

Court No. - 44

Case :- JAIL APPEAL No. - 412 of 2018

Appellant :- Ram Babu Vishwakarma

Respondent :- State of U.P.

Counsel for Appellant :- Nishi Mehrotra, Santosh Tripathi, Sunil Kumar Kushwaha

Counsel for Respondent :- A.G.A.

Hon'ble Saumitra Dayal Singh, J.

Hon'ble Madan Pal Singh, J.

1. Heard Ms. Nishit Mehrotra, learned Amicus Curiae for the appellant-Ram Babu Vishwakarma and Shri Pankaj Kumar Tripathi, learned A.G.A. for the State.

2. Present criminal appeal has arisen from the judgment and order dated 26.10.2013 passed by Shri Santosh Kumar Srivastava, learned Additional Sessions Judge, Court No, 12, Allahabad, in S.T. No. 1583 of 2011 (State Vs. Ram Babu Vishwakarma), whereby the learned court below has convicted the appellant for offence under Section 376 IPC. To the extent, that offence is described to have been committed on a minor child of barely three years of age, the learned court below has sentenced the appellant with life together with fine of Rs. 50,000/- with default sentence of two years.

3. The prosecution story emerged on the Written Report dated 27.08.2011 (Ex.Ka-11 at the trial) submitted by the father of the victim 'R' (P.W.-1). In that, he narrated that at about 3 a.m. in the intervening night of 26/27.08.2011, his three and a half year old daughter, 'X' was taken away by the present appellant to a nearby school where he committed rape (described as '*bura kaam*') on her and left her there. He searched out 'X' the next morning. On information received from certain school going children, he found

'X' crying in the school gallery. 'R' brought her back home. He noticed that she was bleeding. Her injuries clearly indicated that she had been raped. On such information, FIR was registered at P.S. Soraon, District Allahabad on 27.08.2011 at 11:30 a.m. It is Ex.Ka-5 at the trial. Thereafter, on 27.08.2011 itself, Dhananjay Verma, the Investigation Officer (P.W.-4 at the trial) recovered an underwear and a blade lying besides from the place of occurrence described as agricultural field behind the toilet building of a college. That Recovery Memo is Ex.Ka-3 at the trial.

4. On that date itself, the victim 'X' was subjected to medical examination by Dr. Kanchan Mishra (P.W.-5 at the trial) at the Womens Hospital, Allahabad. That injury report is Ex.Ka-8 at the trial). For ready reference, the entire report is quoted as below :

“मैं अपनी बेटी 'X' का अन्दरूनी जाँच करवाने को तैयार हूँ।

(illegible) ougal care – Dist-Women hospital Allahabad. examined

'X' D/o 'R' R/o at 3 p.m. on 27.08.2011.

B/B – CPNO 3680 Kanchan Singh C.H.C. Soraon, Alld. P/S

M/I – a Small Black Mole on the Lt side of face 1 cm away from Tragus (ear).

External examination- No marks of Injury on the Body except on the Perineal Region. Pubic & axillary hair not developed.

Teath-20

Internal examination-3 cut marks on B/l Labia Majora = 1cm – 3cm

Hiatus torned out communicating c̄ Ractum. Stool filled in vagina, hymen torn, little finger can be Inserted c̄ very difficulty. Vaginal swab taken.

<i>advised –</i>	<i>X-ray wrists & elbow joint</i> <i>X-ray Ankle & knee joint</i> <i>X-ray shoulder joint</i>	}	<i>for estimation of age</i>
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Pathology- Vaginal smear for the presence of spermatozoa & gonococcal.

Opinion – Final opinion about Rape to be given after Vaginal Swab Report

मुझे मूल प्रति एवं Vaginal Swab Smear दे दी गई है।”

5. The appellant was arrested in the intervening night of 27/28.08.2011. He was subjected to medical examination. No injury mark was seen over his body.

6. The X-ray report of the victim 'X' disclosed her age to be about 3 years. Also, the pathology report of the vaginal smear drawn from the victim 'X' did not result in positive report of spermatozoa. The clothing and the blade recovered by the Investigation Officer Dhananjay Verma (P.W.-4) were subjected to forensic/serological examination. That report dated 16.09.2013 did not report presence of blood on the underwear of 'X'. However, it did record the presence of disintegrated blood on the blade recovered from the place of occurrence.

7. Here itself, we may take note of the fact that upon the FIR being lodged, Sub-Inspector Dhananjay Verma (P.W.-4) recorded the arrest of the appellant on 28.08.2011 at about 3:30 a.m. on Parcha no. 2. He then drew up Parcha no. 3 after a few days on 03.09.2011 and recorded the statement of 'X' at the hospital. Next, Parcha no. 4 was drawn by him after about a month on 04.10.2011 wherein he copied the medical reports of 'X' and also recorded the dispatch (of recovered material) made by him to the FSL. He also recorded the statements of the relatives of the victim 'X'. The same day he submitted the charge sheet.

8. In that state of investigation made, charge sheet was submitted against the appellant. Upon the case being committed for trial to the Court of Sessions, following charges came to be framed against the appellant :

“यह कि दिनांक 26/27.8.11 को समय लगभग तीन बजे रात्रि बहद ग्राम मलाक चतुरी, अन्तर्गत थाना सोरांव, जनपद-इलाहाबाद स्थित स्कूल के बगल गलियारे में आपने वादी 'R' की अवयस्क पुत्री 'X' आयु लगभग साढ़े तीन वर्ष के साथ जबरदस्ती बलात्संग किया। इस प्रकार आपने भारतीय दंड संहिता की धारा-376 के अन्तर्गत दंडनीय अपराध किया जो कि इस न्यायालय के प्रसंज्ञान में है,”

9. Besides relying on the above documentary evidence, the prosecution relied on oral evidence of six witnesses. The father of 'X' namely 'R' was examined as P.W.-1. He is not an eye-witness of the occurrence. He proved that on the night of the occurrence, the appellant took away his daughter while the family of 'R' were sleeping at their house. Second, he proved that the appellant had committed rape on 'X' in an agricultural field and left her there. Third, he proved that 'R' searched for 'X' in the next morning but could not find her. At about 8 a.m. other children saw 'X' crying. On that information, he brought 'X' home. Fourth, he proved (that at that time), 'X' was bleeding from her private part, indicating rape had been committed on her. Fifth, he proved, his wife namely 'Ra' (P.W.-2 at the trial) had seen the accused take 'X' away from their home. Last, he proved the Written Report.

10. Next, the mother of 'X' namely 'Ra' was examined as P.W.-2 at the trial. She proved that the appellant took away 'X' from her house at about 3 a.m. on the night of the occurrence and that she had seen the same.

11. Second, she proved that the appellant had committed rape on 'X' in an agricultural field and left her there.

12. Third, she proved that other school going children found 'X' crying, the next morning. They told her about the same. Then, she along with her husband (P.W.-1) brought 'X' back.

13. Fourth, she proved that at that time 'X' was bleeding from her private part which indicated that she had been raped by the appellant. She proved that 'X' indicated to her with her gesture that the appellant had committed rape on her.

14. Next, she proved that the underwear and other clothing of 'X' were recovered from the place of occurrence. At the same time, she

proved that she had not made any statement to the police and the case had been lodged by her husband (P.W.-1). The statement of P.W.-2 was not recorded during investigation.

15. Next, the victim 'X' was examined as P.W.-3. Remarkably her statement does not reflect if any particular question was put to the said witness by the learned Court below, to assess if she was capable of furnishing rational answer to questions put to her or if she was prevented in that regard for tender years. Though the statement is typed, only this much had been recorded in handwriting "*Peedita bayan dene layak paayi gayi*". As to the occurrence, the appellant was shown to 'X'. She thus recognized him as the accused who had caused the occurrence. She then stated that the accused had gagged her mouth with a cloth whereafter he injured her on her private part with a blade. Thereafter, he committed rape on her. She also proved that she was taken away by the appellant while she was sleeping with her mother.

16. Thereafter, Sub-Inspector Dhananjay Verma was examined as P.W.-4. as noted above. He proved the steps of investigation. Next, Dr. Kanchan Mishra was examined as P.W.-5. She proved the injuries suffered by 'X'. Thereafter, Constable Prem Narayan Mishra was examined as P.W.-6. He proved the registration of the case.

17. Thereafter, the statement of the appellant was recorded under Section 313 Cr.P.C.

18. In that state of the evidence, learned court below has convicted the present appellant for the most heinous offence under Section 376 I.P.C. committed on a minor/infant aged about three years and sentenced him with life imprisonment and fined him as above.

19. Submission of learned Amicus Curiae is, in the the first place

the occurrence as narrated may not be fully established. Though the injuries suffered by 'X' are proven on the strength of the medical opinion and evidence led by Dr. Kanchan Mishra (P.W.-5), the occurrence is first described to have been caused with a blade. In that nature of occurrence, further allegation of rape is conflicted.

20. Second, it has been strenuously urged, in any case, even if it is to be accepted that the minor has suffered penetrative sexual assault with or without being preceded by the injuries caused by the sharp edged blade, no credible material or evidence exists to implicate the present appellant with that occurrence. In that regard, it has been submitted, the recovery of the underwear and blade was made by the police on 27.08.2011 whereas the appellant was arrested thereafter, in the intervening night of 27/28.08.2011. Therefore, that recovery is not referable to any disclosure statement made by the appellant. Second, P.W.-1 and P.W.-2 are not eye-witnesses.

21. Third, they have offered material improvements and contradictions.

22. Fourth, 'Ra' (P.W.-2) had not made any statement to the police under Section 161 Cr.P.C.

23. Fifth, in any case, both P.W.-1 and P.W.-2 have offered a wholly unbelievable and inherently false account. Once 'Ra' (P.W.-2) clearly proved that 'X' was sleeping with her on the intervening night of 26/27.08.2011 along with 'R' (P.W.-1), at a place described as their house, it is unbelievable that having seen the appellant take away her daughter from that place at that hour, she did not raise any alarm at that time itself. No parent whether of a girl or a boy child may allow such an occurrence to pass without alarm being raised. Neither 'Ra' (P.W.-2) alleged any explanation for that unnatural conduct on her part nor the prosecution proved any pre-existing

relationship of trust between the parties as may have allowed 'Ra' (P.W.-2) to not raise any alarm.

24. Sixth, though 'Ra' (P.W.-2) did not raise any alarm herself, she did inform 'R' (P.W.-1) (at that time itself), that 'X' had been taken away by the appellant. That occurrence itself indicates, if true, 'Ra' (P.W.-2) did not accept the occurrence of her child being taken away by the appellant to be natural or normal occurrence. To that extent, she expressed her concern to her husband 'R'. Therefore, it is wholly improbable, unlikely and unbelievable that both parents of 'X' namely 'R' (P.W.-1) and 'Ra' (P.W.-2) went back to sleep and went about search for 'X' only the next morning.

25. Seventh, it has been submitted, the only eye-witness of the occurrence put forth by the prosecution is the three year old child witness 'X'. No statement of that child witness was recorded under Section 164 Cr.P.C. That was the bounden duty of the Investigation Officer in view of the mandatory provision of Section 164 (5A)(a) of the Cr.P.C. Not only that, the Investigation Officer Dhananjay Verma (P.W.-4) also did not prove that the child witness 'X' had named the present appellant, during police investigation.

26. Eight, the learned court below did not make any assessment if the child was amenable of giving rational answers necessary for her statement to be relied against the appellant. To that extent, the provision of Section 118 of the Evidence Act were given a go by.

27. Ninth, learned court below has completely erred in allowing the child witness to identify the appellant by first pointing at him, in Court. That too was done about two years after the occurrence. In absence of any Test Identification Parade, such identification of the accused by a child witness (aged about three years), two years after the occurrence, is doubtful.

28. Thus, it has been submitted, though even if the course of rape is established, that charge was not proven against the present appellant.

29. On the other hand, learned A.G.A. would submit, the F.I.R. was lodged wholly promptly. The appellant was the only person named therein. The F.I.R. is not an encyclopaedia of all events. Merely because the place of occurrence came to be described as school where the child was discovered in the morning though the actual place of occurrence was the agricultural field behind the college, no material improvement or contradiction may be claimed in the evidence received at the trial.

30. As to the evidence of last seen, heavy reliance has been placed on the statement of 'Ra' (P.W.-2) who had seen the appellant carry away 'X' from her presence. No real doubt emerged during her cross-examination as may lead to any doubt in her testimony. Reference has also been made to the cross-examination of 'X' to submit that the involvement of the present appellant was wholly proven.

31. Seen in that light, it has been further submitted, the child witness has spoken the truth. In absence of any pre-existing animosity, it cannot be doubted that the identification of the accused may not be doubted for reasons of technicalities.

32. Last, it has been submitted, any discrepancy in the investigation may not cause any benefit to the defence. Therefore, merely because the statement of 'X' had not been got recorded by the Investigation Officer Dhananjay Verma (P.W.-4) under Section 164 Cr.P.C. and merely because the appellant may not have described in the statement of the victim 'X' recorded under Section 161 Cr.P.C., it cannot be said that there is no evidence to implicate the present

appellant in the occurrence.

33. Having heard learned counsel for the parties and having perused the record, in the first place, we have no reason to doubt that the occurrence was first caused to 'X' in which she suffered the most heinous offence. We also have no reason to doubt that such occurrence may have been caused in the intervening night of 26/27.08.2011 at which time after she was abducted while sleeping with her parents 'R' and 'Ra'. Further, we have no reason to doubt that the said victim had been carried away by someone and that rape would have been committed on her in the agricultural field behind the school building from where she was recovered, the next morning. Also, there is no reason to doubt that she managed to reach the school building by morning where she was discovered by school going children first. That discovery led to her father 'R' reaching that place and taking her home.

34. Thereafter, there is also no reason to doubt that upon the victim 'X' being recovered by her father 'R' (P.W.-1), the First Information Report was lodged promptly and the medical examination was also conducted promptly and adequately. No reason to doubt exists with respect to the medical opinion as to commission of violent rape on the hapless victim who is none other than a child barely three years of age.

35. The key issue here is, if the appellant is the person who had committed such dastardly, brutal and crime of perversion P.W.-1 is not an eye witness and is also not a witness of last seen. He clearly deposed before the learned court below that he came to know of the occurrence upon information given to him by his wife 'Ra' (P.W.-2). That information he gained at 3.00 a.m. on the intervening night of 26/27.8.2011, when 'X' was taken away from the custody of her parents, without their consent. Yet, it is admitted to 'R' (P.W.-1) that

he did not act on gaining such information, in real time. He slept. He went in search of 'X' in the morning but could not find her. Though he claims that the present appellant lived nearby his own house, he never went in search of 'X' to the house of the appellant, either in the night or the morning. In fact he could not trace out 'X' and learnt of her whereabouts from others.

36. Insofar as 'Ra' (P.W.-2) is concerned, she did not make any statement during the investigation. This fact she candidly proved during her examination-in-chief, itself. Yet, at the trial, she claimed to be a witness of last seen. Though she proved that she told her husband 'R' (P.W.-1) that the appellant had taken away 'X', immediately on that happening, she too did not prove-either that she went after the appellant or that she even went out of her house less so to the house of the appellant to search for 'X' either that night or the next morning.

37. Therefore, in the entity of the facts noted above, a reasonable doubt exists as to the version offered by 'Ra' (P.W.-2), for the first time in Court. In the absence of any previous statement made by her and upon that admission, no cross-examination was required to be made by the defence to doubt that statement. Whatever she has stated in Court was statement made for the first time.

38. Thus, we are unable to accept that the parents of 'X' became aware that the latter had been taken away from their custody surreptitiously that too at about 3:00 a.m. in the night, while 'X' was sleeping with them. Neither they were disabled in any way in stopping the abducted or going after him nor they had reason to treat that occurrence as normal nor they searched for 'X' at the house of the appellant even in the morning, before the discovery of 'X' at the school premises. Such conduct renders both the witnesses 'R' (P.W.-1) and 'Ra' (P.W.-2) wholly unreliable, in the eyes of law.

The conduct offered by them, on their own showing, is wholly unnatural and against nature. Therefore, no credence may be given to any part of their statements. In **Lahu Kamlakar Patil and another Vs. State of Maharashtra, (2013) 6 SCC 417**, the Supreme Court observed as below :

“26. From the aforesaid pronouncements, it is vivid that witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. That apart, a court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individuals to individuals. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accord with acceptable human behaviour allowing variations, then his testimony becomes questionable and is likely to be discarded.

27. Keeping in mind the aforesaid, we shall proceed to scrutinise the evidence of PW 2. As is evincible from his deposition, on seeing the assault he got scared, ran away from the hotel and hid himself behind the pipes till early morning. He went home, changed his clothes and rushed to Pune [Ed.: Since the case has been tried by the Additional Sessions Judge, Raigad, Alibag, it would seem that the incident took place in Alibag, Raigad, which is about 300 km from Pune.] . He did not mention about the incident to his family members. He left for Pune and the reason for the same was also not stated to his family members. He did not try to contact the police from his residence which he could have. After his arrival at Pune, he did not mention about the incident in his sister-in-law's house. After coming back from Pune, on the third day of the occurrence, his wife informed him that the police had come and that Bhau, who had accompanied him, was dead. It is interesting to note that in the statement under Section 161 of the Code, PW 2 had not stated that he was hiding himself out of fear or he was scared of the police. In the said statement, the fact that he was informed by his wife that Bhau was dead was also not mentioned. One thing is clear from his testimony that on seeing the incident, he was scared and frightened and ran away from the hotel. He was frightened and hid himself behind the pipes throughout the night and left for home the next morning. But his conduct not to inform his wife or any

family member and leaving for Pune and not telling anyone there defies normal human behaviour. He has also not stated anywhere that he was so scared that even after he reached home, he did not go to the police station which was hardly at any distance from his house. There is nothing in his testimony that he was under any kind of fear or shock when he arrived at his house. It is also surprising that he had not told his family members and he went to Pune without disclosing the reason and after he arrived from Pune and on being informed by his wife that his companion Bhau had died, he went to the police station. We are not oblivious of the fact that certain witnesses in certain circumstances may be frightened and behave in a different manner and due to that, they may make themselves available to the police belatedly and their examination gets delayed. But in the case at hand, regard being had to the evidence brought on record and, especially, non-mentioning of any kind of explanation for rushing away to Pune, the said factors make the veracity of his version doubtful. His evidence cannot be treated as so trustworthy and unimpeachable to record a conviction against the appellants. The learned trial court as well as the High Court has made an endeavour to connect the links and inject theories like fear, behavioural pattern, tallying of injuries inflicted on the deceased with the post-mortem report and convicted the appellants. In the absence of any kind of clinching evidence to connect the appellants with the crime, we are disposed to think that it would not be appropriate to sustain the conviction.”

39. Insofar 'X' (P.W.-3) is concerned, in the first place it is truly remarkable and painful to note that the S.I. Dhananjay Verma (P.W.-4) did not ensure that the statement of 'X' was recorded under section 164 Cr.P.C. as soon as possible. It is shocking that no such statement was recorded because according to the prosecution story the identity of the accused was known from day one. The statement of the said witness S.I. Dhananjay Verma (P.W.-4) clearly brings out that not only such statement was not recorded but that during investigation, 'X' (P.W.-3) may not have named the present appellant as the perpetrator of the occurrence. During his examination-in-chief itself he stated "*Usne bataya ki mere sath balaatkaar ki ghatna hui hai*". He did not prove that it was disclosed to him by 'X' during the course of investigation that the appellant had caused that occurrence though the appellant may

have been arrested during the intervening night of 27/28.8.2011-solely on the strength of the FIR allegation. Therefore, it is not established by the prosecution that 'X' had named and identified the appellant during investigation.

40. What is then alarming is that the learned court below has clearly missed the requirement of Section 118 of the Indian Evidence Act. Other than a mere opinion of the Court recorded- "*Peedita bayan dene layak paayi gayi*", there is no material to establish that any question was put to the child witness 'X' to ascertain if she had the capacity to make the statement as required by the Court. The observation made by the Court without any objective material in the shape of questions put to the victim 'X' and the answers furnished by her, we are left with no material to test the subjective opinion formed by the learned court below.

41. Section 118 of the Indian Evidence Act reads as below:

"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."

42. In **Pradeep Vs. State of Haryana, (2023) 19 SCC 221**, the Supreme Court observed as below :

"13. Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is

advisable to record the preliminary questions and answers so that the appellate court can go into the correctness of the opinion of the trial court."

43. In the context of undisputed facts that 'X' was three years old on the date of the occurrence and barely five years on the date of her evidence being recorded in Court and specially in view of the fact that the Investigation Officer had already blundered in not obtaining the statement of 'X' under Section 164 Cr.P.C., it remained an obligation on the learned court below to have proceeded carefully with sensitivity in first ascertaining if 'X' was competent to understand the questions being put to her and was not prevented, by tender years or other circumstances, from rendering reasonable answers thereto.

44. Second error was committed by the learned court below in allowing the prosecutor to point out at the accused in Court and then ask the child witness if he was the person who had committed the offence. It was a leading question put to the child witness. Here, we consider it necessary to record relevant part of the statement of 'X'- "*Saakshi ko abhiyukt ko dikhaya gaya to ladki ne abhiyukt ko pehchaan kar bataya ki isi ne mujhe pakad kar le gaya tha aur mere muh me kapda daal diya tha aur mere pashaab ke raaste ko blade se kaata tha.*" In absence of spot arrest; any recovery referable to Section 27 of Indian Evidence Act; prior identification made in accordance with law; due procedure followed for the examination of the victim 'X' and; identification of the appellant in the dock, blatant and incurable errors have crept in the trial proceeding. Even that identification is wholly belated i.e. two years after the occurrence.

45. As to the objection raised by learned AGA on the strength of cross-examination statement of 'X', we find that the learned court below has further erred in allowing such a question to be put to the

victim that too by the accused who had no legal aid available to him. That we observe on the strength of the cross-examination statement as recorded. It reads:

"Abhiyukt ne swayam peedita se poochha ki kya maine tumko uthaya tha to peedita ne abhiyukt ki taraf dekh kar sar hila kar kaha ki haan."

(emphasis supplied)

46. Clearly there was no defence lawyer made available to the appellant at the time of the cross-examination of the victim 'X' who happens to be the sole eye witness. Here too the learned court below has erred on more than one count. It has failed to ensure that adequate legal aid was made available to the accused, amongst others, at the all important stage of cross-examination. Second, it has allowed a question to be framed and put to the victim as only a novice or untrained hand in law may ever do. Once, the accused had been identified at the pointing out of the prosecutor, the answer to that question raised by the appellant himself could only be-as furnished. Practically, the learned court below allowed the appellant to be self-incriminated.

47. In such doubtful evidence of a solitary child witness, prudence commands us to search for corroboration. In **Dattu Ramrao Sakhare v. State of Maharashtra (1997) 5 SCC 341**, the Supreme Court held :

"5....A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the 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..."

48. In **Hari Om v. State of U.P. (2021) 4 SCC 345**, a three-Judge bench of Supreme Court reiterated the caution observed by this

Court in **Suryanarayana v. State of Karnataka (2001) 9 SCC 129**, that "corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence". It was further observed therein:

"6. This Court in Panchhi v. State of U.P. [Panchhi v. State of U.P., (1998) 7 SCC 177 : 1998 SCC (Cri) 1561] held that the evidence of the 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 an easy prey to tutoring. The evidence of the child witness must find adequate corroboration before it is relied upon, as the rule of corroboration is of practical wisdom than of law (vide Prakash v. State of M.P. [Prakash v. State of M.P., (1992) 4 SCC 225 : 1992 SCC (Cri) 853]; Baby Kandayanathil v. State of Kerala [Baby Kandayanathil v. State of Kerala, 1993 Supp (3) SCC 667 : 1993 SCC (Cri) 1084]; Raja Ram Yadav v. State of Bihar [Raja Ram Yadav v. State of Bihar, (1996) 9 SCC 287 : 1996 SCC (Cri) 1004] and Dattu Ramrao Sakhare v. State of Maharashtra [Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341 : 1997 SCC (Cri) 685]).

7. To the same effect is the judgment in State of U.P. v. Ashok Dixit [State of U.P. v. Ashok Dixit, (2000) 3 SCC 70 : 2000 SCC (Cri) 579]."

13. The rule regarding child witnesses was laid down by the US Supreme Court as far back as 1895 Wheeler v. United States, 1895 SCC OnLine US SC 220 in the following terms:

"5. ... While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial Judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous."

49. In **Sooryanarayana v. State of Karnataka 2023 SCC OnLine SC 777** referred to by a Bench of three Judges in **Hari Om v. State of U.P. (2021) 4 SCC 345**, it has been held thus:

"5. Admittedly, Bhavya (PW 2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eyewitness. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence,

is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not."

Recently, a coordinate Bench of this Court in *State of Madhya Pradesh v. Balveer Singh* 2025 SCC OnLine SC 390 : 2025 INSC 261 speaking through J.B. Pardiwala, J., considered a large number of prior decisions of this Court to lay down guidelines for the appreciation of the evidence of a child witness. We have perused through the same.

Reference can also be made to other judgments in *State of M.P. v. Ramesh* (2011) 4 SCC 786; *Panchhi v. State of U.P.* (1998) 7 SCC 177; and *State of U.P. v. Ashok Dixit* (2000) 3 SCC 70, etc.

14. The principles that can be adduced from an overview of the aforesaid decisions, are:

- a. No hard and fast rule can be laid down qua testing the competency of a child witness to testify at trial.
- b. Whether or not a given child witness will testify is a matter of the Trial Judge being satisfied as to the ability and competence of said witness. To determine the same the Judge is to look to the manner of the witness, intelligence, or lack thereof, as may be apparent; an understanding of the distinction between truth and falsehood etc.
- c. The non-administration of oath to a child witness will not render their testimony doubtful or unusable.
- d. The trial Judge must be alive to the possibility of the child witness being swayed, influenced and tutored, for in their innocence, such matters are of ease for those who may wish to influence the outcome of the trial, in one direction or another.
- e. Seeking corroboration, therefore, of the testimony of a child witness, is well-placed practical wisdom.
- f. There is no bar to cross-examination of a child witness. If said witness has withstood the cross-examination, the prosecution would be entirely within their rights to seek conviction even solely relying

thereon."

50. Here, no corroborative material evidence exists to link the present appellant in the occurrence. The entire prosecution story rests on the solitary testimony of the child witness who happens to be the unfortunate victim of such heinous offence. The learned court below ought to have closely scrutinized that evidence and looked for corroboration if any before the finding the appellant guilty. At this stage, Sri Sheshadri Trivedi learned counsel of this Court has on our request intervened and relied on a decision of the Supreme Court in **Sovaran Singh Prajapati Vs. State of Uttar Pradesh 2025 SCC OnLine SC 351**, wherein it was observed as below:

"Purpose of Trial

7. It is important to restate the purpose of trial. A trial, of course, is a fact-finding exercise wherein both parties, i.e., the prosecution and defence, after investigation by the competent authorities, present their versions of events and the role and duty of the Court to determine the truth. While undertaking such determination, the Court is not only to look at the evidence at hand but also ensure that all consideration balances the demand for justice and the rights of the accused. The American Jurisprudence 2nd Ed. 2007, in the following terms, captures the purpose of a trial:

"The purpose of trial is to determine the validity of the allegations. The objective is to secure a fair and impartial administration of justice between the parties to the litigation and not the achievement of a hearing wholly free from errors. Once a civil action has been instituted and issue is joined upon the pleadings, there must be a trial on the issue before a judgment may be rendered. Trial is not a contest between lawyers but a presentation of facts to which the law may be applied to resolve the issues between the parties and to determine their rights. It is also not a sport; it is an inquiry into the truth, in which the general public has an interest."

Fair Trial - A Guarantee under Article 21 of the Constitution of India

10. Fair and impartial administration of justice is a treasured right protected by various enactments of law including, first and foremost, the Constitution, which under Article 21 guarantees the Right to Fair Trial. In numerous pronouncements, this Court has underscored the same.

10.1. A Three-Judge Bench of this Court in Vinubhai Haribhai Malaviya v. State of Gujarat (2019) 17 SCC 1, held as under:

"17. Article 21 of the Constitution of India makes it clear that the

procedure in criminal trials must, after the seminal decision in *Maneka Gandhi v. Union of India* [*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248], be "right, just and fair and not arbitrary, fanciful or oppressive" (see para 7 therein). Equally, in *Commr. of Police v. Delhi High Court* [*Commr. of Police v. Delhi High Court*, (1996) 6 SCC 323; 1996 SCC (CRI) 1325], it was stated that Article 21 enshrines and guarantees the precious right of life and personal liberty to a person which can only be deprived on following the procedure established by law in a fair trial which assures the safety of the accused. The assurance of a fair trial is stated to be the first imperative of the dispensation of justice (see para 16 therein).

18. It is clear that a fair trial must kick off only after an investigation is itself fair and just. The ultimate aim of all investigation and inquiry, whether by the police or by the Magistrate, is to ensure that those who have actually committed a crime are correctly booked, and those who have not are not arraigned to stand trial. That this is the minimal procedural requirement that is the fundamental requirement of Article 21 of the Constitution of India cannot be doubted. It is the hovering omnipresence of Article 21 over CrPC that must needs inform the interpretation of all the provisions of CrPC, so as to ensure that Article 21 is followed both in letter and in spirit."

(Emphasis supplied)

...

(a) Duty of the Trial Court

15. On numerous occasions, this Court has highlighted the duty of a Trial Court to be an active participant to seek out the truth in a given set of circumstances ensuring that a balance is struck between the role and responsibility of prosecution as also the rights of the accused. It would be helpful to refer to certain pronouncements:

15.1. This Court in *Pooja Pal v. Union of India* (2016) 3 SCC 135 observed:

"54...It was remarked as well that due administration of justice is always viewed as a continuous process, not confined to the determination of a particular case so much so that a court must cease to be a mute spectator and a mere recording machine but become a participant in the trial evincing intelligence and active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community..."

15.2. Reference may once again be made to the *Best Bakery Case* (*supra*), where in regard to the role of a Court, it was held:

"55. The courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and

responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself."

(Emphasis supplied)

15.3. In *Bablu Kumar v. State of Bihar* (2015) 8 SCC 787, this Court observed:

"22. Keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court, it can irrefragably be stated that the court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. The law does not countenance a "mock trial". It is a serious concern of society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The court is under the legal obligation to see that the witnesses who have been cited by the prosecution are produced by it or if summons are issued, they are actually served on the witnesses. If the court is of the opinion that the material witnesses have not been examined, it should not allow the prosecution to close the evidence. There can be no doubt that the prosecution may not examine all the material witnesses but that does not necessarily mean that the prosecution can choose not to examine any witness and convey to the court that it does not intend to cite the witnesses."

(emphasis supplied)"

51. Thus, though the trial may have been conducted in accordance with the provisions of the Cr.P.C. and primarily the legality of the order passed by the learned court below has to be tested on the strength of test provided under Cr.P.C., justice that springs from the fountain head of Article 21 of the Constitution of India may not remain a mute spectator to the technical completion of a trial proceeding. We cannot, as appeal Court, allow the accused to be convicted on the strength or on the basis of a wholly erroneous and unfair and defective procedure adopted at the trial.

52. We are also concerned that in such circumstances, the learned court below remained a mute spectator and did not consider its obligation to put appropriate questions to the child witness 'X' to

ascertain the truth. As observed in **Sovaran Singh Prajapati (supra)**, the purpose of the fair trial is not to seek a formal conclusion of a proceedings brought at the instance of the prosecutor but inheres in it a fair enquiry to be made by the Court itself to reach a just conclusion.

53. Everything apart, the learned court below ought to have remained alive to that primary obligation to unearth the truth in the prosecution story and therefore, it ought to have put relevant questions to the witnesses even if the defence was disabled or prevented or unable to put up an effective cross-examination. While the child witness may not have been subjected to extensive cross-examination, at the same time, necessary cross-examination has not been made to ascertain the truth. Those lapses have rendered the trial proceedings open/amenable to doubts as to the basic fairness and therefore completeness of the exercise-to discover the truth.

54. In such circumstances, as observed above, though the occurrence is proven, insofar as the role of the present appellant is concerned, we find no corroboration to link the appellant with that occurrence. Recovery of the underwear and blade was made much prior to the arrest of the appellant. In any case, no blood stain was noted on the underwear. The blood stain claimed on the blade was found disintegrated.

55. In view of the above reasoning, we are unable to sustain the conviction. In fact we find that the prosecution story against the appellant was never proven less so, beyond reasonable doubt. In view of the above reasoning, the appeal is **allowed**. The impugned judgment and order dated 26.10.2013 is hereby set aside. In absence of evidence, the appellant is acquitted of the charges framed against him. He is in jail. He may be released forthwith unless not wanted in any other case. The appellant is directed to

furnish bail bonds in compliance of Section 437-A Cr.P.C. to the satisfaction of the Court concerned within two months from today.

56. A copy of this judgment alongwith original record of the trial Court be transmitted to the Court concerned for necessary compliance. Compliance report be submitted to this Court, at the earliest. Office is directed to keep the compliance report on record.

57. Ms. Nishit Mehrotra, learned Amicus Curiae appearing on behalf of the appellant has rendered her valuable assistance to the Court. She be paid Rs. 25,000/- towards her fee for the able assistance provided by her in hearing of the present appeals.

Order Date :- 31.7.2025

SA/Prakhar/Faraz

(Madan Pal Singh, J.) (S.D. Singh, J.)