THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appellate Jurisdiction)

SINGLE BENCH: BHASKAR RAJ PRADHAN, JUDGE.

Crl. A. No. 18 of 2017

State of Sikkim

.... Appellant

versus

Dawa Tshering Bhutia,
S/o Late Lumug Bhutia,
Resident of Jail Dara,
Chandmari, East Sikkim

.... Respondent

Application under Section 378 Code of Criminal Procedure, 1973.

Appearance:

Mr. Karma Thinlay, Additional Public Prosecutor with Ms. Pollin Rai, Assistant Public Prosecutor for the State-Appellant.

Mr. K. T. Bhutia, Senior Advocate with Ms. Bandana Pradhan and Mr. Saurav Singh, Advocates for the Respondent.

JUDGMENT
(24.05.2018)

Bhaskar Raj Pradhan, J

1. A daunting question emanate for consideration in the present criminal action. It relates to the deposition of an alleged victim whose modesty had been allegedly outraged by the Respondent. A victim' statement, it is said, is akin to the statement of an injured witness and should receive the same

weight but what is the quality of evidence required to be given by such a victim to bring home a charge of outraging her modesty and would it require corroboration?

2. A judgment of acquittal dated 28.12.2016 passed by the Learned Judge, Fast Track Court, East & North Sikkim at Gangtok (the Learned Judge) in Sessions Trial (F.T.) Case No. 05 of 2016 is sought to be assailed by the State of Sikkim. The Learned Judge has acquitted the Respondent from the solitary charge of assaulting or using criminal force to the victim-P.W.1 with intent to outrage her modesty punishable under Section 354 of the Indian Penal Code, 1860 (IPC). Leave having been granted on the application of the State, the Appeal is under consideration.

3. The First Information Report (FIR) was lodged on 22.11.2014 at 2050 hours at the Sadar Police Station, Gangtok by the victim wherein she alleged that she was sexually assaulted by the Respondent. The victim stated that the Respondent tried to forcefully kiss her pushing himself towards her and further that he disrobed himself went inside her bed and made sexually provoking actions. The victim also alleged that it was an unlawful act against a working woman and the Respondent has outraged her modesty because of which she was mentally unwell. The victim also complained that when she resisted the Respondent's advances he threatened to throw her out from her job.

4. On the strength of the aforesaid FIR a criminal case would be registered under Section 376/511 IPC and investigation taken up by P.W.13-the Investigating Officer. It is unclear as to how and why criminal case was registered for alleged rape and for attempting to commit offences punishable with imprisonment for life or other punishment on the basis of the allegations made in the said FIR.

5. The Investigating Officer would file charge-sheet No. 42/SHO/SPS/16 dated 04.03.2016 under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) also for the offences under Section 376/511 IPC.

6. During the investigation the Chief Judicial Magistrate-P.W.10 would also record a statement of the victim under Section 164 Cr.P.C. on 04.07.2016.

7. Charge would be framed under Section 376/511 IPC on 06.06.2016 and 13 witnesses including the Investigating Officer-P.W.13 would be examined by the prosecution during trial. A perusal of the charge framed by the Learned Judge would however, disclose, quiet evidently, that charge under Section 376/511 IPC had been registered since the victim had alleged that she was *"sexually assaulted"* in the FIR although the victim had clarified in the FIR itself that she was forcefully tried to be kissed.

8. After the trial the Respondent would be examined under Section 313 Cr.P.C. on 13.12.2016 on which date an opportunity to lead defence evidence would be declined.

9. During the hearing before the Learned Judge, the Learned Additional Public Prosecutor would concede that there is no evidence under Section 376/511 IPC but would submit that there were enough materials against the Respondent to establish a case under Section 354 IPC and although no charge had been framed under Section 354 IPC the Learned Judge would go on to examine it since, as submitted by the prosecution, they had been able to prove it.

10. The impugned judgment dated 28.12.2016 would acquit the Respondent for the offence even under Section 354 IPC on the following grounds:

(i) The evidence of P.W.8-the Doctor who examined the victim on 22.11.2014 had opined that there was no forceful sexual act and that there was no injury/bruises on any part of the body suggesting forceful pulling and pushing.

(ii) The evidence of the victim and other witnesses established that there was an altercation between the Respondent and the victim as she was fired from service after being caught smoking in the hotel room. The evidence of P.W.2-the victim's brother and P.W.7 supported the version of the defence regarding the altercation between the Respondent and the victim.

(iii) The evidence of the victim and other prosecution witnesses i.e. P.W.2, P.W.7, P.W.8, P.W.10 and the Investigating Officer-P.W.13 established that the victim gave different

versions and tried to improve her case and in fact the prosecution evidence established that the victim had made false allegation against the Respondent.

(iv) The victim's version is difficult to believe. Prosecution failed to produce two employees of the hotel where the alleged incident took place despite giving several opportunities. There is no evidence of the victim raising any alarm or telling P.W.2 and P.W.3 about the incident when they reached the place of occurrence after the alleged incident.

(v) There is no cogent proof about the alleged incident. Conviction can be based on the sole testimony of the prosecutrix without any corroboration provided it lends assurance of her testimony. However, in the case at hand, the testimony of the prosecutrix has been rendered totally unreliable.

11. Section 354 of the IPC reads thus:

> ***"354. Assault or criminal force to woman with intent to outrage her modesty.—****Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.***"**

12. The ingredients required to be established to bring an accused within the mischief of Section 354 IPC are:-

(i) Assault or use of criminal force on a woman.

(ii) The said assault or use of criminal force must be intended to outrage or knowing it to be likely that he will thereby outrage her modesty.

13. Mr. Karma Thinley, Additional Public Prosecutor for the Appellant would rely upon the evidence of the victim and submit that the victim's deposition cogently proved all the ingredients of the offence under Section 354 IPC. He would submit that the records reveal that the FIR was filed promptly and that the substance of the accusation exists in the FIR itself as well as the statement of the victim under Section 164 Cr.P.C. The presence of the victim at the hotel on the date of the incident has been proved by the evidence of P.W.2, the victim's brother, his friend P.W.3 and of the victim herself. Mr. Karma Thinlay would submit that the evidence of hostile prosecution witness-P.W.5 would establish that on 24.11.2014 police officer had visited the Hotel and seized the contract of employment of the victim, a photocopy of the voters identity card as well as one passport photograph of the victim in his presence which have been duly exhibited. He would submit that the deposition of the Respondent's wife-P.W.7 would establish that she had gone to Kalimpong and as such was not in the hotel at the time of the alleged incident giving an opportune occasion for the Respondent to indulge in the alleged criminal act. Mr. Karma Thinlay would submit that the deposition of the Learned Chief Judicial Magistrate-P.W.10 would cogently prove the recording of the Section 164 Cr.P.C. statement of the victim. He would further submit that the only ground on which the Learned Judge had acquitted the Respondent regarding the inimical relationship between the

victim and the Respondent is negated by the evidence of the victim. She has stated that she had asked the Respondent for her salary in advance for her treatment to which the Respondent had handed over her documents and passport photo and told her that she was no longer required for the job. After that the victim had told the Respondent that she would not leave the job and requested him for permission to visit the doctor which he agreed and had in fact given her an amount of ₹500/- for the same. Mr. Karma Thinlay, would thus submit that permission having been granted and an amount of ₹500/- having been paid by the Respondent to the victim the question of them having any inimical relation thereafter would not arise. Mr. Karma Thinlay would rely upon several judgments of the Supreme Court on the ingredients required to be established by the prosecution and would submit that the prosecution has been able to do so.

14. In re: ***Vidyadharan v. State of Kerala***[1] the Supreme Court would hold:

> ***"9.*** *In order to constitute the offence under Section 354 mere knowledge that the modesty of a woman is likely to be outraged is sufficient without any deliberate intention of having such outrage alone for its object. There is no abstract conception of modesty that can apply to all cases. (See State of Punjab v. Major Singh [AIR 1967 SC 63 : 1967 Cri LJ 1] .) A careful approach has to be adopted by the court while dealing with a case alleging outrage of modesty. The essential ingredients of the offence under Section 354 IPC are as under:*

[1] **(2004) 1 SCC 215**

(i) that the person assaulted must be a woman;

(ii) that the accused must have used criminal force on her;

and

(iii) that the criminal force must have been used on the woman intending thereby to outrage her modesty.

10. *Intention is not the sole criterion of the offence punishable under Section 354 IPC, and it can be committed by a person assaulting or using criminal force to any woman, if he knows that by such act the modesty of the woman is likely to be affected. Knowledge and intention are essentially things of the mind and cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed. A victim of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weight. ……."*

[Emphasis supplied]

15. In re: ***Raju Pandurang Mahale v. State of Maharashtra***[2] the Supreme Court would hold:

"11. *Coming to the question as to whether Section 354 of the Act has any application, it is to be noted that the provision makes penal the assault or use of criminal force on a woman to outrage her modesty. The essential ingredients of offence under Section 354 IPC are:*

(a) That the assault must be on a woman.

(b) That the accused must have used criminal force on her.

(c) That the criminal force must have been used on the woman intending thereby to outrage her modesty.

12. *What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter.*

[2] **(2004) 4 SCC 371**

The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word "modesty" is not defined in IPC. The Shorter Oxford Dictionary (3rd Edn.) defines the word "modesty" in relation to a woman as follows:

"Decorous in manner and conduct; not forward or lewd; Shamefast; Scrupulously chaste."

13. *Modesty is defined as the quality of being modest; and in relation to a woman, "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct". It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. As observed by Justice Patteson in R. v. James Lloyd [(1836) 7 C&P 317 : 173 ER 141] :*

In order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part.

The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.

14. *Webster's Third New International Dictionary of the English language defines modesty as "freedom from coarseness, indelicacy or indecency: a regard for propriety in dress, speech or conduct". In the Oxford English Dictionary (1933 Edn.), the meaning of the word "modesty" is given as "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct*

(in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions".

15. *In State of Punjab v. Major Singh [AIR 1967 SC 63 : 1967 Cri LJ 1] a question arose whether a female child of seven-and-a-half months could be said to be possessed of "modesty" which could be outraged. In answering the above question the majority view was that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of Section 354 IPC. Needless to say, the "common notions of mankind" referred to have to be gauged by contemporary societal standards. It was further observed in the said case that the essence of a woman's modesty is her sex and from her very birth she possesses the modesty which is the attribute of her sex. From the above dictionary meaning of "modesty" and the interpretation given to that word by this Court in Major Singh case [AIR 1967 SC 63 : 1967 Cri LJ 1] the ultimate test for ascertaining whether modesty has been outraged is whether the action of the offender is such as could be perceived as one which is capable of shocking the sense of decency of a woman. The above position was noted in Rupan Deol Bajaj v. Kanwar Pal Singh Gill [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059] . When the above test is applied in the present case, keeping in view the total fact situation, the inevitable conclusion is that the acts of the accused-appellant and the concrete role he consistently played from the beginning proved combination of persons and minds as well and as such amounted to "outraging of her modesty" for it was an affront to the normal sense of feminine decency. It is further to be noted that Section 34 has been rightly pressed into service in the case to fasten guilt on the accused-appellant, for the active assistance he rendered and the role played by him, at all times sharing the common intention with A-4 and A-2 as well, till they completed effectively the crime of which the others were also found guilty.***"***

[Emphasis supplied]

16. In re: ***Tarkeshwar Sahu v. State of Bihar (Now Jharkhand)***[3] the Supreme Court reproduced the cases of various Courts indicating circumstances in which the Court convicted the accused under Section 354 IPC as under:

> ***"44****. We deem it appropriate to reproduce the cases of various courts indicating circumstances in which the court convicted the accused under Section 354 IPC.*
>
> ***45.*** *In State of Kerala v. Hamsa [(1988) 3 Crimes 161 (Ker)] it was stated as under: (Crimes p. 164, para 5)*
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> *"What the legislature had in mind when it used the word modesty in Sections 354 and 509 of the Penal Code was protection of an attribute which is peculiar to woman as a virtue which attaches to a female on account of her sex. Modesty is the attribute of female sex and she possesses it irrespective of her age. The two offences were created not only in the interest of the woman concerned, but in the interest of public morality as well. The question of infringing the modesty of a woman would of course depend upon the customs and habits of the people. Acts which are outrageous to morality would be outrageous to modesty of women. No particular yardstick of universal application can be made for measuring the amplitude of modesty of woman, as it may vary from country to country or society to society."*
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> ***46.*** *A well known author Kenny in his book Outlines of Criminal Law [19th Edn., para 146, p. 203] has dealt with the aspect of indecent assault upon a female. The relevant passage reads as under:*
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> *"In England by the Sexual Offences Act, 1956, an indecent assault upon a female (of any age) is made a misdemeanour and on a charge for indecent assault upon a child or young person under the age of sixteen it is no defence that she (or he) consented to the act of indecency."*

[3] **(2006) 8 SCC 560**

47. *In State of Punjab v. Major Singh [AIR 1967 SC 63 : 1967 Cri LJ 1] a three-Judge Bench of this Court considered the question—whether modesty of a female child of 7½ months can also be outraged. The majority view was in the affirmative. Bachawat, J. on behalf of majority, opined as under:*

"The offence punishable under Section 354 is an assault on or use of criminal force to a woman with the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not define 'modesty'. What then is a woman's modesty?

… the essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses a modesty capable of being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence punishable under Section 354. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as, for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anaesthesia, she may be sleeping, she may be unable to appreciate the significance of the act; nevertheless, the offender is punishable under the section.

A female of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. In this case, the victim is a baby, seven-and-half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless from her very birth she possesses the modesty which is the attribute of her sex."

48. *In Kanhu Charan Patra v. State of Orissa [1996 Cri LJ 1151 (Ori)] the Orissa High Court stated as under:*

"The accused entered the house and broke open the door which two girls of growing age had closed from inside and molested them but they could do nothing more as the girls made good their escape. On being prosecuted it was held that the act of the accused was of grave nature and they had committed the

same in a daredevil manner. As such, their conviction under Sections 354/34 was held proper."

49. *The High Court of Delhi in Jai Chand v. State [1996 Cri LJ 2039 (Del)] observed as under:*

"The accused in another case had forcibly laid the prosecutrix on the bed and broken her pyjama's string but made no attempt to undress himself and when the prosecutrix pushed him away, he did not make efforts to grab her again. It was held that it was not an attempt to rape but only outraging of the modesty of a woman and conviction under Section 354 was proper."

50. *In Raja v. State of Rajasthan [1998 Cri LJ 1608 (Raj)] it was stated as under:*

"The accused took the minor to a solitary place but could not commit rape. The conviction of the accused was altered from Sections 376/511 to one under Section 354."

51. *The Court in State of Karnataka v. Khaleel [2004 Cri LJ (NOC) 10 (Kant)] stated as follows: [Cri LJ (NOC) 10]*

The parents reached the sugarcane field when accused was in process of attempting molestation and immediately he ran away from the place. There was no evidence in support of allegation of rape and accused was acquitted of charge under Section 376 but he was held liable for conviction under Sections 354/511 IPC.

52. *The Court in Nuna v. Emperor [15 IC 309 : (1912) 13 Cri LJ 469] stated as follows: (Cri LJ p. 469)*

"The accused took off a girl's clothes, threw her on to the ground and then sat down beside her. He said nothing to her nor did he do anything more to her: [It is held] that the accused committed an offence under Section 354 IPC and was not guilty of an attempt to commit rape."

53. *The Court in Bisheshwar Murmu v. State of Bihar [2004 Cri LJ 326 (Jhar)] stated as under:*

> *"The evidence showed that the accused caught hold of the hand of the informant/victim and when one of the prosecution witnesses came there hearing alarm of the victim, offence under Sections 376/511 was not made out and conviction was converted into one under Section 354 for outraging the modesty of the victim."*
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> ***54.*** *The Court in Keshab Padhan v. State of Orissa [1976 Cutt LR (Cri) 236] stated as under:*
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> *"The test of outrage of modesty is whether a reasonable man will think that the act of the offender was intended to or was known to be likely to outrage the modesty of the woman. In the instant case, the girl was 15 years of age and in the midnight while she was coming back with her mother the sudden appearance of the petitioner from a lane and dragging her towards that side sufficiently established the ingredients of Section 354.***"**

17. Mr. Karma Thinlay would submit that minor discrepancies in the evidence produced by the prosecution has led the Learned Judge to hold that the victim had made different statements before the police, Magistrate and Trial Court which discrepancies ought not to have detracted her from the material particulars establishing the ingredient of the offence which had remained untarnished. To elucidate what may be considered as minor discrepancies Mr. Karma Thinlay would rely upon two judgments of the Supreme Court.

18. In re: ***State of U.P. v. Santosh Kumar & Ors.***[4] the Supreme Court would hold:

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[4] **(2009) 9 SCC 626**

> ***"24.*** *In any criminal case where statements are recorded after a considerable lapse of time, some inconsistencies are bound to occur. But it is the duty of the court to ensure that the truth prevails. If on material particulars, the statements of prosecution witnesses are consistent, then they cannot be discarded only because of minor inconsistencies.****"***
>
> *[Emphasis supplied]*

19. In re: ***R. Shaji v. State of Kerala***[5] the Supreme Court would hold:

> ***"26.*** *Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 CrPC, he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.****"*** *[Emphasis supplied]*

20. Mr. K. T. Bhutia, Learned Senior Advocate for the Respondent on the other hand would vociferously submit and highlight various evidences available to establish the inimical relationship between the victim and the Respondent. He would submit that the factum of the victim having been thrown out of her job just before the alleged incident would throw grave

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[5] **(2013) 14 SCC 266**

suspicion about the version of the victim regarding the incident. The conflicting versions regarding the same incident by the victim at different points of time has rendered the deposition of the victim unreliable. The victim had flatly denied having any altercation with the Respondent when suggested during her cross-examination. However, her own brother-P.W.2 has falsified the victims version by stating that during the day the victim had in fact come to his room and told him that she was fired from service by the Respondent and that he had also shouted at her while doing so. P.W.2 also stated that the victim had told him about the altercation which she had with the Respondent during the day. Mr. K. T. Bhutia would submit that the admission of the victim's brother-P.W.2 that the victim had a habit of taking alcohol and smoking and further the fact that the victim had told him that she was scolded by the Respondent as he found her smoking in the hotel room probabilises the defence version and renders the victim's evidence unreliable. This fact is also corroborated by the deposition of the Respondent's wife-P.W.7 who also admitted the Respondent having told her about firing the victim for smoking in the room. He would submit that even the Investigating Officer has deposed that P.W.7 had stated about the said fact even at the time of recording her statement under Section 161 Cr.P.C. Mr. K. T. Bhutia would submit that the evidence of a victim must be cogent and consistent. However, in the present case the victim had narrated different versions in

the FIR, statements under Section 161 and 164 Cr.P.C. and the deposition regarding material particulars. He would submit that in the FIR the victim is said to have reported that the Respondent had tried to forcefully kiss her pushing himself towards her whereas in the statement under Section 164 Cr.P.C. she had stated that the Respondent had pushed her on the bed and started kissing her on her cheek and neck and once again in her deposition she stated that the Respondent started putting his hands over her body and tried to kiss her on her cheeks. Mr. K. T. Bhutia would submit that a victim of such a heinous offence would have absolutely clear memory about the incident and that there is a huge difference between *"started kissing me"* and *"tried to kiss me"*. He would submit that similarly the entire deposition of the victim is replete with contradictions on various material aspects of the case which renders the victim version completely false. Mr. K. T. Bhutia would also rely upon various judgments of the Supreme Court on the quality of evidence required of a sterling witness and on the power of the High Court while examining a judgement of acquittal.

21. In re: ***Ganesh Bhavan Patel v. State of Maharashtra***[6] the Supreme Court would hold:

> ***"13.*** *The dictum of the Privy Council in Sheo Swarup v. King-Emperor [AIR 1934 PC 227 : 61 IA 398] , and a bead-roll of decisions of this Court have firmly established the position that although in an appeal from an order of acquittal the powers of*

[6] **(1978) 4 SCC 371**

*the High Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against an order of conviction, yet, as a rule of prudence, it should — to use the words of Lord Russel of Killowen — "always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses." Where two reasonable conclusions can be drawn on the evidence on record, the High Court should, as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the Court below. In other words, if the main grounds on which the Court below has based its order acquitting the accused, are reasonable and plausible, and cannot be entirely and effectively dislodged or demolished, the High Court should not disturb the acquittal.***"***

[Emphasis supplied]

22. In re: ***Ramesh Babulal Doshi v. State of Gujarat***[7] the Supreme Court would hold:

"7*. Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above-quoted conclusions. This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the*

[7] **(1996) 9 SCC 225**

> *conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then — and then only — reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not."*
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> *[Emphasis supplied]*

23. In re: ***Ajit Savant Majagvai v. State of Karnataka***[8] the Supreme Court would summarize the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal thus:

> ***16.*** *This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial court. These principles have been set out in innumerable cases and may be reiterated as under:*
>
> *(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.*
>
> *(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if*

[8] **(1997) 7 SCC 110**

the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness-box.

*(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.***"**

24. In re: ***Gorle S. Naidu v. State of A.P.& Ors.***[9] the Supreme Court would hold:

"13. *Though mere acquittal of a large number of co-accused persons does not per se entitle others to acquittal, the Court has a duty in such cases to separate the grain from the chaff. If after sieving the untruth or unacceptable portion of the evidence residue is sufficient to prove the guilt of the accused, there is no legal bar in convicting a person on the evidence which has been primarily disbelieved vis-à-vis others. But where they*

[9] **(2003) 12 SCC 449**

are so inseparable that any attempt to separate them would destroy the substratum on which the prosecution version is founded, then the Court would be within its legal limits to discard the evidence in toto. ……"

"14. *The respective stands need careful consideration. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See Bhagwan Singh v. State of M.P. [(2002) 4 SCC 85 : 2002 SCC (Cri) 736 : (2002) 2 Supreme 567]) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : AIR 1973 SC 2622] , Ramesh Babulal Doshi v. State of Gujarat [(1996) 9 SCC 225 : 1996 SCC (Cri) 972 : (1996) 4 Supreme 167] , Jaswant Singh v. State of Haryana [(2000) 4 SCC 484 : 2000 SCC (Cri) 991 : (2000) 3 Supreme 320] , Raj Kishore Jha v. State of Bihar [(2003) 11 SCC 519 : 2004 SCC (Cri) 212 : (2003) 7 Supreme 152] , State of Punjab v. Karnail Singh [(2003) 11 SCC 271 : 2004 SCC (Cri) 135 : (2003) 5 Supreme 508] , State of Punjab v. Pohla Singh [(2003)*

11 SCC 58 : 2004 SCC (Cri) 276 : (2003) 7 Supreme 17] and Suchand Pal v. Phani Pal [(2003) 11 SCC 527 : 2004 SCC (Cri) 220 : JT (2003) 9 SC 17]" .

[Emphasis supplied]

25. In re: ***Rai Sandeep Alias Deepu v. State (NCT of Delhi)***[10] the Supreme Court would hold:

> ***"22.*** *In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such*

[10] **(2012) 8 SCC 21**

> *a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."* *[Emphasis supplied]*

26. The FIR has been lodged on the very same day of the alleged incident. The presence of the victim has been established by the prosecution and in fact that is an admitted fact, the Respondent would not deny. It is also certain that the victim had been employed by the Respondent just a few days before the alleged incident. The seizure of the victim's employment contract, voter identity card and passport photo from P.W.7-wife of the Respondent from the hotel also establishes the victim's employment at the hotel by the Respondent. The prosecution alleges that the victim's modesty was outraged by the Respondent on 22.11.2014 after dark.

27. Out of the 13 witnesses examined by the prosecution there is no eye witness to the alleged incident. The deposition of the victim stands alone. The prosecution has examined P.W.5 who is the only witness from the hotel where the alleged incident took place. P.W.5 has the same name which has been used by the victim several times in her statement recorded under Section 164 Cr.P.C. However, it is not established that P.W.5 is the same

person referred by the victim. The said P.W.5 was examined as a witness to the seizure of a copy of the contract of employment, photocopy of voter identity card and passport photograph all belonging to the victim from the hotel on 24.11.2014 and nothing further. In such circumstances, it becomes crucial to examine the evidence of the victim minutely. A deposition of a victim of alleged sexual crime must be given primary consideration. At the same time it is not as if to say that the prosecution does not have to prove his case beyond reasonable doubt. A solitary statement of the victim, if it inspires confidence, is sufficient to record a conviction and no further corroboration is required. A statement of a victim is akin to a statement of an injured witness and her testimony, ordinarily, should receive the same weight.

28. In criminal cases of this nature in which witnesses unaccustomed to judicial processes speaking in vernacular enters the witness box to depose, it must be kept in mind that these witnesses are susceptible to various attendant circumstances of anxiety, unfamiliarity, awkwardness and newness. It must also be kept in mind that since the language of the Court is English and what is stated by the witness in vernacular is recorded by the Court in English often times the witness do not get an opportunity to even realize if what she/he had stated was correctly put across in the deposition. Distance of time may often lead to minor discrepancies in the narration of

facts. A Court while examining and appreciating such evidences must be alive to these factors. It is the duty of the Court to search for the truth. While doing so it is necessary to remove the grain from the chaff.

29. To appreciate the rival submissions of Mr. Karma Thinlay and Mr. K. T. Bhutia Learned Senior Counsel appearing for the respective parties it is vital to examine the victim's deposition first. A chart reflecting the narration of facts by the victim first before the Learned Chief Judicial Magistrate under Section 164 Cr.P.C. and thereafter in her deposition in her examination-in-chief is being drawn up for comparison as follows:

Area	**Event as narrated in Section 164 Cr.P.C. statement**	**Event as narrated in deposition before Court**
Hotel	**"**On 20.11.2014 I was told by Dawa Tshering Bhutia that I should stay in the hotel itself. Accordingly, I started residing in the said hotel. The said Dawa Tshering Bhutia and his wife also resides in the hotel itself.**"**	**"**I do not remember the exact date but in the month of November, 2015 I was informed by one Binod Tamang who used to stay in the same building where I was staying as a tenant, that he would find me an employment as a Receptionist at a hotel located at Deorali, East Sikkim. Accordingly, Binod Tamang took me to the said hotel where we met the accused who told me to submit me one passport size photo and my Voter I.D. card, thereafter the accused told me that I had been selected for the said job as a receptionist. The accused further told me that it would be inconvenient for me to commute from my house to the work place every day therefore he suggested that it would be better if I stayed in the hotel (work place) itself. He further told me that he would accommodate me in Room No.106 of his hotel.**"**
	"On 21.11.2014 the wife of Dawa Tshering Bhutia went to Kalimpong along with one house keeping staff. She also took 5 numbers of blankets along with her for cleaning the same.**"**	**"**The following day I went to the hotel with some of my belonging and joined my duty and started staying in the said hotel. Everything was running smoothly for a few days but after 4-5 days for my joining the duty the wife of the accused (Aiela) went to Kalimpong to give the dirty linen of the hotel to the laundry at Kalimpong and while going she also took along with her one girl who used to stay with them.**"**

	"On 22.11.2014 I asked for the permission from Dawa Tshering Bhutia to visit my home as there were no guests in the hotel. I was told by Dawa Tshering Bhutia that the guest may come at any time and I cannot leave the hotel. Thereafter, I went to my room at Lingding and brought some clothings for my use in the hotel.**"**	**"**At round 8 p.m. of the same day i.e. the day Aiela left for Kalimpong, I took my dinner after attending to the guests of the hotel and retired for the night. The next morning I asked the accused for an advance of my salary as I needed it to avail treatment for skin disease (hand). On hearing this the accused handed me my document and my passport photo and told me that I was no more required and I could leave the job and go. However, I told him that I would not leave the job and asked the accused for permission to visit the doctor for an hour and to this the accused agreed and also give me an amount of Rs.500/-. Thereafter I made queries about the availability of the Doctor and came to learn that the Doctor was not available at that time as he had gone out of state and he would return only after a week. Thereafter, I went to my room at Lingding, Gangtok, East Sikkim and met my brother who stays there and spent some time with him after which I returned to the hotel.**"**
Hotel	**"**On the relevant day at around 4pm waiter Suraj asked me the permission to leave the hotel for sometime. I let him go.**"**	
		"That day there were no guests in the hotel but even then I attended my duty till 8 p.m. sometime during the evening the cook of the hotel had asked me as to what curry should be prepared for dinner. At around 8 p.m. the accused also came to the reception and asked me what should be prepared for dinner and he himself said that deep fried chicken should be prepared for dinner that night.**"**
Room No.102 (Respondent's room)	**"**At around 6pm, he came back little bit drunk and he was also carrying a bottle of country liquor with him. I was in the hotel room No.102 where Dawa Tshering Bhutia used to stay. He had called me in his room and he was giving instructions to me with regard to the running of a hotel. He told me that I should check all the staff working in the hotel as they might pick up the articles from the hotel. At that time waiter Suraj called us from the counter of the hotel and told us to come down in the counter.**"**	**"**After about half and (sic) hour one boy who was employed in the housekeeping section at the hotel called me through the intercom and told me that the dinner was ready and he asked me to come to the kitchen which is below the reception/counter to have dinner. Thereafter I, the accused person, the small boy employed in housekeeping section and the cook had dinner.**"**
Counter/ kitchen	**"**I came down to the counter and after sometime Dawa Tshering Bhutia also came in the counter. The kitchen of the hotel is adjacent to the restaurant and the counter. I saw that Suraj was in the kitchen. I went to the kitchen and he gave me two packets of nuts (supari) and he also gave the bottle of country liquor to Dawa Tshering Bhutia. Dawa Tshering Bhutia then put the country liquor in four cups and offered us to drink. Suraj refused to take the said country liquor as he was already drunk. Dawa Tshering Bhutia then asked me to drink the same but I did not drink it and I only pretended that I am drinking. Dawa Tshering Bhutia started drinking said country liquor adding some Rum in the same. Thereafter, he went to the room and he also called me in his room.**"**	**"**After the dinner the small boy employed in housekeeping section brought a Pepsi bottle (small) containing "Nigar" (local wine) and the accused told everyone present there that all of us will take the said "Nigar" (Local wine). Then the accused who was already drunk before dinner, poured the "Nigar" for all of us and even for me. When I did not take the "Nigar" that had been served to me the accused insisted that I should drink it but I told him I would have it later in my room and I took the "Nigar" to my room.**"**

Room No.102 (Respondent's room)	**"**I went to his room and found that he was watching T.V. He told me to seat (sic) on the bed but I told him that I am all right and I kept on standing nearby him. He then pulled me by my hand and asked me to seat on the bed. I told him that I am feeling sleepy and I want to go my home. I do not exactly remember the time but it must be around 8pm at the relevant time. Thereafter, he told me that he will give me gold and he will also transfer the above hotel in my name. He told me that I should accompany him in a long drive and should drink beer. He then forced me to drink the country liquor and in the process the liquor also spilled over my body. He also told me that I do not know how to dress and I only wear Kurta. He told me that he will get me modern dresses.**"**	
Restaurant/ reception	**"**Thereafter, as I was little bit scared of him I came down to the restaurant where I saw cook and Suraj. I had my dinner in the restaurant. Thereafter, I went to the reception and filled up the necessary papers which are required to be sent to the police station and handed those papers to Suraj who used to take the same to Thana. I also gave Suraj a red colour jug for cleaning the same in which I wanted to take some water in my room.**"**	
Restaurant/ reception	**"**When I came out from the kitchen I found Dawa Tshering Bhutia in the restaurant with keys in his hand. He then asked me to reach a bottle of bisleri water and a cup of Rum in his room i.e., room No. 102. He also told me to stay there in the said room. After reaching the water and Rum I came to the reception of the hotel and locked the same. Thereafter, Dawa Tshering Bhutia came to the reception and forcefully pulled by my hand to his room. Room No.102 is in the same floor and it is near to the reception.**"**	**"**After this I went and checked all the rooms of the hotel to ensure whether it was properly locked and safe. After locking the rooms I went to the reception area and was keeping the keys of the hotel rooms out there when the accused also came there and he suddenly caught hold of my hand and told me that he had something to tell me and also told me to go to his room for chatting. I denied to go to his room but he forcefully took me to his room.**"**
Room No. 102	**"**Once I was taken inside his room he forced me to drink the cup of rum which I refused but he pushed me on the bed and he started kissing me on my cheek and neck. He also snatched my cell phone and he started physically abusing me. I then pushed him and after taking my cell phone I ran towards the reception where the keys of room was kept. I took the keys and ran towards my room.**"**	**"**In the room the accused took out a bottle of beer and glasses and offered it to me but I refused and kept it on the table. At the said time my mobile phone rang but the accused did not allow me to attend the call and told me that there was no need to attend the call while we were chatting. Saying this the accused switched off my mobile. Then the accused started putting his hands over my body and also tried to kiss me on my cheeks and during this process the beer that the accused had kept on the table also spilled all over my clothes. I was very frightened but I somehow managed to take my mobile from the table and hurriedly fled away from the room and went towards my room.**"**

Room No. 106 (Victim's room)	**"**When I was unlocking the door of my room (room No. 106) Dawa Tshering Bhutia came and he pushed me inside the room and locked the door. I put the master key on the switch. The moment I put the key the lights in the room switched on and the T.V. of the room was also switched on. The said Dawa Tshering Bhutia then increased the volume of T.V. and started removing his clothes of the upper part of his body. He then laid himself on my bed in the room and started forcing me to sleep with him. I was scared and was standing near the bed. He also put a quilt over him. He then came out of the bed and started removing his pant. At that time I ran towards the toilet of the room and locked the door from inside. I send a SMS to my brother asking him to come soon in the hotel as the owner of the hotel is misbehaving with me. I also called my brother Saroj Rai many times but he did not pick up the phone. Dawa Tshering Bhutia was outside the door and was knocking continuously. After sometime, my brother called me back and I asked him to come to hotel Neema Ghang. After about 15 minutes my brothers one of his friend and his driver came to the hotel. I did not see as to who open the main door of the hotel but when I heard the noise of people who were entering inside the hotel I also came out of the toilet and ran towards my brother.**"**	**"**When I was opening the door of my room with the room keys, the accused also reached there and entered my room after pushing me. In my room the accused told me that we should spend the entire night talking to each other. Then he switched on the T.V. and selected a news channel. After which he took off his half jacket, climbed on my bed, covered himself with the blanket on the bed. Then after this the accused pulled me next to him and asked me to sit with him. I did not agree to sit with him but instead went inside the bathroom of my room and locked myself inside the bathroom and from there I called my brother Saroj Rai from my mobile phone but he did not receive my call. Therefore, I sent a message to my brother saying that the accused was insisting to stay with me in my room. This message was received by a friend of my brother who saw the message and informed my brother about it. On hearing this my brother called me back but out of fear that the accused would hear me I had opened the water tap in the bathroom and spoke to my brother standing near the tap. But my brother could not hear me as I was whispering over the phone and because of the sound of the tap water. Therefore, I again sent another message telling him to come as soon as possible. After sending the message I did not go to my room but stayed inside the bathroom only. After about 10-15 minutes I heard the voice of my brother shouting, he was banging on the door of the hotel asking them to open up. Then the accused went and opened the door and after sometime my brother came and I came out of the bathroom and went to my brother and told him about the incident. There is a single entrance to the floor where my room and the room of the accused was located and on the said day only myself and the accused were in the said floor.**"**
Sadar P.S.	**"**Thereafter, my brother and his friends brought Dawa Tshering Bhutia to Sadar P.S. I also accompanied them to Sadar P.S. In the Sadar P.S. wrote FIR which I signed and filed in the Sadar P.S. After I lodged FIR I was forwarded to STNM Hospital by the police for medical examination.**"**	**"**My brother's friend and a driver had also come to the hotel at the said time. Thereafter, we took the accused to Sadar P.S. where I lodged an FIR against him.**"**

30. A perusal of the statements of the victim as narrated to the Learned Chief Judicial Magistrate under Section 164 Cr.P.C. and to the Court in her deposition reflects that the victim's statements are in great detail.

31. The victim in her statement recorded under Section 164 Cr.P.C. would narrate what had transpired in room No.102 when

she went there on being called by the Respondent and proceeded to his room. When the victim reached the room he was watching T.V. He asked her to sit on the bed. She declined saying she is sleepy and she wanted to go home. The Respondent would tell her that he would give her gold and also transfer the hotel in her name. He would also tell her that she should accompany him for long drives and drink beer. He would then force her to drink country liquor and the liquor would spill over her body. The Respondent would tell her that she did not know how to dress and that she wore only kurtas. He would tell her that he would get her modern dresses. All these facts were not narrated by the victim while deposing later in the Court. The deposition in Court is the substantial evidence of the victim. The cook and one Suraj who were mentioned by the victim in her statement have not been examined to corroborate the victim.

32. The reading of the two statements of the victim also reflects that she had stated certain facts which transpired at the restaurant and the reception area of the hotel on the relevant day. In her statement recorded under Section 164 Cr.P.C. the victim would state that after reaching the water and rum to the Respondent's room she came to the reception of the hotel when the Respondent after coming there forcefully pulled her hand to his room. In her deposition in Court the victim would state that after locking the rooms she went to the reception area and while she was keeping the keys of the hotel rooms the Respondent

came and suddenly caught hold of her hand and told her that he had something to tell her and to go to his room for chatting and when she resisted he forcefully took her to his room. There were discrepancies on the details of what transpired at the relevant time. These discrepancies have been brought out by the defence with the cross-examination of prosecution witnesses. However, the victim is consistent that the Respondent had pulled her hand forcefully and taken her to his room No. 102 in both the statements.

33. The victim would again narrate about what transpired in the Respondent's room No. 102 thereafter in both the statements. In her statement recorded under Section 164 Cr.P.C. she would state that once she was taken inside his room the Respondent forced her to drink a cup of rum which she declined but he pushed her on the bed and started kissing her on her cheek and neck. The victim would also state that the Respondent snatched her cell phone and started physically abusing her after which she ran towards the reception took the keys of her room and ran towards it. In the victim's deposition in Court she would however, state that in the room the Respondent took out a bottle of beer and glasses and offered it to her but she refused and kept it on the table. She would also state that her mobile phone rang at that time but the Respondent did not allow her to attend the call and told her there was no need to attend the call while they were chatting and switched off the phone which fact was not

stated by her in her statement recorded under Section 164 Cr.P.C. She would also state that thereafter the Respondent started putting his hand over her body and also tried to kiss her on her cheeks and during this process the beer that the Respondent had kept on the table spilled all over her clothes. She would state that she was frightened but somehow managed to take her mobile from the table and hurriedly fled away from the room and went towards her room. The deposition of the victim would again have discrepancies. It is seen that in the statement recorded under Section 164 Cr.P.C the victim had stated that the Respondent had pushed her on the bed and started kissing her on her cheek and neck. However, in her deposition she would state that the Respondent started putting his hand over her body and also tried to kiss her on her cheeks and during this process the beer that the Respondent had kept on the table spilled all over her clothes. The facts as deposed by the victim not having been stated in such great detail while giving her statement under Section 164 Cr.P.C. would be brought out by the defence in cross-examination and during arguments to submit that these discrepancies would make the deposition doubtful. There are discrepancies in the two statements. If one were to ignore the discrepancies regarding the victim's statements i.e. about the Respondent *"started kissing me"* and *"tried to kiss me"* as well as other related details of the

specific incident one may still find ingredients of the offence in the residue of the victim's deposition.

34. The victim would also narrate what transpired thereafter in her room No. 106 when she ran away from the Respondent's room No. 102. In her statement recorded under Section 164 Cr.P.C. she would state that when she was unlocking the door the Respondent came and pushed her inside the room and locked the door. At that time she put the master key on the switch and immediately the lights as well as the T.V. in the room was switched on. The Respondent increased the volume of the T.V. and started removing his clothes from the upper part of his body and thereafter laid himself on the victim's bed and started forcing her to sleep with him. She was scared and standing near the bed. He put a quilt over himself. Thereafter he came out of the bed and started removing his pant. At that time she ran towards the toilet of her room and locked the door from inside. She sent a "SMS" to her brother asking him to come soon to the hotel as the Respondent was misbehaving. She tried to call her brother several times but he did not pick up the phone. Respondent was outside the door and knocking continuously. After sometime her brother called her back and she asked him to come to the hotel. 15 minutes thereafter the victim's brother came with a friend and a driver to the hotel. She did not see as to who opened the main door but she heard the noise of the people who were entering inside the hotel. She also came out of

the toilet and ran towards her brother. The victim would relate about the same facts in her deposition but with a variation. She would state that when she opened the door of her room the Respondent also reached there and entered the room after pushing her. In the room the Respondent would tell her that they should spend the entire night talking to each other then he switch on the T.V. and select a news channel. After that the Respondent would take off his half jacket, climb on her bed and cover himself with the blanket the Respondent would thereafter pull her next to him and ask him to sit with him. The victim would not agree and would instead go to the bathroom and lock herself inside the bathroom and from there call her brother from her mobile but he would not receive the call. Thereafter, she would send a message to her brother telling him that the Respondent was insisting on staying with her in her room. The victim would state that this message was received by a friend of her brother who informed him about it. Her brother thereafter called her back but due to fear that the accused would hear her she opened the water tap in the bathroom and spoke to her brother standing near the water tap. The victim's brother could not hear as she was whispering over the phone and because of the sound of the tap water. She would send yet another message telling her brother to come as soon as possible. Thereafter, she would continue to stay inside the bathroom. After 10-15 minutes she would hear the voice of her brother shouting and banging on

the door of the hotel asking them to open up. The Respondent would go and open the door. After sometime her brother would come and she would also get out of the bathroom and go to her brother and tell him about the incident. The facts relating to what transpired in room No.106 on the relevant day have substantial variances in the two statements.

35. The narration of the facts in the examination-in-chief of the victim as to what transpired on that day after the Respondent forcefully took the victim to his room from the reception and thereafter again in the victim's room when she ran away from the Respondent to her room does indicate the existence of both the ingredients of the offence under Section 354 IPC. However, the evidence in examination-in-chief is not the entire evidence. The evidence of a witness in cross-examination must also be considered with equal seriousness.

36. Criminal force has also been defined in Section 350 IPC:

> ***"350. Criminal force.-*** *has been defined in Section 350 IPC. "Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is set to use criminal force to that other."*

37. Assault has also been defined in Section 351 IPC:

> ***"351. Assault.—****Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.*

> *Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.*"

38. However, during the victim's cross-examination the defence has highlighted various discrepancies between the statement made by the victim while giving her statement to the police; while giving her statement under Section 164 Cr.P.C. to the Learned Chief Judicial Magistrate and while deposing before Court which this Court shall now examine.

39. In the victim's cross-examination she would admit that:

(i) She did not know the name of the hotel where she was employed by the Respondent.

(ii) She did not know who the actual owner of the hotel was or whether he lived with his family on the top floor.

(iii) She had stated before the police and the Magistrate that she was appointed as a Manager and not as a receptionist.

(iv) At the time of appointment she was told that she cannot ask for leave often and she agreed not to demand pay in advance.

(v) When she asked for leave and advance payment the Respondent lost his temper.

(vi) Although she denied having any altercation with the Respondent she admitted that the Respondent returned all her documents i.e. passport photo, contract of employment and copy of voters I.D. card and told her to leave and not to come back.

(vii) She went to her room at Lingding and met her brother-P.W.2 and his friends present in their room.

(viii) She had not stated to the police or Magistrate that the Respondent was already drunk before dinner and that he had poured *"nigar"* for all of them including her.

(ix) At the time of recording her statement by the police and the Magistrate she had not stated important things regarding the incident due to nervousness and fear.

(x) She knew the difference between rum and beer.

(xi) On the same night when she had lodged the FIR she was also sent for medical examination but she did not disclose the fact of the beer being spilled over her clothes to the police or to the Doctor on duty who examined her.

(xii) There were no latches on the door of the bathroom from inside and that the door of the bathroom is fitted with round shaped lock. To lock the door one has to push the middle button in the round shape clock and that the bathroom's door can be easily opened with the key from the outside.

(xiii) In her statement recorded by the Magistrate she had stated that she had put the master key on the switch and the moment she put the key the light in the room as well as the T.V. switched on.

(xiv) She had stated to the police and Magistrate that the Respondent was outside the door and knocking continuously.

(xv) She had not stated that she had made a hue and cry for help while giving a statement to the Magistrate or to the police.

(xvi) At the relevant time the waiter and the cook were present at the hotel and that she did not try to take help from them.

(xvii) The area where the hotel is located is a crowded place next to the motor stand.

(xviii) The taxi stand and the road near the hotel are always crowded and vehicles are parked next to the hotel building.

40. The Learned Chief Judicial Magistrate-P.W.10 would also be cross-examined regarding the statement of the victim recorded by him under Section 164 Cr.P.C. P.W.10 who would admit that the victim had not made the following statements when she narrated her story to him about:-

(i) The Respondent coming to the reception area of the hotel and suddenly catching hold of her hand and telling her to go to his room for chatting when the victim had gone to the reception area after locking the rooms.

(ii) The Respondent taking out a bottle of beer and glasses and offering it to her and the victim refusing and keeping it on the table.

(iii) The Respondent not allowing the victim to attend to the incoming call on her mobile and switching off her mobile.

(iv) The Respondent putting his hand over her body and trying to kiss her on her cheek and during the process beer spilling over her clothes.

(v) The victim being frightened but somehow managing to take her mobile from the table and hurriedly fleeing away from the room and going towards her room.

(vi) The Respondent telling her that they should spend the entire night talking to each other.

(vii) The Respondent having switched on the T.V. and selected a news channel.

(viii) The Respondent taking off his jacket, climbing on her bed and covering himself with a blanket on the bed.

(ix) The Respondent pulling her close and asking her to sit down.

(x) The victim sending a message to her brother-P.W.2 stating that the Respondent was insisting to stay with her in her room.

(xi) The message sent by the victim to her brother-P.W.2 having been received by his friend who informed him.

(xii) The brother-P.W.2 calling her but out of fear she opening the water tap to talk to him and speaking to her brother-P.W.2.

(xiii) The brother-P.W.2 not being able to hear her as she would whisper over the phone and because of the sound of the water tap.

(xiv) The victim again sending another message to her brother-P.W.2 and telling him to come as soon as possible.

41. The Investigating Officer-P.W.13 was finally cross-examined. In her deposition the Investigating Officer-P.W.13 admitted the following:

(i) No message was sent to the brother's friend by the victim.

(ii) She had not checked the call records with timings of the mobile of the victim.

(iii) During investigation she found that the hotel belongs to a lady but she did not try to meet her.

(iv) She had recorded the statement of P.W.4 who did not state that he had received a call from the victim's brother-P.W.2.

(v) She had recorded the statement of P.W.7-wife of the Respondent and in her statement she had stated that on 22.11.2014 when she called up her husband, she was told that the newly appointed staff (alleged victim) was fired from service by the Respondent as she was not found fit for the job.

(vi) She had recorded the statement of the victim but the victim had not stated to her that on arrival of her brother-P.W.2 and his friend she had complained to them or disclosed to them as to what the Respondent had done to her.

(vii) The victim had not narrated about how she was informed by one Binod Tamang that he would find employment as a receptionist in the hotel;

about Binod Tamang taking her to meet the Respondent who asked her to submit her passport size photograph and voter I.D. card and thereafter selecting her as a receptionist and about the victim joining her duty the following day.

(viii) The victim had not stated to her about the victim making inquiries about the Doctor and learning that he would be available only after a week.

(ix) The victim had not stated to her that after locking the rooms she had gone to the reception area and was keeping the keys of the hotel rooms when the Respondent came and suddenly caught hold of her hand and told her that he had something to tell her and to go to his room for chatting.

(x) The victim had not stated that in the room the Respondent took out the bottle of beer and glasses and offered it to the victim but the victim refusing and keeping it on the table.

(xi) The victim had not stated about the mobile phone ringing and the Respondent not allowing the victim to attend the call telling her that there was no need to do so while they were chatting and thereafter switching off her mobile.

(xii) The victim had not stated about the Respondent putting his hands over her body and during this process the beer spilling over her clothes.

(xiii) The victim had not stated that in her room the Respondent told her that they should spend the entire night talking to each other.

(xiv) The victim had not stated that the Respondent had switched on the T.V. and selected the news channel.

(xv) The victim had not stated that the message was received by her brother's friend who saw the message and informed the brother-P.W.2 about it.

(xvi) The victim had not stated that the brother-P.W.2 had called back but out of fear that the Respondent would hear her, the victim had opened the water tap in the bathroom and spoken to him.

(xvii) The victim had not stated that the victim's brother-P.W.2 could not hear her as she was whispering over the phone because of the sound of tap water.

(xviii) The victim had not stated that she had again sent another message telling him to come as soon as possible.

(xix) That the place of occurrence was a crowded place in front of a motor stand where there were other hotels adjacent to the hotel run by the Respondent on lease.

42. The cross-examination of the Investigating Officer-P.W.13 would also reflect how the defence had meticulously brought out every little discrepancy in the deposition made by the victim and other witnesses in Court highlighting the inconsistencies in the deposition and the statement recorded by the Investigating Officer-P.W.13 under Section 161 Cr.P.C.

43. The fact that the victim had been employed by the Respondent at the hotel is an admitting fact. The presence of the victim on the date of the incident has been established by the prosecution and admitted by the Respondent himself. The seizure of the victim's document from the premises of the hotel from P.W.7-wife of the Respondent vide seizure memo (exhibit-8) has been proved by the Investigating Officer-P.W.13 as well as the witness P.W.5. The other inmates of the hotel who were present on the date of the incident not having been examined the only question which was required to be examined by the Learned Judge in such circumstances was whether the evidence of the victim could stand alone and bring home the charge under Section 354 IPC.

44. A black coloured mobile was seized by the Investigating Officer from the victim's brother-P.W.2 on 12.12.2014 after 20 days of the incident and the lodging of the FIR vide seizure memo (exhibit-6). It was the case of the prosecution that the victim had sent "SMS" to P.W.2 from the bathroom of the alleged place of occurrence seeking his help. This evidence if proved would provide a vital clue. The seizure was affected in the presence of two witnesses. P.W.4 admitted in cross-examination that he could not say whether the mobile (M.O.I) was the same mobile seized by the police on the relevant day and also that he thought that the colour of the mobile was white. P.W.4 would also state that the contents of the seizure memo (exhibit-6) were not read

over to him by the police and thus he did not know the contents thereof. P.W.6 also could not say definitely whether the mobile shown to him in Court was the same mobile. P.W.6 neither knew the owner of the mobile nor had any idea from whom it was seized. The contents of the seizure memo were also not explained to him. P.W.6 also admitted that the mobile was not wrapped in any paper in front of him. The Investigating Officer-P.W.13 sought to prove the messages by producing two photographs of the screen shot taken from the mobile (M.O.I) which was marked as document C for identification bearing her signatures. This was objected to by the defence. Document C was neither proved by the victim nor by the victim's brother-P.W.2 as both the said witnesses were not even shown the said document in Court. The question of relying upon the purported message against the Respondent would not arise. Quite clearly the prosecution has failed to prove this vital probable evidence in the manner prescribed under Section 65B of the Indian Evidence Act, 1872. The victim's mobile was also not seized.

45. The evidence of the victim if read alone and minus the inconsistencies and exaggerations it may also be possible to hold that the ingredients of the alleged offence have been made out. However, the Learned Judge would hold that the altercation between the Respondent and the victim having been established and admitted to a certain extent by the victim herself and corroborated by the deposition of her brother-P.W.2, possibility

of false implication could not be ruled out and therefore unsafe to convict the Respondent.

46. This Court shall thus examine each of the grounds on which the judgment of acquittal has been based keeping in mind the settled principles of law that in an appeal against an order of acquittal this Court possesses all the powers of an Appellate Court and nothing less than the power a High Court has while hearing an appeal against an order of conviction. This Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and finding which may be contrary to the findings recorded by the Trial Court if those findings are against the weight of evidence on record and perverse. Before reversing any finding of acquittal each ground on which the order of acquittal was based must be examined and considered and it is also incumbent upon this Court to record its reasons for not accepting those grounds and subscribing to the view expressed by the Trial Court that the accused is entitled to an acquittal. It is imperative while doing so to keep in mind that the presumption of innocence is still available in favour of the accused that no longer stands as an accused in view of the acquittal which acquittal now fortifies the presumption of innocence. If two views may be possible in a given set of facts marshalled before the Court the view in favour of an accused must be adopted. While doing all these it is necessary to remember that the Trial Court had the advantage of looking at

the demeanour of the witnesses and observing their conduct in the Court especially in the witness box which this Court would not have. The accused is entitled to the benefit of doubt even at this stage. This doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

47. In order to prove the ingredients of Section 354 IPC no evidence of bruises or marks needs be proved. Hurt is not a necessary ingredient of either assault or criminal force. The evidence of the Doctor-P.W.8 does not therefore lead to the inevitable conclusion that there was no assault or use of criminal force upon the victim and that her modesty had not been outraged. Bruises or injury if found on the body of the victim immediately after the incidence may corroborate the victim's statement of assault or use of criminal force for outraging her modesty.

48. The victim, in her deposition before the Court would state:

> ***"****At around 8 p.m. of the same day i.e. the day Aiela left for Kalimpong, I took my dinner after attending to the guests of the hotel and retired for the night. The next morning I asked the accused for an advance of my salary as I needed it to avail treatment for skin disease (hand). On hearing this the accused handed me my document and my passport photo and told me that I was no more required and I could leave the job and go. However, I told him that I would not leave the job and asked the accused for permission to visit the doctor for an hour and to this the accused agreed and also give (sic) me an amount of Rs.500/- .*

Thereafter I made queries about the availability of the Doctor and came to learn that the Doctor was not available at that time as he had gone out of state and he would return only after a week. Thereafter, I went to my room at Lingding, Gangtok, East Sikkim and met my brother who stays there and spent some time with him after which I returned to the hotel. **"**

49. In cross-examination the victim, on being suggested, would state:

"*It is true that at the time of appointment I was told that I cannot ask for leave now and then and I was also asked not to demand pay in advance. (The witness volunteers to say that she was not asked to demand to pay in advance.) It is true that when I asked for leave and advance payment the accused lost his tamper (sic). It is not a fact there was altercations between the accused and me regarding the leave asked for and the advance payment. It is true that accused returned all my documents i.e. my passport photo, contract of employment and xerox copy of Voters I.D. card and told me to leave and not to come. I do not know whether I stated to the Magistrate or police that however I told him that I would not leave the job and asked the accused for permission to visit the Doctor for an hour and to this the accused agreed and also gave me Rs.500/-. It is not a fact that I was fired from service and left the hotel threatening the accused with dire consequences.*

*I do not remember whether I stated to the Magistrate or Police thereafter I made queries about the availability of the doctor and came to learn that the doctor was not available at that time as he had gone out of State and he would return only after a week. It is true thereafter when I went to my room at Lingding, Gangtok, East Sikkim I met my brother and his friends present in the room. It is not a fact that I discussed with my brother and his friends, altercations which I had with the accused in the day time regarding the leave and advance. It is not a fact that I told my brother and his friends about the accused and the temper he had lost on me.***"**

50. The victim in cross-examination would further deny the suggestion of the defence to the following effect:

> ***"****It is not a fact that since I was fired from service and humiliated I decided to take revenge with the help of my brother and his friends, accordingly we have implicated the accused in a false case. It is not a fact that in the day time when I visited my room at Lingding after being fired from service I met my brother and his friends in my room and we decided and conspired to implicate the accused in a false case. I have already worked in four places including the hotel owned by the accused. It is not a fact that I was scolded by the accused on that day for having smoke in the hotel room.*
>
> *It is not a fact that I have lodged the false FIR marked Exbt.1 with totally false allegations. It is not a fact that the allegations made in the FIR and my evidence and the statements recorded by the Magistrate are totally contradictory. It is not a fact that I am deposing falsely.****"***

51. The victim would clearly state in her examination-in-chief that after the altercation with the Respondent she:

> ***"****Thereafter, I went to my room at Lingding, Gangtok, East Sikkim and met my brother who stays there and spent some time with him after which I returned to the hotel.****"***

52. The victim's brother-P.W.2 would be examined as a prosecution witness. In cross-examination P.W.2 would admit:

> ***"****It is true that in the day time my sister came to my room and told me that she was fired from service by the accused and she also told me about the shouting by the accused while throwing her from service. It is true that my sister told me about the altercations which she had with the accused in the day time. It is true that my sister told me that she was scolded by the accused as he found her smoking in the hotel room. It is not a fact that I did not receive any message from my sister. It is not a fact that when I met my sister at my room we decided to take revenge against the accused. It is not a fact that in the*

*room we decided and made a plan to implicate the accused in the false case.***"**

53. It is the case of the defence that the victim was caught smoking in her room at the hotel for which she was fired from her job. The defence made the suggestion to the victim during her cross-examination to which she stated:

> **"***It is not a fact that I was scolded by the accused on that day for having smoke (sic) in the hotel room.***"**

54. P.W.2-the brother of the victim in cross-examination admitted to the suggestion made by the defence about the victim having told him about being scolded by the Respondent as he found her smoking in the hotel room. He also admitted that his sister i.e. the victim had a habit of taking alcohol and smoking.

55. P.W.7 is the wife of the Respondent. She would be examined as a prosecution witness. In cross-examination she would state:

> **"***It is true that in my statement recorded by the police I had stated that on 22.11.2014 I called up my husband from Kalimpong who told me that the newly appointed staff (alleged victim) was fired by him as she was not found fit. It is true that my husband told me that the said girl was caught smoking and consuming alcohol in hotel room and it was risky to keep her in the hotel.***"**

56. The evidence produced by the prosecution probabilises the version of the defence that just prior to the alleged incident

complained of by the victim there was an altercation between the victim and the Respondent probably due to the fact that the victim was caught smoking in the hotel room. It is well settled that the accused need not prove his defence. It is enough if he can show by preponderance of probability that the plea taken by him is plausible and raises a reasonable doubt. Then he is entitled to the benefit. In the circumstances the judgment of the Learned Judge cannot be faulted to the extent that she comes to the conclusion that there was an altercation between the victim and the Respondent prior to the alleged incident. However, the question is whether the defence success in probabilising the altercation would lead to the inevitable conclusion that, therefore, it was certain because of the said *animus* that the victim made the false allegation of outraging her modesty.

57. The Learned Judge has held that the evidence of the victim as well as other prosecution witnesses P.W.2, P.W.7, P.W.8 and the Investigating Officer-P.W.13 established that the victim had projected different versions and tried to improve her case.

58. The deposition of P.W.2-the victim's own brother, contradicts and also does not support the deposition of the victim on material points of fact. The evidence of the victim's brother-P.W.2 is vital since the victim herself deposes that she narrated about the incident to him. Although the victim had deposed that after the incident she had tried to speak to her brother on the mobile phone after several attempts to call him

from the bathroom of the room where she was allegedly assaulted, P.W.2 did not even mention about it in his deposition. The victim had also deposed that when her brother-P.W.2 came to the hotel after receiving her message she came out of the bathroom and went to her brother and told him about the incident. If that was so P.W.2 ought to have been the first person to have heard the details of the alleged assault from his sister-the victim. He would be thus a material prosecution witness. However, P.W.2 only deposed that when he asked his sister as to what had happened she said the accused had shouted at her and had tried to catch hold of her hand. There was no whisper from the brother-P.W.2 about the allegation of outraging the modesty of the victim by the Respondent in his deposition. P.W.2 also stated that he and P.W.3 had gone to the hotel after the said P.W.3 had received the message from the victim and further that both of them heard about the incident from the mouth of the victim at the hotel itself pursuant to which they took the Respondent and the victim to the Sadar Police Station, Gangtok where the victim lodged the FIR. There is no arrest memo to verify this fact. The victim also deposes that her brother-P.W.2 came with a friend. P.W.3, however, had a different version to tell the Court. In his deposition P.W.3 stated that he had received a call from P.W.2 who had asked him to come outside the disco where he was working as a bouncer and when he went out and met him he told him that he needed a favour from him and

asked him to accompany him to help his cousin who most probably had a fight with her husband. P.W.3 did not whisper anything with regard to what the victim told him and P.W.2 at the hotel when they went there. P.W.2 and P.W.3 were prosecution witnesses. The prosecution is bound by their statements which have been accepted by it as both of them have not been declared hostile and cross examined. The deposition of the P.W.2-the brother of the victim or his friend- P.W.3 does not even suggest that the victim told them that her modesty had been outraged. Thus, two views may be possible in the same set of facts marshalled before the Trial Court. One against the Respondent from the mouth of the victim and one in his favour from the mouth of the victim's own brother-P.W.2 and his friend-P.W.3 who admittedly had been told about the incident by the victim herself.

59. The victim's statement at the time of the FIR was cryptic. No fault can be attributed to that. An FIR need not necessarily be an encyclopaedic account with minute details of every fact that transpired. It is only the first information of commission of a cognizable offence. However, in the said FIR the victim mentioned that when she resisted the Respondent's advances of forcefully trying to kiss her he threatened to throw her out of her job. This statement about the Respondent threatening to throw her out of the job is particularly important because Mr. K. T. Bhutia, submits that it is precisely because of the victim's

animus against the Respondent for having been thrown out of her job the victim had falsely accused the Respondent of outraging her modesty. The victim said nothing to the Learned Chief Judicial Magistrate while recording her statement under Section 164 Cr.P.C. and to the Trial Court in her deposition about the threat she allegedly received from the Respondent when she resisted his sexual advances. However, as seen earlier, although the victim denied discussing about the altercation with P.W.2-her brother, he has candidly admitted that the victim had in fact visited him during the afternoon on the date of the incident and told him that she had been fired from her service by the Respondent and that she had also been scolded by him while doing so. There is no comprehensible reason why the victim's own brother-P.W.2 would not tell the Court as to what he heard from the victim about the Respondent having outraged her modesty. This was the afternoon of the same day when the alleged incident took place. He also admitted that the victim had told him that the altercation and scolding was due to the fact that she was caught smoking in the hotel room. In these peculiar circumstances the mention of the factum of being threatened to be thrown out of her job in the FIR, the first contemporaneous complaint regarding the alleged incident, gathers significance. It probabilises the defence version of an altercation between the victim and the Respondent due to which their relationship had become inimical. It also cannot be ruled out that due to this

animus exaggerated allegation about outraging the modesty of the victim may have been made. There is substantial force in Mr. K. T. Bhutia's submission that there is difference between *"started kissing me"* and *"tried to kiss me"* and a victim would surely not forget a crucial fact when she was forced upon, allegedly by the Respondent. Either of the versions may however, constitute the offence of outraging the modesty of a woman. Equally, a victim of such circumstances facing legal proceedings for the first time out of sheer nervousness could have made inconsistent and sometimes self defeating statements in her deposition. This Court is alive to the fact that while evaluating evidence in a case of outraging the modesty of a woman, no self respecting woman would come forward just to make a humiliating statement against her honour. This Court is also alive to the fact in such cases supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the victim should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. However, the numerous discrepancies in the statements made by the victim under Section 161 and 164 Cr.P.C. and her deposition brought out by the defence in cross-examination makes it extremely difficult to separate the grain from the chaff to arrive at the ethereal truth. The narration of discrepant facts in the statements of the victim being related to the same alleged

incident of outraging her modesty sieving the untruth or unacceptable portion of the evidence seems virtually impossible. The said facts are so inseparable that any attempt to separate them would definitely destroy the substratum on which the prosecution version is founded. A judgment of conviction cannot be based on presumption and probabilities.

60. P.W.2-the victim's brother himself has proved that the victim withheld certain vital information about the altercation she had with the Respondent the same day of the incident. The probability that the incident did occur cannot be ruled out. Equally, the probability about the Respondent's innocence cannot also be ruled out. Some of the discrepancies in the conflicting statements are not minor or inconsequential. Paramount amongst all these is a question which remains unanswered in the end of the trial i.e. why did not the victim's own brother-P.W.2 depose about what the victim had narrated to him when he had gone to the hotel on receiving a message from the victim immediately after the incident? The law, well settled, is that where two reasonable conclusions can be drawn on the evidence on record, this Court should, as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the Court below. Vital evidence of the inmates or staffs of the hotel where the alleged incident took place who were present have not been brought forth by the prosecution. The evidence of the victim's own brother-P.W.2 and P.W.3-the other

person who accompanied him to the hotel on receipt of information from the victim immediately after the incident, does not corroborate the victim's evidence on material particulars of the alleged act of outraging the modesty of the victim. In such circumstances, although it is absolutely true that the victim's evidence, if it is inspires confidence, can stand alone, the Learned Judge has correctly concluded that due to the various discrepancies in the prosecution versions it would not be safe to rely upon her sole testimony to convict the Respondent in the present case. Although Mr. Karma Thinlay laboured hard and well to convince this Court that the material evidence brought forth by the prosecution was enough to bring home the charge of outraging the modesty of the victim the order of acquittal cannot be interfered with because of the presumption of innocence of the Respondent which has been further strengthen by his acquittal. The golden thread, as often stated, which runs through the web of administration of justice in criminal cases, must be respected. The possible view on the evidence adduced in the case pointing to the innocence of the Respondent must be adopted. This Court is afraid that there are no compelling and substantial reasons for interfering with the judgment of acquittal. It is sincerely difficult to hold that the findings of the Trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. It cannot be said that there was no prevarication in the version of the victim. Attempts to improve

upon the evidence at different stages are apparent making it difficult to remain disturbed by the presumed anguish of the victim. A victim of crime of outraging the modesty of a woman is in the same position as an injured witness and should receive the same weight. However, while doing so the presumption of innocence of the accused must also be borne in mind especially when the accused has been acquitted after a trial. The presumption that a victim would not ordinarily tell a lie is but a presumption and that cannot be any basis for assuming that the statement of such a witness is always correct or without embellishment or exaggeration. Minor inconsistencies in the victim's statement which does not affect the substratum or the core ingredients of the alleged offence may be ignored but major discrepancies which disturb the very foundation of the prosecution must be taken note of. Judicial examination of evidence must be focused to extract the truth thereof. Truth however, does not always come in black and white. Shades of grey sometimes shadow the truth. Sometimes the shades of grey may itself be the truth. A delicate balance needs to be maintained between the judicial perception of the anguish of the victim of such crimes and the presumption of innocence of the accused. An inequitable tilt either way may not render balanced justice. While it is true that in an adversarial system of criminal justice administration the evidence adduced would inevitably lead to only one party's success, the solitary goal to search the

ethereal truth can only give a quietus to the conflict. A victim's evidence, if it inspires confidence, can be the sole basis for convicting an accused without any corroboration. When a Court is however, confronted with the evidence of a victim strewn with exaggerations, embellishments and inconsistencies it must necessarily seek corroboration in material particulars before convicting an accused. In the present prosecution, corroboration to the inconsistent statement of the victim is wanting and her brother's-P.W.2 statement which could have been a clincher has raised serious doubts on the victim's version itself leaving no alternative but to give the benefit of doubt to the Respondent.

61. This Court, in the peculiar facts of the present case, is thus of the view that the benefit of doubt must be given to the Respondent who had been acquitted by the Trial Court. This Court is in agreement with the conclusion arrived at by the Learned Judge, Fast Track Court, East & North Sikkim at Gangtok in Sessions Trial (F.T.) Case No. 05 of 2016 in the impugned judgement dated 28.12.2016. Consequently the Appeal is dismissed.

Sd/-

(Bhaskar Raj Pradhan)
Judge
24.05.2018

Approved for reporting: yes.
to/ Internet: yes.