A GOWRISHANKARA SWAMIGALU

v.

STATE OF KARNATAKA & ANR.

(Criminal Appeal Nos. 568-569 of 2004)

MARCH 5, 2008

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[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

Penal Code, 1860 – s.377:

Unnatural offence – Appellant was 'Junior Swamiji' in a C *'Mutt'– 'Mutt' used to run a school – Respondent No.2, aged 13 years, was a student in said school – Appellant allegedly subjected him to unnatural offence for seven days at about the same time – FIR lodged more than a month after the incident – Absence of medical evidence in regard to* D *commission of offence – Trial Court acquitted Appellant giving him the benefit of doubt – High Court reversed the judgment of acquittal – On appeal, held: High Court erred in reversing the judgment of acquittal – It took into account large number of irrelevant factors – Case in question belonged to the rarest* E *of rare category where a deeper scrutiny was necessary, particularly when the Trial Court had recorded acquittal upon assigning sufficient and cogent reasons – It was not a case where only one view was possible.*

Appellant was 'Junior Swamiji' in a 'Mutt' situated in F **the State of Kerala. The 'Mutt' used to run a school. Respondent No.2, aged 13 years, was a student of Class IX in the said school and was staying in the school hostel. According to the prosecution, Appellant asked two students, PW-2 and 'G', who were also staying in the** G **hostel, to bring Respondent No.2 to his office and after he came, subjected him to unnatural offence. The said activity of Appellant allegedly continued for seven days at about the same time. Respondent No.2 purportedly came back to his house a few days later and told his**

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mother, PW4, about the indecent behaviour of Appellant, when he gave dirty clothes to her for washing and she found sticky substances in his lungi. The FIR was lodged more than a month after the incident. The Trial Court acquitted Appellant giving him the benefit of doubt. The State filed appeal while Respondent No.2 filed a revision application. High Court heard both the matters together and reversed the judgment of acquittal, holding Appellant guilty and sentencing him to ten years Rigorous Imprisonment.

In appeal to this Court, the conviction of Appellant was challenged on various grounds, viz. delay in lodging of the FIR was not explained satisfactorily; the FIR was in two parts and the second part showed improvement made by Respondent No.2 (PW-1) in his statements made in the first part; medical evidence adduced by the prosecution negated the charges against the Appellant; chance discovery of the offence by the mother and maternal uncle of Respondent No.2 was wholly concocted, as it was wholly unnatural that the lungi would not be washed for a period of about 10 days although Respondent No.2 had only two pairs of lungi. It was contended that the High Court committed a serious error in reversing the judgment of acquittal without considering the parameters therefor.

Allowing the appeal, the Court

HELD: 1. Delay in lodging of a FIR although by itself may not be a ground to disbelieve the entire prosecution case, but each case must be judged on its own facts. If the story of Respondent No.2 (PW-1) is to be accepted at its face value, the Court may not take serious notice of delay in lodging the FIR. But, for the said purpose, the entire facts and circumstances of this case must be taken note of. The offence was said to have been repeated for seven days at about the same time. It is wholly unlikely that a student of a school of the Mutt, where compulsorily

A prayer has to be offered on a clean cloth and as apart from two pairs of lungi and two pairs of school uniforms he did not have anything else, had been putting on the same lungi at least for about seven days while visiting the appellant at his call. [Para 10] [1053-C-E]

B 2. From the statements of PW-4, it appears that according to Respondent No. 2, his mother (who worked as an Aaya in the school) used to come to the school for washing the clothes once in a week or so. At the same time, soap had been provided to Respondent No. 2 for C washing his clothes. This conduct on the part of Respondent No. 2 throws serious doubts to the whole story. If after Respondent No. 2 had returned to school, attempts were made by the appellant immediately thereafter to send for him for repeating the commission D of the same offence, there was no reason why the FIR was not lodged immediately. [Para 11] [1053-F-G]

3. It is against natural human conduct that such an act would be committed at 8 O'clock in the morning and that too continuously for seven days. Even if PW-2 and E 'G' had been asked to bring Respondent No. 2 with them, it is against all human conduct that after closing the door they would be asked to be in the room and except seeing the act with their own eyes, for all intent and purport they would know what had been happening in the room. F [Para 12] 1054-E-G]

4. According to the complainant, PW-2 and 'G' called him only for the first day and not thereafter. How, then on all the other days, he went to the office room of the G appellant in the same way is not explained. [Para 13] [1054-H; 1055-A]

5. A bare perusal of the FIR itself shows that it cannot be in the handwriting of a student studying in Class IX. It was in very good handwriting. It was written H systematically. There was no mistake. There was no

hesitation in writing. It was absolutely neat and clean. The contents of the FIR clearly demonstrate that the same has been drafted by a person who is well versed in legal language. Immediately, a purported statement was taken after the FIR was lodged. That there exists some improvement therein is not in dispute. A further statement was recorded that he had himself written the FIR. The subsequent statement may not be a part of the FIR being a statement under s.161 of the Code; but the defence is entitled to show that improvements have been made therein vis-à-vis the allegations made in the FIR. [Para 14] [1055-B-E]

6. When PW-3, an expert (Doctor) categorically ruled out the commission of the unnatural offence having regard to his expertise, it was obligatory on the part of the prosecution to draw his attention to the authorities so as to enable him to furnish an explanation. It may be true that absence of medical offence by itself may not be a crucial factor in all cases, but, the same has to be taken into consideration as a relevant factor when other evidences point towards the innocence of the appellant. Why in a case of this nature, filing of chargesheet was unduly delayed and could be filed only after the dispute between Senior Swamiji and the appellant crystalised, is beyond anybody's comprehension. The High Court merely relied upon the evidence of PW-1 (Respondent No.2). His statements were taken as gospel truth. Only on the basis thereof, all other factors pointing out the discrepancies in the prosecution case were lost sight of. [Paras 21, 22] [1058-B-E]

Mihir Alias Bhikari Charan Sahu v. State, Opp. Party [1992 (98) Cr.LJ 488]- referred to.

7.1. A large number of irrelevant factors including the rate of conviction, legalisation of sodomy in other countries had been taken into consideration by the High Court. Appellant for no reason was condemned in the

A clearest possible terms. He was accused to be coming to the High Court in an air-conditioned car and holding press conferences which was denied and disputed by the public prosecutor. He was also branded as a habitual offender. Taking of such irrelevant factors clearly demonstrates how
B the mind of the High Court stood influenced not only for the purpose of reversing a judgment of acquittal but also for imposition of sentence. If the High Court was clear in its mind that it was dealing with a criminal case and that too the offence is a serious one, one fails to understand
C why it had made endeavours to mediate in the internal disputes of the Mutt and for that purpose held sittings in chamber. One also fails to understand as to why the presence of the appellant on each day of hearing was insisted upon and his absence had been adversely
D commented upon. [Para 23] [1058-E-H; 1059-A]

7.2. Keeping in view the peculiar fact situation obtaining herein, this is one of the rarest of rare cases where a deeper scrutiny was necessary particularly when the Trial Court had recorded a judgment of acquittal upon
E assigning sufficient and cogent reasons. [Para 25] [1060-B]

B.C. Deva @ Dyava v. State of Karantaka [2007 (9) SCALE 338]; *State of Kerala v. Kurissum Moottil Antony* [(2007) 1 SCC 627] and *State of Punjab v. Gurmit Singh and*
F *Others* [(1996) 2 SCC 384]- distinguished.

8. The High Court also completely lost sight of the parameters of its jurisdiction to reverse a judgment of acquittal. It is not a case where only one view was
G possible. The High Court failed to bear in mind the legal principles and misdirected itself at various stages. It was wholly unfair to the appellant. [Paras 27, 29] [1060-G-H; 1064-C]

Jagdish & Anr. v. State of Madhya Pradesh [2007 (11)
H SCALE 213]; *Chandrappa & Ors. v. State of Karnataka* 2007

(3) SCALE 90; *Haji Khan v. State of U.P.* **[(2005) 13 SCC 353] and** *Abdul Gafur & Ors. v. The State of Assam* **[2007 (13) SCALE 801]- relied on.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 568-569 of 2004.

From the Judgment dated 30.1.2004 & 3.2.2004 of the High Court of Karnataka at Bangalore in Crl. A. No. 254/99 c/w Crl. R.P. No. 287/99.

Sushil Kumar, Rajesh Mahale, B.L. Chandrashekhar, H.S. Seshadri, H.S. Raju and K. Lingaraju for the Appellant.

M.N. Rao, P. Vishwanatha Shetty, M. Shivappa, Mahesh R. Uppin, G.N. Rajasekhar, Chandrasekharah, P.R. Ramasesh, Sanjay R. Hegde and Amit Kumar Chawla for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. A Mutt known as Sri Siddaganga Mutt (for short "Mutt") is situated in the State of Kerala. Appellant was a 'junior Swamiji' therein. He was declared as the successor of the 'senior Swamiji' on or about 21.05.1975. Disputes and differences are said to have arisen between the two Swamijis. Police protection was given to the appellant. Both of them, however, purported to have signed an agreement on 13.05.1986. It was, however, not implemented.

The 'Mutt' used to run a school. Respondent No. 2 herein was admitted in the VIIIth standard in the said school of the Mutt. At the material time, he was reading in the IXth standard therein.

On 18.07.1986 at about 8.30 a.m., the appellant allegedly through PW – 2 Palaksha and Gopinath called him to his office. The office was partitioned, one part of it was converted into a bed room. After Respondent No. 2 entered in the office, he was asked to rub lemons on his body. He allegedly had stripped prior thereto. Respondent No. 2 was also asked to take his clothes off.

A 2. Respondent No. 2 alleged that he was subjected to unnatural offence by the appellant. His clothes, anus and panche (lungi) got soiled. He was given a sum of Rs. 10/- and asked not to tell the same to anybody else. The said activity of the appellant is said to have continued upto 23.07.1986. He was B every time offered some money. In total a sum of Rs. 75/- was paid to him.

He allegedly came back to his house with his brother on 28.07.1986. He gave the dirty clothes for washing to his mother. His mother found sticky substances in the lungi. When accosted, C he allegedly told her about the indecent behaviour of the appellant. PW-8 Bhagawan Singh, the maternal uncle of Respondent No. 2 (brother of PW-4 mother Dushyanthi) at that time was also present. The victim was allegedly persuaded to go back to the school. He came back to the school on D 3.08.1986. PW-9 Shivakumar and Natraj were said to have been asked by the appellant to bring him again to his office. He declined to come. He allegedly made a complaint to the Senior Swamiji as regards the incident who assured him to look thereinto and asked him not to make any complaint, the prestige E of the Mutt being involved. However, no action was allegedly taken.

He thereafter lodged a First Information Report on or about 29.08.1986 at about 6.30 p.m. Investigation in the matter took a long time. A spot mahazar (Ex. P2) was drawn up only on F 30.08.1986. On 31.08.1986, the statement of PW-4 was recorded. The statement of PW-2 Palaksha was recorded on 17.09.1986. The statement of Gopinath was taken on 23.11.1986. However, he was not examined in court. Statement of PW-9 Shivakumar, another student was recorded on G 2.12.1986. The statement of PW-8 Bhagawan Singh was taken on 31.08.1987. Chargesheet in the case was filed only on 9.05.1988. Keeping in view the aforementioned fact, the Trial Court initially discharged the appellant by an order dated 19.02.1990 which, however, was set aside by the High Court H by an order dated 3.09.1992 with the direction to dispose of

the matter on merits. A

3. The trial started in March, 1996. In the mean time, the appellant was removed from the Mutt. Immediately, thereafter, he filed a suit on 27.05.1988. The said suit is still pending.

Names of sixteen witnesses were cited in the chargesheet. B However, only thirteen of them were examined before the learned Trial Judge. PW-1 is the complainant. PW-2 Palaksha was the student who along with Gopinath allegedly was asked by the appellant to bring Respondent No. 2 to his office. Gopinath who was a material witness as also the Senior Swamiji who could C throw enough light in regard to the complaint made by Respondent No. 2 to him, for reasons best known to the prosecution, were not examined. PW-2 although is not an eye-witness but when the offence was being committed, he allegedly knew as to what was going on as both he and Gopinath were D inside the room, although doors were closed and the place where the bed was placed in the office room was divided only by a plywood partition.

4. PW-3 Dr. V. Bangaraswami medically examined Respondent No. 2 on 29.08.1986. PW-4 Dushyanthi is the E mother of Respondent No. 2. Shivakumariah PW-5 and Dharanesh PW-6 are witnesses to mahazar. PW-7 Dr. Parashuram is a surgeon. PW-8 Bhagawan Singh is the maternal uncle of Respondent No. 2. PW-9 Shivkumar and Natraj are other students who were asked by the appellant to F call Respondent No. 2. Natraj, however, was not examined. PW-10 B. Raghavendra Rao proved the report of the forensic laboratory. PWs. 11, 12 and 13 were the investigating officers.

5. The learned Trial Judge recorded a judgment of acquittal opining: G

> "32. Thus, in view of the above said discussion, I am considering the evidence of the PWs 1, 4, 8 and 9 and also the medical evidence, namely, PWs 3, 7 and 10 and also the evidence of the investigating agency, it is clear H

A that, there is a long gap in recording the statement of the witnesses by the Investigating Agency. As observed earlier, the evidence of the PW1 is not supported by any medical evidence and the alleged version of PW1 regarding his visit to Bangalore is contradictory, when it is compared B with the evidence of the PWs 4 and 8 and there is a delay in filing the complaint, and the fact that, the evidence of the PW1 he was called through the PW2 and CW3, becomes improbable, looking to the facts of the case, and there are improbable circumstances in the case, and as the C evidence of the PW1 is not supported by the medical evidence, and as such, his evidence is not reliable, and there is abnormal and extraordinary delay in filing the complaint, and the accused is not examined by any doctor in this case and the circumstantial evidence does not corroborate, the evidence of the PW1, and they D contradicted to him i.e. PW1's version and in view of the above said discussion, a doubt arises about the prosecution case and as such, the accused is entitled for the benefit of doubt."

E 6. The State preferred an appeal thereagainst. Respondent No. 2 also filed a revision application, the maintainability whereof was in question. Both the criminal appeal and the criminal revision application were taken up for hearing together.

F 7. A disturbing feature that occurred before the High Court may be noticed by us at this stage. Although the allegation against the appellant was commission of a heinous offence, an attempt was made by the court to get the civil disputes between the appellant and the senior Swamiji settled.

G The High Court in its judgment recorded that the appellant used to come in an air-conditioned car and would hold press meetings although the case was pending. He attributed the said conduct on the appellant relying on or on the basis of a statement made by the public prosecutor. The Public prosecutor, however,

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filed a memo before the court denying and disputing the said statements attributed to him. Curiously enough, the High Court directed the appellant to remain present on all the dates of hearing. Only because on one of the dates of hearing, he was not present, serious note thereof was taken and his purported conduct, as noticed hereinbefore, was commented upon.

Appellant was found guilty of commission of the said offence by the High Court. The judgment of acquittal was reversed.

A long hearing was given for imposition of sentence. State and Respondent No. 2 prayed for imposing of life sentence as also a fine of Rs.50 lakhs on him. Ten years' rigorous imprisonment and a fine of Rs. 25 lakhs, however, was imposed stating that the revision application has been allowed in part.

8. Mr. Sushil Kumar, learned senior counsel appearing on behalf of the appellant, would submit:

(i) The delay in lodging of the First Information Report having not been explained satisfactorily, no reliance can be placed thereupon. The First Information Report is in two parts and the second part thereof would clearly show improvement made by PW-1 in his statements made in the first part.

(ii) A bare perusal of the First Information Report would show that the same was drafted by a person having good knowledge of law.

(iii) The medical evidence adduced by the prosecution clearly negates the charges.

(iv) The chance discovery of the offence by the mother and maternal uncle of Respondent No.2 is wholly concocted, as it is wholly unnatural that the lungi would not be washed for a period of about 10 days although he had only two pairs of lungi and two pairs of school uniforms.

(v) According to PW-4 and PW-8, Respondent No. 2 returned home only on 18.08.1986 and remained in the house for about 20 days which belies the story as narrated in the First Information Report.

(vi) The High Court committed a serious error in reversing the judgment of acquittal without considering the parameters therefor.

9. Mr. Sanjay R. Hegde, learned counsel appearing on behalf of the State and Mr. M.N. Rao, learned counsel appearing on behalf of Respondent No. 2, on the other hand, would submit:

(i) the offence alleged being a heinous one performed on a child of 13 years which has ruined the life of a boy must be viewed with all seriousness by this court.

(ii) In a case of this nature, it is wholly unlikely that a young boy would lodge a false First Information Report, particularly, when he was advised by his mother and maternal uncle to inform the police only when an attempt was made to repeat the offence.

(iii) The statement of Respondent No. 2 having not only been corroborated by the other students of the school, being PWs. 2 and 9, also stand corroborated by the evidence of his mother and uncle, PWs 4 and 8, respectively.

(iv) Respondent No. 2 has admitted his handwriting in the sheet of the First Information Report which was marked as Exhibit P1. The latter part of the First Information Report which was marked as Exhibit P1B is really a statement under Section 161 of the Code of Criminal Procedure and, thus, there is no reason why the same cannot be relied upon.

(v) Absence of medical evidence in regard to commission of offence is not conclusive as evidence of injury cannot be found as the Respondent No.2

was examined after a period of 40 days. Furthermore, injuries suffered by him which might have been minor in nature might have been healed up in ordinary course.

(vi) Statement of PW-4 that Respondent No. 2 came back to his house immediately before Rakshbandhan day need not be taken seriously by the court as she, having been hailing from a lower strata of the society might not have been able to remember the exact date after a period of 10 years.

10. Delay in lodging of a First Information Report although by itself may not be a ground to disbelieve the entire prosecution case, but each case must be judged on its own facts. If the story of PW-1 is to be accepted at its face value, the court may not take serious notice of delay in lodging the First Information Report. But, for the said purpose, the entire facts and circumstances of this case must be taken note of. The offence was said to have been repeated for seven days at about the same time. It is wholly unlikely that a student of a school of the Mutt, where compulsorily prayer has to be offered on a clean cloth and as apart from two pairs of lungi and two pairs of school uniforms he did not have anything else, had been putting on the same lungi at least for about seven days while visiting the appellant at his call.

11. From the statements of PW-4, it appears that according to Respondent No. 2, his mother used to come to the school for washing the clothes once in a week or so. At the same time, soap had been provided to Respondent No. 2 for washing his clothes. This conduct on the part of Respondent No. 2 throws serious doubts to the whole story. If Respondent No. 2 had returned to school on 3.08.1986 and attempts were made by the appellant immediately thereafter to send for him for repeating the commission of the same offence, there was no reason why the First Information Report was not lodged immediately.

Even PW-4 has categorically denied and disputed that she

had made any statement before the investigating officer after the First Information Report was lodged on 31.08.1986. According to her, as also PW-8, Respondent No. 2 came back to the house only on the Rakshbandhan day and stayed there for 20 days. He had to be persuaded to return to school. PW-8 came with them. It was he who used to run the house; the husband of PW-4 for all practical purposes having nothing to do with the affairs of the house. The husband of PW-4 has also not been examined.

PW-8 was attached to the Mutt. It was he, who was instrumental for admission of the boy in the Mutt. He knew the Administrator. He did not meet the appellant to make enquiries. He did not meet the Senior Swamiji to lodge a complaint. He did not even meet the Administrator.

PW-4 was not an illiterate lade. She had studied upto IXth standard. She had been working in a school as an Aaya. Her sister is a teacher in a school. It is, therefore, unlikely that no step would be taken by the guardians when they came to know about the incident.

12. It is against natural human conduct that such an act would be committed at 8 O'clock in the morning and that too continuously for seven days.

The site plan shows that the office of the Senior Swamiji is only 5 feet away from the office of the appellant. There was a store room and also a room for sitting of the other staff members attached to the room. Even if PW-2 and Gopinath had been asked to bring Respondent No. 2 with them, it is against all human conduct that after closing the door they would be asked to be in the room and except seeing the act with their own eyes, for all intent and purport they would know what had been happening in the room. Despite the same, according to PW-2, when they came out of the room, Respondent No. 2 was asked about what had happened. He allegedly stated thereabout.

13. According to the complainant, PW-2 and Gopinath

called him only for the first day and not thereafter. How, then on all the other days, he went to the office room of the appellant in the same way is not explained. PW-2, Gopinath as also PW-9 were not studying with him in the same class. They used to stay in the third floor of the hostel; whereas Respondent No. 2 used to stay in the ground floor thereof.

14. A bare perusal of the First Information Report itself shows that it cannot be in the handwriting of a student studying in Class IX. It was in very good handwriting. It was written systematically. There was no mistake. There was no hesitation in writing. It was absolutely neat and clean. The contents of the First Information Report clearly demonstrate that the same has been drafted by a person who is well versed in legal language. Immediately, a purported statement was taken after the First Information report was lodged that there exists some improvement therein is not in dispute. A further statement was recorded that he had himself written the First Information Report. The subsequent statement may not be a part of the First Information Report being a statement under Section 161 of the Code; but the defence is entitled to show that improvements have been made therein vis-à-vis the allegations made in the First Information Report.

15. PW-1 made the following statement in his deposition before the Investigating Officer:

> "I have myself written this application in my own handwriting. As stated in my application, the boys who took me to Gowrishankar Swamiji closed the door and stood inside only. After this incident I did not inform it to anybody. The senior Swamiji expelled Palaksha and Gopinath who used to live with me in the Mutt. When Gowrishankar Swamiji asked me to remove my clothes, I was wearing one Green colour stripped underwear, one white panche, one baniyan and turmeric colour checked towel. My mother has washed the said clothes. From my home town, when I returned to the Mutt on 3-8-86,

A Shivakumar and Natraj, boys of middle school came to me and told me that Gowrishankar Swamiji is called me. I was scared and I did not go. I informed that the junior Swamiji had done such a thing to the senior Swamiji in the evening at about 8-30 p.m. I was afraid that some one will B beat me therefore, I did not give any report about it. Today, I came to know that Siddalingappa and Hebbak Mahadev are searching for me and realizing that I cannot allow it to continue like this. I have given my written application."

16. We have noticed hereinbefore that despite the fact C that commission of such a heinous crime was reported to the police authorities, how tardy the investigation was.

PW-4 in her deposition completely denied to have made any statement before the police officer on 31.08.1986. The D reason is not very far to seek. Her attention was drawn to her previous statements where she had alleged that her son had mentioned about the incidents on 18.08.1986 and left the house on 28.08.1986. When her attention was drawn to the other statements made by her before the Investigating Officer, she E stated:

"...I do not know if I have stated before the police in terms of D1 and D2. Before the police I have not mentioned that I informed my brother Bhagvan Singh that the children have dirtied the clothes. Before the police I have not F mentioned that Bhagvan Singh enquired my son Deepak Singh after coming back from playing as to why he had dirtied his clothes. Further, I have not mentioned to the police that when my son Deepak Singh told to Bhagvan Singh, I was present there. My son went back five days after coming..." G

17. PW-8 who, as noticed hereinbefore, was examined by the police more than one year after the occurrence, viz., 31.08.1987, in his cross-examination, stated:

"...After about 2 months after they came for Rakhi festival, H

my statement was recorded by police. I might have informed the police that we celebrate Rakshabandhan festival on *19-8-86*. I have stated that on *18-8-86* the children came to my sister's house from the Mutt for celebrating the festival. Two days thereafter, my sister had washed the clothes of the children. It is not correct to say that I have not mentioned in the police statement that my sister asked Deepak Singh why his clothes were so dirty. My sister asked both the children why they had dirtied the clothes so much. At that time both the children were in the house. From 18-8-86 both the children stayed for about 20 days in my sister's house in Bangalore. After 20 days, I encouraged the children and left them in the Mutt. I have not seen Palaksha and Gopinath. Even when I went to leave the children at the Mutt, I did not meet the accused and ask him why he was having such immoral intercourse with children and how can he do such a thing. I did not go and meet the Senior Swamiji and inform him that your junior Swamiji is doing such a thing..."

18. Whereas according to PWs 4 and 8, they came to know about the incident on or about 18.08.1986 and Respondent No. 2 and his brother having stayed in the house for 20 days, it remains a mystery how First Information Report could be lodged on 29.08.1986.

19. PW-3 Dr. V. Bangaraswami in his evidence stated:

"All the tissues around the anus are hard and rough. At the time of answering the calls of nature, the extra skin will be expanded. Immediately after it will come to original status. By examination I found that boy was not habitually used for anal intercourse. If there is continuous act of intercourse for about a week or even 2,3 days we can find out as whether he had any intercourse or not."

20. Mr. Hegde relied on a decision of the Orissa High Court in *Mihir Alias Bhikari Charan Sahu v. State, Opp. Party* [1992 (98) Cr.LJ 488], wherein Ejaj Ahmad's Sexual Offences and

A Modi's Medical Jurisprudence and Toxicology have been extensively quoted, to contend that lacerations are likely to disappear if the examination is made after two to three days and nature of injuries would also depend upon several factors.

B 21. When an expert categorically ruled out the commission of the unnatural offence having regard to his expertise, it was obligatory on the part of the prosecution to draw his attention to the said authorities so as to enable him to furnish an explanation. It may be true that absence of medical offence by itself may not be a crucial factor in all cases, but, the same has to be taken C into consideration as a relevant factor when other evidences point towards the innocence of the appellant.

22. Why in a case of this nature, filing of chargesheet was unduly delayed and could be filed only in May, 1988, i.e., only after the dispute between Senior Swamiji and the appellant D crystalised, is beyond anybody's comprehension. The High Court merely relied upon the evidence of PW-1. His statements were taken as gospel truth. Only on the basis thereof, all other factors pointing out the discrepancies in the prosecution case were lost sight of.

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23. A large number of irrelevant factors including the rate of conviction, legalisation of sodomy in other countries had been taken into consideration by the High Court. Appellant for no reason was condemned in the clearest possible terms. He was F accused to be coming to the High Court in an air-conditioned car and holding press conferences which was denied and disputed by the public prosecutor. He was also branded as a habitual offender. Taking of such irrelevant factors clearly demonstrates how the mind of the learned Judges of the High G Court stood influenced not only for the purpose of reversing a judgment of acquittal but also for imposition of sentence. If the High Court was clear in its mind that it was dealing with a criminal case and that too the offence is a serious one, we fail to understand why it had made endeavours to mediate in the internal disputes of the Mutt and for that purpose held sittings in

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chamber. We also fail to understand as to why the presence of the appellant on each day of hearing was insisted upon and his absence had been adversely commented upon.

24. Mr. Hegde relied upon a recent decision of this Court in *B.C. Deva @ Dyava v. State of Karantaka* [2007 (9) SCALE 338] to contend that in a case involving sexual abuse the testimony of the victim should ordinarily be believed. The factual matrix involved therein was absolutely different as not only the prosecutrix was found to be a consenting party, but immediately after the incident she rang to her mother for the purpose of disclosing the incident and she felt so depressed and humiliated as to lead her to the extreme step of ending her life by jumping in a water tank. It was in the aforementioned situation opined:

> "12. Having carefully gone through the evidence of the prosecutrix, we find no plausible and justifiable reasons whatsoever to disbelieve and discard her testimony. The prosecutrix is a trust-worthy witness and her evidence cannot be brushed aside on the above-noted flimsy plea raised by the accused."

The question as to whether the witnesses in criminal cases irrespective of the nature of offence should be fully relied upon or not would depend upon the fact of each case. There cannot be any precedent on fact.

25. Reliance has been placed on *State of Kerala v. Kurissum Moottil Antony* [(2007) 1 SCC 627] wherein it was held that in a case of sexual assault whether corroboration is necessary or not is again a question in regard whereto no hard and fast rule can be laid down. In the aforementioned case, the victim was a girl of 10 years. The accused trespassed into her house when she was alone and committed an unnatural offence. The testimony of the girl found corroboration from the medical evidence. It was observed:

> "7. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the

A case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery..."

In any event, keeping in view the peculiar fact situation obtaining herein, we are of the opinion that this is one of the B rarest of rare cases where a deeper scrutiny was necessary particularly when the Trial Court had recorded a judgment of acquittal upon assigning sufficient and cogent reasons and wherewith we agree.

C 26. Reference to *State of Punjab v. Gurmit Singh and Others* [(1996) 2 SCC 384] does not take us any further. Therein it was observed:

"...The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must D deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable E prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which F may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations." G

27. The High Court also completely lost sight of the parameters of its jurisdiction to reverse a judgment of acquittal. It is not a case where only one view was possible. We are not unmindful that some mistakes had also been committed by the H learned Sessions Judge which had been pointed out by Mr. M.N.

Rao in the following terms:

(i) The PW7 has also stated in his evidence that "no abnormality is detected as per Ex. P3". This goes to show that the evidence of the PW1 and the evidence of PWs 3, 7 and 10 are taken together, it is clear that the evidence of the PW1 is not corroborated by the medical evidence.

(ii) It is the defence of the accused that the PWs 1 and 2 and CW3 and PW9 are not at all residing in the Mutt and they are created against the accused.

(iii) The PW1 in the cross has admitted at page no. 19 that against him the J.C. cases in J.C. No. 86/86, 59/87, 60/87, 61/87, 89/87 and CC 4350/90 were filed by the Kyathasandra P.S.

but, then the High Court could have made an endeavour to arrive at its independent findings.

Our approach to the case is not different as we have made all endeavours to appreciate the testimony of the victim in the background of the entire case.

28. We have ourselves gone through the materials on records very carefully and are clearly of the opinion that the learned Trial Judge was correct in its view.

29. We may at this juncture notice a few precedents operating in the field.

In *Jagdish & Anr. v. State of Madhya Pradesh* [2007 (11) SCALE 213], this Court held:

"12. The High Court while dealing with an appeal from a judgment of acquittal was, thus, required to meet the aforementioned reasonings of the learned Trial Judge. There cannot be any doubt whatsoever that irrespective of the fact that the High Court was dealing with a judgment of acquittal, it was open to it to re-appreciate the materials

A brought on records by the parties, but it is a well-settled principle of law that where two views are possible, the High Court would not ordinarily interfere with the judgment of acquittal. [See *Rattan Lal v. State of Jammu & Kashmir* – 2007 (5) SCALE 472].

B 14. It is unfortunate that the High Court while arriving at the aforementioned conclusion did not pose unto itself the right question. In the event, it intended to arrive at a finding different from the one arrived at by the Trial Court, it was obligatory on its part to analyze the materials on record C independently. The High Court was also required to meet the reasoning of the learned Trial Judge. If the learned Trial Judge upon appreciation of the evidence arrived at a conclusion that the time of occurrence disclosed in the First Information Report was not correct inasmuch whereas D the occurrence is said to have taken place at 08.00 a.m. but in fact it took place much prior thereto, it could not be opined that the First Information Report was lodged within an hour of the incident..."

E It was noticed:

"17. Yet again in *Kallu alias Masih and Others v. State of M.P.* [(2006) 10 SCC 313], this Court opined :

"8. While deciding an appeal against acquittal, the power of the Appellate Court is no less than the power exercised F while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence G and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get H the benefit of any doubt. Further if it decides to interfere,

it should assign reasons for differing with the decision of the trial court." A

[See also *Rattanlal* (supra) and *Ramappa Halappa Pujar & Others v. State of Karnataka* – 2007 (6) SCALE 206]."

[See also *Chandrappa & Ors. v. State of Karnataka* 2007 (3) SCALE 90 and *Haji Khan v. State of U.P.* [(2005) 13 SCC 353] B

Recently in *Abdul Gafur & Ors. v. The State of Assam* [2007 (13) SCALE 801], a Bench of this Court held:

C

"10. The accused persons are not strangers and were practically neighbours of the informant and his family. The High Court noted that there was no intention to falsely implicate accused persons because of enmity and there was no reason as to why dignity of two young girls would be put at stake by alleging rape. It is to be noted that in fact rape was alleged but the Trial Court found that there was no material to substantiate the plea of rape. The evidence is totally inconsistent and lacks credence. The High Court's observations were clearly based on surmises and contrary to the factual scenario. The High Court has noted that the evidence of PWs. 1,2,3,5 & 8 stand fully corroborated by the medical evidence. Significantly, on consideration of the evidence of PW 4, it is clear that the evidence of this witness is clearly contrary to the medical evidence. To add to the confusion, it is noted that the High Court recorded as finding that appellant Abdul Gafur was absconding. As a matter of fact the evidence of Investigating Officer (in short the 'I.O') shows that he had arrested Abdul Gafur on the date the First Information Report (in short the 'FIR') was lodged. Unfortunately the High Court has merely referred to certain conclusions of the Trial court without analyzing the evidence and various submissions made by the appellants. To add to the vulnerability of the prosecution version, the FIR was lodged long after the incident and in fact law was already set on D E F G H

A motion after the telephonic message had been received.

11. The aforesaid infirmities in the background of admitted animosity between the parties renders the prosecution version unacceptable. The Trial Court and the High Court did not analyse the evidence correctly and acted on mere
B surmises and conjectures. That being so, the appellants deserve to be acquitted, which we direct."

The High Court unfortunately failed to bear in mind the aforementioned legal principles. The High Court misdirected
C itself at various stages. It was wholly unfair to the appellant.

30. For the reasons aforementioned, the appeal is allowed. The judgment of conviction and sentence passed by the High Court is set aside and the judgment of acquittal passed by the Trial Court is restored. Appellant is set at liberty forthwith if not
D required in connection with any other case.

B.B.B. Appeal allowed.