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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 318 OF 2023-F

Shobhit Kumar
Age 34 years,
S/o. Devi Charan,
R/o. Abul Haipur, Kora,
Jahananad, Fatehpur, Uttar Pradesh
presently in Judicial Custody ....Appellant

Vs

State
Through Public Prosecutor
High Court of Goa
Parvorim – Goa ....Respondent

Adv. Sahil Samir Sardessai for the Appellant.
Mr. Pravin N. Faldessai, Addl. Public Prosecutor for the Respondent-State

CORAM : SHREERAM V. SHIRSAT, J.

RESERVED ON : 12th February 2026

PRONOUNCED ON : 16th February 2026 (through VC)

JUDGMENT *(Per : SHREERAM V. SHIRSAT, J.)*:

1. The present appeal has been filed by the Appellant challenging the impugned judgment and order dated 16/01/2023 passed by the Fast Track, Special Court, POCSO at Panaji in Sessions

Case No. 4 of 2022 by which the Appellant herein has been convicted for the offences punishable under Sections 363, 376 of IPC and under Section 4 of the POCSO Act. The Appellant is sentenced to undergo 3 years rigorous imprisonment and to pay a fine of Rs.25,000/-, in default to undergo 1 month rigorous imprisonment for the offence punishable under Section 363 IPC. The Appellant is also sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.50,000/-, in default to undergo 1 month rigorous imprisonment under Section 376 IPC and under Section 4 of the POCSO Act to undergo 10 years rigorous imprisonment and to pay a fine of Rs.50,000/- and in default to undergo 1 month rigorous imprisonment.

2. **The case of the prosecution is as under:**

a. It is the case of the Complainant, that she is a resident of Curca, Tiswadi, Goa and is residing at the given address along with her daughter, i.e. the victim (victim's name withheld) aged 16 years and 9 months. It is further the case that her daughter was studying in standard 10th. It is further the case that on 11 December 2021 at 10:00 hours, when she was busy in her labour work at construction site, her daughter was also present with her and at that time she informed her that she wants to buy

Zandu balm and cold drink from the nearby grocery shop and accordingly she permitted her to go. It is further the case of the Complainant that till 10:30 hours, the victim did not return to the construction site so she started searching for her daughter, but she was not traceable. It is further the case that she tried to contact her on her mobile number, but her phone was switched off. It is further the case that she rushed to the room, however, the victim was not present in the room and therefore she contacted her neighbours and with the help of her friends and neighbours tried to locate her daughter, but she was not to be traced, so also her whereabouts were not forthcoming. It is further the case that thereafter she lodged a complaint giving the details of her daughter and she had stated that she strongly suspected that some unknown person had kidnapped her minor daughter, 16 years and 9 months and taken her to an unknown destination.

b. Thereafter investigation commenced and the Appellant came to be arrested. Upon culmination of the investigation, the charge sheet came to be filed in the present case. The trial court framed the charges u/s. 363, 376 of IPC and u/s. 4 of the POCSO Act, to which the Appellant pleaded not guilty and claimed to be tried.

3. To bring home the guilt of the Appellant, the prosecution in all examined 10 witnesses:

PW1 (name withheld)	:	Victim
PW2 -(name withheld)	:	Mother of the victim, the Complainant
PW3 – Emam Sab Hiremani	:	Panch witness to the scene of offence
PW4 – Sachit D. Mulgaonkar	:	Panch witness in 3 Panchnamas (hostile)
PW5 – Kasim Mehaboob Heramani	:	Witness – Labourer at construction site
PW6 – Krishnapa Malagiti	:	Panch witness to taking charge of the clothes of victim (hostile)
PW7 – Dr. Chetan Lavu Karekar	:	Doctor who conducted the medical examination of the Appellant
PW8 – Dr. Rupa Padwalkar	:	Doctor who examined the victim
PW 9 – Sujay S. Korgaonkar	:	PSI- Investigating Officer
PW 10- Y	:	Investigating Officer
PW 11-Sujatha Manikeri	:	Headmistress of Kannada Medium High School at Goa

4. After the conclusion of the examination of witnesses cited by the prosecution, the statement of the Appellant was recorded u/s. 313

of the Cr.P.C. giving an opportunity to the Appellant to explain the evidence that has come on record. The Appellant did not examine any witness in self defence, however the defence of the Appellant is of false implication. The Fast Track Special Court after considering the evidence on record was pleased to convict the Appellant for the offence punishable u/s. 363, 376 of IPC and u/s. 4 of the POCSO Act for the respective sentences, which have been enumerated above.

5. Aggrieved by the order passed by the Trial Court, the present Appellant has filed the Appeal. The State has contested the Appeal.

6. The point that arises for determination in the Appeal is whether on the re-appreciation of the evidence led before the Trial Court, the judgment recording conviction of the Appellant for the offence u/s. 363, 376 of IPC and 4 of the POCSO Act is maintainable?

7. I have heard Mr Sahil Sardessai, Learned Counsel for the Appellant and Mr Pravin Faldessai, Learned Additional Public Prosecutor for the State and with their assistance, I have perused the material and evidence on record.

8. The Learned Counsel for the Appellant has submitted that the Appellant has been falsely implicated and therefore the conviction is bad in law. He has submitted that there is no cogent evidence to support the case of the prosecution. He has further submitted that the

identity of the Appellant has not been established and that there is no medical evidence to support the case of the prosecution. He submitted that the case arises out of love affair between the Appellant and the victim and the victim being the age of more than 16 years and 9 months, she knew the consequences of her actions and therefore it cannot be said that the sexual relations between them were without her consent. He has further submitted that investigation has not been properly conducted since the lady officer has not conducted the investigation and even the testimony of the victim as well as her mother is not believable. The Ld. Counsel further submitted that the medical report was not submitted to the Magistrate at the time when the statement under section 164 Cr.P.C. came to be recorded which has to be mandatorily done and therefore the Appellant is entitled for acquittal. He submitted that the police have failed to take into consideration the WhatsApp chats evidence and Instagram chats which would have shown that it was a love affair between the Appellant and the victim. He therefore submitted that the Appellant deserves to be acquitted.

9. *Per contra*, the Learned Additional Public Prosecutor has submitted that the Trial Court has rightly convicted the Appellant as there is sufficient evidence to show and to prove that the offence for

which the Appellant has been charged with has been duly proved. He has submitted that the victim is below 18 years and therefore the consent is anyways immaterial even though she is 16 years and 9 months old. He submitted that even assuming without admitting that there are any lapses in investigation, but still there is nothing to disbelieve the testimony of the victim girl and other medical evidence. He has further submitted that even though the IO had not forwarded the medical certificate to the Ld. Magistrate while recording the statement of the victim under section 164 Cr.PC, the same will not be fatal to the case of the prosecution. The Ld. Additional Public Prosecutor further submitted that offences against the minor victims need to be sternly dealt with and no leniency be shown. He further submitted that the Trial Court has rightly convicted the Appellant and urged that the conviction be confirmed.

10. In wake of the submissions made and considering the material on record, it will therefore be necessary to analyse the evidence to come to a conclusion whether the Appellant has been rightly convicted or the material that has surfaced is such that no conviction in such a case could have been recorded by the trial court.

ANALYSIS OF THE EVIDENCE

11. PW-1 is the victim herself who has deposed that at the relevant time, she was studying in standard 10th and was residing at Curca village. She has deposed that she knows the Accused (Appellant) as the Accused was working as a security guard at the construction site, where she along with her mother were also staying. She has further deposed that one friend of her mother by name Sarla, had told her that the Accused-Appellant was asking for her contact number to which she told her not to give her number to the Accused-Appellant as her mother would not like it. She has deposed that after receiving the mobile number, the Accused-Appellant called her on her mobile and stated that he loves her. She has deposed that at the relevant time she was 16 to 17 years old. She has further deposed that the Appellant started sending messages to her on Instagram and WhatsApp and started chatting with her and that he proposed to her and she agreed for it. She has further deposed that in the month of December 2020, when her mother came to know about the relationship with the Accused-Appellant, the Accused-Appellant started residing at Taleigao, at the same construction site. She has further deposed that the Accused-Appellant used to come to her house to watch TV and on 10/12/2021, her mother called up to her maternal aunt stating that she should take her to Karnataka at their

native place. She further deposed that this fact was informed to the Appellant to which the Appellant told that they should run away from Goa. She has further deposed that the Appellant told her that he will wait for her at Panaji bus stand on 11/12/2021 and if she does not come, he will commit suicide. She has further deposed that out of fear she went with him and while leaving the house she took Rs.300/- and came to the bus stand. She has further narrated as to how she travelled from Panaji to Belgaum and further till Ahmedabad. She has further deposed that on 14/12/2021, one supervisor, at a job place, at Ahmedabad arranged for a rented room for both of them. She has further deposed that on 03/01/2022, she called her mother informing her that she wanted to return back to her. She has further deposed that the Appellant was having sexual intercourse with her when they were staying together at Ahmedabad. She has further deposed that on 16/12/2021, she had monthly periods and during the said period for 5 days, they did not have any physical relation. She has further deposed that thereafter the Appellant started working day and night and therefore he could not have sex with her. She has further deposed that from 21st to 27th December 2021, the Appellant had sex with her and that the Appellant was not using condom when he was having sex with her. She has further deposed that thereafter police came to

Ahmedabad and they were brought to Goa on 05/01/2021 and she was handed over to her mother. She has deposed that thereafter she was taken to GMC for medical examination. She has identified the Appellant in the Court. PW-1 was cross-examined by the defence Counsel wherein she was asked whether she remembers the mobile number of the Appellant by which the Appellant was calling her to which she replied that she does not remember the mobile number. She has further answered in cross-examination that the police did not ask from her the WhatsApp chats and the Instagram chats. She has further answered in cross-examination that she does not recollect the description and the names of buses by which they travelled from Goa to Ahmedabad, Gujarat. She has further answered that her statement was recorded under Section 164 of the Cr.P.C.

12. PW2 is the mother of the victim. She has deposed that PW1 is her daughter. She has further deposed on 11 December 2021, she had filed a complaint at Agacaim Police Station as her daughter was missing from the house. She has further deposed that she was working at a construction site and staying with the victim at the construction site. She has further deposed that the victim was studying in standard 10th in the year 2021. She has produced the birth certificate on record. She has deposed that at the time of lodging the complaint, the victim

was 16 years old and was running 17 years and at the relevant time the victim was schooling. She has further deposed that at the room the victim was staying all alone, and since the classes of the victim were online, she had given her mobile to the victim. She has further deposed that the victim and the Appellant were talking over the mobile phone during her absence. She has further deposed that one day, she saw the victim and the Appellant talking on video call and she got angry and enquired from the victim as to why she was talking to the Appellant. She further deposed that the victim told her that she will go to her native place at Karnataka and continue her studies in Karnataka. She has further deposed that her daughter had gone to the market under the pretext of buying some stuff when she asked for money and she took Rs.500/- to Rs.600/- which were there in the house and then left. She has further deposed that she did not find her daughter in the shop. She tried calling her from the mobile, however, her mobile was coming switched off. She has further deposed that then she went to the room of the victim and the victim was not found in the room, therefore, she contacted her neighbour and tried to locate her, but she was not found. She has further deposed that she informed about the same to her owner and accordingly they filed a complaint. She further deposed that as she was suspecting the accused, she filed

a complaint against him. however, the name of the accused was not mentioned in the complaint by the police. She has further deposed that she tried searching the victim for 23 days, however, her phone was coming switched off, and after 23 days, i.e. on 03/01/2022, the victim called her through video call. She has further deposed that the Appellant called her and started enquiring about her health, which she questioned him as to where the victim was and the Appellant replied that the victim was not well and she was with him. She has further deposed that victim spoke to her and informed her that she does not have money to return back to Goa to which the victim was told that she will be sending money to her. It is further deposed that in the meantime, police came to know about their whereabouts and Police brought them to Goa. In the cross-examination PW2 has admitted, that in the FIR and in the complaint, the name of the Appellant has not been mentioned and it is against an unknown person. She has also admitted that she did not state in her complaint that she saw the accused and victim talking to each other on video call. She has further replied in the cross-examination that after the victim called her, she informed the police and the victim was traced at Ahmedabad along with the accused.

13. PW3 Imam Sab Hiremani, is the Panch witness to the scene of offence Panchanama, which was conducted at construction site. He has deposed that they were shown a temporary structure which was on the ground floor of the construction site and it was a construction site.

14. PW4 Sachit D. Mulgaonkar is the Panch witness who has acted as panch in three Panchnamas, which were with respect to the construction site, clothes of the accused and arrest cum attachment Panchanama. This witness turned hostile and after declaring him hostile in the re-examination by the SPP, when the witness was shown MO marked as exhibit B, which was one envelope containing one Kurta and Palazzo pant of the victim, the witness has identified his signature. He has further identified other clothes of the Appellant as well, which were black colour, long sleeve shirt and one long jeans pant, greyish, black colour.

15. PW5 Kasim Hiremani, is a labourer working at the construction site. He has deposed that PW2 came and informed him that her daughter who had gone to the grocery shop did not return home. He has further deposed that and the complainant searched for her daughter, but she was not traceable. He has further deposed that the complainant suspected that her daughter was kidnapped by the

security guard who was working at the same site as he was also missing. He has further deposed that the Appellant had left the said place two days prior to the incident. He has identified the Appellant in the Court. In the cross examination, he has answered that he does not have any document to show that he was working as a labourer at the construction site. In the cross-examination, it has come by way of omission that he had stated to the police that two days prior to the incident, the Appellant was also missing.

16. PW6 Krishnapa Malagiti, is the Panch witness to the recovery of clothes of the victim girl and to the Arrest cum Attachment Panchanama. This witness has turned hostile.

17. PW7 Dr Chetan Lavu Karekar is the Doctor who conducted medical examination of the Accused-Appellant. He has deposed that he conducted medical examination of the Appellant after obtaining consent in clear vernacular language and written in English. He identified the Appellant in the Court. He has opined that on examination, physical and genital, there were no injuries over the penis. He has deposed that there was nothing to suggest that he was incapable of performing sexual intercourse. He has produced on record, the medical report dated 06/01/ 2022 of the Appellant. In the

cross-examination, the doctor admitted to some technical error, which was made by mentioning the timing as 3:10 PM.

18. PW8 Dr Rupa Padwalkar is the Doctor who examined the victim. She has deposed that on 07/01/2022, she was attached to GMC department of Obstetrics and Gynaecology. She has deposed that on 07/01/2022, she was requested to conduct a medical examination of the victim. She has deposed that the report was submitted by her, i.e. the Medico Legal Examination Report of Sexual Violence, dated 07/01/2022 and that her opinion was given upon gynaecological examination of victim that there is evidence of vaginal penetration. She has further deposed that the findings in the report at page 9 and 10 state that there are old healed hymenial tears at 2 o'clock, 8 o'clock and 10 o'clock position. She has further deposed that old healed hymenial tears meant that it is more than 2 to 3 days old. In the cross-examination, she has answered that hymenial tears can occur even by non-sexual activities. She has replied that the victim had given the history that she was of 16 years and 9 months old, however, in her report by mistake, she might have recorded as 27/04/2012, instead of 2002. She has denied the suggestion that she examined a female who was major in age. She has also denied the suggestion that there was no penetration as stated by her in chief. She

has also denied the suggestion that there was no sexual intercourse by accused on the victim. She has also deposed that as per the report she has stated that the victim had disclosed the name of the accused. She has also denied the suggestion that there was no sexual intercourse by the accused with the victim.

19. PW9 Sujay S. Korgaonkar is the PSI who was attached to Agacaim Police Station in the year 2022. He has deposed that he made a request letter to the Special Judicial Magistrate to record 164 statement of the victim and accordingly the statement was recorded. He has deposed that he forwarded exhibits to GSFSL Verna.

20. PW10, Y, the PSI has deposed that he was attached to Agacaim Police Station in the year 2021. He has deposed that the mother of the victim had lodged a complaint stating that the victim was missing from the rented room situated at the construction site and he registered the complaint on the same day. He has deposed that the complaint was against an unknown person for kidnapping from lawful guardianship. He has deposed that he conducted the scene of offence panchanama on 12/01/2021. He, further deposed on 05/01/2022, he conducted the arrest cum attachment panchanama by securing the presence of 2 Panchas. He has further deposed that the Appellant was arrested under the said Panchanama and at that

time the Appellant was wearing black colour long sleeve shirt with white flower design on it and greyish black colour long jeans, pant. Further he has proved the omissions which were put to him. He has further deposed that on 05/01/2022, he had addressed a letter to PI of Aslali Police Station at Ahmedabad, Gujarat, requesting for Police assistance for investigation of the crime. He has further deposed that he made another letter to the same police station on the same day, requesting them to hand over the minor victim girl and suspected accused person. He has further deposed that he recorded the statement of the victim in presence of NGOs at Victim Assistance Unit at Bambolim. He has further deposed about the overall investigation done by him. In the cross-examination, he has answered that at the time of investigation, there was Lady Police Sub-Inspector working at Agacaim Police Station. He has answered that he did not use audio or video recorder while recording the statement of the victim and that he did not handover the medical report of the victim during the time of recording 164 statement of the victim girl by the Special Judicial Magistrate. He has further admitted that he did not conduct any panchanama or recorded the statement of any of the witnesses that the accused and victim resided in Gujarat. He has further replied that he has not verified the mobile number given by the victim. He has

further answered in the cross-examination that he did not produce the accused before the JMFC at Gujarat, however, he has stated that after reaching Goa, he immediately arrested the Appellant and the Appellant and the victim were brought to Goa by air. He has denied the suggestion which was put to him that he was not authorized to conduct investigation as per provisions of POCSO Act.

21. PW-11 Sujatha Manikeri is the headmistress of Kannada medium High School at Goa. She has deposed that she was shown the birth certificate in Kannada language and she has replied that the said certificate is the birth certificate issued by the Civil Registrar of Births and Deaths. She has deposed that the said certificate is of the person G. (victim's name withheld)

ANALYSIS OF THE JUDGMENTS RELIED UPON BY THE LD. COUNSEL FOR THE APPELLANT

22. The Ld. Counsel has relied upon a plethora of judgments to support his case and has urged that the rulings be considered.

a. State (GNCT of Delhi) Vs Vipin @ Lalla, Criminal Appeal No. 94 of 2025 (Arising out of SLP(Crl.) No. 11687 of 2019).

b. Shivam Vs State Govt. of NCT of Delhi, 2024 SCC Online Del 8648.

c. Rahul Rajabhau Pistulkar Vs State of Maharastra, through Police Station Officer and Another, 2024 SCC Online Bom 3172.

d. Ali Mohammed Shaikh Vs Sate of Maharashtra and ors. MANU/Mh/2210/2020.

e. Lalla Vs State of U.P. 2023 SCC online All 2692

f. Rajesh Kumar Dubey Vs State of U.P. 2022 SCC Online All 1719.

g. Amrik Singh Vs. State of Punjab, 2022 LiveLaw(SC) 582.

h. S. Varadarajan Vs State of Madras, 1964 SCC Online 36.

i. Roshan S.o Manohar Sahare Vs The State of Maharashtra, Criminal Appeal No. 236 of 2022.

j. Kisan s/o Bhaiyyalal Harinkhede Vs State of Maharashtra, Criminal Appeal No.303 of 2022.

k. Vijay /so Manoharrao Jawanjal Vs State of Maharashtra, Criminal Appeal No. 185 of 2021.

l. Krishnegowda and others vs State of Karnataka by Arkalgud Police, (2017) 13 SCC 98.

m. Sagar Dinanath Jadhav Vs State of Maharashtra, Manu/MH/1751/2018.

n. XXXX Vs The State of Maharashtra, Criminal Appeal No. 1184 of 2019.

o. Balin Chetia Vs The State of Assam Rep. by PP.Assam, GAHC010085172019.

23. The judgments are dealt with as under, *in seriatim :-*

24. A. The Ld. Counsel for the Appellant has relied upon the judgment of ***State NCT of Delhi versus Vipin @ Lalla, SLP criminal number 11687 of 2019*** *in support of his case and invited the attention to the following paragraphs: -*

> *"9. We have gone through the order of the Trial Court as well as the High Court. The only worthwhile evidence which has been produced before the Court by the prosecution is the deposition of the prosecutrix herself. Although the age of the prosecutrix is 16 years and four months, which has not been seriously disputed (the accused was about 20 years of age at the time of the incident). Nevertheless, the fact remains that the medical examination which was conducted on 18.09.2014 revealed that no injuries were detected on the body of the prosecutrix. Though it was stated in the medical report that her hymen was torn. Definitely the prosecutrix in her examination-in-chief as well as in cross-examination has stuck the fact that she was raped by the*

accused but the fact remains that she has contradicted her statement at more than one place. Moreover she has said in her statement under Section 164 CrPC she had hit the accused on her head by Danda whereas in her examination-in-chief she stated that she hit the accused on his foot. When the accused had surrendered on 10.10.2014 none of these injuries were noticed on the body of the accused.

10. Although it is absolutely true that in the case of rape, conviction can be made on the sole testimony of the prosecutrix as her evidence is in the nature of an injured witness which is given a very high value by the Courts. But nevertheless when a person can be convicted on the testimony of a single witness the courts are bound to be very careful in examining such a witness and thus the testimony of such a witness must inspire confidence of the court. The testimony of the prosecutrix in the present case thus has failed to inspire absolute confidence of the Trial Court, the High Court and this Court as well.

12. In any case as we have already stated above that the testimony of the prosecutrix does not inspire confidence, under these circumstances, we are not inclined to interfere with the well considered order of the Trial Court and the High Court."

25. The facts of the aforementioned case are different from that of the present case. Firstly, it was a case of Appeal against Acquittal where the considerations for re-appreciation of evidence are different

and secondly, the Apex Court in the facts of the case has come to a conclusion that the testimony of the prosecutrix has failed to inspire absolute confidence. In the present case at hand, PW1(victim) in her statement recorded under 161 as well as under 164 Cr.P.C. has stated that the Appellant had sexual intercourse with her and the same has been corroborated by her when she has deposed before the court and there is nothing brought out in the cross examination to discredit her version or render it unworthy of reliance. There are no material contradictions. The testimony of the victim is consistent, cogent, and trustworthy. Accordingly, the deposition of the victim in the present case inspires full confidence of this Court. Hence, the above stated judgment cannot come to the aid of the present Appellant in the present matter.

B. The Ld. Counsel for the Appellant has relied upon ***Shivam versus State Government of NCT of Delhi, CRL.A. 930/2024*** *and has referred to following paras: -*

> *"11. As per the statement of the victim under section 164 dated 10.08.2016, placed on record, there are no allegations of molestation or kidnapping qua tha accused/appellant.... Thus, there are material inconsistencies in the statement of the prosecutrix which makes her unreliable."*
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> *"13. Perusal of the record also indicates that statement under*

Section 313 Cr. P.C. has not been properly recorded by learned Trial Court as the incrimination evidence has not been put properly.

"14. The requirement of section 313 of the Cr. P.C. is salutary and is not a mere formality. The object of recording the statement of the accused under section 313, Cr. P.C. is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such Incriminating circumstances appearing against him in the evidence of the prosecution."

26. The said judgment can be distinguished on the facts of the case. In the present case, PW1(victim) in her statement recorded under 164 Cr.P.C. has stated that the Appellant told her that they should run away from Goa and that he will wait for her at Panjim Bus stop and if she does not come, he will commit suicide. The same has been deposed by her before the Court. Therefore, there are no material inconsistencies in the statement of the victim in the present case. Moreover, the statement of the accused under Section 313 Cr.P.C. has also been duly and properly recorded and no grievance has been raised about the same. Hence, the above stated judgment cannot be relied upon in the present matter and is distinguishable in the facts of the case.

C. Further the Ld. Counsel for the Appellant has relied upon ***Rahul Rajabhau Pistulkar vs State of Maharashtra, 2024 SCC Online Bom 3172*** and urged the court to give consideration to following paragraphs of the judgment: -

"10. I have gone through the record and proceedings. Medical evidence does not corroborate the testimony of the victim as well as the testimony of other witnesses..... In this case, the appellants have admitted the medical certificate. Prosecution did not examine doctor. The medical certificate is at Exh.43. In my view, in this case, even after admission of the medical certificate by the accused, the prosecution ought to have examined the doctor. The doctor would have stated before the Court the method and the instruments used for carrying out the medical examination of the anus of the victim. It is evident on perusal of Exh.43 that the victim was referred for expert opinion to Civil Hospital, Wardha. It has come on record that the victim was admitted in the Civil Hospital at Wardha for two days. However, the prosecution has not produced the medical certificate issued by the doctor who had examined and treated the victim at Civil Hospital, Wardha. Medical Officer from Civil Hospital, Wardha was not examined. In my view, medical evidence does not corroborate the case of the prosecution.

23. Learned Judge relying upon the provisions of Section 29 of the POCSO Act has observed that presumption would trigger

against the appellants. It needs to be stated that presumption under Section 29 of the POCSO Act which has been invoked in this case by the learned Judge was not in accordance with law. As far as Section 29 of the POCSO Act is concerned, the presumption under Section 29 of the POCSO Act is not an absolute presumption. It is a rebuttal presumption. The presumption gets triggered only when the foundational facts are established by the prosecution beyond reasonable doubt. The evidence on record must be sufficient to believe the case of the prosecution and thereby support the very foundation of the case of the prosecution. In this case, the very foundation of the case of prosecution vis-a-vis the charge against the accused is shaken. Therefore, in my view, the presumption under Section 29 of the POCSO Act would not automatically get attracted to base the conviction of the accused.

24. In view of the above, I conclude that the prosecution has miserably failed to prove the guilt of the accused. The defence of the accused, in the facts and circumstances is probable. The defence of the accused deserves acceptance."

27. The facts of the case are totally tangent and not at all relevant to the facts of the present case. In the case in hand, nothing on record shows that the accused-appellant has been falsely implicated as his identity is well established. The medical examination of the victim

gets corroborated by the evidences of PW7, PW8 and PW1. Moreover, both the medical officers, i.e. PW7 and PW8, have been duly examined by the prosecution. The reliance placed upon the Test Identification Parade is irrelevant to the present case as the accused-appellant was known to the victim and has also been duly identified. The evidence on record is sufficient to establish the case of the prosecution. Hence, the above stated judgment cannot be relied upon in the present matter in any manner to advance the case of the Appellant.

D. The Ld. Counsel for the Appellant has relied upon ***Ali Mohammed Shaikh v. State of Maharashtra & ors, Criminal Appeal No. 1006 of 2019, High Court of Bombay*** and has invited the attention to the following paragraphs: -

> *31. It is thus seen that the forensic evidence does not support the prosecution case for establishing the complicity of the accused. The DNA analysis is not disputed by the prosecution.*
>
> *33. We find that there is no corroborative evidence on record to support the version of P.W.1. If at all the accused is to be convicted, the same will have to be based on the sole testimony of the victim (P.W.5). Being a child witness, her evidence had to be scrutinized with great care and caution. No doubt, if the same*

inspires confidence and otherwise there is no possibility of tutoring, the same can form the basis for conviction if found truthful and reliable. We are conscious that a high degree of sensitivity is expected while dealing with the evidence of a child witness who has been abused in such a barbaric manner. We however find that the evidence of P.W.5 in the instant case creates a doubt regarding the identity of the accused. In these circumstances, it would be highly unsafe to convict the appellant solely on the basis of the testimony of the victim."

28. The facts in the above case are different and cannot be equated to the facts of the present case. In the present case in hand, PW8, the doctor of the victim, has deposed that there is evidence of vaginal penetration and the findings of the report states that there are old healed hymenial tears. She has further deposed that old hymenial tears are more than 2 to 3 days old. Therefore, the statement of the victim has been corroborated by PW8, indicating that there was penetrative sexual assault. The evidence on record also does not give an impression that the victim was tutored in any manner to depose against the Appellant. The prosecution has proved its case beyond reasonable doubt without any material inconsistencies. Hence, the above stated judgment cannot be relied upon in the present matter.

E. The Appellant has further placed reliance on ***Lalla vs State of UP, 2023 SCC Online All 2692*** and the relevant paras are: -

> *"36. The investigating officer though is said to have proved the site plan but considering the statement of P.W.1, P.W.3 and P.W.4, it can be said that the investigating officer has not even visited the village. The investigation has been conducted in a very casual manner. Overall, the prosecution failed to prove its case beyond reasonable doubt.*
>
> *37. Thus, in view of shaky testimony of the prosecutrix which is made doubtful by the statement of P.W.3 and P.W.4, coupled with the lack of any corroborative material to determine the exact age of the prosecutrix except the medical report, according to which she appears to be above sixteen years of age, the testimony of P.W.3 and P.W.4, particularly their statement that the victim was going ahead and the accused Lalla was following her, she went with the accused with silver jewellery and cash of Rs. 2200/- as per the written report of P.W.1 himself, I am not inclined to affirm the judgment of conviction of the appellant under Section 376 I.P.C."*

29. In the present case in hand, though it is alleged that the investigation was not carried out properly but no prejudice has been shown to have caused. There is enough cogent evidence on record to

prove the prosecution's case beyond reasonable doubt. There is evidence to prove vaginal intercourse and that the accused was capable of performing sexual intercourse which has been corroborated by PW7 and PW8. Moreover, the victim has disclosed the name of the accused in front of PW8. Therefore, the material on record proves the version of prosecution beyond reasonable doubt. Hence, the above stated judgment cannot be relied to support his case.

F. The Appellant has further relied upon the judgment of ***Rajesh Kumar Dubey vs State of UP, 2022 SCC Online All 1719*** and has pointed out the following :

> *"67. The absence of injuries on the body of the prosecutrix, generally, gives rise to an inference that she was a consenting party to coitus and shows that the prosecutrix did not resist but the absence of injuries is not by itself sufficient to hold that the prosecutrix was a consenting party…."*
>
> *" 68 It is trite law that conviction cannot be based on the sole testimony of the prosecutrix, which is inconsistent and unsupported by the medical evidence and evidence of other witnesses"*

30. In the present case in hand, the consent is immaterial as the victim was below 18 years of age. Hence, the above stated judgment

cannot be relied upon in the present matter. Further in the same judgment the Hon'ble Court has been pleased to observe in para 64 and 65 that minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the Court to reject the evidence in its entirety. Further it is observed that even if there are some omissions, contradictions, and discrepancies, the entire evidence cannot be disregarded. The Court has further observed that after exercising care and caution and sifting the evidence to separate the truth from untruth, exaggeration and improvements, the court has to come to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions, and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses. Therefore, this judgment supports the case of the prosecution and is of no avail to the case of the Appellant.

G. The Ld. Counsel for the Appellant has also placed reliance has on the judgments of ***Amrik Singh vs. State of Punjab, Criminal Appeal No. 993 of 2021, Supreme Court of***

India and ***Sagar Dinanath Jadhav vs. State of Maharashtra, High Court of Bombay, Criminal Appeal No. 212/2017***.

31. The emphasis in the aforementioned cases was on the Test Identification Parade (TIP). It is pertinent to note that TIP is irrelevant in the present case as the accused was known to the victim and has also been duly identified. Hence, the above stated judgments cannot be relied upon in the present matter.

H. The Ld. Counsel for the Appellant has also relied upon the judgment of ***S. Varadarajan v. State of Maharashtra, 1964 SCC Online SC 36.***

32. The facts in that case were totally different. It has been observed by the Apex Court that no doubt though Savitri had been left by S. Natarajan at the house of relative K Natarajan she still continued to be in the lawful keeping of the former, but then the question remains as to what is it which the Appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri, from which an inference could be drawn that she left the house of K Natarajan at the instance or even a suggestion of the Appellant. In fact, she candidly admits that on the morning of October 1, she herself telephoned to the Appellant to meet her in his car at a certain place, went up to that place,

and finding him waiting in the car, got into that car of her own accord. Whereas in the present case, the victim was persuaded by the accused to come with him by threatening that if she does not come, he will commit suicide. She then went out with the accused out of fear. Hence, the above stated judgment cannot be relied upon in the present matter.

I. The Ld. Counsel for the Appellant has further relied upon ***Roshan Vs State of Maharashtra, Criminal Appeal No.236 OF 2022*** and has brought to the notice of the court the following paras in support of his contention: -

> *"16. Perusal of her cross-examination would show that her evidence with regard to the insertion of penis into her vagina has been found to be omission. It is further seen that major part of her examination-in-chief has been proved to be omission.....*
> *17. It is further seen on perusal of the record that the statement of the victim was recorded by PW-7. In her statement before the Police, she narrated only one incident, which had occurred on 2nd January, 2020. It is further seen that, in her statement before the police, she did not narrate the incident of penetrative sexual assault, i.e., the insertion of penis into her vagina by the appellant. It has come on record that the statement of the victim was recorded by the Magistrate. That statement has not been exhibited. The statement is part of the record. The said statement*

can be perused by the Court for the purpose of ascertaining the truthfulness of the evidence of the victim recorded before the Court. Perusal of this statement would show that, in her statement before the Magistrate, she narrated two incidents. According to her, first incident occurred on 28th December, 2019. As per her statement, the accused had committed sexual intercourse with her in his house. As far as the incident of 2nd January, 2020 is concerned, she has stated that the appellant committed sex with her. The incident, which she had narrated before the Court, was not specifically stated by her while recording her statement. In my view, overall perusal of her evidence creates doubt about the occurrence of the incident on 2nd January, 2020."

33. In the present case the facts are totally different. In the present case there are no material contradictions between the statement of the victim, the one recorded under Section 164 Cr.P.C. and her deposition before the Court and has been promptly recorded. The Hon'ble Court in the above case further has observed in para 18 as to why the Court does not believe the evidence that has come on record and has doubted the prosecution case. Hence, the above stated judgment cannot be relied upon by the Appellant to buttress his submissions.

J. The Ld. Counsel for the Appellant has further relied upon ***Kisan versus the state of Maharashtra Criminal appeal No. 303 of 2022*** and has brought to the notice of the court the following paragraphs from the judgment:-

"11. It is to be noted that the absence of injury to the private part of the victim per se is not sufficient to discard the evidence adduced by the prosecution. However, in such a case, the evidence on analysis must be found to be credible and trustworthy. The evidence must be of sterling quality. Perusal of the evidence of the doctor would show that there was no injury or even redness to the genitals of the victim. While appreciating the defence of the accused by invoking the test of preponderance of probability, all these factors, in my view, would assume significance. The absence of injury, despite inserting a finger in the vagina of the victim, is a strong circumstance against the prosecution and in favour of the accused.

"16. .... Similarly, the record is silent about recording their statement by the police as well as by the Magistrate. Learned Judge, placing implicit reliance on the testimony of the victim and her mother, has handed down the sentence of 20 years to the accused. It is to be noted that the provisions of the POCSO Act in the matter of sentence are very stringent. Section 29 of the POCSO Act also provides for presumption of certain facts, In my view, while considering the applicability of the law, which

provides stringent punishment, the Court has to be very careful and cautious. The Court in such a case must be satisfied that the evidence on record is sufficient to prove the case beyond reasonable doubt. This principle of criminal jurisprudence that the prosecution has to prove the guilt of the accused beyond reasonable doubt has not been diluted even by the incorporation of Sections 29 and 30 in the POCSO Act. Presumption under Section 29 of the POCSO Act is not an absolute presumption. In order to trigger the presumption against the accused, as provided under Section 29 of the POCSO Act, the prosecution is duty bound to prove the foundation facts. In the absence of proof of foundation facts viz-a-viz charge, the negative burden cannot be cast on the accused to prove otherwise."

34. The above referred judgment can be distinguished on the facts of the case. In the present case, with respect to the injuries, PW8, the doctor who examined of the victim, has deposed that there is evidence of vaginal penetration and the findings of the report states that there are old healed hymenial tears. Doctor has further deposed that old hymenial tears are more than 2 to 3 days old. Therefore, the statement of the victim has been corroborated by PW8, indicating that there was penetrative sexual assault. The Appellant was identified by the victim in the Court. There is nothing on record to show that the accused-appellant has been falsely implicated or that presumption has been

rebutted by the Appellant which would raise doubt about the prosecution case. Hence, the above stated judgment cannot be relied upon in the present matter.

K. The Appellant has further relied upon ***Vijay versus State of Maharashtra, High Court of Bombay Nagpur bench, Criminal appeal no. 185 of 2021*** and has relied upon the following paras: -

> *"18. On re-appreciation of the evidence, I am satisfied that learned Judge has failed to consider the above stated vital facts. The evidence adduced by the prosecution is not cogent, convincing, and trustworthy. The evidence is not sufficient to prove the guilt of the accused beyond reasonable doubt. The attending circumstances are sufficient to doubt the credibility and trustworthiness of the witnesses. The evidence has not been corroborated by the medical evidence. It is true that the conviction in such a crime can be based on the sole testimony of the victim of rape. However, for placing implicit reliance on the sole testimony of the victim the same must be of stellar quality.*
> *In this case, the evidence could not be said to be of stellar quality to place implicit reliance on the same. The accused has been sentenced to suffer rigorous imprisonment for twenty years. There is no concrete evidence about the penetrative sexual assault. The CA reports are not lending any assurance to the case*

of the prosecution. In my view, therefore, it would not be safe to rely on such doubtful and dented evidence. Learned Judge has failed to consider all these aspects.

On re-appreciation of the evidence I conclude that the prosecution has miserably failed to prove the guilt of the accused. The accused is therefore, entitled for acquittal. The appeal deserves to be allowed."

35. In the present case in hand, the testimony of the victim can be said of stellar quality as the evidence has been corroborated by the medical evidence given by PW8, who has deposed that there is evidence of vaginal penetration and the findings of the report states that there are old healed hymenial tears, indicating that there was penetrative sexual assault. Moreover, there are no material inconsistencies in the statement of the victim in the present case. Therefore, the testimony of the victim is consistent, cogent, and trustworthy. Hence, the above stated judgment cannot be of any use to the Appellant.

L. The Ld. Counsel for the Appellant has relied upon ***Krishnegowda v. State of Maharashtra (2017) 13 SCC 98*** and has relied upon following paragraphs : -

"38. It is settled law that mere lapses on the part of the investigating officer itself cannot be a ground for acquitting the

accused. If that is the basis, then every criminal case will depend upon the will and design of the investigating officer. The courts have to independently deal with the case and should arrive at a just conclusion beyond reasonable doubt basing on the evidence on record.

42. Once there is a clear contradiction between the medical and the ocular evidence coupled with severe contradictions in the oral evidence, clear laches in the investigation, then the benefit of doubt has to go to the accused.

43. Going by the material on record, we disagree with the finding of the High Court that the ocular evidence and the medical evidence are in conformity with the case of the prosecution to convict the accused. The High Court has brushed aside the vital defects involved in the prosecution case and in a very unconventional way convicted the accused."

36. In the present case in hand, although it is argued that investigation was not carried out properly however it is not shown as to what prejudice has been caused. There is enough cogent evidence on record to prove the prosecution's case beyond reasonable doubt. There is evidence to prove vaginal intercourse and that the accused-appellant was capable of performing sexual intercourse, the same has been corroborated by PW7. Moreover, the victim has disclosed the name of the accused infront of PW8. Therefore, the material on record

proves the version of prosecution beyond reasonable doubt. In the above referred judgment, the Hon'ble Supreme Court has considered that if there are clear contradiction between the medical and the ocular evidence coupled with severe contradictions in the oral evidence, clear laches in the investigation, only then the benefit of doubt has to go to the accused. Hence, the above stated judgment cannot be relied upon.

M. The Ld. Counsel has further relied upon the judgment of ***XXX versus state of Maharashtra & Anr, High Court of Bombay, Criminal appeal number 1184 of 2019*** and sought to rely upon following paragraphs which are: -

"28. Turning to the facts before me, which involve a situation, where the accused and the prosecutrix were indulged in a love affair and in cross-examination, she specifically admitting about the same, is one another case, amongst many others coming before the Court, involving a romantic relationship. The girl on her own, left her house and accompanied the accused, where she travelled in distinct States and made no attempt to flee away and rather addressed letters to the concerned police stations about she willingly accompanying the accused and referring to "Nikah", being performed with the accused.

With the evidence on record, the learned Special Judge has rightly derived a conclusion that there is no evidence led by the

prosecution, establishing that the accused had taken away or enticed her and, therefore, an offence under Section 363 of IPC is not made out. However, with the evidence coming on record to the effect that she continued to stay with the accused and physical relationship was established between them, considering that she was aged 17 years and 5-6 months, a conclusion was derived that the act of the accused amounted to an offence of rape as, she being minor, sexual relationship maintained with her, either with or without consent, would amount to rape. The learned Special Judge, though derived a conclusion that it is a case of consensual sex, found the consent immaterial, since the prosecutrix was minor. Left with no option to come out of the rigors of Section 375, since the consent of the minor girl in cases of sexual intercourse is immaterial, the learned Special Judge recorded a finding of guilt against the accused and found him guilty of committing the offence under Section 376 of IPC as well as Sections 4 and 6 of the POCSO Act. This is a peculiar case, where the evidence on record has clearly made out a case for consensual sex, as no where in the examination-in-chief her cross-examination, the prosecutrix has alleged that sexual intercourse was forcible and without her consent and throughout her deposition, she is consistent on the said stand though state that she was informed that the accused was already married to some other woman."

"Para 29. In the wake of the clear case of consensual sex, emerging from the prosecution case, between a girl aged 17 years

and 5 months and a man aged 25, merely because the statute provide punishment for an act of sexual indulgence, as the girl has not attained the age of maturity i.e. 18, when it can be specifically inferred from her conduct that she was capable of understanding the consequences of her act, I am of the opinion that the learned Special Judge has erred in convicting the appellant for committing the offence of rape under Section 376 of IPC as well as the offences under Sections 4 and 6 of the POCSO Act and awarded him the sentence in the impugned judgment."

37. In the present case in hand, the victim in her deposition states that when her mother came to know about her relationship after she saw the daughter on a video call with the accused, her mother called her maternal aunt and stated that she should take her to Karnataka, i.e. her native place. When she informed this to the accused, the accused told her that they should run away from Goa. The accused-appellant then told her that he will wait at the Panaji Bus stand and if she does not come, he will commit suicide. She then went out with the accused-appellant out of fear and under his inducement. There is no material brought on record to show that the victim was capable of understanding the consequences of her act. Whereas, in the above stated judgment there was a bond of love shared by her with the accused and which was deeply rooted for almost two years. Therefore,

the judgement mentioned above cannot be relied upon and cannot be of any avail to the Appellant.

N. In the judgment of ***Balin Chetia versus The State of Assam, Crl.A(J)/24/2019, Gauhati High Court*** *the Ld. Counsel for the Appellant has sought to rely upon the following paras*

"42. Under such backdrop, a reading of the evidence of the victim girl shows that it would not be safe to rely upon the sole testimony of the child witness (P.W.2) to convict the appellant in the present case. There is no corroboration to the evidence of the said child witness (P.W.2) and the evidence of other prosecution witnesses has also not been supported the prosecution case. As there is no medical evidence on record to support the case of prosecution that the victim was subjected to sexual assault by the accused/appellant, it becomes difficult to uphold the conviction imposed by the learned trial court against the accused/appellant.

"43. A proper analysis of the evidence of the prosecution witnesses and the medical evidence brought on record by the prosecution shows that the foundational facts

necessary in the present case to raise presumption under Section 29 of the POCSO Act, have not been established beyond reasonable doubt by the prosecution. The defence has been able to demonstrate that the prosecution story cannot be believed and that, therefore, the presumption would not operate. Under such backdrop, it would be unsafe to hold that the prosecution had proved its case against the appellant under the provisions of the POCSO Act or under Section 376 IPC."

38. In the case referred above the Court has acquitted the Appellant on the ground that that there is no corroboration to the evidence of the victim who is the sole eyewitness, that there is no medical evidence on record to support the case of prosecution that the victim was subjected to sexual assault by the accused/appellant and that on proper analysis of the evidence of the prosecution witnesses and the medical evidence brought on record by the prosecution shows that the foundational facts necessary in the case to raise presumption under Section 29 of the POCSO Act, have not been established beyond reasonable doubt by the prosecution. Whereas, in the present case in hand, evidences placed on record have been duly corroborated. Also, there is medical evidence that goes to show that the victim has been

subjected to sexual assault. Moreover, the foundational facts necessary in the case to raise presumption under Section 29 of the POCSO Act, have been established beyond reasonable doubt by the prosecution. Hence, the above cited case cannot be relied upon in the present matter.

39. Thus, none of the judgments relied upon by the Ld. Counsel for the Appellant can be said to be of any avail to fortify his submissions or in any way supports his cause. The authorities cited above are clearly distinguishable and therefore does not inure to the benefit of the Appellant.

40. The Appellant also tried to raise an objection that the investigation has not been properly conducted which has caused the prejudice to the Appellant. He submitted that the IO has not forwarded the medical reports to the Ld. Magistrate at the time of recording of 164 statement of the victim. The Ld. Counsel for the Appellant has further sought to rely upon the following judgments to advance his submissions.

a. ***State of Karnataka v Shivanna Alias Tarkari Shivanna (2014) 8 Supreme Court Cases 913***
b. ***Miss 'A' v State of Uttar Pradesh in Criminal Appeal No 659 of 2020.***

41. However, upon going through the same, the context in which the directions came to be given are totally different and not at all relevant to the present case. Even assuming for that the IO has not forwarded the medical reports to the Ld. Magistrate at the time of recording the statement of the victim under Section 164 Cr.P.C., itself will not be a ground to discard the deposition of the victim recorded by the Ld. Magistrate under Section 164 Cr.P.C. Even the judgments referred herein above do not warrant such an interpretation and therefore the arguments of the Ld. Counsel for the Appellant deserves to be rejected.

42. Another contention raised by the Ld. Counsel for the Appellant is that the investigation has not been properly carried out.

43. To further dispel this contention, a reference can be made to the judgment of this Court in the case of ***Christian Rajendran and another v Joy Rajendran in Criminal Appeal 261/2021*** wherein it is observed that

> *"17. It is needless to say that the procedure laid down under the Act is to ensure that the victims are not subjected to any harassment during the course of the investigation and also that the investigation is being done in an appropriate manner. The intent of the legislature to lay down the said procedure is to ensure that the victim girls are comfortable in case their medical examination is done in presence of a member of the*

> *family and in their absence, an appointed person. Now question arises as to whether the accused can seek benefit of any procedural irregularity committed during the course of investigation. A candid answer thereto, must be recorded in negative. The reason for the same is that only the procedural illegalities which go to the root of the investigation would affect the trial in appropriate case. It is the settled position of law that irregularities committed during the course of the investigation, if they are not fatal to the case of the prosecution, would not affect the outcome of the trial. In no circumstances, it can be said that such procedural lapses committed by the investigating agency would come to the aid of the accused seeking acquittal. The accused has to show the prejudice caused to him by non-compliance of the procedure and in such circumstances only, the contention of the accused in that regard would be considered.*

44. Whilst superficially alleging that the investigation has not been conducted properly, the Appellant has not shown any prejudice that has been caused to him and therefore even this contention deserves to be rejected.

45. The Appellant has been convicted for the offence under Section 363 of IPC. It will therefore be necessary to see whether there is sufficient material to come to conclusion that the offence is

established and proved beyond reasonable doubt.

46. For quick reference, Section 361 and Section 363 are reproduced herein below:-

> ***Section 361. Kidnapping from lawful guardianship.***
>
> *Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under 2[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*
>
> *Explanation.--The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.*
>
> *Exception.--This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.*
>
> ***Section 363. Punishment for kidnapping.***
>
> *Whoever kidnaps any person from 1 [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

47. Therefore, to establish the charge, it is necessary for the prosecution to prove the following essential ingredients of the offence: *(1) The offence is committed by "taking" or "enticing" a minor or person of unsound mind.*

(2) The person kidnapped must be;

(a) Under the age of 16, if male or

(b) Under the age of 18, if female or

(c) a person of unsound mind

(3) The "taking" or "enticing" must be out of keeping the lawful guardian of such minor.
(4) "Taking" and "enticing" must be without consent of guardian.

48. To prove the age of the victim, that she was a minor below 18 years of age, the prosecution has examined PW 2 – Mother and PW 11- Headmistress. PW 2 has stated in her evidence that Victim, PW 1 was born on 27/05/2005 in Government Hospital at Karnataka and she has produced birth certificate on record. PW 11 Headmistress of the Kannada Medium High School at Zuari Nagar, Vasco Goa, in her evidence has deposed that according to her the date of birth of the victim is 27/05/2005 and the Birth Certificate was signed by the sub-registrar of the concerned village. There is not much cross-examination on this aspect and therefore it is clear from the evidence brought on record that the victim was below 18 years of age and thus

she was a child as on the date of incident within the meaning of Section 2(d) of the POCSO Act. Needless to mention that her consent was no consent at all.

49. Further it has come in the evidence of PW1-the victim that she was staying at the construction site with her mother. It has come in the evidence of PW 2 that PW 1 victim is her daughter and at the relevant time they were staying together at the construction site. PW2, being the mother is the lawful guardian and at that time PW 1 was residing with her. PW 2 also states the fact that the age of PW 1 victim was 16 years old and was running 17. PW 2 also produced the birth certificate on record. Therefore, the two essential facts get proved, in absence of any serious cross examination, that the victim is below the age of 18 years, duly supported by the birth certificate and that the victim was under the custody of the lawful guardian.

50. Further it has come in the evidence of PW 1 victim that Appellant befriended with her and in the month of December 2020 and when the mother of the victim came to know about the victim talking to the appellant, the mother had called up the maternal aunt stating that the victim should be taken to Karnataka, i.e. at their native place. It has also come on record that when this fact was informed to the Appellant, the Appellant told PW 1- victim that they will run away

from Goa. It has also come her evidence that the Appellant told her that he will wait for her at Panaji bus stand on 11/12/2021 and if she does not come, he will commit suicide. PW 1 has categorically deposed that out of fear she went with him. She has further corroborated the said fact in her 164 statement recorded on 21/1/2022 wherein she has stated that on 11/12/2021, the Appellant called her and told her that he was waiting for her at Panaji bus stand and threatened her by saying that if she does not come, he would commit suicide. She has deposed that as she got scared, she took the money from the house and waited for the bus at 10:30 hours. Therefore, what emerges out of the categorical admissions given by the PW 1- victim, is that she has left the house not on her own accord but at the instance of the Appellant and the Appellant by putting the victim under fear that the he would commit suicide, if she does not come, has induced and enticed her to leave the house. The victim out of fear and under coercion has left the house. Inducement or for that matter, enticement by the Appellant, that if she does not come with him, he will commit suicide has created a fear in the mind of the victim pursuant to which the victim has taken the step to leave the house. This is a clear case of enticing by the appellant and taking her out of the custody of her lawful guardian. The Appellant, by threatening her

that he would commit suicide if she does not come, has succeeded in influencing her mental state at the time when the inducement was made and caused her to leave the house. To establish the offence, it was not necessary for the prosecution to prove that the Appellant should have forcibly taken her out of the custody of the lawful guardian, but that she was "caused to go" by the influence which was created in her mind by the Appellant and which indeed caused her to leave the custody of the lawful guardian is itself sufficient to come to conclusion that the victim was enticed and taken away from the custody of the lawful guardian without the consent. It is thus proved beyond reasonable doubt that the Appellant by putting the victim under emotional duress and coercion that he will commit suicide has influenced her mental state and which has weighed on her mind to cause her to leave the house from the custody of her mother, proves beyond reasonable doubt that the Appellant has committed the offence punishable under section 363 IPC.

51. A useful reference can be made to the judgment of ***THAKORLAL D. VADGAMA v. THE STATE OF GUJARAT [1974]1 S.C.R.178***

"The legal position with respect to an offence under s. 366, I.P.C. is not in doubt. ***In State of Haryana v. Raja Ram(1),***

this Court considered the meaning and scope of s. 361; I.P.C. It was said there:

"The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The grava-men of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor.. out of the keeping of the lawful guardian of such minor" in s. 361, are significant. The use of the word "keeping" in the context connotes the idea of charge, protection, maintenance and control: further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section".

In the case cited reference has been made to some English

decisions in which it has been stated that forwardness on the part of the girl would not avail the person taking her away from being guilty of the offence in question and that if by moral force a willingness is created in the girl to go away with the former, the offence would be committed unless her going away is entirely voluntary. Inducement by previous promise or persuasion was held in some English decision to be sufficient to bring the case within the mischief of the statute. Broadly, the same seems to us to be the position under our law. The expression used in s. 361, I.P.C. is "whoever takes or entices any minor" The word "takes" does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. This word merely. means, "to cause to go", "to escort" or "to get into possession". No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word "entice" seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purposes of successful inducement. The two words "takes" and "entices", as used in s. 361, I.P.C. are, in our opinion, intended to be read together so that each takes to some

extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in s. 361, I.P.C. But if the guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating an encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him. The question truly falls for determination on the facts and circumstances of each case."

52. The prosecution by examining PW1, PW2, PW11 has proved beyond reasonable doubt that the Appellant by enticing the victim girl, aged less than 18 years from the lawful custody of her mother without consent of the mother, has committed the offence under Section 361 of the IPC and punishable under Section 363 of the IPC

53. In order to prove the offence of rape and penetrative sexual assault, the prosecution has examined PW1, PW7 and PW8. This court has come to a conclusion that the victim was kidnapped from the lawful guardian, i.e. from the custody of her mother. It will therefore have to be seen whether there is sufficient material on record also to come to a conclusion whether the offence of rape and penetrative sexual assault has been committed when the victim was with the Appellant.

54. **Section 375 defines Rape**

> *375. Rape.-- A man is said to commit "rape" if he–*
> *(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
> *(b) ...or*
> *(c) ..or*
> *(d)..,*
> *under the circumstances falling under any of the following seven descriptions:*
> *First....*
> *Secondly..*
> *Thirdly..*
> *Fourthly.*
> *Fifthly..*
> *Sixthly. With or without her consent, when she is under eighteen years of age.*

Seventhly..

Explanation 1..

Explanation 2.:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1...

Exception 2...

Section 376. Punishment for rape.

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which 1 [shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine].

***Section 2(f)** "penetrative sexual assault" has the same meaning as assigned to it in section 3;*

***Section 3. Penetrative sexual assault.**—A person is said to commit "penetrative sexual assault" if—*

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or.....

Section 4. Punishment for penetrative sexual assault.

[(1)] Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than [ten years] but which may extend to imprisonment for life, and shall also be liable to fine....

55. PW1, the victim, a minor, has in no uncertain terms deposed that the Appellant was having sex with her when they were staying together at Ahmedabad. She has further deposed that from 21st to 27th December 2021, appellant had sex with her and that appellant was not using condom when he was having sex with her. The appellant was identified by her during the course of the trial. There is nothing in the cross-examination, which has been brought on record to dislodge or discredit the testimony of the victim girl. Even in her deposition under 164, she has stated that during their stay at Ahmedabad the Appellant had sex with her and he never used a condom. PW7 who is the doctor who has examined the Appellant has stated that he conducted the medical examination of the Appellant after taking the consent. He has deposed that on physical and genital examination there were no injuries over the penis and there was nothing to suggest that he was incapable of performing sexual intercourse. Even as for this witness, there is no cross-examination on the said medical aspect. PW8 who is the doctor, who has examined victim PW1 has deposed that on

07/01/2022, request was made for medical examination by PSI Yogesh of Agacaim Police Station. She has further deposed that after detailed examination of the victim, a report was submitted by her which is the Medico Legal Examination Report of sexual violence where the opinion was given upon that gynaecological examination of victim that there is evidence of vaginal penetration. She has further deposed that there are old healed hymenial tears at 2 o'clock, 8 o'clock and 10 o'clock positions and by old hymenial tears, she meant more than 2 to 3 days old. She has further deposed that at the time of examination, the victim had given the history that she was of 16 years and 9 months old. In the cross-examination, it was tried to put to her that the hymenial tear can occur even for non-sexual activities. She has denied the suggestion that there was no penetration as stated by her. She has also deposed that at page 3 of her report, the victim had disclosed the name of the Appellant. PW8 has brought on record the Medico Legal Examination report of sexual violence, which has been exhibited, which also corroborates the facts which she has narrated in her deposition before the court. Beyond suggestions, nothing has been brought out in the cross-examination, which could discard the evidence of the doctor or make it unbelievable. Thus, from the evidence that has come on record, it can be clearly deduced that the

Appellant used to have sex with the victim after the victim was kidnapped from the lawful custody of her mother. This fact of sexual intercourse gets corroborated by the evidence of PW8 the doctor who examined her and to whom the history was also given about the Appellant having committed sexual intercourse. PW7, the doctor who examined the Appellant has also in no uncertain terms stated that there is nothing to suggest that the Appellant was not capable of performing sexual intercourse. In the cross-examination, nothing could be elicited which would dislodge a version of any of these witnesses. From the evidence on record supported by the documentary evidence, this Court comes to a conclusion that the prosecution has proved beyond reasonable doubt that the Appellant has committed the offence of rape and a penetrative sexual assault on the victim who is a minor.

56. The Ld. Counsel for the Appellant tried to submit that this was a case of love affair and therefore the victim, even though a minor but aged 16 years and above had accompanied the Appellant on her own accord and therefore it can be presumed that she knew the consequences of her act and therefore the Appellant cannot be held guilty of the offence.

57. To quell this aspect, a profitable reference can be made to the

rulings of the Apex Court in the cases of:

a. ***Independent Thought Vs. Union of India (UOI) and Ors.MANU/SC/1298/2017***

b. ***Society for Enlightenment and Voluntary Action & Anr. v. Union of India & Ors, [2024] 10 S.C.R. 1513***

c. ***Varun Kumar alias Sonu ... v State of Himachal Pradesh and Others .. 2025 SCC OnLine SC 2224.***

58. In case of ***Independent Thought Vs. Union of India (UOI) and Ors.***, it is held that

> *"77. There is no doubt that pro-child statutes are intended to and do consider the best interest of the child. These statutes have been enacted in the recent past though not effectively implemented. Given this situation, we are of the opinion that a few facts need to be acknowledged and accepted. Firstly, a child is and remains a child regardless of the description or nomenclature given to the child. It is universally accepted in almost all relevant statutes in our country that a child is a person below 18 years of age.*

Therefore, a child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an unmarried child or a divorced child or a separated child or a widowed child. At this stage we are reminded of Shakespeare's eternal view that a rose by any other name would smell as sweet-so also with the status of a child, despite any prefix. Secondly, the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. The age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, we must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age.

59. *In the case of* ***Society for Enlightenment and Voluntary Action & Anr. v. Union of India & Ors, [2024] 10 S.C.R. 1513***

it has been held as under:-

> *"79. The Protection of Children from Sexual Offences Act 2012 was enacted by Parliament to safeguard the right of all children to safety, security and protection from sexual abuse and exploitation. It is a self-contained comprehensive legislation for the protection of children from sexual assault, sexual harassment and pornography. The POCSO Act operates in a manner which promotes the best interest and well-being of a child and ensures their healthy physical, emotional, intellectual and social development.*
>
> *"80. The POCSO Act applies to all children regardless of their gender. Section 2(d) defines a child as being under the age of eighteen. The Act elevates the age of consent to eighteen years for all persons. The 2013 amendment to the IPC increased the age of consent under the rape provision from sixteen to eighteen."*

60. In the latest judgment of the Hon'ble Supreme Court in the case of ***Varun Kumar alias Sonu v State of Himachal***

Pradesh and Others reported in 2025 SCC OnLine SC 2224, the Hon'ble Apex Court has been pleased to observe as under:

> *"15. Even assuming that the victim had wilfully volunteered to sexual intercourse, this aspect becomes immaterial, as the victim was a minor on the date of the incident in question. As observed hereinabove, as per the case of the prosecution, she was aged about 15 years on the date of the incident."*

61. Therefore, what can be deduced from the rulings of the Apex Court is that the Protection of Children from Sexual Offences Act 2012 was enacted by Parliament to safeguard the right of all children to safety, security and protection from sexual abuse and exploitation and is a self-contained comprehensive legislation for the protection of children from sexual assault, sexual harassment and pornography. The Act applies to all children regardless of their gender and the section 2(d) defines a child as being under the age of eighteen years. As per the ruling of the Apex Court also the age of consent and willingness to sexual intercourse remains at 18 years of age and there is no dispute about this. Therefore, as held by the Apex Court, under no circumstances can a child below 18 years of age give consent, express or implied, for sexual intercourse and even assuming that the

victim had wilfully volunteered to sexual intercourse, this aspect becomes immaterial, as consent of the minor is no consent in the eyes of law.

62. Taking into consideration the overall evidence, the submissions advanced by the Ld. Counsel for the Appellant and by the Ld. Addl. Public Prosecutor, this Court has come to the conclusion that the prosecution has proved the case against the Appellant beyond all reasonable doubts. The trial court has rightly convicted the Appellant and therefore the Appeal stands dismissed.

63. The Appeal stands dismissed and the conviction of the Appellant is upheld.

64. Appeal stands disposed of accordingly. Pending applications, if any, also stand disposed of.

(SHREERAM V. SHIRSAT, J.)