to take her to his room, on the pretext of giving her

â??Chijiâ? (toffee). One day, the accused had penetrative sex with her. He threatened her not to disclose the incident to her parents, lest he would

kill them. She disclosed the incident to her mother, when parents of all the victims came together and reported the matter to the police. The witness

was confronted with her previous statement, wherein the factum of threats is not so recorded. But then, in our considered view, this fact would be of

not much consequence, for otherwise, we find her statement to be inspiring in confidence. This mere embellishment or improvement, as is so argued,

does not render the witness to be unworthy of credence or her statement to be unbelievable, in the backdrop of the law laid down by the Supreme

Court of India, which we have discussed earlier. The credit of this witness is sought to be impeached by suggesting that there were other children

around, with whom she would play. But then even this, in our considered view, would not render the earlier part of her testimony, to the effect that the

accused used to commit sexual assault by enticing her, to be unbelievable. Suggestion that she did not find any difficulty in urinating or passing the

stool or that she had changed the clothes would also not render her statement to be unbelievable.

57. We find testimony of Victim No.3 to be on similar lines that of the earlier two victims and find her version to be inspiring in confidence for the very

same reasons.

58. Thus, when cumulatively viewed the testimonies of the victims and as corroborated by their mothers, squarely point towards the guilt of the

accused, beyond reasonable doubt, and in our considered view the prosecution to have proved its case by leading clear, cogent, convincing and reliable

piece of evidence.

59. We hold the victims to be witnesses, competent to depose in accordance with

law; their testimonies fully proving the prosecution case; fully corroborated by ocular and documentary medical evidence and the testimonies of their mothers who also could depose and narrate the incident, in accordance with law.

60. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.