

**Amardeep Kujur vs.state**

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**SooperKanoon Citation :** [sooperkanoon.com/1219188](http://sooperkanoon.com/1219188)

**Court :** Delhi

**Decided On :** Nov-13-2018

**Appellant :** Amardeep Kujur

**Respondent :** State

**Advocate for Def. :** Mr. G.M. Farooqui

**Advocate for Pet/Ap. :** Mr. Anuj Kapoor

**Judgement :**

\$~ \* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on :

1. t September, 2018 Pronounced on :

13. h November, 2018 + CrI.A. 252/2016 AMARDEEP KUJUR STATE Through : Mr. Anuj Kapoor, Adv. Appellant (DHCLSC) versus Through : Mr. G.M. Farooqui, APP Respondent for the State CORAM: HONBLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

1 While travelling the rocky terrain of criminal justice- dispensation, the court is, at times, confronted with the necessity to negotiate between the apparently conflicting considerations of ensuring that an offence, ex facie revolting in nature, does not go unpunished, and, at the same time, that the innocent is not subjected to the unbending rigour of the law. This case is one such. The Facts 2. On 13th

December, 2012, S, a 7-year-old male child, was admitted in the Ashiyana Boys Home, Alipur. He remained there till 11th January, 2013. During his sojourn at the Ashiyana Boys Home, S was, as the evidence has revealed and as is undisputed, sodomised.

3. On 11th January, 2013, S was shifted, by Dr. R.P. Singh, under whose care he was, at the time, to the B. R. Ambedkar Hospital (hereinafter referred to as the Hospital), where he was detected to be HIV positive. In view thereof, S was referred, on 15th January, 2013, to Child Survival India (CSI), an NGO dealing with HIV positive patients.

4. While he was under the care of the CSI, S, apparently, disclosed the fact of him having been sodomised during his tenure in the Ashiyana Boys Home. This resulted in the following communication, from the CSI to the Child Welfare Committee, on 4th February, 2013 (Ex. PW-7/A): 04/02/2013 To The Child Welfare Committee Asha Kiran Complex, Avantika Rohini, Delhi-85 Sub:-

"Regarding child sexual abuse Respected Madam, Child Survival India an NGO run a community Centre for HIV infected people with support of Delhi state AIDS control Society. Few days ago a 7 years old male child was referred by ART centre Ambedkar Hospital for ART initiation. The child belongs to Ashiyana boys Home Alipur. During the counselling session, child opened up that children of Ashiyana home sexually abuse and harassment daily. So, he does not want to go back to Ashiyana home. It might be happening with the other children also. So, I request you to please take further action to stop such kind of activities among children. Thanks and Regards Sheela Mann Project Director CSI (Emphasis Supplied)

5. The CWC, thereupon, addressed a communication (titled an Order), dated 13th February, 2013, to the Station House Officer (SHO), PS Shahbad Dairy, drawing his attention to the above extracted communication from the CSI and requesting him to intervene. The said communication read as under: CHILD WELFARE COMMITTEE Asha Kiran Complex Avantika Sec.-. 1, Rohini, New Delhi-110085 ORDER As per report submitted by Child Survival India a 7 years old male child referred by ART Centre Ambedkar Hospital for ART initiation the above said NGO, has alleged that he was

sexually abused and harassed by the children of Ashiyana Boys Home. The SHO of PS Shabaad Dairy is directed to get the said child medically examined at the BSA Hospital to cooperate his statement given to the above said NGO. Sd/- 13/2/13 SHO P.S. Shahbad Dairy CrI.A.252/2016 Page 3 of 69 6. As the facts stated in the communication from the CWC prima facie indicated commission of an offence, under Section 377 of the Indian Penal Code, 1860 (IPC) and Section 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012, investigation of the case was handed over to SI Manoj Kumar (PW-15) and an FIR was registered. The FIR merely reproduced the afore-extracted communication, dated 13th February, 2013, from the CWC to the SHO.

7. On 14th February, 2013, S was taken to the Hospital, where he was examined and MLC (Ex. PW-9/E) was prepared. A sample of his anal swab was also taken.

8. Relevant extracts, from preliminary entries in the MLC of S, as entered by Dr. Kuldeep Singh (PW-3), may be reproduced, thus: Alleged H/O sexual assault (sodomy) about one month back (multiple episodes) at Child Home Alipur as told by Child, I/O and Ms Sheela Mann. Patient has taken Bath and changed clothes multiple times after above said incidents as told by Child, I/O and Ms Sheela Mann. H/o undergoing treatment for HIV. O/E Pt. conscious oriented & c. fair. Pulse - 80/min BP - 1

mm Hg Chest } CVS } WNL CrI.A.252/2016 Page 4 of 69 CNS } } PA Dr Kuldeep Singh advised, in the MLC, referring the child to the Surgery, Psychiatry, Paediatrics and Forensic Medicine departments for his management and to obtain their opinion, and for preservation of sample.

9. The MLC further records the opinion, of the SR in the Department of Paediatrics (Dr Amit), which merely notes that there was alleged H/O sexual assault (sodomy). This entry, it may be noted, was proved by PW-5 Dr Rakesh, during his testimony before the learned ASJ.

10. The SR Surgery, however, entered the following observations on the MLC: Pt presented with alleged H/O sexual assault (sodomy) one month back at Child Home, Alipur. Pt taken Bath and changed clothes after the incident. Brought by I/O and Sheela Mann. Perianal tear at 12 oclock, 1 oclock, 5 oclock and 6 oclock

positions. No active bleeds. No prolapsed mass. Anal tone normal. On proctoscopy Normal rectal mucosa. CrI.A.252/2016 Page 5 of 69 No tear or any prolapse found. No active bleeds/clot. (Emphasis supplied) 11. Dr. Vijay Dhankar, who was the Head of the Forensic Medicine Department in the Hospital, recorded, thus, in the MLC (Ex. PW-9/E), consequent upon local examination: On Lateral Traction - Dilatation of Anal Canal seen with mucosal tear of the size of 1 cm present at 05.00 Clock position. (Emphasis supplied) The report of Dr. Dhankar opined that this finding was suggestive of forcible anal penetration.

12. On 14th February, 2013, the following statement of S was recorded, by the I/O SI Manoj Kumar (PW-15), under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Cr PC): Statement of S, S/O Sarabjeet, R/O Shalimar village, H. No.10, Delhi No 4, Delhi - Aged 7 years (1) What is your name?. Ans. S (2) What is your fathers name?. Ans. Sarabjeet (3) How old are you?. Ans. 7 years (4) Where are your mother and father?. CrI.A.252/2016 Page 6 of 69 Ans. My mother has expired and my father is in jail. (5) How many brothers and sisters are you?. Ans. I have 2 sisters, whose ages I do not know. They are not my real sisters. (6) In which class are you studying?. Ans. In 2nd class. (7) Since when were you residing in Boys Home?. In which kutir, in the Boys Home, were you staying?. Since how many days have you been staying in Child Ans. From the 11th month. (8) Survival India?. Ans. Since about 1 month. (9) Ans. Subhash kutir. (10) Do you understand the meaning of galat kaam (wrong act)?. Ans. Yes. (11) Which boy did galat kaam with you?. Ans. Ashish, Pankaj and Naval. (12) Do all these three boys stay in Subash kutir?. Ans. Yes. (13) Can you recognise these three boys?. Ans. Yes. (14) How many times did these three boys do galat kaam with you?. CrI.A.252/2016 Page 7 of 69 Ans. Many times. (15) Did you mention this to the in charge of Subash kutir?. Ans. I do not know his name, but probably the name of the person, to whom I mentioned it, was Vijender. (16) Do you want to go to the Alipur Childrens Home?. Ans. No I do not want to go there. (17) Do you want to go to your sisters?. Ans. No I want to go to my Mehboob Uncle. (18) Do you want to get your medical checkup done?. Ans. Yes.

13. In the interregnum, the 13th February, 2013 edition of the Times of India carried a detailed report regarding the above incident, which persuaded this Court to take suo motu cognizance, registering the matter as WP (CrI.) 246/2013 (Court

on Its Own Motion v. G.N.C.T.D.), in which the following order was passed, on 15th February, 2013: A suo motu cognizance has been taken of this matter on the recommendation of the Juvenile Justice Committee based on a newspaper report dated 13.02.2013 in The Times of India is also on the basis of interaction of the HAQ Counsellor with the child concerned. Ld. Standing Counsel for the Govt of NCT of Delhi for Criminal Side, Mr. Pawan Sharma, states that a statement of the child was recorded in which he has named three other children who had sexually abused him. There is a reference even to one guard but that occurs only in the HAQ Counsellors report while in the statement of the child, no such allegation has been made. The matter was stated to have CrI.A.252/2016 Page 8 of 69 been reported to one of the charges who has been named both in the HAQ Counsellors report and in the statement of the child. Learned counsel states that the medical report of the child is still awaited. It is, however, not in dispute that the child is HIV positive. In view of the nature of allegations made, it becomes necessary to immediately get the other three children also medically examined, against whom allegations have been made, to verify whether they are HIV positive or not. The aspect of the allegation against the guard made in the HAQ Counsellors report be also investigated and if required, his medical examination be also carried out including the HIV test. In the given situation, it also becomes necessary to shift the three children against whom allegations have been made, to a different home at the conduct be closely monitored. This action is necessary forthwith without even waiting for the medical report of the children. cover. A status report be filed before this Court in a sealed List on 22.02.2013. 14. HIV testing of Ashish, Pankaj, Naval and the appellant, was conducted, by the Delhi State AIDS Control Society, GNCTD, on 19th February, 2013. The result was negative in all cases.

15. On 7th March, 2013, the statements of Ashish, Naval and Pankaj were recorded, under Section 161 of the Cr PC. It is not necessary to set out, in detail, the contents of the said statements, which were in question-answer form. Suffice it to state that the questions and answers, in their respective statements, which related to, or made reference to, the appellant, were thus (as translated): CrI.A.252/2016 Page 9 of 69 Naval Q. What was the name of your guard?. Did he use to come to you?. Ans. The guard disclosed his name to be Amar and stated that he lived in the Subash kutir, Boys Home. Q. Did the guard Amar use to visit

your room?. Ans. Yes, he used to come. Q. Did you ever do galat kaam with S?. Ans. No.I have seen Amar leaving his room on several occasions. Q. Did the guard use to beat S?. Ans. Yes he used to beat him, because he used to defecate in his trousers, and Ashish had to clean the trousers. Did Amar ever tried to do galat kaam with you?. Q. Ans. No. Ashish Q. What was the name of your guard?. Did he use to come to you?. Ans. Amar. He used to come to us and beat S. Q. Ans. Because he used to defecate in his trousers and did not allow us to sleep till late. Q. Ans. No.I have seen Amar going towards him. He used to come at night. Q. Did the guard Amar use to visit your room?. Have you done galat kaam with S?. Did the guard use to beat S?. Crl.A.252/2016 Page 10 of 69 Do you know Amar?. Have you done galat kaam with S?. Ans. Yes, sometimes. Pankaj Q. Ans. Yes. He was the guard at the place where we used to stay earlier. Q. Ans. No, I do not know. Q. Ans. Yes. He used to visit him at night as well. Q. Ans. Yes, because he used to defecate in his trouser and used to remain awake till late. Have you seen Amar going towards S?. Did Amar beat S?.

16. On 23rd March, 2013, the appellant joined the investigation. He was arrested, and taken for medical examination, and certified as capable of sexual intercourse.

17. On 3rd April, 2013, S was shifted to the Satyakam Care Home, Meerut, as directed by this Court.

18. In compliance with the directions issued by this Court in its order dated 15th February, 2013 supra in WP (Crl) 246/2013, the following Compliance Report was submitted, by the CWC, and placed before this Court on the record of the said writ petition: Crl.A.252/2016 Page 11 of 69 Compliance Report A HIV positive boy (S) of 7-8 years was referred by the CWC Kingsway Camp on 13/12/2012 2 Children Home for Boys Alipur for care and protection as his mother had died of HIV2years back and he was looked after by maternal grandmother. After the death of his maternal grandmother, his maternal uncle produced him before CWC Kingsway Camp expressing his inability to take care of the child. Childs father is in judicial custody for sexually assaulting his own daughter. As the child had no support of any extended family member he was placed under the care of Alipur Home for Boys. (S) was under the care of Dr RP Singh who, on 11.01.13 referred him to

Ambedkar Hospital where he was admitted. On 15.01.13 he was sent to Child Survival India (CSI) on discharge from Ambedkar Hospital for close specialised monitoring. On 04.12.13, (S) was brought to CWC Avantika by a council of CSI expressing that the child has informed them in explicit words that he was sexually assaulted at Alipur Home for Children and therefore he is not willing to go back there. When the Committee Member, Mrs Renu Goyal probed the child, he was upset and started crying. CWC was unable to extract any information from (S). However CSI was directed to continue his stay with the present arrangement and bring (S) again after a couple of days. CWC Avantika recognising the gravity of the situation immediately set up a meeting on 06.02.13 which the concerned Supt and Welfare Officers of Alipur Home. (S)s complaint was discussed with them and Superintendent Ms Renu Saxena was instructed to make a thorough enquiry and submit report to CWC Avantika on war footing. The Supt and Welfare Officers visited CSI on 06/02/2013 itself and reported that (S) did not complain of the repeated sexual abuse but did say that he was keen by some voice. The Superintendent also reported that (S) would often pass stools in the bed and children in the home were made to clean/watch these dirty sheets. This practice was irritating some voice who in turn would beat (S). CrI.A.252/2016 Page 12 of 69 The matter was reported in TOI of 13.02.2013. Then counsellor of HAQ interviewed the child on 12 February 2013 and this time (S) did name 3 inmates and a guard as the culprits. ordered for medical examination of child (S). the Honble High Court had directed for CWC filed FIR (78) on 13.02.2013 at PS Alipur and Further according to the Writ Petition (CrI) 246/2013, Medical examination of the main culprits for To transfer the suspected culprits to different HIV and any other indication. forms. The medical test was conducted on 19.02.2013. HIV tests came out negative. The I/O produced 3 accused before CWC. They were interviewed by CWC Chairperson and member Dr Prem Singh. CSI Counsel also produced the victim, who was in a comfortable condition and named all the accused and pointed out that the security guard used to hit him in the stomach. Since accused children were in conflict with law (CCL), directions were given to I/O on 19.02.2013 to present these children before concerned JJB for further directions. CWC Avantika received a call on 20.02.2013 that all the Observation Homes run by NCT of Delhi house children of ages 12 and above. Since three

children in conflict with law are below 12 years and are attending regular school, CWC under the circumstances have temporarily placed them in Shubakshika Shelter Home till such time that they appear for the final exam in March 2013. Crl.A.252/2016 Page 13 of 69 After the final exams, CWC has transferred the three accused children to different childrens homes registered under JJ Act. The Superintendent Ms Renu Saxena has issued memos to the erring staff and reported the misdemeanour of the guard the concerned Security agency. Security agency has been instructed to debar guard Amar from entering the compound of Alipur Home for boys. His services were terminated. Meanwhile, Ms Sheela Mann of CSI, was directed to be set Deepti Ashram in Najafgarh for HIV +, and find out its suitability for shifting S to this institution for further rehabilitation. Though CSI reported that Deepti Ashram was a suitable institute, the management was reluctant to admit the case where the child is involved in legal proceeding. CSI suggested that Satyakam Child Care Home, Meerut was an agency who looks after the rehabilitation of such children. CWC contacted Satyakam Child Care Home, passed the Transfer Orders. Since Meerut happens to be in U.P., CWC further to the permission of State Government, Department of WCD. Permission for Inter-State transfer were granted vide letter No F.61 (Trs.)/AD-/DSW/2003 dated 01- 04-2013. A copy of the letter with a requirement of Quarterly Report was made to CWC Pulanshahar, U.P. the child was transferred to Anti-Retroviral Therapy Centre merit. He was finally to Satyakam Child Care Home on 03.04.2013. transferred Sd/- Kamla Lelwani Chairperson CWC, Avantika 22-04-2013 19. Vide order dated 6th May, 2013, this Court disposed of WP (Crl) 246/2013, in view of the aforementioned Status Report filed by the GNCTD, with directions to continue the proceedings, against the Crl.A.252/2016 Page 14 of 69 appellant, in accordance with law, counsel S and have the remaining three juveniles supervised by the CWC.

20. On 13th June, 2013, PW-14 SI Satish Kumar sought information, from the Superintendent of the Ashiyana Boys Home, inter alia regarding the complete address, contact number and other particulars of Bijender. The Superintendent responded, vide letter dated 15th June, 2013, providing the said information, including the permanent address of Bijender as well as the situs of his employment at that point of time.



21. It appears, from the record, that, despite being thus apprised of the whereabouts of Bijender, he was not co-opted in the proceedings, and was never cited as a witness; neither, apparently, was his statement ever recorded - or, if it was, the record makes no reference.

22. On 19th June, 2013, charge-sheet was filed before the learned CMM. The charge-sheet alleged that, along with Ashish, Pankaj and Naval, the appellant had also sexually assaulted S and relied, for the said purpose, on the disclosure statement recorded, from the appellant, by the I/O, consequent on his arrest on 23rd March, 2013. (Detailed reference stated to have been recorded, would be made, thereto; later in the course of this judgment).

23. The statement of the Counsellor, HAQ, was also recorded on 4th July, 2013 by PW-14 SI Satish Kumar. Yet, for reasons best known to CrI.A.252/2016 Page 15 of 69 the prosecution, the statement was never exhibited in evidence, or relied upon, by it.

24. It was only on 6th July, 2013, i.e. more than a year and a half after the incident had taken place and almost a month after filing of the charge-sheet before the learned CMM, that the statement of S was recorded under Section 164 of the Cr PC. The learned MM, who recorded the said statement, posed certain preliminary questions, to S, to ascertain his capability and competence to testify. Inasmuch as there is no challenge, to the capability of S to testify, it is not necessary to refer to the said questions. The actual statement, recorded from S, as exhibited before the learned ASJ as Ex. PW-2/A, may be translated thus: On SA Amar was a chowkidar at Ashiyana. Amar used to ask me to do work. He used to insert the place from where he used to urinate, into the place from where I used to defecate. He did this on several occasions. He used to keep me in fear. I used to bleed considerably, while defecating. He used to tell me that, if I revealed these facts to anyone, he would kill me. Observation: The child was very scared initially, even at the name of Amar. With great effort, he uttered only above said version about the incident. 25. Consequent upon, and pursuant to, recording of the above statement, of S, under Section 164 of the Cr PC, a supplementary charge sheet was filed, before the learned CMM, on 9th July, 2013. The said supplementary charge-sheet

noted the fact that the statement CrI.A.252/2016 Page 16 of 69 of the representative of the HAQ Centre for Child Rights had in fact been recorded. Reference was also made, in the said supplementary charge-sheet, to the statement of S, recorded under Section 164 of the Cr PC, as well as to the contents thereof, observing that these contents, too, disclosed a prima facie case of commission, by the appellant, of offences under Section 377 of the IPC and Section 4 of the POCSO Act.

26. On 26th September, 2013, the report of the DNA Fingerprinting Unit of the FSL was received. The Report established that no blood or semen was found on any of the samples, including the anal swab of S.

27. On 28th April, 2014, charge was framed, against the appellant, to the effect that, around a month before 13.02.2013 at Ashiyana Boys Home, the appellant, along with his co-accused juveniles, committed penetrative sexual assault upon the child S, and thus committed an offence U/S5m) of POCSO Act, 2012 which is punishable U/S6of POCSO Act, 2012. 28. The appellant pleaded not guilty, and claimed trial, thereby setting into motion the proceedings which continued, inexorably, till the conviction of the appellant, under Section 6 of the POCSO Act and his sentencing, therefor, and, consequently, to the present appellate proceedings before this Court. CrI.A.252/2016 Page 17 of 69 29 The Evidence:

29. 1 The prosecution led the evidence of 16 witnesses, whereas the defence did not choose to lead the evidence of any witness. 29.2 The depositions, of the witnesses cited by the prosecution, may be divided into the following four categories: (i) depositions relating to the committing of the offence - by PW-1, PW-2 (the victim S), PW-7, PW-14 and PW-15, (ii) depositions relating to collection of samples and submission to the Forensic Science Laboratory (FSL) - PW-13, (iii) depositions relating to medical evidence - PW-3, PW-5, PW-8, PW-9, PW-15 and PW-16 and (iv) other witnesses - PW-4, PW-6 and PW-10. 29.3 Before referring to the evidence of any of the other witnesses, it would be appropriate to advert to the deposition of the victim S, himself, during trial - which would take us, in turn, to his deposition under Section 164 of the Cr PC. 29.4 Before proceeding to record his examination-in-chief, the learned Additional Sessions Judge (hereinafter referred

to as the learned ASJ), first put certain questions to S - who was 9 years old at the time - to assess his competence to testify. These questions related to his name, his fathers name, his mothers name, the number of his siblings, the class in which he was studying, the name of his school and its location, the distance between the school and the Childrens Home, and, as in all cases, whether one should lie, or speak the truth. It is not necessary to reproduce the questions; suffice it to state that, in the opinion of this Court, they were sufficient to vouchsafe for the competence and capability of S to be examined, and cross-examined. 29.5 The testimony of S was, thereafter, recorded, albeit without oath, given his tender age. Again, it is not necessary to reproduce his deposition in extenso. S categorically stated, in his deposition, that three boys and one Amar Deep had, in the Childrens Home, kissed (him) on (his) lips and had established peno-anal contact with him. This, he testified, had continued repeatedly for some days, with associated threats to neutralise him, were he to report the incident to anyone. He also stated that, whenever the act was committed he used to feel pain and it used to bleed. He stated that he did not remember the names of the three boys, but confirmed that Amardeep (i.e. the present appellant) was working in the Childrens Home as security guard. On being asked to identify the appellant in court, S initially burst into tears but, thereafter, correctly identified him. He confirmed that he had been medically examined and that his statement (under Section 164 of the Cr PC) had been recorded by the learned MM. He identified the said statement, which was exhibited as Ex. PW-2/A, as well as his signatures thereon. 29.6 In cross-examination, S confirmed that, in the Boys Home, he, as well as thirteen other inmate children, used to stay in one room, without any window. He deposed that they used to get up at 5 AM and go to bed at 10 PM. He confirmed that he had never gone outside the Boys Home, and that he had stayed at Ashiyana Boys Home till the age of 7, whereafter he was shifted to the Boys Home at Meerut. He further confirmed that no outsider was allowed to enter the Ashiyana Boys Home, and that the alleged sexual assault had been committed, on him, in the single room in which all the children used to live and sleep, in the presence of the other children, who were sleeping at the time, after 11 PM. He further deposed that he had shouted due to pain at that time, hearing which one boy, whose name he did not remember, had

awoken. 29.7 Permission, sought by learned counsel appearing for the appellant before the learned ASJ, to suggest, to S, that he had been deposing falsely, was denied, given the age of S, even while reserving liberty, to said learned counsel, to so urge at the time of arguments. 29.8 I may now refer, seriatim, to the other witnesses, who deposed regarding the commission of the alleged offence. Depositions regarding the incident 29.9 PW-1, Kamla Lekhwani was the Chairperson of the CWC. She deposed that S had been admitted to the Childrens Home, as his father was in jail. On medical examination by Dr R.P. Singh, the appellant was found to be HIV positive, whereupon his custody was handed over to Child Survival India (hereinafter referred to as CSI), Crl.A.252/2016 Page 20 of 69 an NGO which used to look after HIV positive children. The said NGO, she deposed, had informed her that S had complained of having been sexually abused by three boys, namely Pankaj, Ashish and Nawal, and the appellant, who was a security guard at the Childrens Home. At the instance of the CWC, FIR was registered. She also deposed that this Court had taken suo motu cognizance of the incident and that, as directed, she had filed a compliance report (Ex. PW-1/A) in this Court. The only question posed to PW-1 in cross- examination was whether, in the said compliance report, she had named the appellant, to which she merely directed reference to the compliance report itself. A reading of the said Compliance Report, however, reveals that PW-1 did not, in fact, name the appellant as one of the oppressors of S, as informed to her by the CSI. 29.10 In her Compliance report (Ex. PW-1/A), filed by PW-1 before this Court, PW-1 stated that, on 4th February, 2013, S had been brought to the CWC by the counsel of CSI, who informed that S had explicitly disclosed having been sexually abused at the Boys Home. Efforts to elicit information from him, however, proved futile, as he started crying. On being questioned, the Superintendent and Welfare Officers of the Childrens Home denied the allegation that S had been complaining of repeated sexual abuse, and stated that he had only reported having been kicked by some boys, as he was in the habit of soiling the bed. On his being queried, by the Counsellor on 12th February, 2013, however, S named the appellant and three inmates of the Childrens Home as the culprits. The matter was reported in the Times of India and taken up, suo motu, by this Court, which directed Crl.A.252/2016 Page 21 of 69 medical examination of the persons named as

culprits by S, to ascertain their HIV status. The medical test, conducted on 19th February, 2013, however, disclosed the HIV status of the persons named by S to be negative. 29.11 PW-7 Ms Sheela Mann, Project Director of CSI, disclosed, in her testimony during trial, that, in January, 2013, a male child had been referred to them for Anti-Retroviral Treatment (ART) at Ambedkar Hospital, as he appeared to be HIV positive. She further deposed that, during counselling, the child stated that he did not want to return to the Ashiyana Boys Home, as he had been sexually abused in the environs thereof, whereupon they referred the matter to the CWC vide letter dated 4th February, 2013 (Ex. PW-7/A). At the initiative of the CWC, FIR was registered and, as he did not wish to return to the Ashiyana home, the boy was retained with them for two months, during which period he was examined at the BSA Hospital in her presence, vide MLC Ex. PW-3/A, and also psychologically evaluated. She also testified to the recording, of the statement of the boy (Ex. PW-7/B), in her presence, by SI Manoj Kumar (PW-13), on 14th February, 2013. In cross-examination, PW-7 admitted the fact that, in her letter Ex. PW-7/A, she had not named the appellant, and that, even in the statement recorded, from the boy, by SI Manoj Kumar on 14th February, 2013, he did not name the appellant as his oppressor, in her presence. She also acknowledged that S had always named some of his senior fellow inmates at the Ashiyana Boys Home as his assaulters, and had never named the appellant. However, none of the assaulters (Pankaj, Ashish and Nawal) tested positive for HIV. CrI.A.252/2016 Page 22 of 69 She professed ignorance regarding the cause of inclusion of the name of the appellant, in the case, as S had always complained about sexual assault having been committed, on him, by older boys at the Home. She reasserted, at the conclusion of cross-examination, that, though S remained in their custody from January to April, 2013, he had never named the appellant as his offender, throughout his period of stay. 29.12 PW-14 SI Satish Kumar, to whom the investigation had been marked on 2nd June, 2013, deposed that, after filing of the charge sheet in the case on 15th June, 2013, he interrogated Shabaaz Khan, of HAQ Centre, on 4th July, 2013, as the said person had counselled S. He further deposed that, consequent to obtaining an order from the CWC, for recording the statement of S, under Section 164 of the Cr PC, he brought the victim from the Home on 6th July, 2013, and filed an application, under Section 164 of the Cr PC,

for recording his statement. After recording the statement of S, under Section 164, he deposed that he left S at the Home and filed a supplementary charge- sheet. In cross-examination, he admitted that he could not give any specific reason as to why the statement of S could not be recorded prior to 6th July, 2017, but denied the suggestion that he had tutored S. 29.13 SI Manoj Kumar, deposing as PW-15, testified that, on 14th February, 2013 he, along with Const. Sher Ali, visited the premises of CSI, where he met S along with PW-7 Sheela Mann, and that S was taken to the Hospital for medical examination. He testified to CrI.A.252/2016 Page 23 of 69 having received sealed samples from the doctor at the Hospital, which were exhibited as Ex. PW-8/A and that, thereafter, the statement of S was recorded in the presence of PW-7 Sheela Mann. PW-15 further deposed that, on 19th February, 2013, he had recorded the statements of Pankaj, Ashish and Naval (Ex. PW-4/A to PW-4/C) and had the potency test of the said witnesses, and the appellant (the reports whereof were exhibited as Ex. PW-9/A to PW-9/D), conducted. He further deposed that, consequent on his arrest, the appellant recorded his disclosure statement on 23rd March, 2013, which was exhibited as Ex. PW-15/A and which read thus (as translated): I belonged originally to Jharkhand. I have studied till 8th class. After the death of my parents in 2001, I came to Delhi, in search of work, along with my sister Magadhlina, who stays in House No 28, Village Kheda Khurd. Till July 2012, I used to stay with my sister Magadhlina, and do odd jobs. In August, 2012, I secured employment as Security Guard at the Childrens Home, Alipur, Delhi. My duty hours were ordinarily 12 noon to 8 PM. In December, 2012, a boy named S came to stay at the Subash kutir in the Childrens Home. One day, I found S playing in the ground. I affectionately told him to play on the swings, and, while he did so, went on talking to him. S, thereafter, went indoors. After this, I used to meet S frequently, and grew to like him. I started buying eatables and giving them to him, as a result of which he became close to me. One day, S was playing in the ground of the Childrens Home. I went close to him and gave him chocolates to eat, and started behaving affectionately towards him. While doing so, I started feeling like doing galat kaam with him, as I was yet unmarried. I, thereafter, took S with me to a secluded place inside the Home, where I did galat kaam with him and threatened him that I would not leave him, if he disclosed this fact to anyone. S got scared and did not reveal

what had happened. Thereafter, whenever I got an opportunity I used to do galat kaam with S. S was shifted to another Home on 11th January, 2013. I got to know that S had been kept in the Home at Kheda Khurd. One day the Supervisor said that S had been shifted to Kheda Khurd and desired to know who wanted to go there. I agreed to do Crl.A.252/2016 Page 24 of 69 so, as I used to stay with my sister in the village close by. One day S told the madam in the NGO that Naval, Ashish, Pankaj and I had done galat kaam with him. Ms Sheela Mann, of the NGO, thereupon, conveyed this information to the CWC officials. On finding that I could get entrapped, I fled to Jharkhand. I have committed a mistake and pray for pardon.

29.14 In cross-examination, PW-15 acknowledged that S had, in his statement (Ex. PW-7/B), named only Ashish, Pankaj and Naval, and had not named the appellant. He also admitted that he had not recorded the statement of the sister of S, under Section 161, Cr PC. He further admitted that he could not explain as to why the statement of S, under Section 164, Cr PC, could not be recorded till he was in charge of the investigation.

Medical Witnesses

29.15 Dr. Kuldeep Singh (PW-3), the Chief Medical Officer (CMO) in the Hospital, who had prepared the MLC (Ex. PW-3/A) of S, proved the said MLC in his deposition on 27th November, 2014. He testified that, on 14th February, 2013, at about 12:50 PM, S, about 7 years of age, was brought to the Hospital by SI Manoj Kumar (PW-15), along with PW-7 Sheela Mann. He further deposed that the I/O, Sheela Mann, as well as S, informed him that multiple episodes of sodomy had been committed, on S, about a month back at the Ashiyana Boys Home, Alipur. He deposed that, during examination, S was conscious, oriented and that his vitals were normal. He testified that he, along with Dr. Vishal, SR, Surgery, collected the anal Crl.A.252/2016 Page 25 of 69 swab of S and handed it over to the Duty Constable for being submitted to the I/O. The cross-examination of PW-3 was uneventful.

29.16 Dr Vishal Choudhary, SR, Surgery in the Hospital, deposing as PW-16, confirmed having examined S on 14th February, 2013, and having found peri-anal tears at 12 oclock, 1 oclock, 5 oclock and 6 oclock position, which indicated that the child was sexually assaulted. He confirmed the observations entered, by him, on the reverse of the MLC (Ex. PW-3/A), to which reference has already been invited hereinabove, as well as his signatures, appearing on the body thereof.

29.17 The defence did not choose to cross-examine either PW-9 or PW-16,

despite grant of opportunity. 29.18 PW-8 Const. Sher Ali and PW-15 SI Manoj Kumar, in their depositions, also testified to the fact of medical examination, of S, at the Hospital, having been conducted. They were not cross-examined in this regard. Other witnesses 29.19 PW-4, Shashank Mishra, who was working at the Shubhashika Open Shelter, Meerut, deposed, during trial, that, on 20th February, 2013, Pankaj, Ashish and S had been referred, to the said Open Shelter, by the CWC, and that the statements (Ex. PW-4/A, B and C) were recorded, by the I/O on 7th March, 2013, in his presence. In CrI.A.252/2016 Page 26 of 69 cross-examination, he testified that the statements were written by the I/O in his own handwriting. 29.20 PW-6 Const. Shanker, of PS Alipur deposed, on 29th June, 2015, that, on 23rd March, 2013, the appellant had joined investigation, and had been interrogated by the I/O. He correctly identified the appellant, who was present in Court. He further deposed that the appellant had been arrested vide Arrest Memo Ex. PW-6/J, and had been taken for medical examination to the Hospital, whereafter he was produced before the MM and remanded to judicial custody. He was not cross-examined, despite grant of opportunity. 29.21 Ms Seema Malik, Welfare Officer of the Ashiyana Boys Home, Alipur, appeared for recording of her evidence, as PW-10 on 9th September, 2015 and brought, with her, the attendance register (Ex. PW-10/A) pertaining to the appellant, for the period 12th December, 2012 to 21st February, 2013. She confirmed that the appellant used to work in the Ashiyana Boys Home as Security Guard in the second shift, from 12 noon to 8 PM. She also produced the attendance register pertaining to S, which was exhibited as Ex. PW-10/B-1 to B-10. She confirmed that S had remained in the Childrens Home at Alipur till 3rd April, 2013, whereafter he was transferred to the Satyakam Care Home, Meerut. In cross-examination she acknowledged that she had no personal knowledge of the case, and also confirmed that, till the time S had remained under the supervision of the Ashiyana Boys Home, he had never complained against anyone. She also confirmed that, at the end of his duty, every CrI.A.252/2016 Page 27 of 69 guard used to sign the attendance register, and had to leave the Home immediately, and that he was not allowed in the premises without making an entry in the arrival register kept at the entry gate. Statement of the appellant under Section 313, CrPC2922 The statement of the appellant was recorded, under Section 313 of the Cr PC, on 19th



October, 2015 and 8th December, 2015. While accepting that, on 13th February, 2013, he had been working as Security Guard at the Alipur Childrens Home, where S was residing, the appellant denied all allegations of having established sexual contact with S. He asserted that he had been falsely named by S, and that the allegations against him were false and baseless. He insisted that his duty hours ended at 8 PM and that he had no access to S, thereafter. He stated that he did not wish to lead any defence evidence.

30. Judgement of the Trial Court 30.1 Having thus assimilated the evidence, the learned ASJ proceeded to record the following observations/findings: (i) The age of S as per the statement of PW-1 as well as the MLC, could safely be assessed to have been about 7 to 8 years, on the date of commission of the alleged offence. On this aspect, there is no dispute. Crl.A.252/2016 Page 28 of 69 (ii) Stress was laid, by learned counsel appearing on behalf of the appellant, on the fact that S had not, initially, named the appellant as having committed sexual assault upon him. Reliance was placed, for this purpose, on the testimony of PW- 7 SI Manoj Kumar, who had proved the statement of S, recorded during investigation (Ex. PW-7/B), in which he had named only Ashish, Pankaj and Naval. It was, therefore, sought to be contended that the appellant had been roped into the case because of having been falsely implicated, subsequently by S, which was under pressure from the Police authorities, after cognizance had been taken, in the matter, by this Court. However, while examining the statement of S, recorded under Section 164 of the Cr PC, the MM had observed that S was initially very scared, at the name of the appellant, and managed to utter his version of the incident, only with great effort. (iii) S had also implicated the appellant, during his testimony at the time of trial. The manner in which the appellant had assaulted him was also reiterated. Reliance was also placed on the observation, by the learned ASJ, that, when he was asked to identify the appellant, S started sobbing and said that he did not want to see him. (iv) These facts indicated that S was fearful of the appellant. (v) The mere fact that, in his statement recorded during investigation (Ex. PW-7/A), S did not name the appellant, could not be a ground to disbelieve his testimony, as he was Crl.A.252/2016 Page 29 of 69 traumatised by the appellants acts. Reliance was also placed, on this regard, on the statement, of S, to the effect that the appellant used to threaten him after committing his acts of sexual assault. (vi) S

was found to be consistent in his various depositions, regarding the acts allegedly committed on him by the appellant. The manner in which he had described the acts was also consistent with the understanding of a child of 7 to 8 years of age. (vii) For these reasons, the testimony of S was found to be reliable, truthful and trustworthy. (viii) Learned counsel appearing for the appellant had also sought to impress, on the Court, the fact that neither the blood, nor the semen, of the appellant, had been detected on the anal swab of S. Reliance was also placed, by the said learned counsel, on the fact that the examination of the appellant found that he was not HIV positive which, according to said learned counsel, was incompatible with the allegation that he had sexually assaulted S, who was HIV positive. Dealing with these submissions, the learned ASJ held that the absence of any semen or blood, on the anal swab of S, could not be a reason to exonerate the appellant, as the swab had been taken many days after the incident occurred. Equally, the learned ASJ held that it was not necessary that sexual contact, with a person was HIV positive, necessarily had to result in the other partner being infected by the said virus. For these reasons, the learned ASJ held that the appellant could not be exonerated for want of forensic evidence. (ix) PW-16 Dr Vishal Choudhary had proved the observations entered by him on the MLC of S, to the effect that peri-anal tears were found, on the body of S, at the 12 o'clock, 1 o'clock, 5 o'clock and 6 o'clock positions, indicating that he had been sodomised. (x) S had duly identified the appellant as his oppressor. (xi) It had also been sought to be contended, on behalf of the appellant, that his duty hours ended at 8 PM whereas, even as per the statement of S, the assault, on him, took place after 11 PM. The appellant argued, therefore, that he had no access to S, at the time when the assault occurred. The learned ASJ has dismissed this submission, too, on the ground that S was a 7-year-old boy, living without any family support, and would have hardly learnt to see time on a watch. As such, it has been opined, in the impugned judgement, that it would have been very difficult for him to note the exact time of his sexual assault. The learned ASJ has held that the testimony, of S, to the effect that the appellant had assaulted him after 11 PM, had to be treated as an approximation, on the basis of the fact that the other boys in the Home had gone to sleep by then. Crl.A.252/2016 Page 31 of 69 30.2 Following on the above observations/findings, the learned ASJ held that (i)

the testimony of S was found credible and trustworthy, (ii) S had identified the appellant as his assaulter, (iii) the narration, by S, of the entire incident, was corroborated by the medical evidence and (iv) the appellant failed to establish his defence. 30.3 Resultantly, held the learned ASJ, the appellant was convicted for the offence punishable under Section 6 of the POCSO Act. 30.4 Given his finding that the appellant had molested a child, who had no parents, in a merciless manner, the learned ASJ held that the interests of justice warranted sentencing, of the appellant, to rigorous imprisonment for 10 years with fine of 5000/-, with default simple imprisonment of one month. He also awarded compensation, with which, needless to say, the appellant is not concerned.

31. The appellant is before this Court, in appeal, thereagainst.

32. Rival contentions:

32. 1 Mr. Anuj Kapoor, who had been assigned this case by the DHCLSC and advanced arguments, on behalf of the appellant, with commendable clarity and precision, submitted thus: (i) The charge, as framed by the learned ASJ against the appellant, was that, around a month before 13.02.2013, the appellant had, with his co-accused juveniles, committed CrI.A.252/2016 Page 32 of 69 penetrative sexual assault on S. No particular date was specified, in the said charge. The record indicated that S had been in the Ashiyana Boys Home till 11th January, 2003. As such, for the period during the month before 13.02.2013, S was housed in the premises of the CSI, where the appellant had no access to him. (ii) The letter, dated 4th February, 2013, written by Sheela Mann, as Project Director of the CSI to the CWC, made no mention of the appellant. (iii) The entire incident had come to light when the Times of India reported the matter on 13th February, 2013. This had resulted in cognizance being taken by this Court, and a Compliance Report being sought by it. The said Compliance Report (Ex. PW-1/A), too, did not name the appellant. (iv) This Compliance Report, too, established that S had been admitted in the Ambedkar Hospital on 11th January, 2013, from where he was taken to the CSI. As such, S had ceased to reside in the Ashiyana Boys Home w.e.f. 11th January, 2013. (v) As Dr. R.P. Singh was not examined, the condition of S, prior to his being referred to the Ashiyana Boys Home, was unknown.

Crl.A.252/2016 Page 33 of 69 (vi) Neither were the Superintendent or Welfare Officers examined, in this regard. (vii) The Order, dated 13th February, 2013, from the CWC to the SHO, PS Shahbad Dairy, which constituted the basis of the FIR, too, did not make any reference to the appellant. (viii) The order, dated 15th February, 2013, passed by this Court also specifically observed that the reference to the guard occurred only in the report of the HAQ Counsellor, while in the statement of the child, no such allegation has been made. (ix) The statement of S, recorded under Section 161 of the Cr PC on 7th March, 2013 (Ex. PW-7/B), too, made no reference to the appellant, or to his having assaulted or abused S in any manner. (x) Despite S having, in his statement under Section 161 of the Cr PC, named Bijender, as the person to whom he had revealed the commission of sexual assault upon him, no effort was made to record the statement of Bijender. (xi) Though, in cases of child sexual assault, the statement under Section 164 is invariably recorded immediately, in the present case, the FIR was registered on 13th February, 2003, and the statement of S, under Section 164 was recorded only on Crl.A.252/2016 Page 34 of 69 6th July, 2013. He points out that, even in the charge-sheet, which was drawn up on 19th June, 2013, there was no reference to the statement of S, under Section 164. (xii) While, in his earlier statement under Section 161, S merely used the ambiguous expression galat kaam, his statement under Section 164 was graphically descriptive, and described the incident, which had taken place, in lurid detail. (xiii) In such circumstances, the possibility of S having been tutored, could not be ruled out, especially as the charge sheet, in which the appellant had been implicated, had already been submitted before the court. It was essential, for the prosecution that the statement of S also implicate the appellant, so that there would be no discrepancy between the charge-sheet and the said statement. (xiv) The report of the Counsellor, from HAQ, was never exhibited, the Counsellor was never examined, and no reliance has been placed, even by the learned ASJ, on the said report. (xv) The HIV test, conducted on the appellant, had returned a negative result. Apropos the finding, of the learned ASJ, on this aspect, to the effect that sexual contact, with a victim carrying the HIV virus, did not necessarily imply that the virus would be transmitted, the MLC recorded that S had suffered anal tears and bleeding. Peno-anal contact had, therefore, occurred, between the appellant and his oppressor.

Had the Appellant CrI.A.252/2016 Page 35 of 69 been the assaulter of S, it was highly improbable that the HIV virus would not be transmitted to him. The testing took place nearly a month after the incident, so that, if the HIV virus had in fact been transmitted to the appellant, it would have shown up in his test results. (xvi) In his testimony during trial, S made no reference to any body part, but merely referred to the act committed on him as bhaka bhak. (xvii) The attendance register, relating to the attendance of staff in the second shift on 12th January, 2013 at the Ashiyana Boys Home, recorded the period, during which the appellant was in attendance, as 1200 to 2000 hours. The assault on S was, on the other hand, supposed to have taken place after 11 PM. (xviii) In his statement under Section 313 of the Cr PC, the appellant had categorically denied having committed sexual assault on S. (xix) In the attendance register, of the Ashiyana Boys Home for the months of December 2012, January 2013 and February 2013, the names of the three juveniles who assaulted S, i.e. Ashish, Pankaj and Naval, did not figure in the attendance sheets for the months of December 2012 and January 2013, but only figured in February 2013. The allegations of S having been sodomised by the said three boys, too, was, therefore, doubtful. CrI.A.252/2016 Page 36 of 69 (xx) Bijender, who had been named by S, in his statement under Section 164 of the Cr PC, was never produced in the witness box. The only person, from the Ashiyana Boys Home, who was examined, was Ms. Seema Malik, Welfare Officer, who squarely disclaimed personal knowledge of the case. (xxi) In her cross-examination, PW-7 Sheela Mann, acknowledged that S had never named the appellant in any of his statements, in her presence, and always disclosed the names of certain older boys as his assaulters, and not the appellant. She, in fact, clearly stated that she did not know how the name of accused has cropped up in the present case as the victim had always complained about the sexual assault by the older boys residing at the home. She reiterated, towards the conclusion of the deposition, that, though the child was in our custody from January to April, 2013 but he never named the accused throughout his stay as the offender. (xxii) The statement of the appellant, under Section 161 of the Cr PC, had been recorded on 14th February, 2013, whereas the depositions of Pankaj, Ashish and Naval, under Section 161, were recorded on 7th March, 2013. This delay had not been explained, especially as, during the month of February, 2013, the appellant was

residing in the same Ashiyana Boys Home, as the other three boys. CrI.A.252/2016 Page 37 of 69 (xxiii) Naval and Ashish, in their statements under Section 161 Cr PC, implicated the appellant in response to a question as to whether they used to do galat kaam with S. There was no occasion, for them to implicate the appellant, in response to such a question, thereby indicating that the implication was not genuine. (xxiv) In such circumstances, the learned MM, who had recorded the statement of S under Section 164, Cr PC ought to have been called to the witness box, especially in view of the fact that the victim S was only 7 years of age and his statement, under Section 164, was highly belated. (xxv) The learned ASJ, while recording the statement, during trial, of S, noted his demeanour, towards the appellant, before seeing him, but not after. (xxvi) Though a suggestion was put, to the appellant, during the course of the recording of his statement under Section 313 of the Cr PC, to the effect that, during his counselling session, S had stated that he had been sexually assaulted at the Ashiyana Boys Home, the psychiatrist, who had conducted the counselling, was also not examined. 32.2 Mr. Kapoor points out that the presumption of guilt, contained in Section 29 of the POCSO Act, applied only where the foundational facts were already proved. He relies, for this purpose, on *Prakash v. State*, CrI.A.252/2016 Page 38 of 69, 2016 SCC Online Mad 10692 and *Vishal @ Sagar Vasant Waghmare v. State of Maharashtra*, 2014 SCC Online Bom 1887. 32.3 In these circumstances, Mr. Kapoor would contend, the refusal, on the part of the learned ASJ, to his client, to cross examine S, was fatal to the proceedings. 32.4 While concluding his arguments, Mr. Kapoor submits that it was not his case that S had not been sexually assaulted, but that his client was not responsible for such assault. 32.5 Learned APP Mr. Farooqui submits, per contra, that no fault, whatsoever, can be discerned in the reasoning of the learned ASJ, and that the present case is not one which would call for interference by this Court. He submits that the position, in law, is trite, that primacy is to be accorded to the deposition of the victim of sexual assault, especially where the victim is juvenile, or of tender years, as such victims would not be prone to falsehood and manipulation. He submits that there is nothing to indicate that S bore any enmity towards the appellant, as would predispose him to falsely implicate the appellant, especially in such an abhorrent crime. The depositions of S, under Section 164 of the Cr PC,

and during trial, he submits, corroborated each other in all essential particulars, and, therefore, no occasion arose, for this Court to look further. Mr. Farooqui contends that the mitigating factors, to which Mr. Kapoor alluded, were not such as would entitle his client to acquittal, as, even otherwise, the evidence available against the appellant was sufficient to bring the offence home to him. Mr. Farooqui reiterated the reasoning of the learned ASJ, and exhorted this Court to dismiss the appeal. An Excursus 33. That the hapless innocent, S, was made victim of the inhuman crime of sodomy, while housed at the Ashiyana Boys Home, is indisputable and, to be fair to the defence, undisputed. The medical evidence, read with the testimonies, during trial, of the doctors who had expressed their opinions in the MLC of S, seen in conjunction with the oral deposition of S, under Section 161 and Section 164 of the Cr PC and, thereafter, during trial, make it clear that he had, indeed, been anally assaulted. Mr. Kapoor, too, did not labour this point, making it clear, during the course of his submissions, that he was acknowledging the fact that S had, indeed, been sodomised while in the Ashiyana Boys Home, and that his case was only that the crime could not be brought home to his client, who was innocent in that regard.

34. The task, before this Court in the present case is, therefore, only to determine whether, on the facts of the case and the evidence available on record, the Trial Court was justified in convicting the appellant under Section 6 of the POCSO Act, and sentencing him therefor.

35. Though it often goes unrecognised, it remains a somewhat paradoxical truism that a Court, adjudicating on an alleged criminal offence, and the culpability, or otherwise, of the person accused of having committed the said offence, never really ascertains whether, in fact, the accused is, or is not, guilty, irrespective of how the court may choose to word its verdict. All that the court can do - and all that it does - is to arrive at the conclusion to which the evidence, available before it, points, and to proceed, on the basis of such conclusion, to pronounce on the innocence, or guilt, of the accused, and to award sentence commensurate therewith.

36. The duty of the court is not, therefore, to determine, for itself - far less to satisfy itself - whether the accused had committed the crime or not. The duty of the court is to assimilate, analyse and evaluate the evidence available before it, and indicate the conclusion to which such evidence necessarily points. That conclusion, and that conclusion alone, has to guide the decision of the court that follows. Personal perceptions and predilections, regarding the accused, and his involvement, or otherwise, in the perpetration of the offence, have necessarily to take a backseat, if the rule of law is to be allowed to prevail.

37. Penological peregrinations, on the jurisprudential pathway of crime and punishment, travel the entire distance between deterrence and just desserts. On the ultimate goal of punishment and sentencing, the judicial debate has yet to reach its terminus ad quem. The rising incidences of crime, as well as the increasing brutality of crimes as witnessed in recent times, have persuaded courts, lately, to somewhat read down the once sanctified theory that it is better to acquit ten guilty persons, than to convict one innocent. The choice, now, is regarded as Hobson's; and rightly - the principle, metamorphosed as on date, is that it is as impermissible, to acquit one guilty person, as it is, to convict ten innocent persons.

38. One principle which has, however, stood the test of time, is that the enormity of the crime cannot be permitted to influence the mind of the court, while evaluating the evidence before it. The court cannot permit itself to be carried away by the theory that allowing serious crimes to go unpunished, is potentially likely to embolden prospective criminals, or increase the crime graph in society. As a sociological fact, this may undoubtedly be true. If the commission of ghastly crimes does not result in the conviction of the criminal, the signal that is sent, to like-minded psychosocial deviants, may possibly be adverse to all-round societal interest. While such a consequence is not one that any court, on whom the duty to ensure the propagation of a just and equitable social order is cast, can afford to overlook, that cannot permit any authority, which acts judicially, or even quasi-judicially, to embark on a quest to find, as it were, the neck which best fits the noose. Conviction can follow only on a finding of guilt, and a finding of guilt can be arrived at only if the evidence, clearly and unambiguously, points towards it, and



nowhere else. The fact that the accused, before it, is the person who may be most likely to have committed the crime, of which the court is sensitised in any particular case, can never be the basis to return a finding of conviction against her, or him. If such a finding has been returned, by a lower judicial authority, it is the bounden duty of the appellate court to reverse it. If, Crl.A.252/2016 Page 42 of 69 as a consequence, the one person, who was found guilty of having committed the crime, and sentenced therefor, is set free, resulting in the offence going unpunished, so be it. That is the command of the law, and that alone can be the command of the law in a society which purports to be governed by the rule thereof. The court cannot, at that point of time, allow itself to be swayed by the possible consequences, sociologically speaking, of its decision. The conviction of the person who was found guilty of committing the crime, and the sentencing of such person, may, undoubtedly act as a deterrent, to others predisposed towards committing such offences; equally, the acquittal of such person, or the reversal of conviction, might embolden such possible offenders. That is entirely irrelevant.

39. The reason for this somewhat lengthy excursus, before approaching the issue at hand, is only because the crime, in the present case, is undoubtedly repulsive and abhorrent in equal measure. Anal assault, of a 7-year-old boy, is not an offence which can be tolerated in any society, howsoever primitive its evolution might be. Neither is it a crime which should be allowed to go unpunished. The learned ASJ has, after analysing the evidence, arrived at the conclusion that the charge of having committed the offence had been brought home to the appellant, and has proceeded, therefore, to convict him. This Court, however, is seized of the appeal, by the convict, thereagainst. If this Court holds in favour of the appellant, the result would be that the appellant would stand acquitted, but the crime would go unpunished. Can this factor, at all, be permitted to guide the exercise, by this Court, Crl.A.252/2016 Page 43 of 69 of its appellate wisdom?. The answer, in my view, has resoundingly to be in the negative.

40. With that approach in mind, I turn to the evidence. Analysis 41. That S was a victim of sodomy, at the premises of the Ashiyana Boys Home, as already noted by the hereinabove, cannot be disputed. The question to be asked is, therefore, whether the evidence unmistakably points at the appellant being the perpetrator of

the said offence.

42. It would be advantageous to proceed, chronologically, once again, through the events, as they transpired in the present case.

43. On 13th December, 2012, S was admitted to the Ashiyana Boys Home, from where he was shifted, to the Hospital on 11th January, 2013 and, thereafter, to the CSI on 15th January, 2013, on being detected HIV positive.

44. The spark that ignited the flame, in the present case, may be said to be the letter, dated 4th February, 2013 supra, addressed by the CSI to the CWC, which refers to the disclosure, by S, of the fact that he had been sexually abused at the Ashiyana Boys Home. The communication, however, specifically mentions that the said abuse had occurred, as per the disclosure by S, at the hands of the children Crl.A.252/2016 Page 44 of 69 of the Ashiyana Boys Home. This aspect is underscored in the last sentence of the said letter, which exhorts the Chairperson of the CWC to take further action to stop such kind of activities among children. It is absolutely clear, therefore, that, till that stage, no complaint had been made, by S, regarding the involvement of the appellant, in any form of sexual abuse perpetrated on him.

45. This aspect is again reflected in the corresponding communication, dated 13th February, 2013 supra, by the CWC to the SHO, PS Shahabad Dairy, which again refers to the allegation, by S, that he was sexually abused and harassed by the children of Ashiyana Boys Home. Again, there is no mention of the appellant, or anyone other than the children of the Ashiyana Boys Home, having ever abused S.

46. In this context, it becomes necessary to refer, at this stage, to the testimonies of PW-1, Kamla Lekhwani, Chairperson of the CWC, and PW-7 Ms Sheela Mann, Project Director of the CSI during trial, especially of the latter.

47. PW-1 Kamla Lekhwani reiterated the fact that the CSI had informed her of the complaint, of S, regarding sexual abuse by 3 boys namely Pankaj, Ashish, Naval and security guard Amardeep. The communication, from the CSI to the CWC,

dated 4th February, 2013, already stands extracted, as well as referred to, in detail, hereinabove, and it is clear, from a reading thereof, that there is no reference, at any point, to the appellant as being one of the abusers of Crl.A.252/2016 Page 45 of 69 S. PW-1 was specifically questioned, in this regard, by learned counsel appearing for the appellant before the learned ASJ, and the query, as well as its response thereto, by PW-1, merit reproduction, as under: Question:-

"Is it not correct that the name of accused Amardeep is not mentioned in your compliance report Ex. PW-1/A, as an offender for sexually assaulting the victim S?. Answer:-

"My compliance report may be perused for the same. A reading of the Compliance Report, dated 22nd April, 2013 supra, as submitted by PW-1 Kamla Lekhwani, reveals that the reference, therein, to the appellant, is only in connection with the statement alleged to have been made, by him, to the HAQ Counsellor, and nowhere else.

48. PW-7 Sheela Mann, of CSI was, however, much more categorical in her deposition. Her testimony in cross-examination deserves to be reproduced, here, thus: It is correct that in my letter Ex. PW-7/A I have not named the victim nor any description of child has been given in the said letter. It is correct that even the date of the reference of the child to our NGO is not mentioned in Ex. PW-7/A. It is correct that the victim never named the supervisor of the Ashiyana Boys Home as a defender or as the person who committed sexual assault on him. It is also correct that the name of accused never appeared in the statement of victim Ex. PW-7/B in my presence. It is correct that the victim always disclosed the role of some older boys who sexually assaulted him and never named the accused is an offender. We even tested the offenders named by the victim namely Naval, Ashish and Pankaj for HIV but they all tested negative for the test. I do not know how the name of Crl.A.252/2016 Page 46 of 69 accused has cropped up in the present case as the victim had always complained about the sexual assault on him by the older boys residing at home. The child was in our custody from January to April, 2013 but he never named the accused throughout his stay as the offender.

(Emphasis supplied) 49. The repeated expression of surprise, by PW-7 Sheela Mann, at the appellant having been included as an accused in these proceedings, merits judicial cognizance.

50. The FIR, which came to be registered, consequent on receipt of the said communications, on 13th February, 2013, again makes no reference, whatsoever, to the appellant, but highlights, again, the sexual abuse suffered, by S, at the Ashiyana Boys Home, by its juvenile inmates.

51. The MLC of S, drawn up consequent to his examination, by Dr. Vishal Chaudhary, SR Surgery (PW-16) and Dr. Vijay Dhankar, Head of Forensic Medicine, recorded that S was found, on local examination, to have suffered dilatation of the anal canal with multiple anal tears, of which at least one was found to be mucosal, meaning that the underlying tissue had been penetrated. These reports were proved during trial, by way of oral evidence, which was not subjected to cross-examination, despite grant of opportunity. They have, therefore, to be treated as sacrosanct.

52. This aspect is significant, for the reason that, when the appellant was tested for HIV, on 19th February, 2013, the test was found to be Crl.A.252/2016 Page 47 of 69 non-reactive; in other words, the HIV virus was not found to be present in the serum of the appellant. Given the fact that mucosal tears were found to be present in the anal region of S, the possibility of non-transmission of the HIV virus would, normally, be remote, especially as the allegation of the prosecution, founded on the subsequent depositions of S, is that sexual assault, by the appellant on S, took place, not once, but on multiple occasions. Unfortunately, the learned ASJ has not noticed this aspect of the matter, while returning a finding, which can be characterised as no more than his ipse dixit, that it is not necessary that the HIV virus would, in every case of sexual contact, be transmitted from partner to partner. In so holding, the learned ASJ has ignored the above two facts, apparent from the evidence, i.e., firstly, that S had suffered mucosal tears in the anal region and, secondly, that the appellant was alleged to have repeatedly sexually assaulted S. Sexual contact is, it is well known, the primary mode by which the HIV virus is transmitted.

53. The statement of S, under Section 161 of the Cr PC, recorded on 14th February, 2013, again, makes no reference whatsoever to the appellant. To a query as to the perpetrators of galat kaam on him, the response, of S was, clearly and unequivocally, to name the three juveniles Ashish, Pankaj and Naval. It was further deposed, by S, that these three boys did galat kaam with him many times. Again, there is no reference, in the said statement, to the appellant.

54. In the said statement, S specifically named Bijender as the person, in the Subash kutir, to whom he had unburdened himself . On CrI.A.252/2016 Page 48 of 69 13th June, 2013, PW-14 SI Satish Kumar sought information, from the Superintendent of the Ashiyana Boys Home, inter alia regarding apparently following on the said lead, PW-14 Satish sought, from the Superintendent of the Ashiyana Boys Home, the details of Bijender, which were provided, by the Superintendent, vide letter dated 15th June, 2013(supra). It appears, from the record that, despite being thus apprised of the whereabouts of Bijender, he was not co-opted in the proceedings, and was never cited as a witness; neither, apparently, was the statement of Bijender recorded. Learned counsel appearing for the appellant, Mr. Kapoor, contends - and I am inclined to agree therewith - that the total exclusion, from the present proceedings, of the efforts made, if any, to trace Bijender or, if he had been so traced, to disclose the outcome thereof, the statement, if any, recorded from the said Bijender or, if no such statement was recorded, the reason for not doing so, necessarily invites an inference adverse to the prosecution.

55. The first reference, to the present appellant, on the records of this case, is to be found in the order, dated 15th February, 2013 (supra), passed by this Court in WP (CrI) 246/2013. The said order, again, notes that the reference, to the appellant, was to be contained only in the report of the HAQ Counsellor. The exact nature of the said reference, to the appellant, is also unclear, as the order of this Court merely notes that there is a reference even to one guard in the HAQ Councillors report while in the statement of the child, no such allegation has been made. It was apparently for this reason that this CrI.A.252/2016 Page 49 of 69 Court directed that the said allegation, as contained in the report of the HAQ Counsellor, be also investigated.

56. Steps were, apparently, taken in this direction, as is reflected in the supplementary charge-sheet, filed in the present case on 9th July, 2013, which notes the fact that the statement of the representative of the HAQ Centre had been recorded. Why, then, has the said statement, too, been kept out of the evidence, by the prosecution in the present case?. Again, there is no answer, forthcoming, to this query, legitimately raised by Mr. Kapoor, from the prosecution - a lacuna which must necessarily, yet again, resulting in an adverse inference, detrimental to the prosecution.

57. Proceeding, now, to the statements of Ashish, Pankaj and Naval, which were recorded on 7th March, 2013, the prosecution relies on the fact that these witnesses - who were named by S as being his assailants, in his disclosure to the CSI - implicated the appellant. Besides the fact that the said three boys were never co-opted as witnesses by the prosecution during trial, thereby resulting in their statements going completely untested and, consequently, unreliable as evidence against the appellant, a significant objection, to the said statements, as legitimately raised by Mr. Kapoor on behalf of the appellant, and to which the learned APP had no response, was the unexplained delay in the recording of the said statements, when the statement of S, under Section 161, already stood recorded on 14th February, 2013. Mr. Kapoors objection, to the effect that the inclusion, of the name of the appellant, in the depositions of the said Crl.A.252/2016 Page 50 of 69 boys, necessarily requires to be attributed to the delay in the recording of their statements, during which period this Court had already noted, in its order dated 15th February, 2013, that the appellant was also being treated as an accused, merits serious consideration.

58. Equally, there is substance in Mr. Kapoors submission regarding the manner in which the appellant was named by these three boys. It may be noted, here, that, in fact the appellant was named as an assaulter, of S, only by Naval and Ashish, and not by Pankaj. Pankaj only deposed to the effect that he had seen the appellant going towards S at night. Naval and Ashish, however, unquestionably alleged, in their statements under Section 161 of the Cr PC, that the appellant had done galat kaam with S, albeit impliedly. The statements of Naval and Ashish already stand reproduced herein above. As Mr. Kapoor rightly points out, a reading of the said

statements reveals that Naval and Ashish named the appellant even without having been asked any question in that regard. The query put to them was as to whether they had done galat kaam with S. Ordinarily, it would be expected that this query would be answered either in the negative or in the affirmative. Naval and Ashish, however, first answered the query in the negative and, thereafter, volunteered to depose that they had seen the appellant going towards S. Such volunteered information is clearly unusual, especially for children, and may legitimately give rise to an inference that they were prompted, or tutored, to so state. Given the fact that these were statements recorded under Section 161 of the Cr PC, while in police custody, and that Naval and Ashish (or, for that matter, Pankaj) were not co-opted as witnesses on behalf of the CrI.A.252/2016 Page 51 of 69 prosecution, it is, in my opinion, unsafe to rely on the said statements, of Naval, Ashish or Pankaj, as evidence against the appellant.

59. Regarding child witnesses, the Supreme Court observed thus, in *Suryanarayana v. State of Karnataka*, (2001) 9 SCC129 6. This Court in *Panchhi v. State of U.P.* [(1998) 7 SCC177:

1998. SCC (Cri) 1561]. held that the evidence of the child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus an easy prey to tutoring. The evidence of the child witness must find adequate corroboration before it is relied upon, as the rule of corroboration law (vide *Prakash v. State of M.P.* [(1992) 4 SCC225:

1992. SCC of Kerala [1993 Supp (3) SCC667:

1993. SCC (Cri) 1084]. ; *Raja Ram Yadav v. State of Bihar* [(1996) 9 SCC287:

1996. SCC (Cri) 1004]. ; *Dattu Ramrao Sakhare v. State of Maharashtra* [(1997) 5 SCC341:

1997. SCC (Cri) 685]. ).

7. To the same effect is the judgment in *State of U.P. v. Ashok Dixit* [(2000) 3 SCC70:

2000. SCC (Cri) 579]. . ; Baby Kandayanathil v. State (Cri) is of practical wisdom than of 853]. (Emphasis supplied) 60. The following passages, from Ganesh Bhavan Patel v State of Maharashtra, (1978) 4 SCC371 too, merit notice, in this regard: 15. As noted by the trial court, one unusual feature which projects its shadow on the evidence of PWs Welji, Pramila and Kuvarbai and casts a serious doubt about their being eyewitnesses of the occurrence, is the undue delay on the part of the investigating officer in recording their statements. Although these witnesses were or could be available for examination when the investigating officer visited the scene of occurrence or soon thereafter, their statements under Section 161 of the Cr PC were recorded on the following day. Welji (PW3 was examined at 8 a.m., Pramila at 9.15 or 9.30 a.m., CrI.A.252/2016 Page 52 of 69 and Kuvarbai at 1 p.m. Delay of a few hours, simpliciter, in recording the statements of eyewitnesses may not, be itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. A catena of circumstances which lend such significance to this delay, exists in the instant case.

16. The first of these circumstances is that no FIR appears to have been recorded in this case before 3 a.m. of the morning of November 30. The prosecution have treated the statement of Ravji, recorded in the course of investigation, as the FIR Police Sub-Inspector Patil who was in-charge of the Police Station at the relevant time, wanted to have it believed that he had recorded this statement of Ravji at 8.30 p.m. on November 29. But no less a witness than Ravji, himself, gave a direct lie to Patil on this point. Ravji testified in unmistakable terms that his statement was recorded in the Police Station at 12 midnight or 1 a.m. after the completion of the Panchnama of the scene of offence. This Panchnama, according the investigators at 12.15 a.m., and immediately thereafter, the Panchnama in regard to the production of the bloodstained clothes of Accused 1 was prepared and completed at about 12.45 a.m. Ravji further stated that he might have signed his statement recorded by the Police, at 3 a.m.



17. The trial court accepted the evidence of Ravji inasmuch as he stated that his statement - which was treated as FIR - was recorded by the police between 12 midnight and 1 a.m. and was completed when he signed it at about 3 a.m. The learned Judges of the High Court have disbelieved Ravji on this point, for the reason that he is a labour boy about 18 years old, having no sense of time, and have preferred to accept the ipse dixit of SI Patil that Ravji's statement was recorded at 8.30 p.m. With respect, the reasons given by the High Court for brushing aside the testimony of Ravji on this point, appear to us, manifestly unsustainable. The very fact that Ravji was a labour boy, aged about 18, far from being a reason for doubting his veracity on this point, was a guarantee of the truth of his version. He was an unsophisticated witness who was not fully aware or posted the prosecution, was completed by to CrI.A.252/2016 Page 53 of 69 the in point of time before introduced by twists and distortions about the investigating officer. He therefore, unwittingly blurted out the truth on this point. As against him, SI Patil, besides being highly interested in the prosecution, was supposed to be aware that in order a statement should be treated as FIR, it must be recorded first the commencement investigation.

18. In this connection, the second circumstance, which enhances the potentiality of this delay as a factor undermining the prosecution case, is the order of priority or sequence in which the investigating officer recorded the statements of witnesses. Normally, in a case where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence over the evidence of other witnesses. Here, the natural order of priorities seems to have been reversed. The investigating officer first recorded the statement of Ravji, in all probability, between 12.45 and 3 a.m. on the 30th, of Constable Shinde at 4 a.m. and thereafter of Welji, Kanjibhai (PW7 Santukbai (PW6, Pramila, and Kuvarbai, between 8 a.m. and 1 p.m.

19. Thus considered in the light of the surrounding circumstances, this inordinate delay in registration of the FIR and further delay in recording the statements of the material witnesses, casts a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story. 61. Equally, it cannot be overlooked that Naval,

Pankaj and Ashish were co-accused in the offence of committing sexual assault upon S - indeed, they were the only original accused in the said offence - and have, therefore, a vital interest in ensuring that the blame for having committed the said offence was deflected to another person. The evidentiary value of their depositions, under Section 161 of the Cr PC, stands substantially eroded on that ground as well. CrI.A.252/2016 Page 54 of 69 62. While, in the interests of examining the evidence in a holistic manner, I have deigned to refer to the statements, of Naval, Ashish and Pankaj, recorded under Section 161 of the Cr PC, the statements themselves stand statutorily excluded from being admitted in evidence, by Section 162 thereof, save and except in accordance with the proviso to the said provision, which would apply only where the person/persons giving the statements appeared to tender evidence during enquiry or trial. Inasmuch as none of the above named three boys, i.e. Naval, Pankaj, Ashish, was cited as a prosecution witness, this eventuality never arose.

63. The spectre of delay is seen to plague the statement, under Section 164 of the Cr PC, of S, just as much as it does the statements, under Section 161 of the Cr PC, of Naval, Ashish and Pankaj. Despite the fact that S had remained in the care of custody of the CWC throughout the said period, his statement, under Section 164 of the Cr PC, was never recorded, till 6th July, 2013. This, Mr. Kapoor correctly points out, was nearly a month after the filing of charge- sheet, by the prosecution, before the learned CMM, on 19th June, 2013. The appellant already stood indicted as an accused in the said charge-sheet. Mr. Kapoor submits that, in these circumstances, there could possibly be no question of the statement of S recorded, nearly 20 days thereafter, under Section 164 of the Cr PC, not naming the appellant as one of his offenders.

64. There is no explanation forthcoming, throughout, for the delay in recording of the statement, of the appellant, under Section 164 of CrI.A.252/2016 Page 55 of 69 the Cr PC. Specific queries, in this regard, were posed to PW-14 SI Satish Kumar, as well as to PW-15 SI Manoj Kumar, in their respective cross-examinations by learned counsel appearing on behalf of the appellant. PW-14 SI Satish Kumar responded by stating that he cannot tell any specific reason that why the statement of victim could not be recorded earlier to 06.07.2013. In a similar

vein, PW-15 SI Manoj Kumar, too, admitted that he could not give any explanation as to why the statement U/S164Cr PC of the victim S could not get recorded while the investigation was with me.

65. In the absence of any reasonable explanation for the delay in recording the statement of S, under Section 164 of the Cr PC, the court is constrained to draw an inference that the delay was deliberate. Significantly, the learned MM, who recorded the statement of S under Section 164, was also not co-opted as a witness in the proceedings, by the prosecution. Mr. Thakur has contended that the inculcation, of the appellant, by S, in his statement under Section 164 of the Cr PC, was obviously necessary, as, nearly a month prior to the date of recording of the said statement, the appellant had been named as an accused, in the charge-sheet, which was filed on 19th June, 2013. The suggestion of Mr. Kapoor is, therefore, that the prosecution ensured that the involvement of the appellant, in the sexual assault of S, specifically figured in the Section 164 statement of S. Else, submits Mr. Kapoor, there could be no reason why, in his original deposition under Section 161 of the Cr PC, as well as in the account of the incident, as related by S to the members of the CSI and the CWC, the name of the appellant never figured. The inclusion CrI.A.252/2016 Page 56 of 69 of the name of the appellant, by S, in his Section 164 statement, Mr. Kapoor would point out, was a definite improvement on the earlier versions of the incident, as related by S, whether under Section 161 of the Cr PC, or extra-judicially to the CSI and the CWC, and the reason for this improvement was, according to him, the delay in recording of the statement, which permitted the moulding thereof, to suit the case postulated by the prosecution in the charge-sheet filed by it in the proceedings. In the absence of any justification, forthcoming, for the delay in recording of the statement of S under Section 164 of the Cr PC, this submission merits acceptance.

66. Proceeding, now, to the charge, as framed on 28th April, 2014, it is seen that the allegation, against the appellant, therein, was that around a month before 13.02.2013, at the Ashiyana Boys Home, he, along with his co-accused, committed penetrative sexual assault on S. It is not disputed factual position that, on 11th January, 2013, S left the Ashiyana Boys Home for good, and did not return to the said premises, thereafter. In view thereof, it becomes questionable as

to how, around a month before 13th February, 2013, the appellant could have committed penetrative sexual assault on S, given the fact that, more than a month prior to 13th February, 2013, S had left the Ashiyana Boys Home, first for the Hospital and, thereafter, for the CSI, and it is nobodys case that the appellant had access to S, or that he committed any kind of sexual assault, on S, at either of these premises. Even if one were to assume, on the basis of the use of the word around, in the charge, as framed, that the incident could have taken place a day or two prior to 13th February, 2013, the question that Crl.A.252/2016 Page 57 of 69 then arises would be as to how the appellant could be alleged to have repeatedly sexually assaulted S, on several occasions. The charge, as framed, therefore, does not harmonise with the case being sought to be set up, against the appellant, by the prosecution.

67. That takes the court to the evidence, led before the learned ASJ.

68. As has already been noted hereinabove, S had, in his statement under Section 161 of the Cr PC, as well as in the disclosures made by him to the members of the CSI and the CWC, only alleged sexual assault having been committed, on him, by Naval, Vishal and Pankaj. There was no reference, in any of the said versions of the incident, as recited by S, to the appellant being one of his assaulters. As against this, in his statement, recorded under Section 164 of the Cr PC, S alleged that the appellant used to insert his penis in his anus, and had done so on several occasions, resulting in S suffering bleeding from the anal area. In his evidence as recorded during trial, however, S alleged that the three boys, as well as the appellant, had kissed him on his lips, and established peno-anal contact with him, which continued repeatedly for some days. Significantly, in cross-examination, S deposed that these incidents used to take place after 11 PM, in the same room in which he used to sleep along with 13 other children. He also confirmed that no outsider was allowed to enter the Childrens Home. (This also stands vouchsafed by the testimony, during trial, of PW-19 who deposed, on solemn affirmation, that the appellant, left the premises of the Ashiyana Boys Home at 8 p.m., and he, could not have entered again without making Crl.A.252/2016 Page 58 of 69 an entry at the gate. It is nowhere alleged, by the prosecution, that any such entry was made.) Further, in cross-examination, S deposed that, when he was being

allegedly sexually assaulted by the appellant, he shouted in pain, but that all the children, except one, continued to sleep. Of the one child who, according to his deposition, awoke at the time, he stated that he did not remember the name.

69. A court, examining evidence, is entitled to take judicial notice of allegations which, on their face, appear totally unrealistic and improbable. It is difficult for this Court to accept that, night after night, the appellant managed to sneak into the admittedly windowless room where S was sleeping, unnoticed and sodomise him, in such a manner that none of the other boys would awaken, despite S crying out in pain. There are far too many imponderables, in this situation, for it to command, or even commend, the confidence of the court. If the Ashiyana Boys Home was a place into which outsiders were not allowed to enter, how did the appellant manage to enter the room, where S was sleeping, night after night, especially in view of the fact that the room did not even have a window?. Having done so, how could the appellant manage to commit sodomy on S (which would, naturally, involve, among other things, disrobing as well as exposing himself as well as S), without any of the other children coming to know about it?. If S cried out in pain, during the assault, why did none of the other children, save one (who, too, remains unnamed), awaken?. How did the appellant leave the premises, after committing the act?. And, if all this were so, why did S remain completely silent, CrI.A.252/2016 Page 59 of 69 regarding the details of the incidents, till the recording of his statement during trial?.

70. Unfortunately, the learned ASJ rejected the request, of learned counsel appearing for the appellant, to be permitted to question S. While the court is, no doubt, required to be alive to the sensitivities, and sensibilities, of child witnesses, especially those who have suffered sexual assault, it is not permissible for the court to turn a completely blind eye to the person accused of the crime. In a case such as the present, where the versions of the incident, as related by S, firstly under Section 161 of the Cr PC, thereafter under Section 164 of the Cr PC and, thereafter, during trial, were graphically different from each other, with the story not only being improved stage by stage, and especially where the said testimony bristled with improbabilities and, unless explained otherwise, even impossibilities, the court ought not to have completely denied, to the appellant, the opportunity to

test the veracity of the evidence of S, as put forward during trial. The court could very well have taken steps to guide, even monitor, the manner in which S would be cross-examined; it was not fair, however, on the part of the learned ASJ, to deny, to the appellant, an opportunity to do so and, thereafter, to use the untested evidence of S to convict the appellant. Where the life and liberty of the individual is involved, the principles of natural justice, and the requirement of following due process and fair play, are elevated to a very high pedestal. Not only, unfortunately, as the learned ASJ impermissibly denied, to the appellant, the opportunity to test the evidence of S; he has also failed to take stock of the various CrI.A.252/2016 Page 60 of 69 inconsistencies in the deposition of S, or the inherently unbelievable nature thereof, especially seen in the light of his cross-examination.

71. Satyam eva jayate, remains our constitutional credo. The truth must always triumph, and, in its unending quest for the truth, no stone can be permitted to be left unturned by the Court. Lame and arbitrary observations; such as the assumption by the learned ASJ in the present case, that S, being 7 years of age, must not have been able to read the time correctly, and that, therefore, the assertion by S, that the assaults took place after 11 p.m. can find no place in the decision of a judicial authority, far less in a decision on which the life and liberty of a citizen would hinge. The allegation being that the appellant committed repeated anal assault on S, it was totally impermissible for the learned ASJ to have returned a finding of guilt, without even ascertaining, as and when the offence occurred. The situation, in the present case, remains a classic, and unsolved locked room mystery, even while the appellant stands convicted and sentenced therefor. This is entirely impermissible in law. Observations have been returned, both by the learned MM who recorded the statement, of S under Section 164 of the Cr PC, as well as by the learned ASJ who recorded his statement during trial, that S was very scared at hearing the name of the appellant, and managed to relate his version of the incident only with great effort. It has also been recorded that, on being asked to identify the appellant, S started crying and stated that he did not want to see him. The learned ASJ has treated these reactions, of S, as manifesting fear, in his mind, towards the appellant. Such an assumption would, in my view, be totally unjustified. The learned CrI.A.252/2016 Page 61 of 69 MM, as well as the learned ASJ have, I am constrained to hold, somewhat transgressed

their jurisdictions, in thus psychoanalysing S. It was always open to query S, in this regard, and ask him whether he was actually scared of the appellant, or not. Not having chosen to do so, it was not open, either to the learned MM, or to the learned ASJ, to presume that S was in fear of the appellant. The reactions of S, to which the learned MM, and the learned ASJ, have alluded, could equally be on account of the fact that he was being asked to falsely implicate the appellant, for an act which he had never committed. If that were the position - as the defence would urge - it would imply that pressure was being exerted, on S, to depose falsely against the appellant, which could also provoke the reactions to which the learned MM and the learned ASJ have referred. I am not, therefore, prepared to subscribe to the view, of the learned ASJ, that these reactions, as manifested by S, were indicative of the appellant having assaulted him, in the light of the facts of the present case.

72. I may also observe, here, that the manner in which the investigation proceeded, in this case is profoundly unsatisfactory. Several persons, among them the Superintendent of the Ashiyana Boys Home, Dr. R.P. Singh (in whose custody S was, before being shifted to the Ashiyana Boys Home), Ss sister, and the psychiatrist who counselled S, were never co-opted as witnesses. Nothing is forthcoming, regarding Bijender and his whereabouts. The statement of Shahbaz Khan, the counsellor at HAQ was, apparently, recorded, but has been withheld from these proceedings. As a result, the Court CrI.A.252/2016 Page 62 of 69 is deprived of access to vital material, which could have thrown light on the controversy before it.

73. An Overview 73.1 A panoramic view of the evidence discloses the following: (i) The communication, dated 4th February, 2013, from the CSI to the CWC, stated that, during counselling of S at the CSA, he had alleged sexual abuse by the children of the Ashiyana Boys Home. This was also reflected in the consequent order, dated 13th February, 2013, by the CWC to the SHO which, too, referred to S having been sexually abused and harassed by the children of Ashiyana Boys Home. Ms Sheela Mann, of the CWC, categorically deposed that S had never complained against the appellant, and expressed surprise regarding the inclusion, of the appellant, as an accused in the case. She was categorical that the

allegation, of S, was that he had been sexually assaulted by Naval, Ashish and Pankaj alone. (ii) Though the MLC of S disclosed multiple anal tears, of which at least one was mucosal in nature, and despite the allegation, against the appellant, being that he had repeatedly sodomised S, on several occasions, the appellant was detected as not carrying the HIV virus. CrI.A.252/2016 Page 63 of 69 (iii) In his statement, under Section 161 of the Cr PC, recorded about a month and a half after the incident, and a day after the registration of FIR in respect thereof (which did not name the appellant), S, too, did not name the appellant, but alleged that Ashish, Pankaj and Naval had done galat kaam with him, many times. Thereafter, in his statement recorded under Section 164 of the Cr PC, about 20 days after the filing of charge-sheet - which alleged that the appellant, too, was one of the assaulters of S - S alleged that the appellant used to sodomise him, and did so on several occasions. In his examination-in-chief during trial, S again alleged that he had been sodomised by the appellant, on repeated occasions. Between the recording of the statement of S under Section 161, and under Section 164, of the Cr PC, therefore, the appellant was roped in, as one of the assaulters of S. (iv) There was no explanation for the unconscionable delay in the recording of the Section 164 statement of S, despite his having remained in the custody of the CWC and, later, in the Satyakam Child Care Home at Meerut. SI Satish Kumar and SI Manoj Kumar, when questioned in this regard during cross examination, candidly admitted that they had no explanation for the said delay. Significantly, however, as a consequence of the said delay, the allegation, in the charge-sheet, to the effect that the appellant had also sexually assaulted S, found corroboration in the Section 164 statement of S. CrI.A.252/2016 Page 64 of 69 (v) According to the testimony of S, during trial, the repeated assaults, by the appellant on his person, took place after 11 PM, when the thirteen other boys, who shared the room with S, had gone to sleep. Though the room had no window, and though no outsider was allowed to enter the premises, the appellant, apparently, managed, not only to enter the room where S was sleeping, but also to establish peno-anal contact with him, resulting in S crying out in pain, while all the other children, save one - whose name S did not remember - continued to sleep. On each occasion, apparently, the appellant managed to enter the room, and flee from the room, after committing sexual assault on S, without anyone being alerted. This,



despite the categorical averment, by PW-10 Seema Malik, of the Ashiyana Boys Home, to the effect that, after leaving duty at 8 PM, it was not possible for the security guard to re-enter without making an entry in the arrival register entry gate. No such entry has ever been alleged to have been made by the appellant. (vi) The request, of learned counsel appearing for the appellant, to question S regarding the veracity of his testimony, was declined by the learned ASJ, only reserving liberty, to the appellant, to make submissions thereon at the time of arguments. As such, the evidence of S went untested. (vii) The Compliance Report, submitted by PW-1, Kamla Lekhwani, made a reference to the fact that the report of the HAQ Counsellor referred to an allegation having been made by CrI.A.252/2016 Page 65 of 69 S, during his interaction with the Counsellor, to the effect that the appellant had also participated in sexually assaulting him. Neither, however, was the said report of the HAQ Counsellor exhibited in the proceedings, nor was the Counsellor himself co-opted as a witness for the prosecution, despite a specific statement having been made, in the supplementary charge-sheet filed by the prosecution, to the effect that the statement of the Counsellor had been recorded. For reasons best known to the prosecution, the said statement has been withheld from evidence. (viii) The only other admissible evidence, in incriminating the appellant, was in the form of the Section 161 statements of Pankaj, Naval and Ashish. These boys were, however, never co-opted as witnesses. Apart from the fact that their statements, having been recorded under Section 161 of the Cr PC, could not have been used against the appellant, the statements themselves disclosed that they had volunteered to depose that they had seen the appellant moving towards S, without being asked any question in that regard. This, again, is contradictory to the deposition, of S, under Section 164 of the Cr PC and, later, during cross examination in trial, to the effect that, except for one boy, all other children were asleep when the act of sexual assault was committed by the appellant. (ix) Though S, in his statement under Section 164 of the Cr PC, specifically named Bijender as the one person to whom he had disclosed the fact of his having been sexually assaulted, CrI.A.252/2016 Page 66 of 69 and though the details of Bijender were obtained by the I/O, the proceedings are completely silent, regarding the outcome of the investigations, if any, conducted with respect to Bijender. No statement of Bijender has been exhibited in evidence, and Bijender was not co-opted as a

witness for the prosecution, either. This, again, is a serious lacuna, giving rise to a reasonable apprehension that the evidence of Bijender was not in favour of the prosecution. (x) The learned ASJ proceeded to convict the appellant, without even allowing him an opportunity to test the evidence of S, tendered during trial, by questioning him in that regard. S was, at that time, 9 years of age and, his competence to testify having been established by the learned ASJ, the refusal, on his part, to permit the appellant to question him, in the opinion of this Court, constitutes a fatal infraction of the principles of natural justice and fair play. 73.2 The testimony of a victim of sexual assault is entitled, it is trite, to great weight, and can legitimately constitute the sole basis to return a conviction, against an accused. Well, however, as the victim is a child, the court is required to be mindful of the susceptibility, of the evidence of the child, to be influenced by extraneous factors. The possibility, of the child having been tutored - to employ a somewhat uncharitable expression - cannot be entirely ruled out. Where statements have been recorded, from the child, at different points of time, and they are found not only to be mutually inconsistent in relevant particulars, the court is required to tread very softly and, CrI.A.252/2016 Page 67 of 69 ordinarily, a finding of conviction may not be returned solely on the basis of such evidence. At the very least, the accused is entitled to an opportunity to test the evidence; more so where the evidence paints a picture, or relates a story which suffers from various imponderables and improbabilities, and is otherwise difficult to believe. A conviction, which relies solely, or even principally, on the untested evidence of such a child witness - even if the child be himself, or herself, the victim of the offence - may stand vitiated even on that ground. In the considered opinion of this Court, in the present case, it in fact, does.

74. If one were to exclude, from consideration, the evidence of S, as well as the three co-accused juveniles Naval, Ashish and Pankaj, the present case is reduced to one which is dependent, for its sustenance, on circumstantial evidence. In order for circumstantial evidence to constitute the basis of conviction, it has necessarily to be established that the circumstances are such as would create an unbroken chain, which leads only to the conclusion that the accused is guilty of having committed the offence, and none else. Inconsistencies, improbabilities and imponderables, it is well settled, destroy a case which is sought to be propounded

on the basis of circumstantial evidence. For the reasons set out in detail hereinabove, this Court is of the view that, in the present case, the evidence marshalled by the prosecution, and relied upon by the learned ASJ, is insufficient to return a finding of guilt, against the appellant, of having committed sexual assault upon S. Crl.A.252/2016 Page 68 of 69 75. To reiterate, the mystery of how the assaulter entered the room where S was sleeping, and sodomize him day after day, remains unanswered. It would, in the circumstances, be a travesty of justice, to convict the appellant of having committed such an unsolved crime. Conclusion 76. In view of the above findings, the present appeal is allowed. The appellant is acquitted of the charge of having committed sexual assault on S, i.e., of having committed the offences under Section 6 of the POCSO Act as well as Section 377 of the IPC.

77. The appellant shall, therefore, be released, forthwith, unless required to be detained in any other case. C. HARI SHANKAR, J NOVEMBER13 2018/HJ Crl.A.252/2016 Page 69 of 69

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