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IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

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CRA-S-964-2021 (O&M)
Date of decision: 30.04.2024

Uttam Singh **...Appellant**

Versus

State of Punjab **...Respondent**

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Karandeep S. Sidhu, Advocate
for the appellant.

Mr. Satjot Singh, AAG, Punjab.

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MANISHA BATRA, J. *(Oral)*

1. Aggrieved by the judgment of conviction and order on quantum of sentence, both dated 10.08.2021, as passed by the learned Special Judge, Moga, in Sessions Case bearing No. 08 of 2019, titled as ***State vs. Uttam Singh***, arising out of FIR No. 108 dated 03.06.2017, registered under Sections 363, 366-A and 376 of Indian Penal Code *(for short 'IPC')* and Section 4 of the Protection of Children from Sexual Offences Act, 2012 *(for short 'POCSO Act')* at Police Station Baghapurana, District Moga, whereby the appellant was held guilty and convicted for commission of offences punishable under Section 363 of IPC and Section 4 of the POCSO Act, the

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instant appeal has been filed by the appellant. The appellant was awarded sentence in the manner mentioned below:

Under Section	Imprisonment	In default
Section 363 of IPC	03 years rigorous imprisonment with fine of Rs.5,000/-.	In default of payment of fine to undergo rigorous imprisonment for three months.
Section 4 of POCSO Act	10 years rigorous imprisonment with fine of Rs.50,000/-.	In default of payment of fine to undergo rigorous imprisonment for one year.

2. Both the sentences were ordered to run concurrently.

3. Today, the application bearing No. ***CRM-23792-2022***, seeking suspension of sentence of the appellant, is listed but with the consent of learned counsel for the parties, the main appeal is ordered to be taken on Board for final disposal. Consequently, no order needs to be passed in ***CRM-23792-2022.***

4. Shorn of unnecessary details, the facts of the case are that the aforementioned FIR was registered on the basis of the statement recorded by the complainant 'M' (name withheld) on 03.06.2017, alleging therein that on the night of 01.06.2017, her family members and she herself had gone to sleep. At about 05:00 AM, she had woken up and found the victim *(name withheld)*, who was her minor daughter, to be missing. Search made for the victim proved futile. The complainant suspected that her daughter had been enticed away by the appellant on the pretext of performing marriage with her. Initially, a case under Sections 363 and 366-A of IPC was registered. Investigation proceedings were initiated. The victim along with her mother came to the police on 24.10.2017 and recorded her statement that she had

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been enticed away by the appellant on the pretext of solemnizing marriage with her and was taken to different places and then was kept at village Baddi. She also levelled allegations of her being repeatedly ravished at the hands of the appellant. She was medico-legally examined. Her statement under Section 164 of Cr.P.C. was also recorded, on the basis of which, offences under Section 376 of IPC and Section 4 of the POCSO Act were also added. The father and some other family members of the appellant were also nominated as accused in the statements of the victim and her family members. However, during investigation, they were found to be innocent. The appellant could not be apprehended by the police initially and was declared a proclaimed person but subsequently, on his apprehension on 26.10.2018, the investigation was again initiated and after completing the due formalities thereof, challan was presented before the Court of Illaqua Magistrate. The case was committed to the Court of Sessions.

5. On finding a prima facie case for commission of offences punishable under Sections 363, 366-A, 376 of IPC and Section 4 of the POCSO Act, the appellant had been chargesheeted accordingly. He pleaded not guilty to the charges and claimed trial.

6. To substantiate its case, the prosecution examined 12 witnesses in all besides placing reliance upon certain documents and thereafter, the evidence of prosecution was closed.

7. The statement of the appellant under Section 313 of Cr.P.C. was recorded, wherein he abjured his guilt and pleaded false implication. In defence evidence, he examined one witness.

8. On appraising the evidence produced on record and giving due

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deliberations to the contentions as raised by both the sides, the trial Court, vide impugned judgement dated 10.08.2021, acquitted the appellant of charge framed under Section 366-A of IPC but he was held guilty for commission of offences punishable under Section 363 of IPC and Section 4 of the POCSO Act. Vide order on quantum of sentence of the same date, he was sentenced in the manner as mentioned above.

9. It is submitted in the grounds of appeal and it has been argued by learned counsel for the appellant that the impugned judgment of conviction and order on quantum of sentence are not sustainable in the eyes of law and are liable to be set aside as the case of the prosecution suffers from material infirmities. There was delay of 02 days in lodging of FIR, which stood unexplained. The prosecution had miserably failed to produce any cogent, convincing or reliable evidence on record to prove that the victim was minor at the time of commission of subject offences. Rather, the evidence produced on record by the prosecution itself proved that she was major at that time, was having love affair with the appellant and had performed marriage with him. It was not her version that physical relations between her and the appellant were developed without her consent. In fact, they had performed marriage in Gurdwara Sahib, Zirakpur and she had left his company only because of the fact that after his marriage with her, his financial condition had deteriorated and he was not able to fulfill the demands of money as raised by her parents. The trial Court had wrongly placed reliance upon the school leaving certificate of the victim to determine her age, whereas the probative value of this document could not be established from the evidence produced on record by the prosecution

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witnesses at all.

10. Learned counsel for the appellant has further argued that there was no medical evidence on record to prove that the victim, at any point of time, had been subjected to forcible act(s) of sexual intercourse. The testimony of the victim was inconsistent in material particulars, thereby showing that she was a consenting party and was also major at the time of incident. While concluding, learned counsel for the appellant has urged that the appeal deserves to be accepted; the impugned judgment and order on quantum of sentence are liable to be set aside and the appellant deserves to be acquitted of the charges framed against him. To fortify his arguments, learned counsel for the appellant has placed reliance upon the authorities cited as ***Satpal Singh vs. State of Haryana : 2010 (3) RCR (Criminal) 777, Naveen vs. State of Haryana : 2022 (1) RCR (Criminal) 357, Murugan @ Settu vs. State of Tamil Nadu : AIR 2011 Supreme Court 1691, Terry Saoya vs. State of Punjab and another : 2023 (4) RCR (Criminal) 176*** and ***Sagar Kumar vs. State of Haryana : 2011 (1) RCR (Criminal) 620.***

11. *Per contra*, learned State counsel has argued that there was sufficient, convincing and reliable evidence on record to prove the charges as framed against the appellant. The entries made in the record of the school, wherein the victim studied, established her date of birth as 11.10.1999. These entries were admissible in evidence and the appellant failed to produce any evidence on record to the contrary. The testimony of the victim also proved that she was a minor at the time of occurrence and had not only been taken out of lawful guardianship of her parents by the appellant without their consent but had also been forced to perform marriage with him and was

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subjected to acts of aggravated penetrative sexual assault/repeated rape by him. While stressing that the findings so given by the trial Court warrant no interference, it has been urged that the appeal merits outright dismissal.

12. I have heard learned counsel for the parties at considerable length and have also gone through the material placed on record, besides minutely going through the impugned judgment as passed by the trial Court.

13. The case of the prosecution is that on the intervening night of 01/02.06.2017, the appellant had enticed and taken away the victim by inducing her on the pretext of solemnizing marriage with her and had repeatedly ravished her, whereas the case of the appellant is that both the parties were in relationship and the victim, who was a major as on the date of occurrence, had voluntarily gone with him, had performed marriage with him out of her own will at Gurdwara, Zirakpur and the physical relations between them were also established with her consent. The trial Court, while observing that the victim was a minor at the relevant time, had held the appellant guilty for commission of offences punishable under Section 363 of IPC and Section 4 of the POCSO Act by further observing that she had been taken away by the appellant and had been subjected to penetrative sexual assault/rape.

14. In view of the contentions, which have been raised by learned counsel for the appellant as well as learned State counsel, the first and foremost question that arises before this Court for consideration is as to whether the findings as arrived at by the trial Court that the victim was a minor as on 01.06.2017 are correct and based on proper appreciation of evidence produced on record or not ? Since the trial Court, while arriving at

the findings as to the victim being a minor had mainly relied upon Ex. PW-3/A and Ex. PW-3/B, which are the certificates issued by PW-3-Paramjit Kaur, Head Teacher, Primary School, Budh Singh Wala, on the basis of the entries recorded in the register of the school, wherein the victim studied and which is a govt. school, therefore, it is to be considered as to whether the trial Court had rightly placed reliance upon these documents or not ?

15. Before delving into the contentions raised by the parties on the aforesaid point and the finding given by the trial Court on the same, let us consider the settled proposition of law with regard to evidentiary value of the entries recorded in the school register. As per Section 35 of the Evidence Act, any entry in any public or other official book, register or record or an electronic record stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record is kept, is itself a relevant fact. The well settled proposition of law is that to render a document admissible under Section 35 of the Evidence Act, three conditions must be satisfied, **firstly**, entry that is relied on must be one in a public or other official book, register or record, **secondly**, it must be an entry stating a fact in issue or relevant fact, and **thirdly**, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act, but entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the

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material on which the age was recorded. Reliance in this regard can be placed upon ***Birad Mal Singhvi Vs. Anand Purohit AIR 1988 SC 1796.***

16. Reference can further be made to the observations made by Hon'ble Supreme Court in ***State of Bihar and others vs. Radha Krishna Singh and others : AIR 1983 Supreme Court 684***, wherein it was observed that a document might be admissible and yet might not carry any conviction and weight or its probative value may be nil. It was observed that where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has a statutory flavour in that, it is given not merely by an administrative officer but under the authority of a statute, its probative value would indeed be very high so as to be entitled to great weight. The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety, is precious little.

17. Reference can then be had to ***Satpal Singh***'s case (supra), wherein it was observed by Hon'ble Supreme Court that a document is admissible under Section 35 of the Evidence Act being a public document, if prepared by a government official exercising his official duties. However, the question does arise as to what is the authenticity of the said entry for the reason that admissibility of a document is one thing and probity of it is different. It was further observed that entries in any public document, i.e. school register, voter list or family register may be admissible under Section 35 of the Evidence Act. However, the probative value of such entry may still be required to be examined in the facts and circumstances of a particular case and such entry might require corroboration by the person on whose

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information, the same had been made.

18. Similar observations were made by Hon'ble Supreme Court in ***Murugan***'s case (supra), wherein while relying upon an earlier decision cited as ***Madan Mohan Singh & Ors. v. Rajni Kant & Anr., AIR 2010 SC 2933***, it was observed that at the time of considering issue of admissibility of a document under Section 35 of Evidence Act, the Court has a right to examine the probative value of the contents of the document. Authenticity of entries may also depend on whose information such entry stood recorded and what was his source of information. Meaning thereby that such document might also require corroboration. Similar observations were made by a Division Bench of this Court in ***Terry Saroya***'s case (supra) and in ***Naveen***'s case (supra), wherein the accused had been held and convicted for the same offences as in this case. In the complaint, the age of the victim was recorded as 14 years, whereas the victim herself asserted that she was 19 years' old. It was observed that no probative value could be attached to school leaving certificate as it did not stand proved as to what was the source of information before the school for recording the entry as to the date of birth of the victim.

19. On applying the proposition of law as laid down in the above-cited authorities to the facts and circumstances of the present case, this Court is inclined to hold that so far as the question that the entries made in the school record of the victim have evidentiary value is concerned, the same cannot be questioned in view of the fact that these entries were made in the record of a govt. school and obviously the person who recorded these entries was performing his official duties. However, probative value of these entries

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was nonetheless required to be established by the prosecution and on going through the evidence available on record, this Court opines that the observations made by the trial Court that these entries could be accepted to be correct were wrong. PW-3, who was Head Teacher of the school of the victim, admitted during the course of her sworn deposition that the entries in the school register were made on the basis of some disclosure made by a person, who got the victim admitted. She remained silent on the point as to exactly by whom, the victim was got admitted in the school and who gave the oral information about her exact date of birth ? Further neither any birth certificate as issued by the Municipal Council concerned nor any certificate by the village Chowkidar nor any affidavit of either of the parents of the victim is shown to have been given at that time. In ***Vishnu vs. State of Maharashtra : (2006) 1 SCC 283***, Hon'ble Supreme Court had observed that very often parents furnish incorrect date of birth to the school authorities to reduce the age in order to secure admission for their children. For determining the age of the child, the best evidence is of his/her parents, if it is supported by un-impeccable documents. In ***Alamelu and another vs. State represented by Inspector of Police : 2011 (2) SCC 85***, Hon'ble Supreme Court had observed that the date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. In that case, the Headmaster, who had issued the transfer certificate, had not been examined. It was observed that though the certificate was admissible in evidence under Section 35 of the Indian Evidence Act but the admissibility would not be of much evidentiary value to prove the age of the girl in the absence of the

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material on the basis of which the age was recorded and that the date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.

20. As already observed, no evidence could be extracted from the testimony of PW-3 to show that there as any material on the basis of which the age of the victim was recorded as 11.10.1999 and the name and identity of the person, who gave above said date of birth, was not disclosed nor such person was examined, therefore, even while presuming that such entries had been made by a person authorized in performance of his official duties, still the corroborative value could be held and their authenticity could be established only when it was proved that as to on whose instructions/information such entries were recorded and what was the sourse of information of that person, which is unfortunately lacking in this case.

21. It is also relevant to mention that even from the statement of the victim, who appeared as PW-2, her mother PW-1 and her elder sister PW-9, who were most material witnesses of the prosecution, the exact date of birth of the victim could not be established. PW-9, who is elder sister of the victim, disclosed her own age to be 40 years as on 20.08.2019 i.e. the date when her deposition was recorded in the Court. During cross examination, she stated that she got married about 20 years back and at that time, the victim was about 3-4 years' old. Meaning thereby that the victim was above the age of 18 years as on 01.06.2017. PW-1, mother of the victim, deposed during her examination-in-chief that the victim was about 12-13 years of age. However, during cross examination, she was unable to tell the date of her own marriage and simply stated that it took place about 40-50 years

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back. She could not tell even the date of birth of either of her six children including that of the victim. During her cross examination, which was conducted before the trial Court on 03.03.2020, she stated that the victim was now about 21-22 years' old. Her statement, therefore, cannot be relied upon to prove the exact date of birth of the victim. Father of the victim had not been examined as a witness. PW-1 did not state that it was her, who had got the entries recorded in the school record as to date of birth of the victim. As such, the testimony of PW-1 cannot be acted and relied upon for the purpose of proving the exact age of the victim.

22. Further, so far as the victim herself is concerned, though while appearing as PW-2 before the trial Court on 26.03.2019, she claimed her date of birth as 11.10.1999, however, during cross examination, it was stated by her that at the time of occurrence, her younger brother was 17 years of age and that she was 02 years older to him. Meaning thereby that she was 19 years' old as on the date of occurrence. As such, the position which emerges is that evidence produced on record by the prosecution could not be stated to be of sterling quality and the statements of PW-1, PW-2 and PW-9 could not be considered to be having any corroborative value for the purpose of showing that the victim was in fact born on 11.10.1999. More so, in the absence of any evidence forthcoming on record to show the source of information of the person, who recorded the entries in the school record qua the date of birth of the victim, its probative value has not been established. In view of the discussion as made above, it is held that the prosecution had failed to prove beyond doubt that the victim was a minor as on the date of occurrence i.e. 01.06.2017 and the trial Court erred in holding that she was

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so.

23. Let us proceed further to consider the question as to whether it was a case of kidnapping/abduction of the victim or not ? The offence of kidnapping is defined under Section 361 of IPC and the main element of this offence is that the person kidnapped must be a minor under 16 years in the case of a male or under 18 years in the case of a female. Then such person must have been in the keeping of lawful guardian and his/her kidnapping must be from the keeping of the lawful guardian and he/she must have been taken away or enticed away. Since in view of the discussion as made above, the very basic element, i.e. the victim must be under the age of 18 years, is not found to be established beyond doubt, therefore, it cannot be stated that the victim had been kidnapped by the appellant in this case.

24. So far as the charge under Section 4 of the POCSO Act is concerned, since as per discussion made above, it does not stand proved beyond doubt that the victim was below the age of 18 years at the time of occurrence, therefore, it has also not been proved that she fell within the definition of a child as given in Section 2(1)(d) of the POCSO Act, as per which, “Child” means any person below the age of 18 years. Hence, the provisions of the POCSO Act cannot be stated to be applicable. The trial Court had framed charge under Section 376 of IPC as well along with charge under Section 4 of the POCSO Act including some other sections. However, strangely, no finding as to the appellant having committed offence under this section had been given by the trial Court, though in paragraph No. 40 of its judgment, the trial Court observed that since Section 4 of the POCSO Act provided punishment, which was greater in degree than the punishment

provided under Section 376 of IPC, therefore, the appellant was liable to be held guilty and convicted under Section 4 of the POCSO Act. In the considered opinion of this Court, by doing so also, the trial Court had committed error because once charge under Section 376 of IPC had also been framed simultaneously with charge under Section 4 of the POCSO Act, then it was essential for the trial Court to record a categorical finding under Section 376 of IPC as well, irrespective of the fact that the actual sentence could be awarded only under one of these sections, i.e. under Section 376 of IPC or under Section 4 of the POCSO Act. This Court still cannot be absolved of the duty to record a finding with regard to charge under Section 376 of IPC because it is apparent from the trial Court's judgment that though it had discussed the evidence on the point of the victim being subjected to rape/penetrative sexual assault, but still it skipped to record a finding under Section 376 of IPC. Non-recording of finding on a particular section for which an accused is chargesheeted normally entails the consequences of remand of the case. However, on a careful assessment of the evidence produced on record, which is to be discussed in the forthcoming paragraphs, this Court sees no reason to do so and hence proceeds to consider the contentions as raised by both the sides qua the question as to whether the victim was proved to have been ravished at the hands of the appellant or it was a case of consensual relationship as claimed by him.

25. The offence of rape is defined under Section 375 of IPC, which sets out certain circumstances. Relevant for the purpose of this case, is the second circumstance that a male subjecting a female to sexual intercourse without her 'consent', commits offence of rape. As per Explanation-2 of

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Section 375, ‘consent’ means an unequivocal voluntary agreement when the women by words, gestures or any form of verbal or non verbal communication, communicates willingness to participate in the specific sexual act. The well settled proposition of law is that the ‘consent’ with respect to Section 375 of IPC, involves an active understanding of the circumstances, actions and consequences of the proposed act. The consent of a women with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act.

26. Let us now discuss the evidence produced on record by the prosecution in this regard. The case of the prosecution on this point rests upon the testimonies of PW-1/mother of the victim, PW-2/victim herself as well as PW-9/elder sister of the victim. The victim, while recording her statement under Section 164 of Cr.P.C. had stated that on the night of 01.06.2017, the appellant had taken her away from her house and then they stayed at Gurdwara, Mudki Road for 02 days. In the further part of her statement, she stated that while staying at Baddi, the appellant had insisted her to perform marriage/Anand Karaj at a nearby Gurdwara but she had refused to do so by saying that she would get her marriage performed in her native village only. Her statement so recorded is shown to have been contradicted by her sworn deposition, as though in her examination-in-chief, she stated that the parents of the appellant started coxing her to get married with the appellant and to click photographs with him and on her refusal, they used to extend beatings to her and even kept her tied, but during cross examination, she stated that she had gone to a Gurdwara in Zirakpur with the appellant, where their marriage ceremony was performed, though she did not

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remember the name of the said Gurdwara. She admitted that her mother had sworn an affidavit on 21.08.2017, thereby giving the appellant consent to marry her. Even PW-9 stated during her cross examination that she used to meet the appellant before his marriage with the victim, which also suggests that in fact the marriage between the victim and the appellant had been performed.

27. Then so far as PW-1, mother of the victim, is concerned, she admitted that the photographs Ex. DA to Ex. DI were showing the appellant along with the victim. She made out a new case by saying that these photographs were clicked in her house, when the appellant came to her house to see the victim. No explanation whatsoever has been given by PW-1 as to why the appellant had come to see the victim at her house, though it is apparent that such visit was for the purpose of performing marriage or after performance of their marriage. PW-1 was confronted with a document Mark DA, Ex. DW-1/A, which is an affidavit claimed to have been sworn by her on 21.08.2017. Though she denied that any such affidavit was sworn by her but her statement stands falsified by the testimony of PW-2-victim, who admitted that her mother had sworn such affidavit. The defence version as set up by the appellant was that the victim had voluntarily performed marriage with him and even her mother had subsequently consented to their alliance but it was due to his poor financial condition that the victim left him and this version appears to be probable and finds corroboration from her statement as recorded under Section 164 of Cr.P.C. itself, wherein she deposed that she was made to stay in the kitchen of the house of the friend of the appellant at Baddi and was not comfortable at all. She further stated that

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she stayed with the family and friend of the appellant for a period of more than one month. It is own version of the victim as well as her sister PW-9 that she was left at the house of PW-9 by the appellant himself. If it would have been a case of kidnapping/abduction of the victim, then the appellant would not have let her stay with her sister. All this goes to show that the victim had actually gone with the appellant voluntarily and stayed with him for some time and as she was not comfortable while residing with the family and friend of the appelllant, therefore, she had gone to the house of her sister, where she stayed for 2-3 days and then came back to her parental home. Her statement under Section 164 Cr.P.C. was recorded after a gap of about 05 months. She had come back to her home much earlier and there is no explanation as to why she did not come forward to record her statement before the police earlier. Though, it is her own admission that she lived with the appellant only for a period of 1 ½ months. Even PW-9 deposed that the victim was left by the appellant at her house at Dera Bassi and stayed with her only for 2-3 days and then she was taken to her own house. Meaning thereby that she reached back her home some time in the middle of September, 2017. Non-reporting of the victim of her reaching back her house by her family members also raises a question about the truthfulness of the story narrated by the victim and the complainant.

28. More so, from the statements of the victim, her mother and her sister, it clearly emerges that the victim had performed marriage with the appellant at Gurdwara Sahib, Zirakpur after leaving her house on 01.06.2017

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and had gone with him to different places and then stayed with him at Baddi for some time, wherein she worked along with him in some factory. Not only at the time when she went along with the appellant but during the period of her stay with him, she must have come in contact with a large number of people but she never tried to free herself from the custody of the appellant by raising any hue and cry and as per her own version, it was the appellant himself who had left her at the house of her sister on her asking. It is also not the case of the prosecution that any threats were extended by the appellant or the appellant exerted any pressure, carried any weapon or remained present with her throughout the time, due to which, she could not get opportunity to escape. The version as given in the statement of the victim recorded under Section 164 of Cr.P.C. has been materially improved in her statement as recorded before the Court and her sworn deposition is self contradictory also. These circumstances cumulatively taken give rise to the only inference that it was a case of consensual relationship between the victim and the appellant. The victim had initially eloped with the appellant out of her own will, performed marriage with him, indulged in sexual activities with him and thereafter, left him either due to the financial constraints of the appellant or due to any other reason. However, in either way, it cannot be stated to be a case of kidnapping/abduction of the victim or of committing rape upon her against her will by the appellant.

29. Accordingly, in view of the discussion as made above, the present appeal is allowed. The impugned judgment of conviction and order on quantum of sentence, as passed by the trial Court, are set aside. The appellant is acquitted of the charges framed against him. He be released

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forthwith, if not required in any other case. Intimation to the jail authorities/Court concerned be also sent accordingly.

30.04.2024 **(MANISHA BATRA)**
Waseem Ansari **JUDGE**

Whether speaking/reasoned *Yes*

Whether reportable *Yes*