IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Revision No. 113 of 2009.
Reserved on: 01.11.2016
Date of Decision: 30.11.2016.

Chinta Mani ***.....Petitioner***

Versus

Dharam Dutt and Anr. ***.....Respondents***

Coram
Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting[1]? Yes

For the petitioner: Mr. Bimal Gupta, Senior Advocate with Mr. Vineet Vashishta, Advocate.

For the respondent: Mr. Dinesh Sharma, Advocate, for respondent No.1.

Mr. P.M. Negi, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General, for respondent No.2.

Sandeep Sharma, J. *(Oral)*

The present criminal revision petition filed under Section 397 read with Section 401 of the Cr.PC, is directed against the judgment dated 27.4.2009, passed by the learned Additional Sessions Judge, Solan, HP, in Criminal Appeal No. 26-S/10 of 2008, affirming the judgment of acquittal dated 14.8.2008, passed by the learned Additional Chief Judicial Magistrate, Kasauli, District Solan, HP, in Case No. 372/2 of 2000, whereby the respondent-accused (hereinafter

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Whether reporters of the Local papers are allowed to see the judgment? Yes.

referred to as the accused) was acquitted of charges punishable under Sections 377, 511 & 506 of IPC.

2. Briefly stated facts as emerged from the record are that on the statement made by victim namely Jai Singh, recorded under section 154 Cr.PC, police lodged FIR against the accused under Sections 377, 511 & 506 of the IPC at Police Station Kasauli. The victim stated before the police that on 2.11.2000, he was returning back from school and at about 4:00 PM, when he reached near Shiv Temple, R&T wing CRI Kasauli, accused namely Dharam Dutt offered him money to purchase sweets. He further stated that he got lured and he was taken in a Gali behind the house by the accused, where he removed the trouser of the victim up till his knees and the accused also removed his trouser. He applied saliva on his anus and then attempted to penetrate his organ but at that time Santosh Singh came there. He further stated that on seeing him, they both put up their trousers. On suspicion, Daram Dutt inquired as to what they were doing and Jai Singh i.e. Victim, disclosed that accused gave him Rs. 5/- coin and committed unnatural offence with him. He further stated that thereafter he went home and did not disclose the incident to anyone. On 3.11.2000 (the next day), he disclosed the incident to his father and his father took him to police station where the case under Sections 377, 511 and 506 IPC, was registered at Police Station Kasauli. Police after

lodging of aforesaid complaint, prepared the site plan and got victim and accused medically examined from Medical Officer at Zonal Hospital, Solan, from where it obtained medico legal certificate. Police also claimed to have seized Rs. 5/- coin from the accused vide separate memo in the presence of witnesses namely Santosh Singh and Chinta Mani. Accused was arrested but later on was released on bail. Police after completion of investigation, presented the challan in the competent court of law.

3. Learned Additional Chief Judicial Magistrate, Kasauli, District Solan, HP, on being satisfied that prima facie case exists against the accused put notice of accusation to the accused to which he pleaded not guilty and claimed trial. Subsequently, on the basis of evidence adduced on record by the prosecution, acquitted the accused of offences punishable under Sections 377, 506 and 511 of the IPC.

4. State being aggrieved and dis-satisfied with the judgment of acquittal passed by the learned trial Court, preferred an under Section 374 of Cr.PC before the Court of learned Additional Sessions Judge, Solan, HP, which was also dismissed. Since respondent-State failed to file an appeal against the judgment of learned Sessions Judge, Solan, father of the victim namely Chinta Mani, filed the instant

criminal revision petition before this Court laying therein challenge to the judgment of acquittal passed by the courts below.

5. Mr. Bimal Gupta, Senior Advocate duly assisted by Mr. Vineet Vashishta, Advocate, representing the petitioner vehemently argued that the impugned judgments of acquittal recorded by the Courts below are not sustainable as the same are not based upon the correct appreciation of evidence available on record, as such, same deserve to be quashed and set-aside. Mr. Gupta, strenuously argued that bare perusal of judgment passed by the learned trial Court clearly suggests that while recording the statement of PW2 Jai Singh (Victim), the principles and guidelines as envisaged under Section 118 of the Indian Evidence Act, were not followed by the Presiding Officer and as such, judgment passed by the learned trial Court deserves to be quashed and set-aside. He further stated that since aforesaid glaring aspect of non-compliance of Section 118 was brought to the notice of learned Sessions Judge, in the first appeal, it was incumbent upon him to remand the case back to the learned trial Court to rectify the irregularity or mistake by recalling the witnesses for re-examination that too, especially when it was noticed by learned trial Court while recording the judgment of acquittal. While referring to the judgment passed by the learned trial Court, Mr. Gupta, contended that it is evident from the judgment that trial Court itself observed that

statement of PW2 was not recorded by the courts below under Section 118 of the Indian Evidence Act, meaning thereby, court below failed to exercise jurisdiction vested in it and on this sole ground, learned first appellate Court should have allowed the appeal filed by the State. He further stated that since both the courts below have taken hyper technical view while acquitting the respondent for non-compliance pf Section 118 of the Indian Evidence Act, matter needs to be remanded back to the learned trial Court for re-examination. While concluding his arguments, Mr. Gupta, further argued that both the courts below have not appreciated the statement of PW2 i.e. Victim which was otherwise sufficient to prove that respondent accused had in fact committed the offence punishable under Section 377 read with 511 of IPC. He further stated that cross examination conducted upon this witness nowhere suggests that defence was able to shatter his testimony, wherein he categorically stated that accused committed unnatural offence with him by paying him Rs. 5 coin. Mr. Gupta further stated that since it stands duly proved on record that accused had paid a Rs. 5 coin, to the victim, prosecution was successful in proving that on the relevant time, respondent committed sodomy by alluring the victim and as such, judgment passed by the courts below deserve to be quashed and set-aside. He also stated that learned trial Court while acquitting the accused gave undue weightage to the evidence produced in

defence, which was to save himself and admittedly, who were interested witnesses. In the aforesaid background, Mr. Gupta while placing reliance upon following judgments passed by Hon'ble Apex Court prayed that instant matter needs to be remanded back to the learned trial Court for re-examination especially in view of the non-compliance of provisions contained in Section 118 of the Indian Evidence Act, which reads as under:-

1. ***Venkatesan vs. Rani and Anr., 2013 (14) SCC 207***

2. ***Narayan Iranna Potkanthi v. State of Maharashtra, 1994 0 CrLJ 1752: 1994 3 RCR (Cri) 102; 1994 0 Supreme (Mah) 74, Bombay High Court (At Aurangabad)***
3. ***Kabiraj Tudu v. State of Assam 1993 2 Crimes (HC) 647; 1994 0 CrLJ 432, Gauhati High Court.***

6. Mr. P.M. Negi, learned Additional Advocate General, duly assisted by Mr. Ramesh Thakur, learned Deputy Advocate General, representing the State supported the contention put forth by Mr. Gupta. Mr. Negi, apart from aforesaid submissions having been made by Mr. Gupta, stated that medical evidence adduced on record by the prosecution was not read in its right perspective by the courts below. Mr. Negi further stated that since an attempt to commit sodomy by the respondent accused stands duly proved on record, courts below should have not interpreted the medical evidence in the way it has been interpreted. He specifically invited attention of this Court to the Section 511 of the IPC to state that when proseuciton

specifically alleged that there was an attempt to commit sodomy, medical evidence adduced on record by the prosecution should not have been interpreted by the court below to suggest that act was not complete, rather, medical evidence supports the version put forth by the respondent accused. While inviting attention to the medico legal opinion given by the doctor, Mr. Negi, stated that if opinion given by medical expert is read juxtaposing the statement made by PW2 as well as PW3, it stands duly proved on record that accused made an attempt to commit unnatural offence with victim and as such, judgment of acquittal passed by the courts below deserve to be quashed and set-aside.

7. Mr. Dinesh Sharma, Advocate, representing the respondent-accused supported the judgments passed by the courts below. Mr. Sharma, vehemently argued that there is no illegality and infirmity in the impugned judgments. While referring to the impugned judgments, Mr. Sharma, strenuously argued that same are based upon the correct appreciation of the evidence available on record as well as law and as such, there is no scope of interference, especially in view of the con-current findings of facts as well as law recorded by the courts below. With a view to refute the contention put forth by Mr. Gupta, that there was non-compliance of Section 118 of the Indian Evidence Act, Mr. Sharma, contended that even if for the sake of

argument, it is presumed that procedure as laid down in Section 118 was not followed at the time of recording the statement of PW2, the perusal of the judgment passed by the courts below clearly suggests that statement of victim (PW2) recorded by the court below was closely examined and dealt with by the courts below while examining the genuineness and correctness of the complaint filed by PW2 against the accused. While specifically referring the Para-18 of judgment passed by the learned trial Court, Mr. Sharma stated that though learned trial court observed that his predecessor in interest did not follow the procedure laid down in Section 118 of the Act while recording the statement of PW2, who was admittedly minor at that time but If the judgment is read in its entirety, it nowhere suggests that version of PW2 was not considered by the court below and complaint was simply dismissed on the ground of non-compliance of Section 118 of the Indian Evidence Act. Mr. Sharma, while referring to the judgment passed by the courts below specifically invited attention of this Court to the reasoning given by the court below to demonstrate that the courts below have dealt with statement of PW2 and as such, there is no force in the contention of Mr. Gupta, that accused was acquitted on account of non-compliance of Section 118 of the Act. While concluding his arguments, Mr. Dinesh forcefully stated that this Court has very limited powers while exercising its revisionary powers under

Section 397 of the Cr.PC to re-appreciate the evidence, especially when it stands duly proved on record that the courts below have dealt with each and every aspect of the matter very meticulously. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala*** *Vs.* ***Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> ***"In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."***

8. I have heard learned counsel for the parties as well carefully gone through the record

9. True, it is that this Court has very limited powers under Section 397 Cr.PC while exercising its revisionary jurisdiction but in the instant case, where accused has been acquitted of charges, it would be apt and in the interest of justice to critically examine the statements of the prosecution witnesses solely with a view to ascertain that the judgments passed by learned courts below are not perverse and same are based on correct appreciation of the evidence on record.

10. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order. The relevant para of the judgment is reproduced as under:-

> ***8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."***

11. Before adverting to the merits and demerits of the present case, this Court deems it fit to refer to Section 118 of the Indian Evidence Act, which is reproduced herein below:-

> ***118 Who may testify. —All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age,***

> ***disease, whether of body or mind, or any other cause of the same kind. Explanation.— A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.***

12. Perusal of aforesaid provision of law suggests that all the persons are competent to testify before the court save and except court comes to conclusion that they are not able to understand the question put to them or from giving rational answers to those questions, by tender years, extreme old age, and disease, whether of body or mind, or any other cause of same kind, meaning thereby courts below are under obligation in terms of aforesaid section before recording the statement of any person to ascertain whether they are capable of deposing before the Court and can they give rational answers to the questions, which may be put to them during the examination. Section 118 specifically provides that persons of tender age, extreme old age and having disease, which may be of body or mind are required to be dealt with in accordance with the Section 118 of the Act.

13. Admittedly, in the present case, PW2 at the time of recording his statement was minor and presiding officer while recording his statement ought to have complied with the aforesaid Section to ascertain whether he is capable of understating the question put to him or can he give rational answers, to those questions, in view of his tender age or not.

14. Admittedly, Para 16 of the judgment passed by the learned trial Court suggests that presiding Officer who had recorded statement of PW2 had not resorted to voir-dire" in terms of Section 118 while recording the statement of child witness i.e.PW2 to ascertain whether he was capable of understating and answering the questions**.** Presiding Officer who delivered the judgment of acquittal later on categorically stated in its judgment that there was no material on record to state that he had made any such preliminary examination in terms of Section 118 of the Act as well as guidelines of Hon'ble Apex Court and our own high Court in case title ***Romeshwar vs. State of Rajasthan AIR 1952 SC 54 and State of HP v. Anmol Kumar , 1996 (2) CLJ HP 330***, respectively.

15. Careful perusal of aforesaid judgments having been relied upon by the learned trial court in its judgment clearly suggests that evidence of child witness is admissible and learned trial Court in terms of section 118 of the Act is required to verify that child was capable of understanding and answering the question put to him. While having glance to the aforesaid provision of law as well as judgments passed by the Hon'ble Apex Court as well as this Court, one comes to inescapable conclusion that it is mandatory upon the Presiding Judge before recording the statement of child witness, to verify that he or she is/was capable to understand and answer the questions put to him/her

and if aforesaid provision is not complied with, evidence of child is not worthy putting any reliance. Admittedly, in the present case, as has been discussed herein above, presiding officer failed to resort to provisions contained in Section 118, as a result of which, no reliance, if any could be placed on the statements of child witness and no conviction could be recorded on the basis of the same.

16. At this stage, Mr. Gupta, vehemently argued that since learned trial Court failed to comply with the aforesaid provision of law, matter needs to be reexamined by the learned trial Court by recalling the child witness but this Court is unable to accept the aforesaid contention, simply because perusal of judgment passed by the courts below suggests that though they had not resorted to provisions contained in Section 118 while recording acquittal of the accused but statement of PW2 i.e. child has been dealt with very carefully vis-à-vis other evidence adduced on record by the prosecution. If, for the sake of argument, submission made by Mr. Gupta, is accepted at this stage that no reliance could be placed on the statement of PW2 which was made in violation of Section 118, natural corollary would be dismissal of the case of the prosecution which was entirely based upon the statement of PW2. Learned Court after detecting the aforesaid illegality having been committed by his predecessor in interest had two options (1) to re-examine PW2 after complying with the provisions

contained in Section 118 of the Act or (2) to reject the case of the prosecution on this sole ground by placing no reliance upon the statement of PW2 whereby, admittedly he was not resorted to" voir dire". However, in the present case, as clearly emerge from the judgments passed by the courts below, version put forth by PW2 has been dealt with meticulously by the courts below and due reliance has been placed on the same while recording acquittal of the accused.

17. This court solely with a view to ascertain the genuineness and correctness of the judgments of the court below and to ensure that same are not perverse, carefully perused the statement of PW2 Jai Singh, perusal whereof nowhere suggests that he was unable to understand question put to him, rather close scrutiny of his statement clearly suggest that he has been very very straightforward and candid in stating the sequence of events as allegedly occurred at that time of alleged incident, it is another matter that sequence of events narrated by him could not get further corroboration from other material prosecution witnesses. Hence this Court is of the view that no fruitful purpose would be served in case prayer having been made by Mr. Gupta, is accepted and matter is remanded back for re-examination to learned trial Court. Apart from above, PW2 namely Jai Singh must have become major during the pendency of the present petition and

there would be no occasion before the Court to record his statement afresh by resorting to section 118 of the Act.

18. True, it is that in view of the judgments having been relied upon by Mr. Gupta, this Court can remand the case back to the learned trial Court for re-examination in light of non-compliance of provisions contained in the Section 118 of the Act but as has been discussed above, no fruitful purpose would be served by remanding the case at hand at this stage in view of the fact that PW2 Jai Singh (victim) has gained majority. In view of subsequent development, there would be no occasion to record his statement by complying Section118 of the Act. Secondly, as has been discussed in detail above, perusal of statement made by the learned trial Court PW2 clearly suggests that he was capable of understanding the questions and answers which were put to him by the opposite side.

19. It is well settled that evidence of child witness is not required to be rejected per-se Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality and reliability can record conviction i.e. ***Golla Yelugu Govindu v. State of A.P., AIR 2008 SCC 1842.***

20. In the present case, this Court after perusing the statement of PW2 i.e. child witness is fully convinced and satisfied that trial Court below has carefully considered his evidence and only on being

convinced proceeded to decide the case in light of other evidence available on record.

21. PW2 Jai Singh while deposing before the Court, stated that he is 12 years old. As per story of prosecution on 2.11.2000, when victim was returning from the school, accused offered him Rs. 5 coin and took him towards a 'Gali' behind the house where he committed unnatural offence with him but when he was committing aforesaid act, one Santosh Singh (PW3) reached at spot and then, he as well as the accused immediately put on their trousers. On being questioned by PW3 victim disclosed that accused committed unnatural offence with him by paying Rs. 5 but interestingly in the present case, there is nothing on record that PW3 Santosh Singh, who was acquaintance of the father of the victim ever disclosed aforesaid act of sodomy allegedly committed by the accused with the PW2 jai Singh to his father Chintamani. Victim disclosed commission of offence to his father next day and then he was taken to police station by his father. Victim in his statement under Section 154 Cr.PC stated that when accused was attempting to thrust his organ into his anus, Santosh Singh appeared on the scene and thereafter he as well as accused put up their trousers, whereas PW2 Jai Singh in his statement before the Court stated that accused committed act of carnal intercourse. In his cross-examination, he further stated that he did not know the accused from before but in

his statement Ext.PW1/A he has stated that accused lured him by offering him Rs. 5 coin to purchase sweets. If PW2 was not knowing the name of the accused at the time of the commission of sodomy, it is not understood how he made the statement under Section 154 Cr.PC before the Court that person namely Dharma Dutt offered him money to purchase sweets. PW3 Santosh Singh in his statement stated that he saw victim as well as accused in gali whereafter they put on their trousers. He further stated that on his inquiring from victim, he disclosed that the accused gave him Rs. 5 coin for sweets. Even in cross-examination, he stated that when he reached there, accused as well as victim were putting up their trousers. PW3 further stated that on his asking, victim disclosed that accused had committed unnatural act with him but there is nothing in his examination-in –chief as well as cross-examination which could suggest that he saw the accused committing unnatural offence with the victim because he categorically stated that when he reached at spot, he saw accused as well as victim putting up their trousers. He nowhere stated that he saw the accused committing sodomy. Moreover, as has been discussed above, it is not understood why didn't he disclose aforesaid act of sodomy allegedly committed by the accused to his father or to police at first instance.

22. Similarly there is no explanation that why didn't he call other persons on the spot. It is only on 4.11.2000, he came forward to

support the version put forth by PW1 which compels this Court to draw adverse inference. It has specifically come in his statement that he was known to father of the victim. Similarly, perusal of statement of PW3 belies the case of the prosecution. He in his statement himself sated that victim had returned back the coin of Rs. 5 to accused, whereas case of prosecution is otherwise. But, PW2 Victim has nowhere stated in his depositions made before the Court that he returned Rs. 5 coin to the accused. PW3 Santosh Singh, in his cross-examination stated that he had not disclosed the alleged incident to Chintamani because he did not know the victim or the child of Chintamani.

23. This aforesaid explanation rendered by the Santosh Singh cannot be accepted in view of the peculiar facts and circumstances. As per PW3, after seeing accused and the victim in the gali, he inquired about the incident, whereupon victim disclosed that accused committed unnatural offence with him. It cannot be accepted that at that juncture after seeing such heinous crime allegedly having been committed by the accused on a child, Santosh Singh PW3 did not inquire about the antecedents of the accused as well as victim. Because PW2 Jai Singh in his examination in chief specifically stated that Santosh uncle got him released from the spot of occurrence. If the child witnesses knew Santosh Singh, it is difficult to accept that PW3 was not aware that victim was the son of Chinta Mani PW1. PW1 father

of the victim is admittedly not an eye witness to the occurrence rather he made deposition before the Court on the basis of information he gathered from the victim as well as PW3 Santosh.

24. Since statement of PW1 is solely based upon the sequence of events narrated by the victim, version put forth by him was rightly not accepted by the Courts below in terms of section 7 of the Indian Evidence Act. Bare perusal of the statement given by PW1 leaves no doubt that he made an attempt to exaggerate the statement made on record by PW2 Jai Singh.

25. PW1 stated that his son disclosed that during the intercourse he had experienced piercing pain whereas statement of victim PW2 nowhere suggests that. PW2 in his statement only stated that accused attempted to thrust his organ into his anus by applying saliva on his anus and at that juncture Santosh Singh appeared at the scene. Wherein PW1 in his statement before Court, stated that filthy act of carnal intercourse was committed by the accused.

26. Close scrutiny of statement of PW1 Chinta Mani father of the victim clearly suggest that he exaggerated and improved upon the statement made by PW2 solely with a view to ensure conviction of the accused, who admittedly by leading convincing and cogent evidence on record proved that there was an animosity between him as well PW1 and PW3. Otherwise also testimony of PW1 could not be looked

into. As far as PW3 is concerned, this Court has no hesitation to conclude that there are material contradictions in his statement, moreover he has nowhere stated that he saw the accused committing sodomy with Jai Singh, rather he simply stated that when he reached at the spot of occurrence, he saw both the accused and the victim putting on their trousers. Similarly as has been discussed above, PW3 nowhere explained that why he did not bring incident to notice/knowledge of the father of the victim, especially when he knew him.

27. Conjoint reading of aforesaid prosecution witnesses nowhere suggests that accused committed sodomy with victim (PW2) who was minor at that time. According to PW7 i.e. I.O. victim disclosed qua the fact of Rs. 5 coin at the time of registration of FIR. In his cross-examination, he stated that he sealed Rs. 5 coin at the spot, whereas PW1 in his cross –examination admitted that he saw Rs. 5 coin for the first time in the police station only when it was produced by the accused which itself belies the statement of PW7. PW1 stated that coin was taken into possession by the Police only when Santosh Singh had appeared and till that time neither he nor Santosh Singh was aware of Rs. 5 coin. Aforesaid statement made by PW1 belies the version put forth by PW3, who himself stated that victim told him that accused lured him by giving Rs. 5 coin. Similarly, Chintamani PW1 stated that at

the time of recording of FIR, Santosh Singh PW3 was not present with him and he had only come to the police station at about 2.30/3:00 pm. It is admitted fact that FIR with regard to aforesaid incident was registered on 3.3.2000.

28. Now, if the statement of PW3 is perused, it suggests that victim had returned the coin in the presence of Santosh Singh. PW2 in his cross-examination while answering to the suggestion put to him by the prosecution that he had handed over Rs. 5 coin to the police which accused Dharm Dutt had given to him, feigned his ignorance about the same, meaning thereby, the aforesaid claim of prosecution is contrary to recovery memo Ext.PW1/B which suggests that police had recovered Rs. 5 coin from the accused and same was identified by the victim as well as Santosh Singh PW3.

29. Hence, in view of the aforesaid material contradictions, this Court sees no reason to disagree with the findings returned by both the courts below that version put forth by PWs1, 2 and 3 being contrary to each other, cannot be made basis for recording conviction of the accused. Accused has stated under Section 313 Cr.PC that he has been falsely implicated by PW1 and Santosh Singh, who are not at good terms with him and they both tried to implicate him in a false case. With a view to substantiate his aforesaid stand, he examined DW1 Sudarshna his wife, DW2 Satish Kumar and DW3 Beg Raj both

employees of CRI Kasauli. It is admitted case of the parties that accused prior to his retirement was an employee of CRI at Kasauli and was working as Chowkidar there and there is no denial of the fact that PW1 Chintamani is working as a packer while PW3 Santosh Singh is working as Chawkidar in the CRI Kasauli. DW1 Sudarshna stated in her examination in chief that Chintamani and Santosh Singh are not on good terms with them for past about 8 years. She further stated that on 2.11.2000, Santosh Singh had come to their house and had threatened her husband not to make complaints to the Officer, lest he would be roped and taught lesson. Similarly, DW2 Suresh Kumar stated that in the first week of October, 2000, when Chintamani and Santosh Singh were taking tea in the canteen, they proclaimed that since Dharam Dutt (accused's) slanders to the officers, they would teach him a lesson.

30. DW3 Beg Raj also asserted that a quarrel had taken place in the last week of October, 2000, between the accused on one hand and Chintamani and Santosh Singh on the other hand with regard to information given by the accused to his superior.

31. If aforesaid statements having been made by defence witnesses are read in its totality, it certainly compels this Court to draw inference that PW1 and PW3 were not having cordial relation with the accused and they wanted to teach him lesson. Moreover, there is nothing in the cross-examination conducted on these witnesses from

where it could be inferred that they falsely deposed before the Court to help the accused.

32. As per PW2, accused committed unnatural offence with him, whereas per PW3 he went towards the street and found child noise but nowhere stated that he heard cries of child. Similarly, there is no discussion qua the semen, if any, upon the anus and pent of the accused. If the version of PW-3 is taken to be correct that after seeing him, both the accused and victim put on their trousers, there is nothing on record to suggest that I.O. ever took into possession the pent of the victim which could be helpful in finding out that semen, if any, had fallen during the carnal intercourse allegedly committed by the accused. PW2 in his statement stated that act had been completed by the accused but PW6 Dr. P.D. Sharma, who examined the witnesses on the evening of 4.11.2000, categorically stated that if act of sodomy had been committed, there would have been signs of strain or injury. He further stated that in the present case, where the child was small, there should have been injuries in the perennial or anal region, if the act had been committed. He specifically stated in examination that on examination of victim, he did not find any injury or any stains of semen. Perusal of MLC issued by Medical Officer clearly suggests that act, if any, was not complete as alleged by PW2, moreover, there is no explanation on record by I.O. that when he reached at the spot why

he did not take into possession the trousers of the accused and victim? Hence, medical evidence led on record by the prosecution itself belies the stand of the prosecution. PW3 has not supported the case of PW2 that act of carnal intercourse was complete rather he stated that when he reached at spot, he saw accused as well as victim putting on their trousers. Hence, this Court has no hesitation to conclude that there is no direct or circumstantial evidence led on record by the prosecution to connect the accused with the alleged offence. Accordingly, in view of the material inconsistencies in the statement of PWs 1, 2 and 3 especially, the medical evidence led on record by the prosecution, this Court sees no illegality and infirmity in the judgments passed by the Courts below.

33. At this stage, learned counsel for respondent No.1, placed reliance on judgment passed by the Hon'ble Apex Court in case titled ***Bindeshwari Prasad Singh alias B.P. Singh and Ors.*** *v*. ***State of Bihar (Now Jharkhand) and Anr., (2002) 6 SCC 650***, to suggest that in normal circumstances, it may not be open for High Court to interfere with the order of acquittal passed by the Court below merely because the trial Court has taken wrong view of law or has erred in appreciation of evidence, the relevant paras are read as under:-

> ***"6. The matter was reported to the police. Thereafter the case was investigated and the appellants were put up for trial before the Sessions Judge, Dhanbad.***

12.We have carefully considered the material on record and we are satisfied that the High Court was not justified in re-appreciating the evidence on record and coming to a different conclusion in a revision preferred by the informant under Section 401 of the Code of Criminal Procedure. Sub-section (3) of Section 401 in terms provides that nothing in Section 401 shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction. The aforesaid sub-section, which places a limitation on the powers of the revisional court, prohibiting it from converting a finding of acquittal into one of conviction, is itself indicative of the nature and extent of the revisional power conferred by Section 401 of the Code of Criminal Procedure. If the High Court could not convert a finding of acquittal into one of conviction directly, it could not do so indirectly by the method of ordering a re-trial. It is well settled by a catena of decisions of this Court that the High Court will ordinarily not interfere in revision with an order of acquittal except in exceptional cases where the interest of public justice requires interference for the correction of a manifest illegality or the prevention of gross miscarriage of justice. The High Court will not be justified in interfering with an order of acquittal merely because the trial court has taken a wrong view of the law or has erred in appreciation of evidence. It is neither possible nor advisable to make an exhaustive list of circumstances in which exercise of revisional jurisdiction may be justified, but decisions of this Court have laid down the parameters of exercise of revisional jurisdiction by the High Court under Section 401 of the Code of Criminal Procedure in an appeal against acquittal by a private party. (See AIR 1951 SC 196 : D. Stephens vs. Nosibolla; AIR 1962 SC 1788 : K.C. Reddy vs. State of Andhra Pradesh; (1973) 2 SCC 583 : Akalu Ahir and others vs. Ramdeo Ram; AIR 1975 SC 1854 : Pakalapati Narayana Gajapathi Raju and others vs. Bonapalli Peda Appadu and another and AIR 1968 SC 707 : Mahendra Pratap Singh vs. Sarju Singh).

13. The instant case is not one where any such illegality was committed by the trial court. In the absence of any legal infirmity either in the procedure or in the conduct of the trial, there was no justification for the High Court to interfere in exercise of its revisional jurisdiction. It has repeatedly been held that the High Court should not re-appreciate the evidence to reach a finding different from the trial court. In the absence of manifest illegality resulting in grave miscarriage of justice, exercise of revisional jurisdiction in such cases is not warranted.

14. We are, therefore, satisfied that the High Court was not justified in interfering with the order of acquittal in exercise of its revisional jurisdiction at the instance of the informant. It may be that the High Court on appreciation of the evidence on record may reach a conclusion different from that of the trial court. But that by itself is no justification for exercise of revisional jurisdiction under Section 401 of the Code of Criminal Procedure against a

> ***judgment of acquittal. We cannot say that the judgment of the trial Court in the instant case was perverse. No defect of procedure has been pointed out. There was also no improper acceptance or rejection of evidence nor was there any defect of procedure or illegality in the conduct of the trial vitiating the trial itself. At best the High Court thought that the prosecution witnesses were reliable while the trial court took the opposite view. This Court has repeatedly observed that in exercise of revisional jurisdictional against an order of acquittal at the instance of a private party, the Court exercises only limited jurisdiction and should not constitute itself into an appellate court which has a much wider jurisdiction to go into questions of facts and law, and to convert an order of acquittal into one of conviction. It cannot be lost sight of that when a re-trial is ordered, the dice is heavily loaded against the accused, and that itself must caution the Court exercising revisional jurisdiction. We, therefore, find no justification for the impugned order of the High Court ordering re-trial of the appellants."***

34. Reliance is also placed on judgment rendered by the Hon'ble Apex Court in case titled ***K. Ramachandran v. V.N. Rajan and Anr., (2009) 14 SCC 569.*** Para 40 of the judgment reads as under:-

> ***"40. This question has been considered in the celebrated judgment of Akalu Ahir & Ors. v. Ramdeo Ram [(1973) 2 SCC 583], where, after considering the judgments of D. Stephens v. Nosibolla [1951 SCR 284], Logendranath Jha v. Polailal [1951 SCR 676], K.C. Reddy v. State of Andhra Pradesh [(1963) 3 SCR 412] and Mahendra Pratap Singh v. Sarju Singh [(1968) 2 SCR 287] this Court came out with categories of case which would justify the High Court in interfering with the finding of acquittal in revision: (Akalu Ahir case, SCC pp. 587-88, para8)***
>
> > ***"(i) Where the trial Court has no jurisdiction to try the case, but has still acquitted the appellant-accused;***
> > ***(ii) Where the Trail Court has wrongly shut out evidence which the prosecution wished to produce;***
> >
> > ***(iii) Where the appellate Court has wrongly held the evidence which was admitted by the Trial Court to be inadmissible;***
> >
> > ***(iv) Where the material evidence has been only (either) by the Trial Court or by the appellate Court; and***

> ***(v) Where the acquittal is based on the compounding of the offence which is invalid under the law.***"
>
> ***Of course, these categories were declared by this Court to be illustrative and this Court observed that other cases of similar nature could also be properly held to be exceptional in nature where the High Court could justifiably interfere with the order of acquittal."***

35. In view of the peculiar facts and circumstances as emerged from the record as well as statements made by the PWs, this Court sees substantial force in the contentions of the counsel appearing for the respondent-accused that accused was falsely implicated on account of personal enmity between the parties. This Court after carefully perusing the entire evidence led on record by the parties sees no reason to differ with the findings recorded by the courts below which appear to be based upon the correct appreciation of evidence available on record. Apart from PW2 i.e victim Jai Singh, prosecution cited two witnesses PW1 and PW3 to prove its case against the accused but they nowhere proved the case of the prosecution beyond reasonable doubt and as such learned trial Court rightly came to conclusion that if two views are possible, the one which is favorable to the accused may be adopted.

36. In this regard, I may refer to the judgment passed by the Hon'ble Apex Court reported in ***State of UP*** *versus* ***Ghambhir Singh****, AIR 2005 (92) SCC 2440*, where Hon'ble Apex Court has held that if on the

same evidence, two views are reasonably possible, the one in favour of the accused must be preferred. The relevant paragraph is reproduced as under:-

> ***"6. So far as Hori Lal, PW-1 is concerned, he had been sent to fetch a basket from the village and it was only a matter of coincidence that while he was returning he witnessed the entire incident. The High Court did not consider it safe to rely on his testimony because he evidence clearly shows that he had an animus against the appellants. Moreover, he evidence was not corroborated by objective circumstances. Though it was his categorical case that all of them fired, no injury caused by rifle was found, and, only two wounds were found on the person of the deceased. Apart from this PW-3 did not mention the presence of either PW-1 or PW-2 at the time of occurrence. All these circumstances do create doubt about the truthfulness of the prosecution case. The presence of these three witnesses becomes doubtful if their evidence is critically scrutinized. May be it is also possible to take a view in favour o the prosecution, but since the High Court, on an appreciation of the evidence on record, has recorded a finding in favour of the accused, we do not feel persuaded to interfere with the order of the High Court in an appeal against acquittal. It is well settled that if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred."***

The Hon'ble Division Bench of this Court vide judgment reported in ***Pawan Kumar*** *and* ***Kamal Bhardwaj*** *versus* ***State of H.P.****, latest* ***HLJ 2008 (HP) 1150*** has also concluded here-in-below:-

> ***"25. Moreover, when the occurrence is admitted but there are two different versions of the incident, one put forth by the prosecution and the other by the defence and one of the two version is proved to be false, the second can safely be believed, unless the same is unnatural or inherently untrue.***
> ***26. In the present case, as noticed hereinabove, the manner of occurrence, as pleaded by the defence, is not true. The manner of the occurrence testified by PW-11 Sandeep Rana is not unnatural nor is it intrinsically untrue, therefore, it has to be believed.***
> ***27.Sandeep Rana could not be said to have been established, even if the prosecution version were taken on its face value. It was pleaded that no serious injury had been caused to PW-11 Sandeep Rana and that all the injuries, according to the testimony of PW-21 Dr. Raj Kumar, which he noticed on the person of Sandeep Rana, at the time of his medical examination, were simple in nature."***

37. In the present case also there is no cogent and convincing evidence led by the prosecution to prove the guilt of the accused, rather by way of leading defence witnesses in his support, accused successfully proved on record that there was a motive for PW1 and PW3 to falsely implicate him.

38. At the cost of repetition, it may be stated that it is true that any statement made in violation of Section 118 of the Act cannot be read in evidence. But in the present case, as has been discussed in detail, perusal of statement of PW2 nowhere suggests that he was unable to understand the question put to him. Hence, both the courts below taking cognizance of the statement made by PW2 proceeded ahead to decide the matter in accordance with law. Since version put forth by PW2 did not get corroboration from other material prosecution witnesses, courts below righty refused to record conviction of the accused merely on the statement of PW2.

39. This Court after carefully perusing the statement of PW2 is also of the view that there is nothing such in the statement, which could persuade courts below to record conviction of the accused. Even if at this stage, case is remanded back to the court below for re-examination of child witness in terms of Section 118 of the Act; no fruitful purpose would be served at this stage, especially in view of the fact

that by now, PW2 has gained majority. Moreover, PW2 nowhere supported the case of the prosecution and he was declared hostile. But even this Court keeping in view of the nature of offence allegedly having been committed by the accused examined entire evidence in its entirety, which nowhere proves the guilt of the accused.

40. Consequently in view of the detailed discussion made herein above, this Court does not see any illegality and infirmity in the judgments passed by the courts below and as such, same are upheld and present petition stands dismissed.

30th November, 2016 **(Sandeep Sharma),**
manjit **Judge.**