

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

CRA 24 of 2020

Ali Imam

Vs.

The State of West Bengal & Anr.

For the Appellant : Mr. Fazlur Rahman, Adv.
Ms. Krishna Yadav, Adv.

For the State : Mr. Saswata Gopal Mukherjee, Ld. PP
Ms. Faria Hossain, Adv.
Mr. Aniket Mitra, Adv.

Heard on : July 19, 2022
Judgement on : August 01, 2022

DEBANGSU BASAK, J.:-

1. The appellant has assailed the judgement and order of conviction dated December 18, 2019 and the order of sentence dated December 19, 2019 passed in Sessions Trial No. 3 (12)/2015 Special POCSO case No. 44 of 2015 passed by the learned Additional District and Sessions Judge Bench -II, City Sessions Court, Kolkata.

2. By the impugned judgement and order of conviction dated December 18, 2019, the appellant has been found guilty under Sections 4/8/12 of the Protection of Children from Sexual Offences Act, 2012 and under Section 506 of the Indian Penal Code, 1860. By the impugned order of sentence dated December 19, 2019, the appellant has been sentenced to suffer rigorous imprisonments for varying periods for the offences he has been found guilty of. He has also been directed to pay fines of various amounts and in default to undergo rigorous imprisonment. All the sentences had been directed to run concurrently. The victim boy had been awarded compensation in final form of Rs. 50,000 under Section 357 (2) of the Criminal Procedure Code and the State Legal Services Authority, Government of West Bengal had been directed to pay the compensation amount to the victim boy.
3. The prosecution had approached the trial court with a case that, the prosecution witness No. 2 had filed a written complaint with the Park Street police station on September 19, 2015 alleging that on such date at about 2 PM, his son, the victim herein, aged about 11 years, came home. At that time the victim was mentally disturbed and was crying. The

victim boy had narrated an incident happening with him and stated that on such date, when the victim was coming home from the saloon, the appellant, residing at the third floor of the same premises, took the victim to the flat of the appellant. The appellant had motivated the victim to be naked and act in a bad sense. The appellant had kissed the victim boy made the victim boy naked and sexually abused the victim. The appellant had committed unnatural intercourse with the victim at his rectum. Thereafter, the appellant had threatened the victim by stating that if the victim disclosed the incident to anybody else, the appellant would kill him.

4. That, the officer in charge of Park Street police station, on receipt of such written complaint, had started Park Street police station case No.354 dated September 19, 2015 under sections 4/8/12 of the Protection of Children from Sexual Offences Act, 2012 read with Section 506 of the Indian Penal Code, 1860. Such case had been endorsed to the sub-inspector Nirmal Das for investigation. The investigating officer upon completion of the investigation had submitted a charge sheet against the appellant under Section 506 of the

Indian Penal Code, 1860 read with Sections 4/8/12 of the Protection of Children from Sexual Offences Act, 2012.

5. The jurisdictional court had framed charges against the appellant on December 16, 2015 under Section 506 of the Indian Penal Code, 1860 and under Section 4/8/12 of the Protection of Children from Sexual Offences Act, 2012. The appellant had pleaded not guilty and claimed to be tried.
6. At the trial, the prosecution had examined five witnesses. The prosecution had also relied upon various documents which had been marked as exhibits 1 to 7. The appellant had denied the allegations under Section 313 of the Criminal Procedure Code. The appellant had produced one defence witness who was examined and cross examined.
7. Mr. Fazlur Rahman, learned advocate appearing for the appellant has submitted that, the prosecution failed to establish primary facts constituting the offence. He has contended that, out of the five witnesses that the prosecution had examined, only the victim boy was the eyewitness. None of the other prosecution witnesses were eyewitnesses. He has pointed out that, prosecution witness No. 2 is the father of the victim, prosecution witness No. 3 is the mother of the victim and the prosecution witness No. 5

is the friend of the father of the victim and that they were interested witnesses. The investigating officer obviously cannot be said to be an eyewitness.

8. Learned advocate appearing for the appellant has submitted that, since the prosecution failed to establish the case beyond reasonable doubt, the statutory presumption under Section 29 of the Protection of Children from Sexual Offences Act, 2012 are not attracted. In support of such contentions, he has relied upon **2017 Volume 3 Calcutta Law Times 243 (Shahid Hossain Biswas vs. State of West Bengal)**.
9. Learned advocate appearing for the appellant has submitted that, apart from the prosecution witness No. 1, there were no independent witnesses. The prosecution witness No. 2 had specifically admitted that there was enmity between the appellant and his father. He has contended that, the victim was medically examined after the incident. The medical report does not corroborate the version of the prosecution witness No. 1. The victim and his father had declined medicolegal examination of the victim. According to him, the version of the prosecution witness No. 1 has not been corroborated by the medical evidence. He has contended

that, no independent witness has come forward to corroborate the incident narrated by the victim. Absence of independent witness, according to the Learned advocate for the appellant is fatal to the case of the prosecution and in support of such contention, he has relied upon **2017 (3) All India Criminal Law Reporter 539 (Kanakarajan @ Kanakan vs. State of Kerala).**

10. Learned advocate appearing for the appellant has submitted that, the prosecution has failed to prove that the victim was sexually assaulted. He has submitted that no forensic report has been placed by the prosecution to establish the alleged sexual assault on the victim.
11. Learned advocate appearing for the appellant has questioned the quality of the investigations. He has submitted that, the prosecution has not brought any evidence on record to establish that the victim boy was at the saloon as claimed by him at the material point of time. He has drawn the attention of the court to the evidence of the investigating officer where the investigating officer stated that he did not investigate about the saloon where the victim went to cut his hair.

12. Learned advocate appearing for the appellant has submitted that the prosecution witness No. 1 is a child witness. The testimony that the prosecution witness No. 1 has deposed remained uncorroborated by any evidence. He has claimed that to the prosecution witness No. 1 was tutored. In support of such contention, he has drawn the attention of the court to the deposition of the prosecution witness No. 1 where he has stated that his mother told him that the appellant had a shop at Mullik Bazar. He has relied upon **1995 Volume 4 Supreme Court Cases 416 (Arbind Singh vs. State of Bihar)** and contended that, in absence of the evidence of the child witness being corroborated, such evidence should not be relied upon. He has also relied upon **2019 Volume 13 Supreme Court Cases 516 and 1995 Supp (4) Supreme Court Cases 416 (Arbind Singh Vs. State of Bihar)** as such contention.

13. Learned Advocate for the appellant has submitted that the prosecution did not examine any independent witness at the trial. No witness has been examined to establish that the victim was at the hair cutting saloon at that time claimed. Nor has the prosecution produced any witness establishing that the victim was taken by the appellant to

his room. According to him, absence of independent witness has been fatal to this case of the prosecution and in support of such contention he has relied upon **2017 Volume 3 Supreme Court Cases 597 (Kanakarajan @ Kanakan Vs. State of Kerala).**

14. Learned advocate for the appellant has referred to the evidence of the defence witness. He has submitted that, the defence witness was able to prove that the appellant was not at the place of occurrence at the time when it is alleged that the incident happened. He has contended that, the prosecution witnesses improved upon the statements that they made initially to the police. Moreover, according to him, there were inconsistencies in the testimonies of the prosecution witnesses. He has submitted that, the appellant is not guilty and should be acquitted.

15. Ms. Faria Hossain, learned advocate appearing for the state has referred to the facts of the present case. She has submitted that, the prosecution witnesses and the exhibits prove the case of the prosecution beyond all reasonable doubt. She has submitted that, the prosecution witness No. 1 was the victim. He had recorded a statement under Section 164 of the Criminal Procedure Code, implicating the

appellant. The evidence of the prosecution No. 1 in court was the same as the statement recorded under Section 164 of the Criminal Procedure Code being Exhibit 1. She has submitted that the incident had occurred on September 19, 2015 at about 2 PM when the appellant had committed carnal intercourse with the victim by inserting his penis into the anus of the victim at the flat situated at 88/H/3 Elliott Road, Kolkata.

16. Learned advocate appearing for the state has submitted that, the date of birth of the victim was established from the birth certificate. The victim was born on October 26, 2003 and that the incident had occurred on September 19, 2015 when the victim was 12 years old. She has submitted that, a victim of 12 years old will not have the wherewithal to describe in details the incident as he has done in exhibit 1 and in his deposition in Court. She has submitted that the victim suffered the incident and therefore correctly implicated the appellant.

17. Learned advocate appearing for the state has submitted that, the victim is the best witness and had deposed as prosecution witness No. 1. She has contended that, there was nothing on record to disbelieve the evidence

of the prosecution witness No. 1. She has referred to the evidence of the mother of the victim as prosecution witness No. 3. She has pointed out that, the mother deposed that her son, the victim, cried when he narrated the incident to her. She has contended that, once the victim had suffered an unnatural incident as the one that he complained of, the victim acted in a manner and in consonance with such trauma. Such conduct of the victim has been corroborated by the evidence of his mother being the prosecution witness No. 3.

18. Learned advocate appearing for the state has submitted that, the victim was examined at the Chittaranjan Medical College and Hospital, Kolkata at about 1 o'clock in the night of the same day. She has contended that, no person would undergo the trouble of a medical examination at 1 o'clock in the night if there was an element of false implication. She has referred to exhibit 4 which is the medical examination report of the victim and submitted that, the incident stands corroborated.

19. Learned advocate appearing for the state has submitted that, in a case of rape, absence of medical evidence would not be fatal to the prosecution if the

evidence of the victim is reliable, trustworthy and believable. She has submitted that, in a case of rape under Section 4 of the Protection of Children from Sexual Offences Act, 2012, the trial court was to consider the matter with all its sensitivity and humanity. According to her, from the evidence of all the prosecution witnesses, it is established that the incident had taken place on September 19, 2015 at about 2 PM in the flat of the appellant. According to her, the absence of medical evidence would not be fatal to the case of the prosecution if it is otherwise had been proved as in the instant case. She has contended that, the appellant took the victim to his flat where the appellant ravished him. According to her, the appeal should be dismissed.

20. The prosecution had examined five witnesses at the trial. The only eyewitness of the incident that the prosecution had examined is the victim himself. He had been examined as prosecution witness No. 1.

21. In his deposition the victim, as the prosecution witness No. 1 had stated that, the appellant was his neighbor. On September 19, 2015, he had returned home from the saloon after cutting his hair. On the staircase, he had met the appellant who forcibly took him to the room of the appellant

on the 3rd floor of the building. The victim had stated that, he resided on the 4th floor of the building. Then, the appellant had told the victim that he was a good boy and that the appellant would feel happy if the victim went with him. The victim had stated that, the appellant told him that the appellant was born for him and that he was born for the appellant. The appellant had kissed the victim on both his cheeks and lips. Thereafter, the appellant laid him on the bed. The appellant had also laid down on the bed with the victim. The appellant had told the victim that the appellant wanted to play with him. The victim had thought that the appellant would play some indoor games with him. So the victim had consented to it. The appellant had thereafter started pressing the body of the victim and opened his pants. When the victim had resisted, the appellant said that, since the appellant was his uncle it was not a wrong act. After that, the appellant had forcibly laid the victim on the bed. The appellant had thereafter laid on top of the victim. Thereafter, the appellant had opened his pants and put his penis into the private part of the victim. The appellant had remained in such position for 2/4 minutes. The appellant had thereafter got up and wiped the place

with a towel. The appellant had offered the victim some money and threatened the victim that if he disclosed the incident to anyone he would murder him and his father.

22. The victim as prosecution witness No. 1 had also stated that, after the victim assured the appellant that he would not disclose the incident to anyone, the appellant allowed the victim to go home. Thereafter, the victim had returned home. When his mother had asked the victim why he was late, he told his mother that there was a long queue in the saloon. The victim had taken bath and laid down on the sofa. He had attended namaz and sat for study but was unable to concentrate due to tension and nervousness. His mother had asked him as to what had happened. He had then narrated the entire incident to his mother. His mother had informed the incident to his father over telephone. His father had returned home with 2/3 friends. His father had taken him to the Park Street police station with one of his friends. His father had written the complaint before the police. The victim had narrated the entire incident before the police. The police and his father had taken him to the Chittaranjan Medical Hospital for his medical examination at about 2 A.M. He had been medically examined. The

doctors had asked him what happened where upon he narrated the entire incident to them. He had also recorded a statement under Section 164 of the Criminal Procedure Code.

23. The victim as prosecution witness No. 1 had been cross-examined on behalf of the appellant. In cross-examination, he had stated that, he went to the saloon at about 12 noon. The police did not ask him and he did not tell the police about the name of the saloon. His father had left him at the saloon on that date and went away for his work. He had stated that, most of the time there are people in the staircase who climb up and down the staircase. There are schools in the building. There is no life in the building. He had stated that, there was a strained relation between the appellant and his father. He had accepted the suggestion that the appellant goes to a shop in the morning and returns home in the evening. However, he had volunteered and said that, the appellant goes to a shop at about 12 noon/1 P.M and that, on the date of the incident, the appellant was going to his shop. On seeing the victim, he had returned to his room with the victim.

24. The prosecution had examined the father of the victim as prosecution witness No. 2. He had stated that he was in the chamber in the evening. He had been informed by his wife at about 8 P.M to come to his house. His wife had told him that the victim was in a very disturbed condition, moving in the house without any aim and was crying profusely. He had stated that, the appellant had taken his son to his room, licked and kissed him. Thereafter, the appellant had committed unnatural sex with him. The appellant had threatened the victim, his son. The prosecution witness No. 2 had lodged the police complaint. He had, however, not been able to identify the appellant in Court. He had stated about his son being taken for medical examination. He had identified the medical report of his son, the victim which was marked as exhibit 4. He had also produced the birth certificate of the victim which was marked as exhibit 5.

25. In his cross-examination, the prosecution witness No. 2 had stated that, there is a school on the first floor of the building. There are residential flats on the second floor of the building. The building is ground plus four storied. He had denied any enmity with the appellant.

26. The mother of the victim had deposed as the prosecution witness No. 3. She had stated that on September 19, 2015, her husband, the prosecution witness No. 2 had taken her son, the victim herein, to the saloon for his haircut. Her husband made the victim sit in the saloon and went to his chamber. After some time, the victim had returned home and looked very upset. She had asked him as to what happened. Initially he did not reply. The victim had taken a bath and was lying down in one room. When she went to that room, and asked to the victim as to what had happened, he went to the other room. Again she had followed the victim to the other room. The victim had shifted to another room. She had offered the victim food. But the victim had refused to take food. She had asked to the victim to study. He had studied with his books but could not concentrate. She had stated that, the victim was restless throughout the day. In the evening, the victim started crying profusely. On being asked several times, the victim had told her that when the victim was returning home from saloon after having a haircut and was climbing up the stairs of their building to come home, the appellant had forcibly taken the victim to the room of the appellant. The appellant

had taken her son to the inner room of the house and started caressing and kissing him. The appellant had opened the pant of the victim and committed unnatural sex with him. The appellant had also threatened her son not to disclose the incident to anyone else he would murder him. For such reason, the victim had been disturbed and restless and was not able to tell her anything. She had stated that the appellant stays in the third floor of their building. She had identified the appellant in court. She had stated that, after hearing about the incident, she informed the same to her husband, the prosecution witness No. 2 herein, over telephone and that her husband came home immediately from his chamber. Her husband had heard about the incident from their son, the victim, at home and went to the Park Street police station with her son. On the same night, the police had come to their house and seized the wearing apparel of her son. She had given a statement before the police. Her son had become normal after 3/4 months of the incident. Her son is still scared of climbing down the stairs alone.

27. In her cross-examination, she had stated that, they reside on the fourth floor of the building. She had stated

that, the building is ground plus 5 storied. She had also stated that, the building has two staircases on two sides. She had volunteered and said that, all the residents of the building use one staircase and the staircase at the back side of the building remains closed. She had stated that, her son returned home after 2 PM on the date of the incident. Her son had taken a bath after 15/20 minutes. Her son thereafter did not leave the home. Her son had read the namaz and then had a little food which was lesser than usual amount of food. She had denied the suggestion that there was enmity between the appellant and her family. She had stated that she believed her son when he told her about the incident.

28. A friend of the father of the victim had deposed as the prosecution witness No. 4 at the trial. Prosecution witness No. 4 had stated that, on the date of the incident, the father of the victim had called him over telephone and told him that the appellant and the victim boy both reside at the same place. The appellant had taken the victim to his room and committed unnatural sex with him. After that, the victim had gone to his mother crying and was unable to disclose anything before her. On being asked, several times,

the victim had finally disclosed about the incident to his mother. Thereafter, the mother of the victim had informed the incident to her husband over telephone and her husband had informed the same to the prosecution witness No. 4 over telephone. Thereafter, they had decided to go to the police station. The prosecution witness No. 4, the victim, and the father of the victim had gone to the police station and lodged the complainant. The police officer had sent the victim for medical examination. He had identified the appellant in court.

29. In cross-examination, the prosecution witness No. 4 had stated that he did not have personal knowledge about the incident and heard about the same from the prosecution witness No. 2 who in turn heard about the same from the prosecution witness No. 3.

30. The sub- inspector of the police of the Park Street police station on duty on the night of September 19, 2015 had been examined as prosecution witness No. 5. He had identified the signature of the officer in charge on the complainant of the prosecution witness No. 2. He has stated that, the complaint was registered as a general diary which had been marked as Exhibit 6 at the trial. He had stated

that, thereafter, he had left the police station along with the prosecution witness No. 2 and his son for medical examination of the victim. After medical examination of the victim, he had collected some exhibits. He had proceeded to the house of the victim and examined the mother, father and other relatives of the victim. He had seized the wearing apparels of the victim which was lying in the house. He had examined the appellant and arrested the appellant after observing the formalities. He had drawn up the formal first information report which had been marked as Exhibit 7 at the trial.

31. In cross-examination, the prosecution witness No. 5 had stated that, after a verbal complaint was made by the prosecution witness No. 2, he had asked the prosecution witness number 2 to reduce the same in writing and hand it over to him. He had stated in cross-examination that, he had left the police station at about 23:40 hours on September 19, 2015 for the first time to visit the place of occurrence. He had stated that the building was ground plus 4 storied. The building had two staircases. The building also had schools on the first and the second floor. He had stated in cross-examination that, he did not

investigate about the saloon where the victim went to cut his hair. He did not investigate about the time that was spent by the victim at the saloon. He did not investigate about the period of time while the victim had remained outside the flat. He did not investigate about the time when the victim had returned home on the date of occurrence. He did not investigate as to whether the victim had attended the school or not on September 19, 2015. He had stated that, he tried to have the medicolegal examination of the victim. The victim did not cooperate with him for such examination. The father of the victim had informed him in writing that he was not willing to have medicolegal examination of his son.

32. The appellant had been examined under section 313 of the Criminal Procedure Code. There the appellant had admitted that, he knew the victim and his parents. He had claimed that the father of the victim was not a medical practitioner and that he runs a medical shop. He had claimed that he was innocent, falsely implicated and that he would adduce evidence.

33. The appellant had produced a shop owner at the market where the appellant has a shop, as defence witness

No. 1. The defence witness No. 1 had stated that, the appellant used to come to his shop at about 9 AM and returned from the shop at about 9 to 9.30 P.M. The defence witness No. 1 had stated that, he had a business and a shop adjacent to the shop of the appellant. He had learnt on September 20, 2015 that the appellant was arrested by the police. After hearing about the same, he along with 10 to 15 business men had gone to the Park Street police station to enquire about the incident. He had stated that, they told the investigating officer that they had seen the appellant in the morning on September 19, 2015 opening his shop and also at the time of lunch at about 2 PM. In cross-examination, he had stated that, he had seen the appellant on the date of the incident at 2:30 PM.

34. The stand of the victim and his family members has been consistent with regard to the incident and the post-occurrences. The incident had occurred September 19, 2015 at about 2 PM. On the same day at 23:25 hours, the father of the victim had lodged the first information report which had been marked as Exhibit 2. The father of the victim had taken the prosecution witness No. 4 with him to the police station for the purpose of lodging the complaint. The victim

had been medically examined on September 20, 2015 at about 1 AM. The victim had recorded the statement under section 164 of the Criminal Procedure Code before the learned Magistrate on September 23, 2015 which had been marked as Exhibit 1/3 as a whole by the order dated August 27, 2018 on a petition of the prosecution filed under section 294 (3) of the Criminal Procedure Code. The victim had deposed before the Court, at the trial, on May 19, 2016. The victim was born on October 26, 2003 which appears from the birth certificate of the victim which had been marked as an exhibit at the trial being Exhibit 5.

35. The statement of the victim under section 164 of the Criminal Procedure Code had been recorded on September 23, 2015 in respect of the incident dated September 19, 2015. The statement of the victim recorded under section 164 of the Criminal Procedure Code being Exhibit 1/3 had been recorded within four days of the date of the incident. In the facts and circumstances of the present case, it cannot be said that, a long period of time had elapsed between the date of the incident and the date of the recording of the statement under section 164 of the Criminal Procedure

Code. The statement had been recorded in close proximity to the date of the incident.

36. In his statement recorded under Section 164 of the Criminal Procedure Code being Exhibit 1/3, the victim had stated that on September 19, 2015 at about 12:30 PM, he was returning to his home alone from the saloon after having a haircut. At the time when he was climbing the stairs of the building, to go to his flat at the fourth floor, he had met the appellant at the second floor on the staircase. The appellant had asked him to enter the room of the appellant. The victim has described how the appellant had dealt with him and committed aggravated penetrative sexual assault on him.

37. The victim had deposed as prosecution witness No. 1 at the trial on May 19, 2016. There is hardly any blemish between the contents of the First Information Report, the statement of the victim that had been recorded on September 23, 2015 and the deposition of the victim as prosecution witness no. 1 in Court on May 19, 2016. The victim had withstood the cross-examination made on behalf of the appellant. The victim had stood firm with regard to

the incident of aggravated penetrative sexual assault on him by the appellant.

38. As has been noted above, the incident happened on September 9, 2015 at about 2 P.M. The victim had confided about the incident for the first time to his mother at his home in the evening. The mother of the victim had been examined as prosecution witness No. 2. The testimony of the prosecution witness No. 2 has corroborated the testimony of the victim as the prosecution witness No. 1.

39. After the victim had confided about the incident to his mother on the date of the incident itself, the mother of the victim had called the father of the victim and informed him about the incident on the same day itself. Father of the victim as prosecution witness no. 3 had also corroborated the victim and her mother in his deposition. The father of the victim had lodged the First Information Report. The contents of the First Information Report is in accordance with the incident as has been described by the victim in his deposition as prosecution witness no. 1 in Court.

40. On the date of the incident itself, the father of the victim had informed his friend, the prosecution witness No. 4 about the incident. The father of the victim and his friend,

the prosecution witness No. 4 had gone to the police station to lodge the First Information Report. The prosecution witness No. 4 had corroborated the evidence of the prosecution witness No. 3, that is the father of the victim about the call he had received from the father of the victim and the victim going to the Police Station to lodge the First Information Report.

41. The prosecution had examined the investigating officer as the prosecution witness No. 5. He had, during his testimony corroborated the evidence of the other prosecution witnesses with regard to the happenings subsequent to the incident.

42. ***Rajaram @ Raja (supra)*** has been rendered in a special leave petition against an order where the High Court had set aside an order of conviction. In the facts of that case, the evidence of prosecution witness of twelve years of age had been analyzed. In her evidence, the child witness of the prosecution had admitted that she was threatened by the police and due to that, she had made a statement in respect of the prosecution case. In such circumstances, the Court had found such evidence of the child witness to be unreliable in the facts of the present case, the appellant has

not drawn any attention to evidence that the child witness had been maintained by the father or by any person.

43. **Arbind Singh (supra)** the Supreme Court has considered into appeals arising out of concurrent orders of conviction. In the facts of that case also, evidence of a child witness had been analyzed. It had been found that, there was a gap of four years between the incident and the date on which the evidence of the child witness was recorded. The Court had noted that, three statements of the child witness had been recorded on three different dates and that the last of such recordings was under Section 164 of the Criminal Procedure Code. It had noted that there were glaring variations between the three statements and the evidence led at the trial. The child witness had been inconsistent in her version. The Court has also found evidence of tutoring of certain aspects of the case.

44. In **Mahendra Singh and Ors. (supra)** the Supreme Court has referred to the observations made in **1957 SCR 981 (Vadivelu Thevar vs. State of Madras)** which is as follows:-

“.....Hence, in our opinion, it is a sound and well established rule of law that the court is concerned with the quality and not with the

quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way – it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subordination. In the second category, the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.”

13. It could thus be seen that this Court has found that witnesses are of three types, viz., (a) wholly reliable; (b) wholly unreliable; and (c) neither wholly reliable nor wholly unreliable. When the witness is “wholly reliable”, the Court should not have any difficulty inasmuch as conviction or acquittal could be based on the testimony of such single witness. Equally, if the Court finds that the witness is “wholly unreliable”, there would be no difficulty inasmuch as neither conviction nor acquittal can be based on the testimony of such witness. It is only in the third category of witnesses that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.”

45. In the facts of the case, ***Mahendra Singh and Ors.*** (*supra*) the Supreme Court had found that the person claiming to be the eye witness, did not witness the incident and, therefore, did not find the evidence of such prosecution witness to fall in the category of wholly reliable witness.
46. Out of the three categories of witnesses classified, that is, wholly reliable, wholly unreliable, and neither wholly reliable nor wholly unreliable we have to classify the prosecution witness No. 1 who is victim, in one of the three categories in order to arrive at a conclusion as to whether the charges made against the appellant have been proved beyond reasonable doubt or not.
47. In the facts of the present case, the prosecution has not advanced any medical evidence to corroborate the claim of the prosecution witness No. 1. Although the victim, being the prosecution witness No. 1 had been taken for medical examination in the night of the incident itself, the medical examination report of the victim has not been marked as an Exhibit at the trial. What had been exhibited at the trial is the signature of the father of the prosecution witness No. 1 appealing on such report giving consent for the medical

examination of his son. The victim and his father had refused medico legal examination of the victim.

48. Absence of medical evidence per se is not fatal to the case of the prosecution if, the evidence of the witness otherwise established the charges. It is trite law, if the evidence of the victim of a sexual assault is creditable medical corroboration of the event is not required. Evidence of a victim of sexual assault cannot be treated as an accomplice to the crime and the evidence of such person cannot be discarded merely due to absence of medical evidence corroborating the claim.

49. Evidence Act has not prescribed any age limit to a person deposing at the trial. It has not laid down that, evidence of persons of certain age should be suspected or cannot be relied upon. Age of the witness by itself, does not impinge upon the reliability of the evidence of the person adducing it.

50. A Court can rely upon the testimony of a child witness if it is credible and truthful. Evidence of a child witness can form the basis of the conviction. Corroboration of the evidence of a child witness is not a must but considered by Court as a rule of prudence. Evidence of a

child witness cannot be discarded solely on the ground of lack of corroboration when such evidence is reliable. In the event the child witness is competent to depose, the child witness stands the test of cross-examination and there being no infirmity in the evidence of the child witness, a conviction based upon the evidence of such child witness can be passed.

51. In the facts of the present case, prosecution witness No. 1 was a child when he had deposed. He was a child when he had suffered the trauma. He had confided in his mother for the first time about the incident on the date of the incident itself. His mother in turn had informed his father of the incident, on the date of the incident itself. His father had taken the help of his friend to go to the police station along with the victim for the purpose of lodging the First Information Report, again on the date of the incident itself.

52. All these four persons had deposed as prosecution witnesses. All these persons had corroborated each other so far as their evidence is concerned. The appellant has not been able to draw our attention to any blemishes of any of

the prosecution witnesses with regard to the incident and the post occurrence events.

53. The evidence of the child witness being the prosecution witness No. 1, in the fact and circumstances of the present case is wholly reliable. Moreover, his evidence has been corroborated by the other prosecution witnesses as noted above. The prosecution witness No. 1, who is a victim stands at higher pedestal as a victim of the incident and as an eye witness thereto. His evidence has to be given due weightable.

54. It has been contended on behalf of the appellant that, the prosecution had failed to produce any independent witness at the trial. It has been contended on behalf of the appellant that, the prosecution had failed to produce any person from the saloon where the victim had allegedly had his hair cut. The prosecution had failed to produce any person at the staircase seeing the appellant taking the victim to the room of the appellant. In absence of such witness, it has been contended that, the incident and the involvement of the appellant thereto has not been proved beyond reasonable doubt.

55. ***Kanakarajan @ Kanakan (supra)*** which the appellant has relied upon, is a case where, some of the prosecution witness had turned hostile and the others were found unreliable. In such circumstances it had been held that, non-examination of the independent witness was fatal to the case of the prosecution. In the facts of the present case, none of the prosecution witnesses had turned hostile. As has been noted above, all the prosecution witnesses had corroborated each other.

56. In ***Shahid Hossain Biswas (supra)*** the Court had analyzed the evidence of the prosecution. It had analyzed the evidence of the victim itself. At the trial, the victim had deposed of forcible rape on her which continued for about an hour and that she suffered bleeding injuries on her person due to such assault. Medical evidence had been advanced in that case which did not corroborate forcible rape on the victim causing bleeding injuries. Moreover, there had been evidence on record pointing to the accused being falsely implicated by the victim and her family members over previous enmity with the assistance of local political leader.

57. In the facts of the present case, although, the prosecution witness No. 1 had in cross-examination stated that there was an enmity between his father and the appellant, the alleged enmity between the appellant and the father of the victim, had been denied in cross-examination by the father of the victim as well as the mother of the victim being prosecution witness Nos. 3 and 2 respectively. The appellant has not produced anything on record to suggest that there was a pre-existing enmity between the appellant and the family member of the victim or the victim.

58. In the present case, the prosecution has not produced any medical evidence. Absence of medical evidence per se cannot be said to be fatal to the case of the prosecution. The victim had been medically examined contemporaneously. The medical examination report has not been marked as an exhibit on behalf of the prosecution although the signature of the father of the victim has been marked as exhibit. The appellant knew of such medical examination report as the same was in the records of the trial Court. The appellant had also made on efforts to have such document marked as an exhibit primarily on the ground that the medical examination report is inconclusive on the sexual assault.

59. In the context of the requirement in criminal jurisprudence on the prosecution to establish the charges beyond reasonable doubt, Section 29 of the Protection of Children from Sexual Offences Act, 2012 has been considered in ***Shahid Hossain Biswas (supra)***. It has held that the foundational fact of the prosecution case must be established by leading evidence before the statutory presumption under Section 29 is triggered to shift the onus on the accused to prove to the contrary.

60. In the facts of the present case, the five prosecution witnesses examined at the trial had established beyond reasonable doubt that the appellant was guilty of the charges framed against him. The appellant had sought to discharge the presumption under Section 29 of the Protection of Children from Sexual Offences Act, 2012 by producing a witness to establish his alibi and trying to discredit the witnesses for the prosecution.

61. The defence witness No. 1 at the trial had stated that he had seen the appellant to open his shop, which was adjacent to his shop room, in the morning. He had also seen the appellant during lunch. He did not state in his evidence that the appellant was present in his shop since morning till

lunch. He also did specify what he meant by lunch time. In cross-examination, he had stated that he had seen the appellant at 2.30 P.M.

62. The evidence that has been placed before the Court establish that the incident had occurred around 2 P.M. In cross-examination the prosecution witness no. 1, who is victim had stated the appellant goes to his shop at 12/1 P.M. and that, on that date he was going to his shop. On seeing the victim the appellant had returned to his room with the victim. The defence witness has not stated that he had seen the appellant in his shop room since morning till 2.30 P.M. The appellant has, therefore, not established that the appellant was in his shop room at the time of the incident and not at the place of occurrence. In absence of the appellant conclusively establishing his alibi, we are unable to accept the same as sufficient defence of the appellant to the charges framed against him.

63. In view of the discussions above, we have not found any ground to interfere with the judgement of conviction and the order of sentence. The judgement of conviction and the order of sentence are upheld. CRA 24 of 2020 is, therefore, dismissed.

64. Let a copy of this judgement along with Trial Court's records be sent to the Trial Court forthwith.
65. Urgent Photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

[DEBANGSU BASAK, J.]

66. I Agree.

[BIBHAS RANJAN DE, J.]