IN THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

S.B.- HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE.

Crl. L.P No. 05 of 2017

State of Sikkim

…. Appellant.

versus

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

… Respondent.

Application under Section 378 sub-Section 3 (b) of the Criminal Procedure Code, 1973.

Appearance:

Mr. Karma Thinlay Namgyal, Addl. Public Prosecutor with Mr. S.K Chettri and Ms. Pollin Rai, Asstt. Public Prosecutors for the Appellant.

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

O R D E R
(11.08.2017)

Bhaskar Raj Pradhan, J

1. The parameters of judicial consideration while deciding an application for leave to appeal against the judgment of acquittal is the issue before this Court in the present application. Leave to appeal has been sought by the State under Section 378 (3)(b) of the Criminal Procedure Code, 1973 (Cr.P.C) against the judgment dated 28.12.2016 passed by the learned Judge, Fast Track Court (East and North) at Gangtok in Session's Trial (Fast Track) Case No. 05 of 2016 under Section 376/511 Indian Penal Code (IPC). Although charges were framed under Section 376/511 IPC on

the submission of the learned Additional Public Prosecutor at the stage of final arguments that the evidence produced did not make out a case under Section 376/511 IPC but under Section 354 IPC, the learned Trial Judge held that the prosecution has not been able to prove the case even under Section 354 IPC.

2. On 25.05.2017, notice was issued on the application for leave pursuant to which, on 21.06.2017, the learned Counsel would seek time to file response to the application for condonation of delay as well as the present application for leave.

3. On 04.08.2017, Mr. K.T Bhutia, learned Senior Counsel appearing for the Respondent would submit that he would like to argue and contest the application for leave, instead. This Court heard Mr. Karma Thinlay Namgyal, learned Senior Advocate and the Additional Public Prosecutor for the State of Sikkim and Mr. K.T Bhutia.

4. Mr. Karma Thinlay Namgyal would argue that the evidence of the prosecutrix (PW 1) before the Court satisfied the ingredients of the offence under Section 354 IPC and the same had not been demolished in cross-examination. The impugned Judgment disbelieving the prosecutrix version and acquitting the Respondent is wrong and thus, leave ought to be granted. While doing so, Mr. Karma Thinlay Namgyal, would rely upon the examination-in-chief of the prosecutrix and submit that the ingredients of the alleged offence had been cogently proved by the Prosecution. He would plead that there is sufficient evidence to prove the offence under Section 354 IPC and that the Learned Trial Court has failed to appreciate the evidence of the victim (P.W.1), Saroj Rai (P.W.2) and Benjamin Lepcha (P.W.3) in its correct perspective.

5. Mr. Karma Thinlay Namgyal would rely upon the judgment of the Apex Court in re: ***Mohd. Imran Khan v. State Government (NCT of Delhi)***[1] in which it was held:-

> *"**Evidence of the prosecutrix***
>
> *22. It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Evidence Act, 1872 (hereinafter called "the Evidence Act"), nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of the Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."*

6. Mr. Karma Thinlay Namgyal would also rely upon the judgment of the Apex Court in re: ***R. Shaji v. State of Kerala***[2] in which it was held:-

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

[1] **(2011) 10 SCC 192**
[2] **2013) 14 SCC 266**

what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.

27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. (Vide Jogendra Nahak v. State of Orissa [(2000) 1 SCC 272 : 2000 SCC (Cri) 210 : AIR 1999 SC 2565] and CCE v. Duncan Agro Industries Ltd. [(2000) 7 SCC 53 : 2000 SCC (Cri) 1275])".

7. Mr. K.T Bhutia would, however, assert that the acquittal of the Respondent has bolstered the presumption of innocence in favour of the Respondent and leave to appeal can be granted where it is shown that the conclusion arrived at by the Trial Court are perverse or there is misapplication of law or any legal principle. To supplement his argument he would also rely upon a judgment of the Delhi High Court in re: ***Geeta Sharma v. State NCT of Delhi & Anr***[3] in which it was held:-

"4. The law with regard to the grant of leave is well settled by catena of judgments. Leave to appeal can be granted where it is shown that the conclusions arrived at by the Trial Court are perverse or there is misapplication of law or any legal principle."

8. To bring home his point, Mr. K.T Bhutia, would take the Court through the cross-examination of the prosecutrix, the Magistrate (PW 10) who recorded the Section 164 Cr.P.C statement of the prosecutrix and the Investigating Officer (PW 13) and contend that the entirety of the examination in chief of the prosecutrix has been demolished and rendered unreliable as both the Magistrate and the Investigating Officer who recorded the Section 164 Cr.P.C statement and the Section 161 Cr.P.C statement of the Respondent

[3] **2017 SCC OnLine Del 9313**

respectively have admitted that what the prosecutrix has deposed before the Court was not what she had deposed before them on material particulars.

9. Mr. K.T Bhutia would further contend that the evidence of the brother of the prosecutrix **i.e.** Saroj Rai (P.W.2) and Benjamin Lepcha (P.W.3) would in fact contradict the evidence of the prosecutrix. Mr. K. T. Bhutia would submit that this was a case where the evidence would clearly reveal that the deposition of the prosecutrix was unreliable.

10. Both the learned Senior Advocates appearing for the respective parties would take the Court through various paragraphs of the impugned judgment to contest their respective arguments.

11. This Court has heard the learned Senior Advocates in great detail and examined the impugned Judgment.

12. Section 378 (1) and (3) Cr.P.C provides :-

> *" 1. Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5), -*
> *(a)…….*
> *(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision.*
> *…….*
> *3. No appeal to the High Court under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court."*

13. The Apex Court in re: ***State of M.P v. Dewadas & Ors.***[4] would hold that:-

> *"**10.** Under the scheme of the Code, the State Government or the Central Government may prefer an appeal under sub-section (1) or sub-section (2) of Section 378 of the Code, but such appeal shall not be entertained unless the High Court grants "leave" under sub-section (3) thereof. The words "No appeal under sub-section (1) or sub-section (2) shall be entertained" used in sub-*

[4] (1982) 1 SCC 552

section (3) of Section 378 create a qualified bar to the entertainment of an appeal filed by the State Government or the Central Government under sub-section (1) or sub-section (2) from an order of acquittal passed in a case instituted otherwise than upon a complaint. The Code, by enacting sub-section (3) of Section 378, therefore, brought about a change in that there is no longer an unrestricted right of appeal against the orders of acquittal passed in such cases. ....."

"11..... *The Law Commission in its 48th Report had observed:*

"While one may grant that cases of unmerited acquittals do arise in practice, there must be some limit as to the nature of cases in which the right should be available."

And, keeping in view the general rule in most common law countries not to allow an unrestricted right of appeal against acquittals, it recommended:

"With these considerations in view, we recommend that appeals against acquittals under Section 417, even at the instance of the Central Government or the State Government, should be allowed only if the High Court grants special leave.

It may be pointed out that even now the High Court can summarily dismiss an appeal against an acquittal, or for that matter, any criminal appeal. (Section 422 of the Criminal Procedure Code)

Therefore, the amendment which we are recommending will not be so radical a departure as may appear at the first sight. It will place the State and the private complainant on equal footing. Besides this, we ought to add that under Section 422 of the Code, it is at present competent to the appellate court to dismiss the appeal both of the State and of the complainant against acquittal at the preliminary hearing."

The recommendations of the Law Commission were not, however, fully carried into effect. Sub-section (3) of Section 378 of the Code was introduced by Parliament to create a statutory restriction against entertainment of an appeal filed by the State Government or the Central Government under sub-section (1) or sub-section (2) of Section 378 from an order of acquittal passed in a case instituted otherwise than upon complaint....."

14. The report of the Joint Committee of the Parliament dated 04.12.1972, p.xxvi, would give the reason for introducing the then new provision in the following words:-

"The Committee was given to understand that in some cases this executive power to file appeals against an order of acquittal was exercised some-what arbitrarily. It would, therefore, be desirable and expedient to provide for a check against arbitrary action in this regard. The Committee has therefore provided that an appeal against an order of acquittal should be entertained by the High Court only if it grants leave to the State Government in this behalf."

15. In re: ***State (Delhi Administration) v. Dharampal***[5] the Apex Court would hold:-

*"**25.** A comparison of Section 378 with the old Section 417 shows that whilst under the old section no application for leave to appeal had to be made by the State Government or the Central Government, now by virtue of Section 378(3) the State Government or the Central Government have to obtain leave of the High Court before their appeal could be entertained."*

16. The Apex Court in re: ***State of Rajasthan v. Sohan Lal*** [6] would hold that:-

*"**3.** We have carefully considered the submissions of the learned counsel appearing on either side. This Court in State of Orissa v. Dhaniram Luhar [(2004) 5 SCC 568 : (2008) 2 SCC (Cri) 49 : JT (2004) 2 SC 172] has while reiterating the view expressed in the earlier cases for the past two decades emphasised the necessity, duty and obligation of the High Court to record reasons in disposing of such cases. The hallmark of a judgment/order and exercise of judicial power by a judicial forum is to disclose the reasons for its decision and giving of reasons has been always insisted upon as one of the fundamentals of sound administration justice-delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. The fact that the entertaining of an appeal at the instance of the State against an order of acquittal for an effective consideration of the same on merits is made subject to the preliminary exercise of obtaining of leave to appeal from the High Court, is no reason to consider it as an appeal of any inferior quality or grade, when it has been specifically and statutorily provided for, or sufficient to obviate and dispense with the obvious necessity to record reasons. Any judicial power has to be judiciously exercised and the mere fact that discretion is vested with the court/forum to exercise the same either way does not constitute any licence to exercise it at whims or fancies and arbitrarily as used to be conveyed by the well-known saying: "varying according to the*

[5] (2001) 10 SCC 372
[6](2004) 5 SCC 573

Chancellor's foot". Arbitrariness has been always held to be the anathema of judicial exercise of any power, all the more so when such orders are amenable to challenge further before higher forums. The State does not in pursuing or conducting a criminal case or an appeal espouse any right of its own but really vindicates the cause of society at large, to prevent recurrence as well as punish offences and offenders respectively, in order to preserve orderliness in society and avert anarchy, by upholding the rule of law. The provision for seeking leave to appeal is in order to ensure that no frivolous appeals are filed against orders of acquittal, as a matter of course, but that does not enable the High Court to mechanically refuse to grant leave by mere cryptic or readymade observations, as in this case ("the court does not find any error"), with no further, on the face of it, indication of any application of mind whatsoever. All the more so, when the orders of the High Court are amenable to further challenge before this Court. Such ritualistic observations and summary disposal which has the effect of, at times, and as in this case, foreclosing statutory right of appeal, though a regulated one, cannot be said to be a proper and judicial manner of disposing of judiciously the claim before courts. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the court concerned had really applied its mind. All the more so, when refusal of leave to appeal has the effect of foreclosing once and for all a scope for scrutiny of the judgment of the trial court even at the instance and hands of the first appellate court. The need for recording reasons for the conclusion arrived at by the High Court, to refuse to grant leave to appeal, in our view, has nothing to do with the fact that the appeal envisaged under Section 378 CrPC is conditioned upon the seeking for and obtaining of the leave from the court. This Court has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while choosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal."

17. The Apex Court in re: **State *of Maharashtra v. Sujay Mangesh Poyarekar***[7] would hold that:-

> ***"19.*** *Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal "shall be entertained except with the leave of the High Court". It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by sub-section (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.*
>
> ***20.*** *In our opinion, however, in deciding the question whether requisite leave should or should not be granted, the High Court must apply its mind, consider whether a prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.*
>
> ***21.*** *It cannot be laid down as an abstract proposition of law of universal application that each and every petition seeking leave to prefer an appeal against an order of acquittal recorded by a trial court must be allowed by the appellate court and every appeal must be admitted and decided on merits. But it also cannot be overlooked that at that stage, the court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of acquittal recorded by the trial court could not be said to be "perverse" and, hence, no leave should be granted."*
>
> *22. In Sita Ram v. State of U.P. [(1979) 2 SCC 656 : 1979 SCC (Cri) 576] this Court held that: (SCC p. 669, para 31)*
>
> > *"31. … A single right of appeal is more or less a universal requirement of the guarantee of life and liberty rooted in the [concept] that men are fallible, that Judges are men and that making assurance doubly sure, before irrevocable deprivation of life or liberty comes to pass, a full-scale re-examination of the facts and the law is made an integral part of fundamental fairness or procedure."*
>
> *We are aware and mindful that the above observations were made in connection with an appeal at the instance of the accused. But the principle underlying the above rule lies in the doctrine of human fallibility that "Men are fallible" and "Judges are also men". It is keeping in view the said object that the principle has to be understood and applied.*

Then again:-

---

[7] **(2008) 9 SCC 475**

> *"33. It is no doubt true that in a case of acquittal, there is a double presumption in favour of the respondent-accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced by the trial court (and certainly not weakened). Nonetheless, it is not correct to say that unless the appellate court in an appeal against acquittal under challenge is convinced that the finding of acquittal recorded by the trial court is "perverse", it cannot interfere. If the appellate court on reappreciation of evidence and keeping in view well-established principles, comes to a contrary conclusion and records conviction, such conviction cannot be said to be contrary to law."*

Then again:-

> *"35. The High Court, in our judgment, was not right in rejecting the application for leave on the ground that the judgment of the trial court could not be termed as "perverse". If, on the basis of the entire evidence on record, the order of acquittal is illegal, unwarranted or contrary to law, such an order can be set aside by an appellate court. Various expressions, such as, "substantial and compelling reasons", "very strong circumstances", "distorted conclusions", "glaring mistakes", "judgment being perverse", etc. are more in the nature of "flourishes of language" than restricting ambit and scope of powers of the appellate court. They do not curtail the authority of the appellate court in interfering with an order of acquittal recorded by the trial court. The judgment of the High Court, with respect, falls short of the test laid down by this Court in various cases referred to in Chandrappa [(2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325] . The order of the High Court, therefore, cannot stand and must be set aside."*

18. In view of the clear and unequivocal rendition of the Apex Court in re: ***State of Maharashtra v. Sujay Mangesh Poyarekar (supra)*** this Court respectfully seeks to explain the view expressed by the Delhi High Court in re: ***Geeta Sharma (supra)*** cited by Mr. K.T Bhutia as expressed in paragraph 4 thereof to the effect that although it is true that leave to appeal can be granted where it is shown that the conclusions arrived by the Trial Court are perverse or there is misapplication of law or any legal principle, it is equally true that leave to appeal cannot be rejected on the ground that the Judgment of the Trial Court could not be termed as perverse. The power of the

Appellate Court is wide. However, the consideration at the time of deciding whether leave ought to be granted or not and at the stage of deciding an appeal against acquittal are different. A Division Bench of this Court in *re:* ***State of Sikkim v. Kiran Chettri & Anr.***[8] while granting leave to appeal would rely upon the judgment of the Apex Court in re*:* **State *of Maharashtra v. Sujay Mangesh Poyarekar (supra)*** and hold that when arguable points have been raised in the petition for leave to appeal which are serious in nature the same requires consideration by the Court.

19. The Legislature has advisedly used the word 'leave' in Section 378 (3) Cr.P.C which merely means 'permission' and nothing more, after of course, a judicious consideration. Leave is required to be obtained before an appeal is 'entertained' for judicial consideration on merits.

20. Section 378 Cr.P.C corresponds to Section 417 of the Old Code. Sub-sections (1), (2), (4), (5) and (6) of Section 378 are analogous to Sections (1) to (5) respectively of Section 417 of the Old Code. Section 378 (3) Cr.P.C was, at the time of the coming into force of the Cr.P.C, 1973, however, a new provision. The power of the State Government to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court not being an order under clause (a) or an order of acquittal by a Court of Session in revision is subject to Section 378 (3) Cr.P.C. There was no such restriction under the Old Code. Sub-section (3) unequivocally prohibits the entertainment of an appeal by the State Government except with the leave of the Court and thus, the power to prefer an appeal by the State Government against an order of acquittal is not an absolute power. Before such Appeal is entertained by the High Court, the State Government must necessarily obtain leave of the High Court. The mandate of the law is clear. Before the Court

[8] **2017 SCC OnLine Sikk 58**

proceeds to consider on merits or adjudicate upon the merits, leave must be sought by the State Government and granted by the Court.

21. It is clear from the reading of Sub-Section (3) of Section 378 Cr.P.C that the High Court has the power to grant leave or deny the same. If the Court is to deny leave it must be for valid and cogent reason as is required of exercise of any judicial power. It must be kept in mind that by such refusal, a close scrutiny of the order of acquittal by the Appellate Forum would be lost once and for all. The Apex Court in re: ***State of Punjab v. Bhag Singh***[9] held*:*

> *"5. The trial court was required to carefully appraise the entire evidence and then come to a conclusion. If the trial court was at a lapse in this regard the High Court was obliged to undertake such an exercise by entertaining the appeal. The trial court on the facts of this case did not perform its duties, as was enjoined on it by law. The High Court ought to have in such circumstances granted leave and thereafter as a first court of appeal, reappreciated the entire evidence on the record independently and returned its findings objectively as regards guilt or otherwise of the accused. It has failed to do so. The questions involved were not trivial. The requirement of independent witness and discarding testimony of official witnesses even if it was reliable, cogent or trustworthy needed adjudication in appeal. The High Court has not given any reasons for refusing to grant leave to file appeal against acquittal, and seems to have been completely oblivious to the fact that by such refusal, a close scrutiny of the order of acquittal by the appellate forum has been lost once and for all. The manner in which the appeal against acquittal has been dealt with by the High Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court order not sustainable. A similar view was expressed in State of U.P. v. Battan [(2001) 10 SCC 607 : 2003 SCC (Cri) 639] . About two decades back in State of Maharashtra v. Vithal Rao Pritirao Chawan [(1981) 4 SCC 129 : 1981 SCC (Cri) 807 : AIR 1982 SC 1215] the desirability of a speaking order while dealing with an application for grant of leave was highlighted. The requirement of indicating reasons in such cases has been judicially recognized as imperative. The view was reiterated in Jawahar Lal Singh v. Naresh Singh*

[9] **(2004) 1 SCC 547**

[(1987) 2 SCC 222 : 1987 SCC (Cri) 347] . Judicial discipline to abide by declaration of law by this Court, cannot be forsaken, under any pretext by any authority or court, be it even the highest court in a State, oblivious to Article 141 of the Constitution of India."

22. The State seeks leave to appeal against the Judgment of acquittal for an alleged offence of assault or criminal force on the victim with intent to outrage her modesty under Section 354, IPC which provides:-

"*354. Assault or criminal force to woman with intent to outrage her modesty.- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine."*

23. The prosecutrix has in her examination-in-chief narrated in great detail about the alleged incident which is alleged to have taken place in the month of November, 2015.

24. This Court has considered the impugned judgment for the limited purpose of deciding whether in the present case leave ought to be granted to the State for entertaining its appeal, keeping in mind Section 378 (3) Cr.P.C, its object and purpose, as well as the judgments of the Apex Court quoted above. This Court stays conscious of the law that at this stage whether the order of acquittal would or would not be set aside is not the consideration. This Court also stays conscious of the law that at this stage the Court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of the acquittal recorded by the Trial Court could not be said to be perverse. It is seen that the learned Trial Court even while quoting extensively from the evidence of the prosecutrix, which evidence, Mr. Karma Thinlay Namgyal would argue satisfied the ingredients of Section 354 IPC had been made out, has not dealt with how

the said evidence of the prosecutrix has been demolished completely by the evidence of the Magistrate and the Investigating Officer who recorded the statements of the prosecutrix under Section 164 Cr.P.C and Section 161 Cr.P.C respectively as argued by Mr. K.T Bhutia. This was the bulwark of Mr. K.T Bhutia's argument as to why leave ought not to be granted. The learned Trial Court has without analysing the effect of the evidence of the Magistrate and the Investigating Officer concluded in paragraph 21 and 24 of the impugned judgment that:-

> *"21…….The evidence of PW-13, I.O. of case and PW-10, the then Ld. Chief Judicial Magistrate establishes that she had stated different version while giving her statement."*
> *"24. The evidence of the victim as well as other prosecution witnesses i.e. PW-2, PW-7, PW-8, PW-10 and PW-13 establish that the victim projected different versions and tried to improve her case."*

25. The learned Trial Court having not examined the effect of the cross-examination of the Magistrate and the Investigating Officer, so forcefully argued by Mr. K.T Bhutia submitting that the same demolishes the prosecution case, it has become incumbent that the Appellate Court examine the same on merits, after leave, along with the other evidences to come to a decisive conclusion whether the impugned judgment is liable to be sustained or otherwise.

26. On a close scrutiny of the impugned judgment it is evident that the impugned judgment also does not deal with the ingredients of Section 354 IPC which was perhaps vital. Although it is true that the present case being a case of acquittal there is a double presumption in favour of the Respondent of his innocence, the mere grant of leave to the State to prefer an appeal would in no way effect the said presumption as it is well settled that the Appellate Court would reverse an acquittal only for very substantial and compelling reasons. Interference of an order of acquittal would arise when the Appellate Court examines the order of acquittal on merits. The present

application for leave cannot definitely be termed as arbitrary. Arguable points serious in nature have been raised which need to be heard on merits.

27. In the circumstances, this Court is of the view, that leave to appeal ought to be granted to the State, at this stage, without going further into the merits to enable this Court, as the first Appellate Court, to effectively consider the same on merits, keeping in mind that although leave to appeal is the mandate, the appeal nevertheless is not of any inferior quality or grade. This Court is of the view that the appeal is not frivolous and prima-facie it is evident that the present appeal needs deeper consideration after grant of leave by this Court. Accordingly, the Crl. L.P No. 05 of 2017 is hereby allowed.

28. Leave granted.

29. Let the appeal be registered for hearing.

(Bhaskar Raj Pradhan)
Judge
11.08.2017

avi/ approved for reporting : yes
Internet : yes