

IN THE HIGH COURT OF BOMBAY AT GOA  
**CRIMINAL APPEAL NO. 42 OF 2018**

State,  
Through Police Inspector, (major),  
Canacona Police Station,  
Canacona, Goa. ... Applicant/  
Appellant

Vesus

Pritam Kumar, (Major),  
s/o. Sube Singh,  
Native of village Rajpura, Tehsil – Pato-  
di, District – Gudgaon, Haryana ... Respondent

Shri Pravin Faldessai, Additional Public Prosecutor for the  
applicant/ appellant.

Shri Vibhav Amonkar, Advocate for the respondent.

**Coram:- M. S. SONAK &  
NUTAN D. SARDESSAI, JJ.**

**Reserved on : 17<sup>th</sup> July,2019.**

**Pronounced on: 20<sup>th</sup> August,2019.**

**JUDGMENT: (per Nutan D. Sardessai, J.)**

Heard Shri Pravin Faldessai, learned Additional Public  
Prosecutor for the applicant/appellant and Shri Vibhav Amonkar,  
learned Advocate for the respondent.

2. The State aggrieved by the judgment of acquittal rendered by the Children's Court is seeking its reversal in appeal challenging such judgment and consequentially a conviction of the respondent/original accused. The parties for the sake of brevity shall hereinafter be referred to as the State and the accused.

3. Heard Shri P. Faldessai, learned Additional Public Prosecutor on behalf of the State who contended that the victim was an 11 year old girl at the time of the alleged incident of rape on her by her own father in the hotel premises under their occupation. There was a delay of 8 days in lodging the complaint but which had been unfortunately held against the State by the learned Children's Court on the specious premise that the complainant was otherwise a knowledgeable person who did not hesitate to lodge complaints against the accused, her own husband at least on two earlier occasions without any delay and that her conduct to lodge the complaint belatedly when such a heinous crime had been committed was neither understandable nor justifiable. He adverted to the evidence on record and further contended that the Children's Court was in error in

disbelieving the medical evidence on record which clearly established the case of rape against the minor victim and yet the Children's Court departed from the said evidence and disbelieved the case of the prosecution against the accused. It was his further contention that there was undue emphasis by the learned Children's Court on minor discrepancies which did not go to the root of the prosecution case and to record a finding of acquittal in favour of the accused. The Children's Court also disbelieved the version of the complainant on the position of the bed and her position when she had purportedly seen the accused committing the said act of grave sexual violence on her own minor daughter merely on the premise that the panchanama did not substantiate her version of the location of the bed which would belie her version that she could have seen the accused committing the crime on his minor daughter.

4. Shri P. Faldessai, learned Additional Public Prosecutor invited attention to the evidence of the minor victim which had stood the test of cross-examination shorn of the minor embellishments and duly corroborated by the version of her younger brother and yet disbelieved the case of the prosecution

against the accused. The Children's Court laid undue emphasis on the evidence of the owner of the hotel premises and virtually accepted her version as giving a Character Certificate to the accused qua his conduct viz-a-viz his minor children, the victim girl in particular and accepting her version that the complainant was the troublemaker instead. The learned Children's Court ought not to have been swayed by the minor discrepancies in the version of the witnesses which rather made their version compatible with the case of the State against the accused and as it ruled out any case of tutoring. It was a fit case to alter the judgment of acquittal to one of conviction and therefore the State had to succeed in the appeal.

5. Shri V. Amonkar, learned Advocate for the accused contended at the outset that the learned Children's Court had considered all the evidence including the medical evidence and only then arrived at a finding to conclude on the absence of guilt of the accused and to record a finding of acquittal. On his part he referred to the medical report of the victim girl particularly on the findings recorded on her genital examination and submitted that all the normal findings veered towards a conclusion that

there was no substance in the case of the prosecution against the accused. Besides, it was his contention that the onus was always on the prosecution to establish the guilt of the accused beyond reasonable doubt which in the circumstances of the case it had failed to prove. The accused was entitled to the benefit of every reasonable doubt appearing in the case of the prosecution and hence there was no justification for a reversal of the judgment of acquittal. He adverted to the CFSL report which was negative to buttress his case that the prosecution had failed to establish that there was any case of sexual abuse on the minor victim at the instance of the accused.

6. Rather it was the contention of Shri V. Amonkar, learned Advocate for the accused that it was the strained relations between the accused and the complainant which was the precursor for this prosecution initiated against him. The complainant had lodged two earlier complaints against him on flimsy grounds and for which he had been held up at the Police Station while he was in Canacona where he was earlier residing alongwith the complainant and their minor children including the victim girl. The conduct of the complainant in the present case

to lodge the complaint belatedly belied her version and led to an irresistible conclusion that it was a case of false implication against him. Moreover, it was also his case that the conduct of the victim was also relevant who had not protested after the alleged incident and not made any grievance to the complainant even after her persistent questioning which again belied the case against him. The possibility of tutoring of the children to depose about the matter against the accused could not at all be ruled out as remote. Furthermore even the mother of the complainant had shed light on the strained relations between the complainant and the accused and that she would come to her house with the minor children after even minor fights/ quarrels with the accused.

7. Shri Amonkar, learned Counsel for the respondent No.1 reverted to the evidence of the mother of the complainant Chandravati (Pw12) in that regard and besides adverted to the evidence of the respondent No.1 himself who had clearly spelt out in his evidence that the complainant was the one who was dominating their relationship and that the present case was one of false implication against him. He also pointed out the

discrepancy in the version of the complainant viz-a-viz having witnessed the incident of sexual assault on the minor girl through the windowpane unlike the testimony of the panch Tipu(Pw4) who had submitted that there were grills to the window and that there was no visibility in the room from the position purportedly set out by her. There were significant discrepancies in their version which improbabilised the prosecution case against him and on which no much light was shed even by the Investigating Officer PI Madkaikar (Pw14).

8. Shri Amonkar, learned Advocate submitted that it was therefore inconceivable that the complainant has seen the incident as claimed by her. There was no cogent material on record to convict the respondent No.1 and the Trial Court had rightly afforded the benefit of doubt and acquitted him of the charges levelled against him. He placed reliance in **C. Antony v/s. K.G. Raghavan Nair** [(2003) 1 SCC 1] in support of his contention and otherwise submitted that there was no patent perversity in the judgment under challenge. It was also not the case of the prosecution that it was one of non-consideration of the material evidence on record. Further reliance was placed by

him in **Radhu v/s. State of Madhya Pradesh** [(2007) 12 SCC 57] and **Mohd. Ali Alia Guddu v/s. State of Uttar Pradesh** [(2015) 7 SCC 272] while once again reiterating his case that there was no reason for an interference with the judgment under challenge.

9. Shri Faldessai, learned Additional Public Prosecutor submitted in reply that it was not at all acceptable that the version of the victim was tutored looking to the tenor of her testimony viz a viz the testimony of her minor brother Jaykishan(Pw5) who also corroborated the version of the minor victim and there was no reason to disbelieve the case of the prosecution against the accused. This was a fit case to reverse the judgment of acquittal to one of conviction and hence the appeal had to be allowed. We would consider their submissions, the judgments relied upon and the evidence on record in its totality and proceed to decide whether the case warrants an interference with the judgment of the Trial Court and the conviction of the respondent on the charges levelled against him.

10. In **C. Anthony** (supra), the Apex Court held at paragraph 6 that though the Appellate Court has full power to review the

evidence upon which the order of acquittal was founded, still while exercising such an appellate power in a case of acquittal, the appellate court, should not only consider every matter on record having a bearing on the question of fact and the reasons given by the court below in support of its order of acquittal, it must express its reasons in the judgment which led it to hold that the acquittal is not justified. In those line of cases the Apex Court had also held that the appellate court must also bear in mind the fact that the trial court had the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the order of acquittal, and in such cases if two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the findings of the trial court.

11. In **Radhu** (supra), a two Judge bench of the Hon'ble Apex Court summarised the law in rape cases and held that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix and her testimony should not be rejected on the basis of minor discrepancies and contradictions. It further held that absence of injuries on the private parts of the

victim will not by itself falsify the case of rape, nor can it be construed as evidence of consent, nor the opinion of a doctor that there was no evidence of any sexual intercourse or rape be sufficient to disbelieve the victim. However, the courts should, at the same time, bear in mind that false charges of rape are not uncommon, and there are some rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case while dealing with an appeal by special leave of the accused challenging the judgment of the High Court of Madhya Pradesh which affirmed the judgment of the Sessions Court convicting the accused and sentencing him under Section 376, 323 and 343 r/w. 34 IPC.

12. **Radhu** (supra) further held at paragraph 6 that it is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of the offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected

on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor be construed as an evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, wrist, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon.

13. In **Mohd. Ali Alias Guddu** (supra), another two Judge bench of Hon'ble Apex Court while allowing the appeals of the

convicts challenging the judgment of the High Court of Allahabad giving a stamp of approval to the judgment and order passed by the Additional Sessions Judge, Hapur convicting the appellants under Sections 363, 366 and 376 IPC found in the facts at large that insofar as the issue of delay in FIR was concerned, it would demonstrate that though the victim went missing from the house on 22/11/1996, the mother lodged the FIR on 03/12/1996, almost after expiry of eleven days alleging the factum of kidnapping by the accused persons, namely, Ali Waris and Md. Ali @ Guddu. It was observed that though Ali Waris had left the girl at her door steps, the mother, who was expected to have necessitous concern, could have gone to the police station to lodge a missing report which could have prompted the investigation officer to act.

14. In **Mohd. Ali Alias Guddu** (supra), the Hon'ble Apex Court observed that it baffles the common sense that the mother after searching in the neighbourhood as well as amongst the relatives still, for some unfathomable reason that defeats the basic human prudence approached the police station quite belatedly. The Apex Court observed that in rapes cases the delay in filing the FIR by

the prosecutrix or by the parents in all circumstances is not of significance. The adequate protection/allowance in that context has been given regard being had to the trauma suffered, the agony and anguish that creates the turbulence in the mind of the victim, to muster the courage to expose oneself in a conservative social milieu. Sometimes the fear of social stigma and on occasions the availability of medical treatment to gain normalcy and above all the psychological inner strength to undertake such a legal battle. But, a pregnant one, applying all these allowances wherein in the facts and circumstances of the said delay of 11 days in lodging the FIR with the jurisdictional police was treated as fatal as the explanation offered was regarded as totally untenable and the reasoning ascribed by the High Court in accepting the explanation was fundamentally erroneous.

15. In **Mohd. Ali Alias Guddu** (supra), Hon'ble Apex Court observed at paragraph 27 that delay in lodging FIR in cases under Section 376 IPC would depend upon the facts of each case and the Court had given immense allowance to such delay, regard being had to the trauma suffered by the prosecutrix and various other factors, but a significant one, in the present case,

it had to be appreciated from a different perspective. The prosecutrix was missing from home. In such a situation, it was a normal expectation that either the mother or the brother would have lodged a missing report at the police station. The same was not done. This action of Pw-2 really throws a great challenge to common sense. No explanation has been offered for such delay. The learned trial Judge has adverted to this facet on an unacceptable backdrop by referring to the principle that prosecutrix suffered from trauma and the constraint of the social stigma. The prosecutrix at that time was nowhere on the scene. It is the mother who was required to inform the police about missing of her grown up daughter. In the absence of any explanation, it gives rise to a sense of doubt.

16. In **Mohd. Ali Alias Guddu** (supra), the Hon'ble Apex Court further went on to hold at para 28 that the factum that the appellant informed the mother of the victim that he had left the prosecutrix at the door of her house also does not command acceptance. The recovery of the prosecutrix by the brother and her friends also created a cloud of suspicion. In those circumstances their Lordships were inclined to believe the

prosecution version as has been projected that one Arif had informed the brother of the prosecutrix that his sister was at his place but for reasons best known to the prosecution, Arif has not been examined. That apart, the persons who were accompanying the brother had also not been examined by the prosecution. Thus, the manner of recovery of the prosecutrix from the house of Arif remains a mystery. In all these circumstances, the Apex Court allowed the appeals and set aside the judgment of conviction and the order of sentence.

17. Coming to the facts of the case, the evidence on record needs an appraisal to consider whether the learned Children's Court was in error to disbelieve the case of the prosecution against the accused and ultimately to give him the benefit of doubt acquitting him of the charge levelled against him. The mother of the victim and coincidentally being the wife of the accused had come on record that she had objected to the accused taking the victim, aged about 11 years to sleep alongwith him and his son Lakhan in the office room of the hotel Ambika Smruti where they were residing at Devbag, Canacona. Despite her objection he had forcefully taken both the children with him on the

premise that the victim being active and more alert would wake him in case he sleeps, while doing his guard duty while she slept with her other son in the last room of the hotel. On the fateful night i.e. on 23/09/2013, she had woken up at about 21.30 hours and gone towards the office room to which there was a glass windowpane on the back side from which she could get a view inside the room. At that time she was shocked to see the accused without clothes having sex with the victim.

18. The complainant stated that she could not control her anger and went and banged on the main door of the office room. The accused had responded by saying a minute but took around 5 minutes time to open the door and she continued to bang the door. He had come out alone from the office and took her aside by pulling her hand and took her to their room and shouted at her. The victim had not come out of the office room while her son Lakhan continued to sleep in the office room. She was ashamed and also scared of the accused as he was aggressive and she could not ask him anything out of fear and shame. She had woken up her son and gone to sleep in the office room but could not sleep for the whole night. She had asked the victim on

the next morning about 06.30 hours while making her ready to go to school about the incident on the previous night but the victim had kept quiet.

19. She did not tell her anything but nonetheless she found her depressed and nervous. She had also not lodged any complaint to the police on the same day because the victim did not disclose to her anything and also because of embarrassment. She had tried to take the victim into confidence but she had not responded and who continued attending the school. On 30/09/2019, she had sent three children to school as usual and went to her mother's place at Saleri giving instructions to children to come to her mother's place after school. However, she found on reaching her mother's house that the victim was already present before her being sent home from the school as she was suffering from fever and she was scared. On that day too she had not disclosed the incident of 23/09/2013 to her mother on account of embarrassment and shame.

20. Vanita(Pw1) stated that on 01/10/2013, around 06.30 hours when her daughter was getting ready to go to school she found her to be nervous and scared and questioned her by tak-

ing her into confidence and then she started crying by holding her and narrated the incident of 23/09/2013 to her. She had also disclosed that she had not told her about the incident earlier because of threats from the accused that he would kill her. It was further revealed in her examination that on 21/08/2012 i.e. a month prior to the incident, there was a quarrel between her and the accused for which she had gone to her mother's place with her three children and that night too the accused had taken away all the three children and she stayed in the mother's house. The victim disclosed to her that even during that night, the accused had raped by taking her to the toilet in their rented house at Parvem. The victim had further told her that the accused had sexually assaulted her three times i.e. once at Parvem in the rented house and twice at Devbag i.e. hotel Ambika Smruti. She had accordingly gone to Canacona Police Station and lodged the complaint against the accused on 01/10/2013 whereupon the victim was referred to the GMC Hospital, Bambolim for medical examination where she accompanied her on the same day.

21. Vanita (Pw1) at the outset had not uttered a word or whisper to account for the delay of almost 8 days in lodging the FIR anywhere in her statement on oath. Rather she had stated that she was present during the time of Panchanama which was conducted on 02/10/2013 in hotel Ambika Smruti and at Parvem when the spots of offence were shown by the victim and her to the police and thereupon the police had attached the yellow colour bedsheet with brown and pink border and a white colour pillow cover. Besides, the police had also attached a carry bag from under the bed since there was disclosure by the victim that she had used the carry bag which was of cloth to wipe her private part after the forcible sexual intercourse with her by the accused. She had also identified the photographs taken at the scene of crime and more particularly the window through which she had peeped on the relevant night and when she had found that the position of the bed at that time i.e. on the night of the incident being slightly different and visible from the window. She had also handed over the clothes of the victim worn by her on the relevant night to the police on 03/10/2013 and when another panchanama was conducted by the police under which the

clothes of the victim were attached being a 3/4<sup>th</sup> green colour pant with yellow colour dots.

22. Vanita (Pw1) had identified the bedsheet, the pillow cover, the cloth carry bag as also the 3/4<sup>th</sup> pant being the articles attached from the room where the alleged offence had taken place. It is her cross-examination which assumes significance inasmuch as it casts a serious doubt about her narration of having witnessed the incident and more particularly her conduct in not lodging the complaint promptly and above all not justifying the delay in lodging the complaint. For a woman who used to be very alert to lodge complaints against her husband and make grievances about his conduct to her own mother, she had not informed her mother about the incident involving the accused and the minor victim girl despite her mother being a person of confidence. It had shown flaws in her testimony inasmuch as there was a material contradiction in her statement recorded by the Magistrate in which she had not disclosed that on account of her quarrel with her husband i.e. the accused, she had gone with her children to her mother's place and on that very night i.e. 21/08/2013, the accused had come to her mother's place and

taken away all the three children while she continued to stay in her mother's house. Her inability to account this material omission also creates serious doubt about her version that such a similar incident had taken place when the accused had taken the victim girl to Parvem, Canacona in August, 2013.

23. Vanita (Pw1) justified having seen the incident in question by standing on a stone outside the window. However a discrepancy was apparent from her testimony that there was an internal window to the said office room from which she had seen the alleged incident and creating serious doubt whether at all she had seen the incident on the night of 23/09/2013. Moreover, she claimed that the position of the bed as seen in the photograph was not the same as on the date of incident, the bed being shifted away from the window. Besides she was not an uneducated, rustic witness but one who had studied up to 9<sup>th</sup> standard and was working in a hotel earlier at Bangalore. Moreover her testimony also revealed that the relations between her and the accused were strained and that he used to sometime beat her up under the influence of alcohol and at other times there were quarrels between them although it is an another

matter that she denied the case put to her that she had filed a false complaint against the accused by propping up this incident making use of the victim girl to falsely implicate him. Despite her cross-examination and the opportunity available to her, she had not uttered a word or whisper to account for the delay in lodging the complaint which is apart from the fact that there was also no disclosure of the demeanour of the victim girl who was barely 11 years old about the incident considering her young age and the nature of injuries which she could possibly suffer on account of forcible sexual intercourse by the accused.

24. The victim (Pw 2) (name withheld) and aged about 13 years at the time of recording her statement in January 2015 stated that her father i.e. the accused had asked her and her brother to sleep in the office room with him to which her mother had objected but her father had not listened and told her mother to sleep in the residential room alongwith her brother. In the course of the night while she was half asleep she found the accused touching her and her private part to which she had objected but the accused threatened her saying that if she shouted and told anyone about his acts, he would kill her and told her to keep

quiet which she did due to fear. Her father had then removed his clothes and also her clothes and had sexual intercourse with her. During such time she heard some banging on the main door of the office room where they were sleeping and also heard her mother calling to open the door but her father had not opened the door soon. He wore his clothes and sometime later he opened the door but did not allow her mother to come inside the office room. Her mother came inside alongwith her brother and slept in the office room.

25. The victim (Pw2) (name withheld) revealed that she had pain in her private part but did not tell her mother because she was scared due to the threats given to her by the accused who was in his proper senses and not drunk at that time. For a girl of tender years who had been subjected to forcible sexual intercourse, it was nowhere her case that she experienced pain or discomfort and which is evident from her statement that on the next morning i.e. on 24/09/2013 she had gotten up as usual to go to school when her mother asked her about the act committed by the accused on the previous night and as she had seen him doing such act. She had not told her mother anything

about the acts of her father despite her best efforts since she was scared because of the threats given by her father that he would kill her in case she disclosed his act to anyone. Her mother had persisted in her queries throughout the week but she did not tell her anything. On 30/09/2013, she had attended school as usual, but was sent home as she had fever. On the instructions of her mother to come to her grandmother's house she had gone to Saleri. On the next morning i.e. 01/10/2013, while she was getting ready to go to school, she revealed to her mother about the acts of the accused on the night of 23/09/2013. During the entire period from 23/09/2013 to 01/10/2013 she was feeling that she must narrate the incident to her mother but she could not tell her because she was scared of her father and the threats given by him.

26. The victim (Pw2) (name withheld) further revealed that some days prior to 23/09/2012, while they were staying at Parvem and prior to Rakshabandhan day while her mother had gone to take bath at about 7:30 p.m., the accused had asked her to massage his legs and while she was pressing his legs, he had

suddenly started touching her private parts. She had objected it but he threatened her to be quiet and in case she disclosed it to anyone, he threatened to kill her. As a result she had not told her mother any act of the father on that date. It was also her version that the accused committed sexual intercourse with her in the same office room of hotel Ambika Smruti, 6 days prior to 23/09/2013. On Rakshabandhan day they had gone to her grandmother's house at Saleri when her father came in the night and took her and her two brothers to their rented house at Parvem on the motorcycle. That night too on reaching Parvem, they went to sleep and after sometime her father woke up her and told her to serve him food. When she was serving him food, after she prepared it in the kitchen, he started touching her and her private parts to which she had objected. Upon that her father got angry and took her inside the bathroom and committed sexual intercourse with her in the bathroom on the floor forcibly by removing her clothes. During such time too she got severe pain in her private part and it was bleeding.

27. The victim (Pw2) (name withheld) stated that on the next day, her mother returned home to Parvem from Saleri and she

had not gone to school as they were in the process of shifting their residence. Her mother had noticed her half pant which she had thrown in the hall and asked her about the same but due to fear she did not tell anything to her mother i.e. Vanita (Pw1). She was instrumental in showing the police the scene of offence panchanama at Ambika Smruti where they attached the bed-sheet and pillow cover and her panty besides an orange and white colour bag. The Children's Court had recorded the demeanour of the witness i.e. the victim girl who had started crying and appeared disturbed and reluctant to even look at the accused when the curtain was drawn aside. That apart, her testimony had revealed that on the relevant day i.e. 23/09/2013 she had slept on the floor of the office room with her brother while her father was sleeping on the bed initially. There was no further statement by the victim about the incident except to say that she was taken to the bed by the accused while committing the offence but unlike Vanita (Pw1), she stated to the contrary that the position of the bed was the same as seen in the photographs, part of exhibit 14 Colly.

28. The victim (Pw2) (name withheld) also did not recollect what were the clothes worn by her on the night of the incident or whether she was bleeding during the incident. It is another matter that she stated that about 6 days prior to 23/09/2013, the accused had had sexual intercourse with her in the office room during the day time when it was a school holiday for her on the floor of the office room although she did not know where her mother was at the relevant time. She was unable to account for the material contradiction in her statement recorded under section 164 CrPC where it was stated that her mother had come inside the office room after she had knocked on the door and the accused had opened the door on the night of the incident on 23/09/2013. There were other material contradictions in her statement which too she could not account satisfactorily thereby raising a serious doubt on her version about the incident. Even assuming at the highest that she was overawed by the demeanour of her father i.e. the accused that he would put his threats given to her into action, it is rather surprising that for almost more than a week she had not disclosed about the incident to her mother or her grandmother except for the stray narration on 01/10/2013.

29. For the minor aged about 11 years at the relevant time it is also surprising that had the incident to have taken place as narrated by her, she should not have secured any injury on her private part apart from bleeding and lack of any complaint by her in that regard to her mother which should have been her normal reaction. Be that as it may, she too spoke about the quarrels between the accused and Vanita(Pw1) and the incidence of assault by the accused on her mother. It is another matter that she denied the suggestion that she had falsely implicated the accused at the instance of her mother and/or that she was tutored by her to say all these things against the accused.

30. Jaykishan (Pw5), her brother too stated that his father had taken the victim and his younger brother to sleep in the office room while he slept in another room with his mother. During the night time, his mother woke him up and told him that she was scared and then they slept in the office room. In other words, he was totally silent on the incident which had allegedly taken place on the night of 23/09/2013. However, he stated that sometime during the Rakshabandhan day they had gone to Saleri to visit his grandmother and on the following day his father had taken

them to Parvem alongwith the victim and his younger brother while their mother had continued to stay with his grandmother. During the night time he woke up and found that his father and the victim had gone to the bathroom and heard some sound from the bathroom with the victim saying "nahi papa, dukh raha hai" and his father saying "kuch nahi hota hai". The light of the bathroom was on and he peeped through the gap between the door and the floor and he saw the legs of his father and the victim facing each other followed by his father coming out of the bathroom. On the next morning, he saw the underwear of the victim lying in the hall, which was green in colour with white dots and showed to his mother when she came to Parvem on the following morning.

31. Unlike Vanita (Pw1) and the victim, Jaykishan (Pw3) had come with a different version that there was no cot in the office room but corroborated the version of the victim that there used to be quarrels between their parents and during such times, his mother used to go and stay in the house of his grandmother. He also revealed that he used to sleep with his father in the office room and sometime his younger brother or the victim. He had

otherwise categorically denied the case of the defence that nothing could be seen from the gap between the bathroom door and floor. Contrary to his earlier claim he admitted that he had not stated to the police that he had shown the underwear of the victim to his mother when she came to Parvem on the next morning nor had he asked the victim as to why she had thrown her underwear in the hall. His testimony too fails to inspire confidence in the version of Vanita (Pw1) and the victim (Pw2) about the incident on the night of 23/09/2013.

32. Dr. G. Kamat (Pw6) who had occasion to examine the accused on 01/10/2013 stated that on his physical and genital examination, there was nothing to suggest that he was incapable of performing sexual intercourse. He had attached urethral swabs, urethral smear slides and pubic hair and preserved for serological examination apart from referring him to the Blood Bank for his blood group examination. Nothing substantially turns on his statement but to establish that the accused was not incapable of performing sexual intercourse.

33. Dr. M. Ghodkirekar (Pw8) had occasion to examine the victim on 01/10/2013 at the instance of the Canacona Police

and during which time he found that her hymen showed the presence of old healed tears at 3 o'clock position and left side frenulum of labia majora. In his opinion, there was evidence of old healed tears for hymen like that of sexual intercourse and preserved her vaginal smear slides, swabs and pubic hair for detection of human semen and sperm which were to be forwarded to the CFSL through the police. He had also referred the victim girl to the Blood Bank for blood grouping and which was O Rh positive. His unrebutted testimony at the highest would go to show that there were tears to the hymen like those caused in a sexual intercourse which however had not found favour with the Children's Court while appreciating his testimony and holding against the prosecution.

34. Chandravati (Pw12), mother of Vanita (Pw1) stated that she had learnt from Vanita(Pw1) that the accused had raped the victim girl (Pw2) (name withheld). The victim was 11 years old at the time of incident. Prior to the filing of the complaint, Vanita (Pw1) had come to her house and the accused had visited her house in the midnight. At that time, her three children including the victim were staying with her daughter in her house.

On that day in the night, the accused took the children with him on the motorcycle. The victim had never disclosed to her about the acts of the accused during her stay in her house and about which she was informed only by Vanita(Pw1). She also shed light that there used to be constant quarrels between Vanita (Pw1) and the accused and during such time, she used to come and stay in her house with her children and the accused would come to her house and take away the children. She was informed by Vanita(Pw1) that the accused used to harass her and she did not want to stay with him. Besides, she had personally seen the accused harassing Vanita and for which she had made the complaint of harassment to the police against the accused even prior to this complaint and the accused was taken to the outpost.

35. JMFC Shivolkar (Pw13) had recorded statement of Vanita (Pw1), the victim girl (Pw2), Jaykishan (Pw5) and another on different dates at the instance of the police. Vanita (Pw1) had not disclosed to her that on 21/08/2013, there was some quarrel between her and the accused, so she had gone to her mother's place with her children and on that very night, the accused had come to her mother's place and taken all the children away with

him. For that matter she had also not stated to her that on 22/08/2013, she had returned to the rented house at Parvem and at that time she had seen one panty of the victim fallen in the hall, made enquiries with the victim and who did not disclose anything to her. The victim had not stated before her that the accused had allowed her mother to come inside the office room after sometime. Substantially nothing turns on her testimony and quite on the contrary the cross-examination showed the improvements made by Vanita(Pw1) and the victim in their statement in Court unlike those recorded before her. From the evidence of the mother of Vanita(Pw1), the victim girl (Pw2) and Jaykishan (Pw5), the prosecution had not been able to drive home its case of sexual assault on the victim coupled with the evidence of Dr. Kamat (Pw6) and Dr. Ghodkirekar (Pw8).

36. Satish(Pw3) was the panch to the arrest panchnama conducted at the Canacona police station on 01/10/2013 alongwith another when the accused was placed under arrest. The police had attached the clothes under the panchnama. The incident of sexual assault had taken place on 23/09/2013 while the arrest of

the accused was done only on 01/10/2013, a week later and therefore, nothing would substantially turn on his evidence even considering that the clothes of the accused were attached at the relevant time. Tipu (Pw4) was another panch at the instance of the police on 02/10/2013 when they were shown a woman and a minor girl at Devbag, Canacona. The woman i.e. the mother of the minor girl had narrated the incident to them and pointed out the scene of offence. There was an iron gate, which they opened and went inside the house with name "Ambika Smruti" written on the sign board. The complainant i.e. Vanita (Pw1) had shown the office room with another room behind it. There was teapoy and sofa in the office room and in the other room there was one chair and bed.

37. Satish (Pw3) stated that the complainant had informed them that the accused had raped the victim in the said room and which she had seen from the grills. He also did not rule out to the possibility of the bed being visible from the window. There was pillow and bedsheet on the bed in that room. The victim had informed that she was raped on that bed which had a bedsheet of dark yellow colour and the pillow was of pista colour

and there were some stains on the bedsheet. The police had attached the bedsheet and pillow cover by putting in an envelope and sealed the same in their presence. One white colour cloth bag was found next to the bed which the victim had disclosed was used by her to wipe herself after she was raped. This bag too was attached by police by putting it in an envelope and sealed in their presence.

38. Tipu (Pw4) had further narrated that they had gone to Parvem, Agonda in a private vehicle since there was a disclosure by the victim (Pw2) and the complainant (Pw1) that they were residing at that place earlier. The victim had told that she was once raped at that place. This part of the Panchanama was drawn between 9:45 to 11.30 hours. On reaching at Agonda, Parvem they had stopped the vehicle and were taken to the house of one Premandi by the complainant and who confirmed that the complainant and the victim were residing in that house for about a month. The House was bearing No.182 of which the door was opened by Premandi. The victim had disclosed to them that she was molested in the bathroom and on closing the door of the bathroom, they had noticed a gap of around 1-2 inches

from where one could see inside the bath room. The Panchanama was accordingly drawn and so too photographs were taken. He disclosed during his cross-examination that the room with the bed was having a big opening with grills from where the bed could be seen, since the level of the wall was lower below the grills. This aspect is in consonance with the version of Vanita (Pw1) who had affirmed that she had seen the incident of sexual abuse from the window of the office room. It is another matter that her testimony had fallen flat on account of the unexplained delay in lodging the complaint and the variance in her version and the shaky testimony of the victim which did not find corroboration even with her brother Jaykishan (Pw5). Although the doctors had not ruled out the possibility of sexual intercourse on account of the tears to the hymen, there was no evidence worthy of consideration to connect these hymenal tears to the offence perpetrated by the accused on the victim and particularly on the night of 23/09/2013.

39. Tipu (Pw4) had otherwise stated that the complainant had not informed them that the bed position was changed and it was not the same as on the date of the incident. In the absence of

any clinching evidence on the sexual offence itself, the discrepancies in the version of Panch witnesses to the scene of offence Punchnama thereby also fails to inspire confidence. Vipin (Pw7) was a panch to the attachment panchanama of the clothes of the victim on 03/10/2013. The clothes were brought by her mother which were worn by her on 21/08/2013 and 23/09/2013 being a 3/4<sup>th</sup> pant with yellow colour dots, put in a cloth lined envelope, packed and sealed and the same were signed by them. He had identified the 3/4<sup>th</sup> pant in Court. He reiterated that he acted as panch at the instance of PI Madkaikar who had carried out the attachment panchanama of the clothes of the victim and at which time he stated that there was no difference in pant and panty although he could not say why a record was made in the Panchanama as panty instead of pant. As earlier observed nothing substantially turns in the absence of any clinching evidence otherwise available on record against the accused in a crime of such heinous nature.

40. Ritu (Pw10) stated that she had rented out the premises at Devbag Canacona in order to start restaurant business styled as Gomantak. She had engaged the accused in June,2013 to do

the repair work and who was doing all works of repairs including painting. He was residing in the room on the back side of the premises with his family consisting of wife and three children and the keys of the premises were always with him. She too confirmed that there used to be fights between the accused and the Vanita (Pw1) on a regular basis and Vanita(Pw1) used to complain about the accused to her staff. However, contrary to her position as a prosecution witness, she claimed that there was no visibility in the office room by standing outside the kitchen window and which had been personally verified by her. She also gave a clean chit to the accused stating that she had never seen the accused ill-treating his children and found him to be a good father and very proud of his children. The role of this witness was rather to paint the accused with the brush of goodness both regarding his conduct with the complainant and his conduct vis-a-vis the children much less speaking derogatory about him on his sexual orientation qua his minor daughter. Therefore, her testimony is of no consequence to the case of the prosecution against the accused.

41. Premandi (Pw11) revealed that Vanita (Pw1) had contacted her on 22/7/2013 at Parvem Agonda for taking the premises on rent for a month. She gave her the keys of house No.182 and in which she stayed for a month on payment of rent of ₹1500/-. On 02/10/2013, the police had come to her house at Parvem, Agonda as they wanted to conduct a panchnama in respect of the offence of rape and thereupon the police had conducted the panchnama after she opened the house. Admittedly, there was no Agreement drawn between Premandi (Pw11) and Vanita (Pw1) regarding the premises. Her testimony assumes significance only to confirm the fact that the victim stayed in the said house alongwith her mother, two brothers and the accused prior to they shifting to Ambika Smruti.

42. PI Madkaikar(Pw14) was the Officer-In-charge of Canacona Police Station who had registered the offence under Section 376 IPC and Section 8 of the Goa Children's Act on 01/10/2013 at 09.00 hours and then referred the victim girl for medical examination to the GMC, Hospital Bambolim. He had placed the accused under arrest on the same date at 11.00 hours under the arrest pachanama, referred him to GMC, Bambolim for medical

examination and recorded the statement of the victim girl before the NGO as per her say. On the same day i.e. 02/10/2013 he had recorded the statement of her brother, drawn the scene of offence panchanama in the presence of Tipu(PW4) and another upon the spot being pointed out by the victim girl and attached a yellow colour bedsheet with flower design and a creamish colour pillow cover apart from one white and orange cloth carry bag.

43. PI Madkaikar(Pw14) had also conducted another panchanama at Parvem, Agonda, where they were residing prior to their stay at Ambika Smruti and photographs too were taken. He had during the course of the panchanama verified from the panchas that the scene of offence could be seen from outside the windowpane of the 1<sup>st</sup> room and at the second place at Parvem, he had shown the bathroom with its door and a gap in the door between the cemented floor and wooden door of the toilet. He had attached a panty with 3/4<sup>th</sup> size worn by the victim on 03/10/2013, recorded the statement of the witnesses as per their say, requested the Assistant Engineer to depute a draughtman and also requested the JMFC Canacona to record the statements of the witnesses under Section 164 of Cr.P.C. He

had forwarded the exhibits to the office of SP CID, Crime Branch Panaji for forwarding the same for chemical analysis and then on completion of the investigation had filed the charge-sheet against the accused.

44. PI Madkaikar (Pw14) stated at the outset that Vanita (Pw1) had not disclosed to him that there was a quarrel between her and the accused on 21/08/2013 for which she had gone to her mother's place with her three children and that on that night, the accused had come to her mother's place and taken away all the three children while she continued to stay in her mother's house. Vanita (Pw1) had also not stated to him that she had returned to her rented house at Parvem on 22/08/2013 and at that time she had seen one panty of the victim fallen in the hall and made inquiries with the victim, but at that time she did not disclose anything to her. He however admitted that the office room was within the premises of the hotel and that there was no external entry to the office room. This unlike the contention on behalf of the accused does not depart from the case of the prosecution that the complainant could have seen the office room from the window to it. However unlike Vanita (Pw1) he stated

that she had not made any disclosure to him about any change in the internal arrangement of the office room pertaining to bed or that it was shifted away from the window and was not in the same position during the panchanama as on the date of the incident.

45. Coming to the CFSL report, it was revealed that semen was not detected on the bedsheet, cloth carry bag, pillow cover, 3/4<sup>th</sup> pant, vaginal swab, vaginal smear and pubic hair of the victim. This report further creates serious doubt in the prosecution case inasmuch as it belies the version of the victim that she had wiped her private part with the pillow cover/cloth carry bag after the incident of forcible sexual intercourse. If that were so, there should have been traces of semen and in the absence thereof the case of the prosecution is further belied and gives rise to a hypothesis consistent with the case of the defence that it was one of false implication. Moreover, considering also the tender years of the victim, blood was also not detected on the bedsheet, pillow cover, cloth carry bag, 3/4<sup>th</sup> pant which in normal circumstances ought to have been present giving due weightage to her tender years and the mature age of the accused.

46. The accused Pritam Kumar examined himself and during which time he revealed that he had shifted to Goa in the year 2010 much after his love marriage with the complainant in 1999. He was residing in a rented premises at Agonda for about 1 ½ to 2 months which he had to leave as Vanita (Pw1) used to pick up quarrels with him, used to leave the house and go and stay with her mother alongwith the children for which he used to go to the house of his mother-in-law to bring them back. He had shifted to a room allotted to him by one Godwin Fernandes with whom he was working and to whom he had disclosed his problem. The said Godwin had told Vanita (Pw1) not to fight and had allotted one room for their residence at Agonda in which they stayed for around two months. During such time too Vanita (Pw1) fought with him and had left the house and besides lodged the complaint against him with the police alleging that he used to consume alcohol. He was assaulted by the police at Agonda outpost with dandas and told him to leave Goa and to go back to his native place in Haryana.

47. The accused stated that the I.O. in the present case had intervened and told his wife not to fight with him and to stay

peacefully. A complaint was also filed against him by his wife at the Women's cell where he was called for enquiries and the lady officer-in-charge of Women's Cell had told his wife to behave properly, to stay peacefully and sent them back. The reason why Vanita (Pw1) used to quarrel and fight with him was as he used to send money to his parents and also for the expenses of his eldest daughter who was staying with his parents at Haryana. He had continued to stay in the house of Godwin with his family for about 8 months and thereafter he had arranged for a rental premises for their stay at Parvem in the house of one woman. Even in this place Vanita had left the house by raising quarrel with him leaving his youngest son in his company for four days. The victim girl was attached to Vanita (Pw1). She was habituated to robbing money and was not listening to him.

48. Pritam Kumar (Dw1) next stated that he had come in contact with Ritu (Pw10) who had offered work to him of looking after her premises which was under renovation. She was developing a Hotel in the said premises and as such he shifted with his family to the same premises. They were occupying the last room. Ritu (Pw10) had brought a lot of material and had

stored it in the rooms around the office and had allowed him to sleep in the office room and besides handed over the keys to him. There was no window in front of the office room and rather it was a ventilator provided to the kitchen at a height above his head. There was no direct entry to the office room from outside the premises and one had to enter other room of the premises to come to the office room. There was also no bed in the office room. They used to sleep on the floor while the bed was in the other room of the premises. He used to sleep in the office room with the victim and his younger son while Vanita (Pw1) used to slept in the room allotted to them alongwith Jaykishan (Pw5). The victim used to wake up fast and used to be alert in her sleep unlike him who slept soundly and was not waking up easily. He used to take the victim with him to the office room to wake him up in case of any emergency. The long and short of his testimony was to indicate that Vanita (Pw1) used to raise quarrels with him and go and stay with her mother with the children. A false complaint had been lodged against him since she never wanted to stay with him. He would have left Vanita (Pw1) and gone to his native place if he did not have

children. The victim was very much under the influence of Vanita (Pw1) and her family members.

49. Pritam Kumar (Dw1) categorically denied the case of the prosecution put to him that the complainant used to quarrel with him, leave the house and stay in that of her mother alongwith her children and that he used to go to the house of the in-laws to bring them back. He also denied the case put to him that he had made a false statement that he was residing in the house belonging to one Godwin Fernandes and was working for him. In any event but for the bare denial of the case put against him that he had violated the person of his minor daughter, there was no case brought forth by him in defence. He also denied the falsity of his statement that a false complaint was lodged against him by the complainant. For that matter he also denied the prosecution case that he had touched the victim and particularly her private part when she was sleeping with him and having threatened her with dire consequences even to kill her in case she narrated the incident to anyone.

50. Pritam Kumar (Dw1) keeping in tune with his plea in defence categorically denied the suggestion that he had raped the

victim at Parvem on the pretext of getting massage to his legs and having threatened her at that time. He also categorically denied the case put to him that he had raped the victim in the office room of Ambika Smruti in September,2013 and that a week prior thereto, he had taken the victim to the bathroom and had had forcible sexual intercourse with her on the bathroom floor causing her severe pain in her private part apart from bleeding. The learned Children's Court had on examination of the testimony of the complainant did not find favour with the case of the prosecution and raised serious doubts whether the incident as narrated by her at all took place. She disbelieved the complainant on having witnessed the incident from the window of the office room, raised serious doubts on the prosecution's case on account of the delay in lodging the complaint and her conduct not to question the accused despite having witnessed the incident of forcible intercourse when she was otherwise prompt in lodging the complaint against him on petty issues on earlier occasions.

51. She had also found disparity in the evidence of the complainant qua the position of the bed in office room and their

being a variance in her version when coupled with the testimony of the panch witness and the scene of offence panchnama in particular. The learned Children's Court for that matter also found favour with the case in defence of false implementation looking to the testimony complainant's mother who too was silent on the incident of forcible sexual intercourse by the accused on the victim and the complainant having withheld this vital piece of information from her. The learned Children's Court for that matter also raised doubts about the testimony of the minor victim girl and did not give credence to her statement about the incident. Quite on the contrary she found the conduct of the victim whose demeanour she had occasion to note as strange and as she had not confided in her mother about the alleged incident. It is rather strange that the learned Judge ought to have raised doubt on her testimony only because she had not disclosed the incident even to her siblings.

52. It is rather preposterous for the learned Judge to have held against the minor victim girl for not sharing the incident with her siblings who were both her younger brothers and she could not have been expected to confide in them about the alleged

shameful act committed by their own father. The delicate balance of their relationship was totally lost on the Trial Judge who had expected the minor victim girl to disclose such incident to her brothers. One can understand the learned Judge drawing adverse inference against the victim for not disclosing the incident to her mother and grandmother but it is rather farfetched that an adverse inference should be drawn against her for withholding such private and intimate details from her younger brothers. The learned Judge had otherwise found that there was no basis in her statement that she felt threatened merely on the premise that she was well protected by her mother who used to go to the house of her mother after every quarrel with the accused. Even if it be so, the intimidation or fear felt by the minor victim girl appears to have been lost on the Trial Judge on that specious premise.

53. It is another matter that the prosecution had not succeeded in establishing its case against the accused of the scene of offence panchnama and more particularly the acts of forcible sexual intercourse by the accused with the minor daughter. The CFSL report on the absence of any semen on the attached

articles particularly the clothes used by her to wipe her private part after the said incident leaves much to be desired in the case of the prosecution when it was nobody's case that these items of clothes were washed after the incident. Besides, at the cost of repetition, the victim was a minor aged 11 years at the time of incident of alleged forcible sexual intercourse and on her medical examination there ought to have been telltale signs of distress on her private part. However in the absence thereof, this circumstance too works in favour of the accused.

54. The Trial Court had laid undue reliance on the testimony of Ritu (Pw10) to the extent of giving a clean chit to the accused and belying the case of the complainant. Be that as it may, the learned Judge had found that the case of the prosecution was fraught with doubt, that there was considerable delay in lodging the FIR which was not explained and that the accused was entitled to the benefit of doubt. When such is the position of the case of the prosecution, the benefit thereof must go in favour of the accused and which the Trial Court despite the flaws in the assessment of the material had recorded in favour of the accused. The judgment does not call for any interference in

appeal only on the premise that another view is possible. In view thereof, we pass the following:

### **O R D E R**

(a) The appeal is dismissed, the impugned judgment acquitting the accused of the offences punishable under Section 376(2) (f)(i) and (n) and Section 506 (ii) IPC read with Section 8(2) of the Goa Children's Act,2003 and Section 4 of the Protection of Children from Sexual Offences Act,2012 is confirmed.

**NUTAN D. SARDESSAI,J.**

**M.S.SONAK,J.**

mv