

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL APPEAL NO. 745 of 2002****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS. JUSTICE GITA GOPI Sd/-**

Approved for Reporting	Yes	No
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KHANJAN NARJIBHAI PALAS
Versus
STATE OF GUJARAT

Appearance:

BAILABLE WARRANT SERVED for the Appellant(s) No. 1

MR HIREN P VYAS(2269) with MR MAHARASHI SHUKLA for the
Appellant(s) No. 1

MS SEJAL H VYAS(3211) for the Appellant(s) No. 1

MR ROHANKUMAR RAVAL, ADDITIONAL PUBLIC PROSECUTOR for the
Opponent(s)/Respondent(s) No. 1**CORAM:HONOURABLE MS. JUSTICE GITA GOPI****Date : 18/09/2025****ORAL JUDGMENT**

1. The Appeal under Section 374 of the Code of Criminal Procedure, 1973 (hereinafter referred to in short as 'Cr.P.C.') is directed against the judgment and order dated 26.08.2002 passed by the learned Additional Sessions Judge, Ahmedabad, Court No.10 in Sessions Case No.140 of 2000.

2. The appellant as an accused came to be convicted under Section 363 of the Indian Penal Code (IPC), and sentenced to undergo rigorous imprisonment of two years and fine of Rs.1,000/- and in default of payment of fine, to undergo simple imprisonment of three months, whereas under Section 366 of IPC, was ordered to suffer rigorous imprisonment of two years with payment of fine of Rs.2,000/- with the default stipulation to undergo simple imprisonment for four months. While under Section 376 of IPC, the conviction was with the sentence of rigorous imprisonment for three years, ordered to pay fine of Rs.3,000/- and in default of payment of fine, to undergo simple imprisonment of six months. All the sentences were ordered to run concurrently, with the benefit of set off for the time spent in judicial custody.

3. The facts of the case as could be drawn from the impugned judgment briefly put are that the accused by luring the victim girl aged about 14 years, on 16.09.1998 at

about 15.45 hours without the consent of the parents took away the girl from their local custody on his motor bike and then went to Hotel Ghunghat at Gandhinagar and entered into physical relation with the victim girl. Subsequently on 17.11.1998, again the victim was taken away from the guardianship of the parents. A writ petition was filed by the father of the victim girl before the High Court for Habeas Corpus on 11.01.1999. It is the prosecution case that during this period, accused had sexual relations with the victim girl.

4. After due investigation into the complaint made by Gurudev Singh Jasbirsingh Bakshi, the police filed the chargesheet against the accused. Under Section 209 of the Cr.P.C., the case was committed to the Sessions Court. The accused was charged for the offence under Sections 363 and 366 of the IPC on 01.03.2001. Subsequently, charge under Section 376 of the IPC was added on 25.05.2001.

5. The accused challenged the addition of the charge before this High Court preferring Criminal Revision Application No.357 of 2001. The applicant accused thereafter, chose to withdraw the application thus, the trial proceeded against him wherein the accused pleaded not guilty to the charges framed against him.

6. The prosecution in all examined 11 witnesses. Further statement under Section 313 of Cr.P.C was recorded whereby the accused admitted the fact that he knew the victim-prosecutrix as he was visiting Smruti Apartment, Near Azad Society where he had a friend living there. The accused admitted of his regular meeting with the prosecutrix at her residence since one of his friends was a friend of the elder sister of the prosecutrix. The accused further stated that he was ensured by the mother of the prosecutrix that he would be engaged to be married to the prosecutrix and therefore, with the mother's wish and desire, he was meeting the prosecutrix. The accused also stated that the prosecutrix and he were good friends and

they had the blessings of the mother of prosecutrix. Accused denied the allegation that the prosecutrix was abducted from the guardianship of her parents as he pleaded ignorance of her age.

7. Learned advocate Mr. Hiren P. Vyas with Mr. Maharashi Shukla for the appellant raised the contention that the impugned judgment and order is illegal, erroneous and against the weight of evidence on record and provisions of law. Learned advocate for the appellant Mr. Hiren P. Vyas submitted that the delay in filing the First Information Report (FIR) and three different statements of the prosecutrix recorded on 22.09.1998, 23.09.1998 and 15.01.1999, with the comparative analysis of the statements with the Habeas Corpus petition filed on 11.01.1999 would clarify that the prosecutrix had herself left her house on her own volition and with the consent of her mother, and none of her statements alleges of any offence under Section 376 of IPC. The prosecutrix has not alleged of any sexual intercourse between her and the appellant.

8. Learned advocate Mr. Vyas for the appellant further contended that the learned trial Court Judge erred in coming to the conclusion that the prosecutrix was subjected to rape inasmuch as the medical certificate dated 06.10.1998 of the prosecutrix does not disclose any external or internal marks of injury. The observation of the Medical Officer does not record of any physical relation established immediately prior to the complaint.

9. Learned advocate Mr. Vyas submitted that the trial Court had come to an erroneous conclusion that the prosecutrix was below 16 years of age, where the learned Judge has failed to appreciate the Injury Certificate which determines the age of the prosecutrix as per the Radiologist opinion. Dr. Bharat Shankarlal Dave's evidence was required to be appreciated on the basis of principle of law that there could be marginal error of two years which would mean that the prosecutrix would have been above 18 years at the relevant point of time.

10. Mr. Vyas learned advocate for the appellant further stated that the statement and deposition of the parents and sister of the prosecutrix do not make any allegation of sexual intercourse between the prosecutrix and the appellant and the prosecutrix for the very first time on 08.05.2001 after lapse of 32 months in her examination in chief stated that she was subjected to sexual intercourse by the appellant. The evidence recorded of the prosecutrix reveals that the prosecutrix was major at the relevant point of time. She was having a love affair with the appellant and she under the consent of her family members had relation with the appellant with an intention to marry but the prosecutrix at the instance of her parents changed her mind and therefore, the appellant got falsely implicated by them.

11. Advocate Mr. Vyas vehemently raised the issue that the learned trial Court failed to appreciate that the Certificate dated 12.12.1998 issued by the New Samarth High School, Ahmedabad was on the basis of the School

Leaving Certificate of the earlier school attended by the prosecutrix which was Little Flower, Ahmedabad and the date of birth noted was 16.11.1984 where it has been on record that the place of birth of the prosecutrix is Delhi. Mr. Vyas thus submitted that the evidence relied upon for the birth date is not conclusive and no authentic record from Municipal Corporation or the Government showing the correct date of birth has been produced on record by the prosecution.

12. Advocate Mr. Vyas also contended that the learned Sessions Judge failed to appreciate that the father of the prosecutrix could state the age of the prosecutrix as 16 years contrary to the complaint, and that evidence of the father was to be compared with the radiologist report to determine the age, Mr. Vyas thus contended that inspite of there being evidence on record contrary, erroneous finding was recorded.

13. Advocate Mr. Vyas submitted that the deposition of the victim for the first time in the chief examination after about 32 months from the alleged incident relied upon by the trial Court was to observe that the prosecutrix was subjected to sexual intercourse by the appellant would be contrary to the provisions of law when the prosecutrix has not given any such statement before the police of physical relation with the accused. The learned trial Court Judge was required to appreciate that the Habeas Corpus petition was filed by the complainant after the prosecutrix had returned home and the proceedings in the Habeas Corpus petition would reflect that the prosecutrix had made a complaint against her parents, inspite of those evidence on record, no cognizance has been taken of those facts.

14. Learned advocate Mr. Vyas further made a submission that it was erroneous of the learned Sessions Judge in not believing the Investigating Officer who was an independent witness and that there was no irregularity in his investigation. The evidence of the Doctor was also required

to be appreciated who found no adverse injuries to consider the case of rape.

15. Mr. Vyas relied upon the judgment in the case of **Akula Raghuram v. State of Andhra Pradesh** reported in (2025) 4 SCC 209 for his submission to state that when the Doctor specifically refers a victim to the Radiologist and based upon the Report, a Certificate of age is issued then it has to be believed.

16. Learned advocate Mr. Vyas has also placed reliance on a Division Bench judgment of this Court dated 21.09.2023 in the case of **State of Gujarat v. Lalji Chhaganaji Thakor and Another** in Criminal Appeal No.902 of 1996 to submit that the prosecution was required to corroborate the evidence of the School Leaving Certificate for establishing the date of birth by producing the Register of Birth from the place where the birth was registered, while in this case Mr. Vyas stated would be Delhi. Mr. Vyas also placed reliance on Rule 12 of the Juvenile Justice (Care and Protection of

Children) Rules, 2007 to submit that incase the matriculation or equivalent certificates are not available, then in absence, the date of birth certificate from the school first attended other than the first play school would be required to be produced and in absence of birth certificate from first school attended, the birth certificate from a Corporation or a Municipal Authority or a Panchayat would become admissible. Mr. Vyas submitted that matriculation or equivalent certificate could not be brought on record and date of birth certificate from the school first attended was not produced during trial, nor the certificate from Delhi Municipal corporation was brought, and in absence of all, the Radiologist Report would become a necessary evidence on record to consider the age of the victim.

17. In view of the submissions raised with the case laws referred, learned advocate Mr. Vyas prayed to allow the Appeal and acquit the accused.

18. Learned APP Mr. Rohankumar Raval submitted that it

had been proved during the trial the victim girl was aged about 14 years at the time of the incident, and even if the girl voluntarily joins the accused, her act cannot be considered as an independent act. It is submitted that when documentary proof of age is believed by the trial Court, then no further evidence would be necessary to re-examine the age of the prosecutrix. It is further submitted that the case of the prosecution was that the minor girl was kidnapped from the lawful guardianship, with an intention to have illicit intercourse, and the prosecution has established that there was allurement previously also, therefore, any defence of the victim girl voluntarily going away with accused would not be valid. Learned APP has raised a submission that it is not necessary to prove any active part played by the accused immediately prior to the minor leaving her lawful guardian. Mere role of the accused at any stage by which he either solicited or persuaded the minor to abandon the legal guardianship is sufficient to hold him guilty. Relying on the provision of Section 35 of the Evidence Act, learned APP submitted that

the Register maintained in the school is permissible in evidence to prove the date of birth of a person since such records are maintained in the school in discharge of public duty and such documents having its evidentiary value corroborated by the oral evidence of the parents as well as the prosecutrix, the conviction is valid, which should be upheld.

18.1 Learned APP Mr. Rohankumar Raval has relied upon the following decisions of the Hon'ble Courts :-

- **State of Haryana v. Raja Ram** reported in 1973 (1) SCC 544;
- **Thakorlal D. Vadgama v. State of Gujarat** reported in (1973) 2 SCC 413;
- **Java Mala v. Home Secretary, Government of Jammu and Kashmir** reported in (1982) 2 SCC 538;
- **State Of Madhya Pradesh v. Anoop Singh** reported in (2015) 7 SCC 773 and
- The decision of the High Court of Delhi dated 02.07.2024 in **Court on its Own Motion v. State of**

NCT of Delhi in CrI. Ref. No.2 of 2024.

19. Having heard the learned advocates for the respective parties, perused the record. The conviction of the accused was under Sections 363, 366 and 376 of IPC.

20. Section 363 refers to punishment for kidnapping from lawful guardianship. The Section 361 denotes the age of the female as 18 years considering the female below the age of 18 years as minor. Further, the word “lawful guardian” finds explanation in the Section. The act of taking or enticing any female under the age of 18 years out of the keeping of lawful guardian of such minor without the consent of such guardian is said to be kidnapping such minor from lawful guardianship. The expression ‘keeping’ which is employed in the section is co-related to the act of ‘taking’ or ‘enticing’ any minor. Taking or enticing any minor out of the keeping of lawful guardian, makes it a punishable act where the consent of the lawful guardian would be relevant as fact. In case of **Prakash v. State of Haryana**

reported in **AIR 2004 SC 227**, it has been laid down as under :-

“The object of S. 361 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 gravamen 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. Section 361 is designed to protect the sacred right of the guardian with respect to their minors wards. 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.”

21. While in the case of **S. Varadarajan v. State of Madras** reported in **AIR 1965 SC 942**, it has been held from the facts of the case that the girl leaving the father's protection knowingly and voluntarily joining the accused, then it cannot be considered as an offence of kidnapping. It has been observed as under :-

“7. ...It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what we have to find out is whether the part played by the appellant amounts to “taking” out of the keeping of the lawful guardian of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his 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”.”

“9. It must, however, be borne in mind that there is a distinction between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.”

22. The prosecutrix's father Gurudevsingh Jasbirsingh Bakshi was examined as PW1. In accordance to his

testimony, he and his wife and two daughters were residing in Ambawadi, Azad Society. His business was of transportation. His elder daughter is Jasmeet Bakshi-PW3 and the younger one, the prosecutrix. Witness stated that the age of his elder daughter was 19 years while the younger daughter-prosecutrix was 16 years. At the time of the incident, his younger daughter (prosecutrix) was studying in Little Flower School which was located near Anjali Cinema, Bhatta, Ahmedabad, in Standard IX and was not attending tuition classes. He further stated that he was not knowing about her tuitions since for a certain period, he would be staying at Delhi and for the rest of the time at Ahmedabad. The prosecutrix was attending the tuition classes nearby Azad Society. By pointing the accused in the Court, PW1-father stated that the accused was meeting prosecutrix often. In that way, once she had gone to attend tuition class at that time, the accused took the prosecutrix away. For about 2-3 hours after the tuition class she did not return, and he came to know that the accused had taken away the prosecutrix.

23. PW1 does not remember the date of incident. He stated that the accused-Khanjan would often telephone prosecutrix and therefore, he believed that Khanjan had taken the prosecutrix away. On the date of incident, since the daughter did not return back, therefore PW1 and his wife (PW2) enquired about the daughter at the house of the accused and from the accused's father and mother. The witness voluntarily stated that the accused was staying with his mother at Ahmedabad and the accused's father was residing at Gandhinagar. They had searched for their daughter at both the places but she was not found either at Ahmedabad nor at Gandhinagar.

24. The witness PW1 stated that the parents of the accused were informing them that they were searching for the accused. PW1 stated that ultimately, accused was found from his house at Gandhinagar. Therefore, PW1 believed that accused's father had given him shelter and inspite of that,were misdirecting them by falsely informing that they

were searching the accused. PW1 stated that the prosecutrix was found from the house of the accused's father at Gandhinagar. His wife-PW2 brought prosecutrix back. PW1 further stated that on that day, his wife had gone to the accused's house where she found the prosecutrix and also found the presence of the accused and the accused's father.

25. As per the testimony of PW1-father, prior to PW2, bringing back the prosecutrix from the house of accused from Gandhinagar, he had filed a case at this High Court and in that case, Satellite Police Station brought accused Khanjan at the Gujarat High Court and on his appearance, High Court had sent accused to Jail for one month and thereafter, accused was released on bail.

26. The deposition of the father PW1 further records that prior to the incident, accused-Khanjan used to telephone his daughter and when he used to pick up the phone, accused would cut it. PW1 stated that at their house, in

one telephone connection, there were two receivers and handle. PW1 further stated that at certain times, accused-Khanjan would call his daughter and when the prosecutrix would pick up the phone, he would listen from the another receiver and it would be the voice of accused-Khanjan and he could say that accused-Khanjan was talking in Gujarati language and whenever, he used to pick up the receiver and utter 'hello', accused-Khanjan would disconnect the phone. On the phone, he had never heard long conversations between the prosecutrix and accused-Khanjan. The prosecutrix had informed him that the phone call were from accused-Khanjan and often as there were phone calls of Khanjan, he could identify his voice.

27. According to PW1, he only knew that prior to the incident, accused used to phonecall the prosecutrix and apart from that, rest of the facts were known to his wife and elder daughter and he was not knowing it. The day on which the accused had taken the prosecutrix, PW1 did not have any conversation with accused-Khanjan. Prior to the

incident, he had once seen Khanjan who was alone. PW1 further stated that Khanjan used to come to the house opposite theirs in Sameer Apartments and therefore, he could identify him and after the case he came to know that the person who was coming at Sameer Apartments was accused-Khanjan. PW1 further stated that complete facts were known to his wife-Varendra Bakshi.

28. The witness-PW1 again stated that the age of the prosecutrix at the time of incident was approximately 16 years. Her year of birth was 1984 and the month was October. The complaint-Exhibit 8 was given by him, the police was asking him the question and he answered in Hindi and accordingly, the complaint was written. The police thereafter, made him understand the complaint in Hindi language. The witness-PW1 was further show Mark 6/7 which he stated to be the Certificate of Date of Birth of the prosecutrix issued by the Samarth English High School.

29. The deposition in examination in chief brings the

evidence on record that father was hardly staying with the family at Ahmedabad. The prosecutrix was attending tuition classes near Azad Society. The prosecutrix was studying in Little Flower School while the Certificate of date of birth was from The Samarth English High School. According to the father, the prosecutrix was 16 years of age at the time of incident. The father's deposition shows that the accused was often meeting the prosecutrix and were often having telephonic conversations, the father was overhearing the talks. The father was hardly knowing any facts with regard to the prosecutrix and he had shifted the burden on his wife and elder daughter.

30. In the cross examination of PW1, the witness stated that on the day when the prosecutrix was taken away by the accused-Khanjan, he had not filed the complaint and after about a month of the incident, he lodged the complaint. He stated that the period between the accused taking away the prosecutrix and his filing the complaint, during that period, prosecutrix had not returned back home. He affirmed that

on the day when he had given the complaint, the police had given a copy of the complaint and he had put his signature on the original complaint. The Habeas Corpus petition was filed by him on 11.01.1999 and during that period, the prosecutrix had come back home. The witness clarified that two or three days prior to his filing the Habeas Corpus petition, the prosecutrix had returned home. He affirmed that prior to filing the Habeas Corpus petition, he had informed his advocate that the prosecutrix returned home. He further affirmed that the hearing of the Habeas Corpus petition was on 19.01.1999.

31. The father had not filed the complaint immediately on that day. The date of accused taking away the prosecutrix was 19.09.1998. The complaint-Exhibit 8 was registered on 21.09.1998, while the Habeas Corpus petition was filed on 19.01.1999. As per PW1 prior to the writ petition, the prosecutrix was back home.

32. In the complaint, the father had got it recorded that he

was having his business in the name of 'Rajasthan-Nagpur Transport' and that he was staying with his family at Ahmedabad. His elder daughter was 16 years and the prosecutrix was 14 years. Their daughters were studying in English Medium-The Samarth English High School and the elder daughter was in Standard X and the prosecutrix was studying in Standard IX. The prosecutrix was taking tuition between 4.00-5.30 pm from a lady teacher at Azad Society. From his elder daughter who was also studying in The Samarth English High School, he came to know that Khanjan Palash a boy residing behind 15, Vanraj Society, RTO Ground was often coming to meet the prosecutrix at the tuition class and was alluring the prosecutrix for developing love relation. PW1 further stated that he used to frequently go to inquire at the tuition class at Azad Society and PW1 had seen the accused standing there with his bike. On the day of complaint, he informed the police in Exhibit 8 that approximately 15 days prior, his elder daughter-Jasmeet had informed him that his younger sister-the prosecutrix had not gone to the tuition classes

and was moving around with Khanjan Palash. Therefore, on that day, PW1 had gone to Azad Society at the tuition class of the prosecutrix and he found that prosecutrix was not present there. He waited for some time and then he saw that Khanjan Palash had brought prosecutrix as a pillion rider on the bike and therefore, he had threatened the accused to stop following his daughter.

33. The complaint-Exhibit 8 further notes that on 16.09.1998, daughter-the prosecutrix in her usual routine from the school had come home and after changing her clothes had gone to the tuition class at Azad Society. Her tuition class was at about 4.00 pm and she left the house at about 3.45 pm, and thereafter, around 4.10 pm, PW1 received a phone call from accused-Khanjan Palash informing that he was taking prosecutrix out and that he was having Rs.4,000/- to Rs.5,000/- and informed him that they would be residing outside for 7-8 days. According to PW1, thereafter they went to Azad Society but did not find the daughter-the prosecutrix.

33.1 In the complaint at Exhibit 8 it is recorded that on the day of the complaint, the mother of the accused-Divyaben at about 3 O' clock in the evening had left his daughter-the prosecutrix at home and had asked PW1 to take care of her. Thereafter, he asked his daughter-the prosecutrix who informed that the accused-Khanjan had met her at the corner of Azad Society and from there, he had taken her and till that date, they were moving out, therefore, he had given the complaint with the cause that anytime at around 15.45 hours in the evening on 16.09.1998, Khanjan Palash resident of 15, Vanraj Society, Behind RTO Ground, Ranip, Ahmedabad had taken his daughter aged about 14 years from his lawful guardianship alluring her with the intention to marry or enticing her for unlawful purpose from the Azad Society end and therefore, the complaint was given against the accused for doing the needful.

34. Section 366 of the IPC reads as under :-

“366. Kidnapping, abducting or inducing woman to compel her marriage, etc.- Whoever kidnaps or abducts any woman

with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with any person shall be punishable as aforesaid.”

35. The evidence of PW1 as a father would clarify that father was having the knowledge that the accused was often meeting prosecutrix and was also often talking with the prosecutrix on phone. The father is not aware of the date of incident. The complaint-Exhibit 8 dated 21.09.1998 has referred to the date of incident as 16.09.1998 and the father in the complaint-Exhibit 8 states that the mother of accused-Divyaben brought the prosecutrix home at about 3.00 clock and asked the complainant to take care of her.

36. As per the Investigating Officer-Bharatsinh Punjuba Waghela-PW10, the prosecutrix had run away on 17.11.1998 and had appeared at Judge Bungalow Chowky before him on 15.01.1999. This fact contradicts the

complaint of the father-Exhibit 8. The father states that the prosecutrix had run away on 16.09.1998 while the deposition of the Investigating Officer notes the date of elopement as 17.11.1998.

37. Thus, the base of the investigation which starts from the complaint-Exhibit 8 becomes doubtful. It then appears that after the complaint again the prosecutrix had left the house since in the complaint it is recorded that mother of accused had brought the prosecutrix back their home. The provision under Section 366 of IPC as referred hereinabove does not become applicable unless it is proved that the kidnapping of the prosecutrix was with an intent to compel her to marry against her will or to force or seduce her to illicit intercourse.

38. The deposition of the elder sister-Jasmeet Gurudev Singh Bakshi as PW3 records that the prosecutrix had gone twice, first for 2-3 days on 16th November in the year of 1998. Both the time, elder sister stated that the

prosecutrix had gone to accused's house. The elder sister does not know about what had happened on the date of incident as she had not gone to the tuition classes on that day. The elder sister-PW3 states that the prosecutrix had informed her that she had gone to Khanjan's house and once, she had gone alongwith Khanjan to Maudi and at the next time, for two months, she stayed at Khanjan's house. Police had gone for search but prosecutrix was not found at the house of Khanjan but the prosecutrix had informed her that she was at the upper storey in the loft of the house when police had come there. The elder sister stated that thereafter, once her mother had gone to Gandhinagar at Khanjan's father's house and prosecutrix was found there and her mother had brought her back alongwith her from Gandhinagar's house. Khanjan's father, brother and sister-in-law and mother were staying together and when her mother had visited the accused's house, accused-Khanjan and prosecutrix were found there alongwith the members of the family. In the evidence, the elder sister had shown her ignorance of the prosecutrix meeting the accused at the

tuition classes and stated that when prosecutrix had left with accused at that time, she came to know that they were meeting each other.

39. In her evidence, PW3-the sister stated that during the first time and second time, when the prosecutrix had left, she had phoned her and told her that she wanted to marry accused and had asked her to get the marriage invitation card prepared. The witness-PW3 had also informed her mother, who as per PW3 had told her if at all again, there would be a phone call, then PW3 had to ask the prosecutrix as to where they would send the Invitation Card after getting it printed. PW3 further stated the prosecutrix would not talk with her mother, but prosecutrix would discuss all the things with her.

40. PW3 further stated that when they had filed the Writ Petition at the High Court, prosecutrix had come to the police station on 14.01.1999. Thereafter, the relatives of accused had come to their house with the proposal for

marriage, at that time, prosecutrix's mother had informed that the prosecutrix is still young and that they would at that time would not think of marriage. According to PW3 prosecutrix was using mobile phone of the accused to talk with her. She further stated that the second time when the prosecutrix had left the house, the mother of the accused had brought back the prosecutrix home. The third time when she had gone, thereafter, they gave a police complaint and they had gone to bring back the prosecutrix. PW3 further stated that the accused was the friend of the brother of her best friend-Mehul.

41. From the testimony of the elder sister, it transpires that the prosecutrix had left the house thrice. The evidence suggests that she was leaving the house on her own volition. The prosecutrix was telling the elder sister of her intention to marry the accused. The prosecutrix had even asked to keep ready the Marriage Invitation Card. Second time the prosecutrix left, she stayed for about two months at the house of the accused. The witness-PW3 stated that she was

not aware that second time when the prosecutrix had left the house she was staying at her friend's residence. Here prosecutrix is not telling her elder sister that accused Khanjan had taken her with a promise of marriage. The intention of marriage appears to be of the prosecutrix.

42. PW2-mother of the prosecutrix-Varendra Bakshi stated that the prosecutrix was studying in Standard IX and at that time, she was going to IIM Institute for tuitions and there, accused used to attract the prosecutrix towards him by enticing and seducing her, accused had asked the prosecutrix to sit on his bike. The prosecutrix got influenced by the accused and she sat on his bike, in that way, the mother stated that the accused had trapped the prosecutrix. Thereafter, he had taken the prosecutrix out for about 4-5 days alongwith him and thereafter, accused had made the prosecutrix to call and inform that now she would not return home and thereafter, Divyaben (mother of accused) had come to leave the prosecutrix home. The mother stated that thereafter, again accused took the

prosecutrix and when they enquired they found the prosecutrix at the house of the accused at Gandhinagar where all the family members of the accused were present there and she brought back prosecutrix home and at the third time, when the prosecutrix was taken by the accused, the parents and other relatives had kept the prosecutrix at their home for about two months. Thereafter, they had filed a writ petition at the High Court. On filing of the case at the High Court, parents of the accused brought the prosecutrix at the police station and as per the mother, the parents of the accused had influenced the prosecutrix and made her go to Nari Niketan. The mother stated that since the accused had taken her for the first time, she could say that it was accused who was taking her often and accused had taken undue advantage of the prosecutrix, who she stated was of 14 years. The date of birth of prosecutrix was stated by mother as 16.11.1984.

43. Learned advocate for the appellant had taken strong objection to the age of the victim by referring to the evidence

of PW7-Laljibhai Bachanbhai Parmar, the Head Clerk of The New Samarth High School, Ahmedabad. Advocate Mr. Vyas submitted that it has come on record that the prosecutrix had eloped with the accused thrice. The parents as well as the elder sister are not sure about the dates of elopement . As per the father, the prosecutrix was 16 years at the time of incident while the mother has referred to her age as 14 years. Advocate Mr. Vyas submitted that the first date of elopement has not been proved but the complaint is dated 21.09.1998 for the incident as alleged of 16.09.1998. The evidence of PW7 is to the effect that the prosecutrix had taken the admission in their school-The New Samarth High School, Ahmedabad on 01.05.1998. The very date of admission in the School would make the date of birth doubtful since in the year 1998 earlier before the filing of complaint too, the prosecutrix had gone with the accused and therefore, the parents would have all the motive to give false birth date of the prosecutrix in the new school. Advocate Mr. Vyas, thus, stated that when the prosecutrix was still admitted in Std.9, she would not have the

matriculation certificate and therefore, the date of birth certificate from school she first attended would become the admissible evidence and not the document, which has been brought by PW7. Advocate Mr. Vyas further stated that in absence of the date of birth certificate from the school attended, the parents could have produced the birth certificate given by the Corporation or the municipal authority, when the place of birth of the prosecutrix is stated to be at Delhi.

44. PW7-Laljibhai Bachanbhai Parmar was serving as Head Clerk on 12.12.1998 at The New Samarth English School. He brought with him the general register for the year 1998-99. He referred to entry no.592 and stated that the prosecutrix was admitted to their school from Little Flower School and as per the entry in the register, the date of birth of the prosecutrix was 16.11.1984 and that she had taken the admission in his school on 01.05.1998 in Std.9. She had left the school on 25.11.1998. In the cross examination, the witness affirmed that if the facts recorded

would be false, then, false details would appear to have been given and stated that when they admit the students in Std.1, they would insist for the birth certificate from Municipal Corporation and if the admission is on transfer from another school, then, they would ask for school leaving certificate. As per their record, the place of birth of the prosecutrix was Delhi. The witness could not state whether the birth certificate of Delhi Municipal Corporation was produced at Little Flower School.

45. In the case of **State of M.P. v. Anupsinh** (supra) referred by the learned APP, reference to the case of **Mahadeo S/o Kerba Maske v. State of Maharashtra & Anr., (2013) 14 SCC 637** has been made in context with Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to in short as 'JJ Rules, 2007'), applicable in determining the age.

46. Rule 12 of the Juvenile Rules, 2007 reads as under :-

“12. Procedure to be followed in determination of age.

(1) In every case concerning a child or a juvenile in conflict

with law, the Court or the Board, as the case may be, the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or, as the case may be, the Committee shall decide the juvenility or otherwise of the juvenile or the child or, as the case may be, the juvenile in conflict with law, prima facie on the basis of physical appearances or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or

the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or, as the case may be, the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7-A, section 64 of the Act and these rules, no further inquiry shall be conducted by the Court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

47. The Hon’ble Supreme Court in Para 12 of the **Mahadeo S/o Kerba Maske** (supra) has observed as under:-

“Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well.”

47.1 In the referred judgment it has been concluded that the yardstick applicable to determine the age of juvenile can

be followed even for victim. The determination of age is to be done by following the procedure laid down in Rule 12(3).

48. In **State of M.P. v. Anoop Singh** (supra) referred by the learned APP, the alleged incident is of 03.01.2003 and the Rules of 2007 of the Juvenile Justice (Care and Protection of Children) were made applicable. Here in the present case, the date of incident as per the complaint Exhibit 8 is 16.09.1998. Hence, accordingly, the same Rules could be made applicable in the present matter.

49. Dr. Mustak Ahmed Gulamrasul was examined as PW11 at Exhibit 59. He examined the prosecutrix on 22.09.1998, as per the Doctor's testimony, between 2 in the afternoon to 8 in the evening, he was at Civil Hospital as Medical Officer and at about 2.40 in the afternoon, Women Police Constable, Buckle No.6612 from Satellite Police Station had come with the prosecutrix for medical examination. The prosecutrix, before the Doctor, gave the history that 3 months prior, she got acquainted with the boy

who was visiting the house of their neighbours staying opposite to them and she fell in love, they used to go to restaurant and on 16.09.1998, on bike by road, they had gone to Baroda, where they stayed at a hotel and for once, they slept together and again came back on 19.09.1998.

50. The prosecutrix has not informed the Doctor about the earlier incident, which her sister and mother deposed of going with the accused. The medical examination appears to be in context with the complaint Exhibit 8 registered on 21.09.1998. On the very next day, the prosecutrix was sent for medical examination, while according to the Investigating Officer–PW10–Bharatsinh Waghela, the prosecutrix had eloped on 17.11.1998 and had appeared before him at Judge Bungalow Chowky on 15.01.1999. Thus, if the evidence of the Investigating Officer is to be considered then, even after the complaint Exhibit 8, again the prosecutrix had gone with the accused. The father–PW1 stated that he had filed Habeas Corpus petition on 11.01.1999 and the hearing took place on 19.01.1999, but

prior to the hearing, the prosecutrix had returned back home. So accordingly, the deposition of the Investigating Officer–PW10 corroborates with regard to the dates. The history before the Doctor–PW11 reflects that the prosecutrix was in love relation with the accused.

50.1 The medical evidence at Exhibit 31 produced by PW6– Dr. Dipakkumar Champaklal Jadani shows that he had examined the prosecutrix on 17.01.1999, while Dr. Mustak Ahmed–PW11 had examined the prosecutrix on 22.09.1998. Dr. Mustak Ahmed’s deposition refers to his case papers Exhibit 60, where he has deposed that if sexual intercourse has been established 2-3 months prior, then there were all possibilities of old Hymen Rupture. In the cross-examination, he affirmed that if such sexual intercourse has taken place one month prior, then, the Hymen Rupture as referred by him could occur. PW11 could not say looking to the physicality of the prosecutrix that her age would have been between 18 to 20 years.

51. PW8-PSI Bhagwansinh Kalusinh Puvar who stated that on 21.09.1998 at Satellite Police Station between 7.45 to 8.00 in the evening, Gurudev Singh Jasbirsingh Sikh had come before him and he recorded his complaint as dictated by him. He then sent the complaint to the PSO, the witness-PW8 produced the complaint at Exhibit 8 wherein he identified his as well as Gurudev Singh's signature. He stated that on the basis of the complaint I-C.R. No.516 of 1998 was registered. The report was placed in evidence at Exhibit 38. PW8 had recorded the statement of the mother-Virendra Bakshi-PW2 and the elder sister-Jasmeet-PW3. Thereafter, the investigation was handed over to PSI D.T. Waghela. In the cross examination, PW8 stated that on 14.01.99, he had not recorded the statement of the sister-Jasmeet nor Jasmeet had come on 14.01.99 before him at the Police Station. The Investigating Officer-PW8 stated that Jasmeet in her statement dated 22.09.98 has not got it recorded that the prosecutrix had gone at the house of accused-Khanjan and once alongwith Khanjan had gone to Maudi nor had she stated before the Investigating Officer in

her statement that second time for two months, she stayed at the house of Khanjan. PW8 stated that nor Jasmeet in her statement of 22.09.98 had stated that on her asking prosecutrix said that police had gone for investigation at the house of Khanjan and at that time, prosecutrix was not found, and that prosecutrix informed Jasmeet that she was at the loft and thereafter, once her mother had come to Gandhinagar at Khanjan's father's house and at that time, prosecutrix was found in the presence of the witnesses and that her mother had brought her back home. Nor Jasmeet had got it recorded in the said statement, of accused and prosecutrix found at the house in presence of accused's father, brother and sister-in-law and mother. PW8 further stated that the prosecutrix had not stated in her statement dated 22.09.98 of prosecutrix calling her on phone and at that time, Khanjan was near her and prosecutrix calling her from Khanjan's mobile phone and as soon as she would find the peculiar ringing of the telephone, she would know that it was from the mobile phone, nor has she informed the police in her statement that she had taken the telephone

number of the accused from Mehul.

52. PW8 further stated that the eldest sister-Jasmeet has not stated in her statement that the second time the prosecutrix had gone, it was accused's mother who had brought her back home nor has recorded that third time when prosecutrix had gone, prosecutrix had appeared before the police and she had gone to take her back.

53. PW8 was further confronted with regard to the statement of the mother-Virendra Bakshi dated 21.09.98 before him where the Investigating Officer has stated that the mother has not stated in her statement that accused-Khanjan was trying to attract the prosecutrix towards her when she would be attending her tuitions and by alluring the prosecutrix thereafter, would ask to sit on his bike nor of the prosecutrix informing the mother of calling her by phone, nor the mother going at the house of accused the second time and bringing her back in the presence of the family members of the accused from Gandhinagar and also

had not stated that third time the prosecutrix had gone, the accused's parents as well as other relatives had kept the prosecutrix with them for about two months, nor the mother in her statement has stated that once accused had taken her, therefore, she could say that it was Khanjan who was taking undue advantage of the minor age of the prosecutrix and that Khanjan was coming in the neighborhood and therefore, they were knowing his name.

54. The investigating officer PW8 was again recalled by an order below Exhibit 70. Where the witness-PW8- Investigating Officer was asked about the statement of victim recorded on 22.09.98 which he affirmed and had also stated of the further statement recorded of the prosecutrix on 23.09.98, stating that both the days when the statement of prosecutrix was recorded , accused was not present.

55. The Trial Court enquired from PW8, who stated that when he was PSI at Satellite Police Station on 21.09.98, at that time, PSI-Shri. V.P. Waghela was performing his duty

at Judges Bungalow Chowky and at that time, their Senior P.I. was Shri. Kulsinh Gohil who orally had asked him to hand over the investigation to Shri. Waghela.

56. It is required to be recorded here that initially the charge was framed below Exhibit 1 on 01.03.2001 by Additional City Sessions Judge under Sections 363 and 366 of IPC and thereafter below Exhibit 47 on 25.05.2001, the charge was framed under Section 376 of IPC against the accused.

57. To frame the charge under Sections 363 and 366 of IPC, it was recorded that on 16.09.98, after 15.45 hours and thereafter anytime, from the city of Ahmedabad, Azad Society area, the daughter of the complainant-Gurudev Singh Jasbirsingh was taken away from the lawful guardianship of the complainant with an intention to force her for illicit intercourse outside marriage and for that purpose, inducing her or having the knowledge of such possibility had kidnapped her.

58. The order below Exhibit 47 of framing additional charge under Section 376 of IPC was challenged before this High Court by filing Criminal Revision Application No.357 of 2001 but by an order dated 29.11.2001, the Revision Application came to be withdrawn, hence, the trial proceeded with the additional charge of Section 376 IPC.

59. The trial Court while recording the conviction has noted as under :-

“PW10-Bharatsinh Punjabha Vaghela was serving as PSI and after the crime was registered of the complaint given by PW1 on dt.21-09-1998, as the I-Cr.No.516/98, he investigated further. This witness has been examined on the aspect that, in her statement dated 15-01-1999 she had stated, all the facts she stated on 22-09-1998 were true and on dt.16-09-1998, she had gone with friend Khanjan with her own volition and her signatures were also obtained and where she has stated of the physical torture by her parents. There was absence of accused when this statement was given by her. He denied the charge that, this statement had been recorded on getting bribe from the father of the accused. He also denied the fact that, he had not adequately investigated into the complaint and merely used to visit the house of the accused for the name sake and deliberately misled that investigation. As discussed hereinabove, the investigation had been done by this witness is in slip shod manner. Even, if one believes the contradictions proved by the defence, that she had joined the accused on her volition, as discussed herein before, she was incapable of forming her own volition and make up the mind considering her young age and therefore, it needs to be held that, it was the accused who had taken away the prosecutrix from the lawful

guardianship of the parents. As regards the details given by her on dt.15-01-1999, the Court must be conscious of the fact that, by that time the writ petition was already filed by the father of the prosecutrix before the High Court of Gujarat and therefore, the accused left her at the doorstep of Satellite Police Station and before the matter comes up on board, on 18-01-1999 this statement was recorded where there is a clear attempt on the part of Investigating Officer to favour the accused because he was not even bothered subsequently to inquire into the truthfulness of that version. Though there being no requirement to obtain the signature of the prosecutrix, the same has been done presumably to make it sure that, she may not change version after she is out of the spell of the accused. She continued to live with the parents of the accused at Gandhinagar and when he was in charge of the said case, there are specific allegations in the substantive evidence of the prosecutrix as regards the conduct of this witness. It is very sad to note that, in a matter which is before the High Court for bringing a person by way of the writ petition who is young aged 14 years, such kind of attitude is adopted by the Investigating Agency to curry favour to the accused. However, inspite of all these, when the Court has found that, not only the testimony of the prosecutrix requires to be believed but, there is ample corroboration from the evidence discussed herein before for her testimony to sustain the charges against the accused are required to be held to be proved. Thus, prosecution proved the charges of abduction and also of his having had sexual intercourse with the prosecutrix and immediately after she was taken by the accused, they had gone to hotel Ghunghat where the accused had sexual intercourse with her and therefore, ingredients of all the charges u/s. 361, 366 and S.376 are proved beyond reasonable doubt.”

60. The observations of the learned trial Court Judge is required to be examined on the basis of evidence on record. Whether the accused without the consent of the lawful guardian had taken the victim girl to join him has to be analysed. The trial court records that on believing the

contradictions proved by defence that she had joined the accused on her volition, however was incapable of forming her own volition and make up the mind considering her young age and therefore it was held that it was accused who had taken away the prosecutrix from the lawful guardianship of parents. The trial court had found the investigation of PW 10 Bharatsinh Waghela in slip shod manner. However, though the learned trial Court Judge had observed the evidence of PW8-the Investigating Officer-Bhagwansinh Kalusinh Puvar, the learned trial Court Judge has failed to record from the evidence of PW8 that PW8 was recalled by an order below Exhibit 70 where the Investigating Officer was confronted with regard to the evidence of the victim girl which was dated 22.09.98 and 23.09.98. It appears that the learned trial Court Judge had not considered the contradiction which has been brought on record of the statement of the prosecutrix by way of further cross examination of PW8 on being recalled by the order of the Court. The victim's statement was recorded by investigating officer PW8 on 22.09.98 as well as on

23.09.98. The learned trial Court Judge while appreciating the evidence had considered the evidence of PW2 and PW3 to observe that though contradictions were brought on record of the version of PW2 and PW3 but the basic version inherently remained consistent to observe that PW2 and PW3 both have stated of accused having lured prosecutrix and accused had taken away the prosecutrix. The learned Judge had observed that the statement of prosecutrix dated 22.09.98 recorded that prosecutrix had not stated of accused having sexual intercourse with her. The statement of witnesses were recorded by PW8 and not by PW10.

61. The prosecutrix was examined as PW4 which was, in-camera proceeding. The deposition stated that she was residing with her father and mother at Azad Society alongwith her elder sister-Jasmeet. Prosecutrix stated that at the time of incident both the sisters were studying at The New Samarth High School located in Manekbaug. Elder sister was in Standard XI and she was in Standard IX. It was an English medium School. Her father was in

transport business and her mother was a house maker. She was going for tuitions at 6.00 in the evening. Her date of birth she stated was 16.11.1984.

62. There was IIM Society wherein and just opposite their house was Sameer Apartments. Her mother and sister used to come to leave her at the tuition class. The witness stated that while she was returning back from tuitions, Khanjan met her, Khanjan told her that he was loving her and asked her to join him and told her to sit on the bike. Therefore, she sat on it and thereafter, on the road he told her that now they were not going back home and went to Ghunghat Hotel at Gandhinagar where they stayed for two days and thereafter, to another hotel at Vadodara. She does not recollect the name of the hotel and thereafter, they came back from Vadodara and went to the Bank where Khanjan's mother was serving. The witness stated that from the Bank, Khanjan's mother came to leave her home.

63. The prosecutrix has not stated about the date on

which she had gone alongwith the accused and stayed at Ghunghat Hotel. The witness-PW5-Kantilal Ambalal Chowdhary was examined who was a partner in Ghunghat Hotel which is located at Gandhinagar Sector 26 GIDC. PW5 identified the accused in the Court stating that police had brought the accused at their place and therefore, he could identify him. The witness brought the Register in the Court, verifying the Register, the witness stated that on 16.09.98 there was no entry of Khanjan Nagjibhai Palash in their Register nor any entry of 17, 18, 19, 20, 21/09/1998 of accused in the Register for Room No.101, and as per the Register, on 16.09.98, in Room No.101 of their Hotel, Sanjay Patel and Juhi Rathod had stayed for only one day and the person who had stayed there, their address was of Alkapuri, Vadodara.

64. The prosecutrix has not given the specific date of their stay at Ghunghat Hotel nor does she state in the testimony before the Court that while staying at Ghunghat Hotel, accused had established sexual relations with her.

65. The next date as per the prosecutrix is 17th November, 1998. She received a call from Khanjan who had asked her to meet him out and then he said that, 'we should leave'. Thereafter, for three to four days they stayed in a Hotel at Gandhinagar and then stayed at Khanjan's house at Sector No.20 where Khanjan's mother, father, brother and sister-in-law were residing where they stayed for about two months.

66. The prosecutrix as a witness could not name the Hotel and then the evidence is of staying with the family members of accused for about two months in their house. Her evidence is that after ten days they had gone to reside at Khanjan's another mother's home who was Sumanben Palash of Sukhsar Village, Panchmahal District. Thereafter they again came back at the Gandhinagar house where they resided in the presence of the parents of the accused. The prosecutrix stated that at that time whenever police had come for their search, they would go to the house of the

neighbour. Prosecutrix stated that when they were residing at Gandhinagar, police would not come to search on the upper floor. While PSI-Shri. Waghela who the witness stated was at his duty at Satellite Police Station would come at the Gandhinagar house and after having tea would leave the house. According to witness, the house of accused was of ground floor and first floor, which was Government residential place. Thereafter her parents had filed a case before Gujarat High Court and Khanjan's father and mother had advised her to go to Nari Niketan informing that if she would stay there at their house, their Government service would be in peril. On 18.01.1999, there was date at the High Court and prior to that, on 15th January, Khanjan's parents had sent her away and Khanjan had come to leave her at Satellite Police Station. The prosecutrix/witness stated that near Drive-in, a new Police Station was opened and PSI-Shri. Waghela was newly shifted there. Witness stated that when she appeared at the Police Station, PSI Waghela had taken her report and had asked her where she was for such a long period. The witness stated that PSI

Shri. Waghela was knowing that she was at Khanjan's house at Gandhinagar. The prosecutrix made an allegation in her deposition that PSI-Shri. Waghela had taken money from Khanjan's parents.

67. The allegation of bribery has been made by the prosecutrix against PW10-PSI-Shri. Waghela. The evidence of the father of the prosecutrix that they had made a search of the daughter at the house of the accused at Ahmedabad as well as Gandhinagar. Accused was not found at Ahmedabad or Gandhinagar. According to PW1-father, parents of the accused were knowing that they were making a search of the accused and ultimately, accused was found from the house of Gandhinagar and therefore, PW1-father thought that it was the father of the accused who had given them shelter and that he was deliberately misdirecting them stating that they were still in search of the accused. According to the father, his daughter was found from the house of accused at Gandhinagar, however, prior to that, he had filed petition in this High Court and as per the father,

Satellite Police Station had produced the accused before this High Court and thereafter, accused was sent to jail for about one month prior to his bail.

68. The evidence of the father thus, notes that it was the Police of Satellite Police Station who had arrested the accused and as per the evidence of prosecutrix at Satellite Police Station, the PSI was PW10-Shri. Waghela.

69. Investigating Officer-PW10-Bharatsinh Punjuba Waghela who stated that in the year 1998-1999, he was as PSI at Satellite Police Station and on 21.09.98, the PSI of their Police Station received the complaint from Gurudev Singh Jasbirsingh Bakshi and the offence under Sections 363, 366 and 376 of IPC were registered. For further investigation, the papers were sent to him which were registered as I-C.R. No.516/98. The offence was against Khanjan Nagjibhai Palash. He recorded the statement of witnesses and thereafter, he had searched for the prosecutrix and the accused at Sabarmati,

Gandhinagar, Dahod and other places. The witness- Investigating Officer stated that the prosecutrix who had eloped on 17.11.98 had appeared before him on 15.01.99 at Judge Bungalow Chowky. PW1-the father stated that he had filed the Habeas Corpus Petition on 11.01.99. The complaint was given on 21.09.98 while according to the Investigating Officer, the girl had eloped on 17.11.98 who appeared on 15.01.99 while according to the father, the date of hearing in the High Court was 19.01.1999.

70. As per the complaint of the father-Exhibit 8, the accused had taken the daughter on 16.09.98 and on the date of the complaint on 21.09.98, at about 3 o' clock in the evening, accused's mother-Divyaben had left the prosecutrix at their house.

71. As per Dr. Mustak Ahmed Gulamrasool-PW11, on 22.09.98, he had medically examined the prosecutrix who had stated before him that she was in love with the accused and she had come to know him three months prior, they

were going together in restaurants, and on 16.09.98, on the bike, they had gone to Baroda by road. There they stayed at a Hotel, they slept once together and returned back on 19.09.98 at Ahmedabad.

72. PW5-the partner of Ghunghat Hotel had come with the Register to depose about the check-in and check-out of the status of the Hotel Room No.101 on 16.09.98. According to him from 16.09.98 till 21.09.98, none, as the accused or the prosecutrix had stayed in his Ghunghat Hotel. The deposition of the prosecutrix and the history given by her to the Doctor-PW11 finds contradiction. Before the Doctor, she stated that she was knowing the accused since last three months, they were in love and she had not stated before the Doctor that the accused had asked her to join him and sit on the bike, while she stated that during the period of three months, they were going to restaurants and on 16.09.98, they had gone on bike by road to Baroda where they stayed in a hotel. This evidence of the prosecutrix before the Doctor would suggest that she on her

own volition had joined the accused and that there is no evidence of any enticement from the side of the accused. The victim was roaming with the accused even prior to 16.09.98. The trial court on appreciation of contradiction brought on record by the defence came to a conclusion that the prosecutrix had joined accused on her own volition, however the trial court was of an opinion that the prosecutrix at that was incapable of forming her own volition.

73. The prosecutrix in her testimony had stated that on 17.11.1998, accused had taken her and initially they stayed for three-four days in a Hotel at Gandhinagar and thereafter, for two months in the house of the accused. In accordance to the complaint dated 21.09.98, the prosecutrix had come back home on that day. Thereafter, again the prosecutrix went away with the accused. Between the period from 21.09.98 to 17.11.98, the prosecutrix was in the lawful guardianship of her parents. During this period, it appears that no action could be taken against the

accused. The deposition of PW8-PSI Bhagwansinh Kalusinh Puvar states that the statement of prosecutrix was recorded on 22.09.98 and 23.09.98.

74. PW8 stated that in the statement by the prosecutrix on 22.09.98, she had got it recorded that she was staying with her parents at Smruti Apartments and opposite their Apartment, Mehul Jaysinh aged about 21 years was residing in Sameer Apartment, was having his marketing business in Usmanpura and at his house, Khanjan Palash, resident of 15, Vanraj Society, Behind RTO Ground, aged about 21 years was often comin, three months prior she got acquainted with him who was in 1st year B.A. of Navgujarat College and since their acquaintance increased, she was in love relation with him and therefore, she and Khanjan used to meet at the place near the tuition classes, school and other places. The prosecutrix had also informed the police that her sister-Jasmeet was knowing about her relationship.

75. PW8-Investigating Officer further stated that

prosecutrix has also got it recorded in her statement that they had reached at about eight in the evening at Hotel Ghunghat which was near Gandhinagar and booked a room. Both of them slept in the room and Khanjan had not misbehaved with her and on the next day, in the evening, at about 8 o'clock, they left the hotel.

76. The prosecutrix has also got it recorded before PW8 that on the bike with Khanjan, she had gone from Gandhinagar to Vadodara and in the city, they had their food at Vadilal Restaurant and stayed in a room at the Hotel which was beside the Restaurant. She does not recollect the name of the Hotel nor the area where they stayed for two days, where too she stated that Khanjan had not misbehaved or sexually harassed her. Further, it is also recorded that when she had gone out with Khanjan, during that period, Khanjan Palash had not behaved with her in an inappropriate manner or had sexually harassed or had sexual intercourse with her. PW8 again took her further statement on 23.09.98 wherein the prosecutrix had affirmed

the statement as true and proper which was recorded on 22.09.98.

77. In view of this evidence of PW8 who was the Investigating Officer, the allegation of taking bribe by PW10-Shri. Waghela and supporting the accused will be falsified as the victim has not made any allegation against PW8. The prosecutrix does not deny the statement recorded on 22.09.98 but she alleges that police has not made her read her statement nor she recollects of the questions put by the police nor her answer to the police. She further stated that she does not recollect any of her answers to the police on 22.09.98. She denied the suggestion that she was deliberately hiding inspite of knowing all the answers.

78. As per the deposition of the prosecutrix, second time she had gone on 17.11.98 and third time on 10.03.99 and on both the times, her family members knew about the incident. She affirms of police recording her statement thrice but has stated that she does not remember any of

them.

79. The prosecutrix stated that for the very first time on 16.09.98, Khanjan had sexual intercourse with her and at that time, her hymen got ruptured and that it has not happened that prior to that, there was rupture of hymen. From 16.09.98 to 22.09.98, accused-Khanjan had kept her with him and during that period, for the first time, had sexual intercourse.

80. As per the complaint of the father-Exhibit 8, that on 21.09.98 prior to lodging the complaint, accused's mother had left the prosecutrix at his home at about 3 o' clock in the afternoon. The prosecutrix has tried to disown her own statement before the police. The prosecutrix further stated that she earlier, during the period of 2 years and quarter, she had never informed anyone about sexual intercourse. She had denied that on 15.01.99, she had informed the police in her statement that she had stayed for about one month with her parents and during that period, often her

mother was taunting her and was subjecting her to cruelty and her father after consuming liquor, too was harassing her, therefore, fed up of all she had thought of committing suicide. But then instead of dying, she thought of running away from home and therefore, on 17.01.99, as she was facing harassment from home which she could not bear and therefore, packing her clothes in a bag, by informing her sister-Jasmeet who had come to leave her at Ashram Road stand along with her friend Mehul, had left home. She has also got it recorded in her police statement on 15.01.99 that she from Kalupur Railway Station, sat in Janta Mail and had gone to Amritsar where she stayed at Gurudwara and two days prior on 13.01.99, she came back to Ahmedabad and was staying at Maninagar Gurudwara and thus, on that day, had appeared at the Police Station.

81. Nothing has come on record by way of verification of her stay at Amritsar Gurudwara and Maninagar Gurudwara. Probably it could not be verified since the Habeas Corpus petition was filed on 11.01.99. The evidence

of PW10-Shri. Waghela shows that on 15.01.99, the prosecutrix had appeared before him at the Judge Bungalow Chowky. He had arrested the accused and had asked for remand and during the course of remand, PW10 had taken the accused to Gandhinagar Ghunghat Hotel to verify their stay in Room No.101. The IO had recorded the statement of the Manager and thereafter, had made a search with the accused at Vadodara but could not locate the hotel there. PW10 had filed the charge-sheet against the accused. Taking all these facts into consideration and the circumstances as has emerged on the record, the allegation of the prosecutrix of PW10 taking bribe from the parents of the accused and moulding the case as per the convenience of the accused does not stand proved. It is PW10 who arrested the accused and had undertaken the necessary process.

82. PW10 had sent the under-wears of the accused as well as the prosecutrix for examination. PW10 had also received the medical certificate of the victim girl produced at Exhibit

40. The document-Exhibit 19 is the Injury Certificate of the prosecutrix, who was examined on 22.09.98 was also procured by PW10.

83. Exhibit 36-the Certificate of birth date from New Samarth English H/S School dated 12.12.98 is also procured by PW10 and placed on record. The FSL Report-Exhibit 17 and Serological Report-Exhibit 18 was placed in evidence by PW10. In the cross examination, the witness PW10 stated there was no entry of the stay of the accused in Room No.101 at Ghunghat Hotel. After 15.01.99, he had not sent the prosecutrix for medical examination.

84. The charge which was framed on 01.03.2001 was of taking away the prosecutrix aged about 14 years from the legal custody of the complainant on 16.09.98 at 15.45 hours with an intent to have illicit intercourse outside marriage and for that purpose, had enticed her. The further charge on 25.05.2001 was that on 16.09.98 at 15.45 hours, the accused took prosecutrix aged about 14 years and

stayed at at Ghunghat Hotel, Gandhinagar, at that time, accused had sexual intercourse with the prosecutrix and committed rape on her and thereafter, three days from 17.11.1998, in the Hotel at Gandhinagar, the accused had established physical relation with the prosecutrix aged about 14 years.

85. The offence dated 16.09.1998 was under Sections 363, 366 as well as 376 of IPC.

86. Section 361 and 375 of IPC as stood prior to the year 2013 were as under. Section 361 of IPC explains kidnapping from lawful guardianship. Section 375 defines rape.

Sections 361 and 375 of IPC are reproduced hereinbelow :-

“361.- Kidnapping from lawful guardianship.-Whoever takes or entices any minor under sixteen years of age if a male, or under 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 lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.”

“375. Rape.- *A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-*

First.- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under sixteen years of age.

Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

87. The provision under Section 375 IPC makes the act of sexual intercourse as rape if it was with or without the consent of a woman under 16 years of age. While Section

361 IPC makes kidnapping punishable from lawful guardian, if the female was under 18 years of age. Thus, if a woman under 18 years of age and above 16 years gives her consent for sexual intercourse, then such act would not become a punishable act. While under Section 361 IPC if a female under 18 years is taken away or enticed from the lawful guardianship without the consent of such guardian, then it would be said to be kidnapping such person from lawful guardianship.

88. In the case of **Thakorlal D. Vadgama** (supra), as referred by learned APP, Section 361 IPC has been explained in Paragraph 10 with the observations as under :-

“The expression used in Section 361 IPC is "Whoever takes or entices any minor". The words "takes" does not necessarily connote taking by force and it is not confined to use of force, actual or constructive. These words merely mean "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 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 purpose of successful inducement. The

two words "takes" and "entices are 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 of inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361 IPC. 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."

88.1 The words "takes" and "entices" are intended to be read together. The section as explained would mean that if the minor leaves her parental home completely uninfluenced by any promise, offer of inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361 IPC. The prosecution has to prove inducement, allurement or threat etc. to have influenced the minor or which may have weighed with her to leave her guardian's custody then the accused cannot be permitted to plead innocence on the ground that the minor had voluntarily come to him.

89. Here, the major issue which has been raised by the

defence was that the prosecutrix was not minor below the age of 18 years at the time when she had joined the accused. The prosecutrix has stated her date of birth as 16.11.1984. The first date of incident as per the guardian of taking the prosecutrix away from the lawful guardianship of the complainant-father was 16.09.98. Then the age would be 13years 10 months. The Investigating Officer had procured the certificate-Exhibit 36 from New Samarth High School, Ahmedabad. The certificate is dated 12.12.1998. The witness as referred hereinabove PW7—the Head Clerk had placed Exhibit 36 in evidence, where he identified the signature on the certificate of Mahadeviya Saheb, the Managing Trustee. The certificate-Exhibit 36 is not issued by the Principal of the school. The signatory of the certificate has not proved the certificate. The document Exhibit 36 is not the one, which is maintained in the regular course of discharge of official duty. Exhibit 35 is the School Leaving Certificate of the same school – New Samarth High School, Ahmedabad. Presence of the prosecutrix in the school was shown for only 33 days out of 98 days in Std.9

and the time period of her studying in Std.9 is shown since June, 1998. The last school attended is recorded as Little Flower High School. The place of birth is Delhi. The date of birth is shown as 16.11.84. The deposition of PW7–Head Clerk proves that the details of the entry in the register was from Little Flower School. However, the witness–PW7 has not produced the original document received from Little Flower School, where the prosecutrix had taken her admission. Nothing is coming on record of her first school, where she was admitted.

90. In the case of **Jarnail Singh v. State of Haryana** reported in (2013) 7 SCC 263, the Hon'ble Supreme Court was of the view that though Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, was strictly applicable only to determine the age of the child in conflict with law, Rule 12 as a statutory provision should be the basis for determining the age even of a child who is victim of crime.

91. As laid down in the case of **Jarnail Singh** (supra), in scheme of Rule 12(3) matriculation or equivalent certificates of the child concerned is the highest rated option. In case such certificate is available, no other evidence can be relied upon. In absence of said certificate, Rule 12(3) envisages consideration of the date of birth entered in the first school attended by the child. Here the first school attended by the prosecutrix is Little Flower School. No document of date of birth certificate from the first school attended has been produced on record and in absence Rule 12(3) allows reliance on birth certificate issued by the Corporation or Municipal Authority. Here in this case, none of the documents as noted in (i),(ii) or (iii) of Clause (a) of Rule 12(3) has been produced on record to prove the date of birth. Clause (b) of Rule 12(3) thus provides that in absence of the aforesaid, the determination of the age could be made on the basis of medical opinion.

92. Here in this case, Dr. Bharat Shankarlal Dave was examined as PW9 who was a Medical Officer and on

23.09.98 was serving at Civil Hospital, Ahmedabad where from Satellite Police Station, Woman Constable Buckle No.6612 was brought for examination of age. The Doctor noted about the height, weight and position of the teeth and other physiological development of prosecutrix, thereafter, prosecutrix was sent to Radiology Department. The Doctor deposed that as per the Radiologist's opinion, the age was between 14-16½ years. The Certificate was given by PW9 who produced it in evidence at Exhibit 40. According to his own opinion, the age of prosecutrix was between 14 to 15 years. The witness had brought three X-rays taken on 23.09.98 from Radiology Department alongwith X-Ray plate. He referred to the EPR No., the X-Ray Plate produced at Exhibit 41 alongwith the Radiologist opinion. The Doctor in the cross examination stated that he has not noted the age of the victim as 14-15 years. The Doctor earlier denied but then agreed that generally the secondary sexual characters as observed could be of a girl between 18 to 20 years.

93. In the case of **Java Mala** (supra), the Hon'ble Supreme

Court while considering the evidentiary value of the radiological tests determining the age of the person has confirmed that two years on either side can be accepted while appreciating opinion of the expert Doctor ascertaining age of the person on the basis of radiological test.

94. In the case of **Rajak Mohammad v. State of H.P.**, reported in **(2018) 9 SCC 248**, it was held as under:

“4. In view of the above, the focal point for decision would be the age of the prosecutrix in order to determine as to whether she was a major so as to give her consent.

5. In this regard, we have considered the evidence and materials on record. The age of the prosecutrix has been sought to be proved by the prosecution by bringing on record the school admission form (Ext. PW 5/A) and the certificate (Ext. PW 5/B) issued by one Jasdeep Kaur (PW 5), JBT Teacher of Government School Dungi Plate. PW 5 in her deposition has stated that the writings in the school admission form (Ext. PW 5/A) are in her handwriting and the signature affixed is that of the mother of the prosecutrix.

6. In cross-examination, PW 5 had stated that the details mentioned in Ext. PW 5/A have been obtained from the school leaving certificate issued by the Government Primary School, Tambol. The certificate issued by the Government Primary School, Tambol on the basis of which the details in the admission form (Ext. PW 5/A) was filled up by PW 5 has not been exhibited by the prosecution.

7. Nothing hinges on the document exhibited by the prosecution as Ext. PW 5/B as that is the consequential certificate issued on the basis of the entries in Ext. PW 5/A. The mother of the prosecutrix who had allegedly signed Ext. PW 5/A has not been examined by the prosecution.

8. On the other hand, we have on record the evidence of Dr Neelam Gupta (PW 8), a Radiologist working in the Civil Hospital, Nalagarh who had given an opinion that the age of the prosecutrix was between 17 to 18 years.

9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

10. We will, therefore, have to hold that in the present case the prosecution has not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence. If that is so, based on the evidence on record, already referred to, we will further have to hold that the possibility of the prosecutrix being a consenting party cannot be altogether ruled out.

11. We will, therefore, have to conclude that the appellant-accused deserves to be acquitted on the benefit of doubt. We, consequently, set aside the order of the High Court and the conviction recorded as well as the sentence imposed and acquit the appellant-accused of the offences alleged. We further direct that the appellant-accused be released from custody forthwith unless his custody is required in connection with any other case.”

95. In the case of **Ram Suresh Singh v. Prabhat Singh**, reported in (2009) 6 SCC 681, it was held as under:

“12. The condition laid down in Section 35 of the Evidence Act for proving an entry pertaining to the age of a student in a school admission register is to be considered for the purpose of determining the relevance thereof. But in this case, the said condition must be held to have been satisfied. An entry in a school register may not be a public document and, thus, must be proved in accordance with law, as has been held by this Court in Birad Mal Singhvi 1988 AIR 1796 but in this case the said entry has been proved.

13. Even if we had to consider the medical report, it is now well known that an error of two years in determining the age is possible. In Jaya Mala v. Govt. of J&K [(1982) 2 SCC 538 : 1982 SCC (Cri) 502 : AIR 1982 SC 1297] this Court held: (SCC p. 541, para 9)

“9. ... However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.”

14. There cannot furthermore be any doubt whatsoever that the same standard is required to be applied for the purpose of Section 35 of the Evidence Act both in civil as also criminal proceedings, as was held by this Court in Ravinder Singh Gorkhi v. State of U.P. [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632] , stating: (SCC p. 595, para 38)

“38. The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted.”

However, the medical opinion rendered in the present case corroborates the entry made in the register. Admission register of the school having been proved in accordance with law, we do not see any reason as to why the same should not be taken into consideration.

15. We are not oblivious of the fact that it is difficult to lay down a law as to whether in a case of this nature, the lower or the upper age or the average age should be taken into consideration. Each case depends on its own facts. In Jyoti Prakash Rai v. State of Bihar [(2008) 15 SCC 223 : (2008) 3 Scale 348] this Court, upon consideration of a large number of decisions, opined: (SCC pp. 232-33, paras 23-25)

“23. The appellant herein had produced a large number of documents to prove his age purported to be as on the date of commission of the crime. The genuineness of the school certificate and the horoscope had been questioned. The school certificate produced by the appellant was found to be forged and fabricated and as a matter of fact a criminal case was directed to be instituted against the Head of the Institution.

24. The Court, therefore, had no other option but to determine the age on the basis of the medical reports. Both the medical reports dated 24-4-2001 and 29-6-2001 opined the age of the appellant between 18 and 19 years. In terms of the first medical report, the age of the appellant came to be 18 years 5 months 8 days and in terms of the second medical report, it came to be between 18 and 19 years. The High Court opined that the appellant on 1-4-2001 was definitely above 18 years of age and not below 18 years of age.

25. The courts have considered this aspect of the matter on earlier occasions also. If, thus, on the basis of several factors including the fact that school leaving certificate and the horoscope produced by the appellant were found to be forged and fabricated and having regard to the two medical reports the courts below have found the age of the appellant as on 1-4-2001 to be above 18 years, we are of the opinion that no exception thereto can be taken.”

In the present case, however, the documents produced by Respondent 1 were not found to be forged, fabricated or otherwise inadmissible in law. If a document is proved to be genuine and satisfies the requirements of law, it should be, subject to just exceptions, relied upon. However, in Vimal Chadha v. Vikas Choudhary [(2008) 15 SCC 216 : (2008) 8 Scale 608] this Court remitted the matter back for consideration of the age in terms of the rules keeping in view

the provisions contained in Section 472 of the Code of Criminal Procedure.”

96. In the case of **Jyoti Prakash Rai v. State of Bihar**, reported in (2008) 15 SCC 223, it was held as under:

“13. A medical report determining the age of a person has never been considered by the courts of law as also by the medical scientists to be conclusive in nature. After a certain age it is difficult to determine the exact age of the person concerned on the basis of ossification test or other tests. This Court in Vishnu v. State of Maharashtra [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] opined : (SCC p. 290, para 20)

“20. It is urged before us by Mr Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact.”

In the aforementioned situation, this Court in a number of judgments has held that the age determined by the doctors should be given flexibility of two years on either side.

97. In the instant case, as per the radiologist’s opinion as recorded in Exhibit 40, it noted the secondary sexual characters were well developed, breasts well developed, after clinical and radiologist’s opinion, her age was between 14 (fourteen) to 16½ (sixteen and half) years. In accordance to

the judgment referred herein above, margin of error in age ascertained by the Radiologist is two years on either side. Thus, the age recorded by the Radiologist of 14-16½ years could be considered as 12-18½ years. The age on the upper side would come to 18½ years.

98. IPC as it stood then at the time of incident, unlike the POCSO Act, 2012 does not mandate presumption of culpable mental state of the accused and the accused does not have the burden of rebutting the presumption of the existence of such mental state. Thus, as is in all other criminal proceeding, the benefit of doubt at all stages goes in favour of the accused. A question then arises is whether the lower or the upper age recommended in the Radiologist test is to be adopted as the age of the prosecutrix. If the benefit of doubt has to given to the accused in all circumstances, then it is the higher limit which has to be taken and benefit has to be extended to the accused as has been in the cases of **Triveniben v. State of Gujarat** reported in (1989) 1 SCC 678 and **Maruram v. Union of India**

reported in (1981) 1 SCC 107.

99. In **Birad Mal Singhvi v. Anand Purohit** reported in **AIR 1988 SC 1796**, in Paragraph 14 it has been observed as under :-

“14. ... The date of birth mentioned in the scholars’ register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. ... Mere proof the documents Exts. ... would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents.”

100. The case put up by the prosecution is of prosecutrix aged about 14 years was being lured by the accused and taken away and enticed from the keeping of the lawful guardian on 16.09.1998. The statement of prosecutrix was recorded on 22.09.1998, 23.09.1998 and 15.01.1999. The accused took the defence that the mother of the prosecutrix had assured marriage with the prosecutrix. The Habeas Corpus petition was filed on 11.01.1999. The evidence which came on record is that the prosecutrix had left home thrice. The father as complainant has no knowledge, about the prosecutrix. From the evidence of the elder sister and the mother, it transpires that they were knowing of prosecutrix’s relation with the accused.

101. The complaint Exhibit 8 is dated 21.09.1998. The prosecutrix was medically examined by PW11-Dr. Mustak Ahmed Gulamrasul on 22.09.1998. The Doctor had observed old hymen tear. The history before the Doctor reflects of love relation and of prosecutrix openly moving around with the accused and even visiting restaurant. The history also depicts that on 16.09.1998 the prosecutrix on her own had gone with accused on his bike. It is not that accused had asked her to sit on the bike with the intention to take her to some hotel for any illegal sexual intercourse. The medical examination on 22.09.1998 does not show of any physical force exerted by accused on the prosecutrix. The pubic hair and the hair of the underarms were well developed, even the breast were found developed.

102. The evidence has come that even prior to the complaint-Exhibit 8, prosecutrix had gone with the accused and then on 16.09.1998 and even after the complaint, prosecutrix had eloped with the accused.

103. The prosecutrix till her statements on 22.09.1998 and 23.09.1998 which were recorded by PW8-Investigating Officer had not made any allegation of sexual intercourse by the accused. In the Court during the trial, she disowned both her statements. However, the contradiction could be proved by the evidence of PW8, who was recalled for that purpose.

104. The trial Court too had believed that the prosecutrix had joined the accused on her own volition, however found prosecutrix incapacitated to form opinion because of her age. The father in the complaint-Exhibit 8 got recorded the age of the prosecutrix as 14 years while in the deposition, the father stated the age of prosecutrix as 16 years. Crucially to be noted that the during this period of elopement, which was earlier to the date of complaint, the school of the prosecutrix gets changed. As noted hereinabove, prosecutrix appears to have started her schooling in The New Samarth English High School in June

1998. The actual days of attending school, was recorded as 33 days out of 98 days, which had not been proved by the witness PW7-the Head Clerk by producing attendance register. The School Leaving Certificate-Exhibit 35 is dated 25.11.1998. In view of the analysis of the evidence earlier recorded hereinabove, no record of Little Flower High School has been produced and proved. The condition laid down in Section 35 of Indian Evidence Act for proving an entry pertaining to the age of a student in a School Admission Register is to be considered for the purpose of determining the relevance thereof. An entry in a school register may not be a public document and they must be proved in accordance with law. Here the witness-Head Clerk did bring the Register of admission in Court but failed to produce certified copy of the relevant entry. Further, in absence of record from Little Flower High School, the documents of The New Samarth English High School becomes doubtful in wake of the fact that the admission and school leaving date on Exhibit 35, are almost nearing the date of elopement and complaint.

105. The Investigating Officer-PW10 Shri. Waghela who procured Exhibit 35 and Exhibit 36, was required to further investigate, and could have recorded the statement of the Principal of Little Flower High School, the school first attended by the prosecutrix. It was the duty of the Investigating Officer to bring the best evidence on record to place the truth. It is not that the Investigating Officer has to merely secure and collect evidence, but has to investigate the base and authenticity of the evidence. The real evidence as contemplated under Rule 12(3) of JJ Rules, 2007 could have been brought on record, had PW10 further investigated the evidence at Little Flower High School.

106. The evidence of a victim of sexual assault stands almost on par with the evidence of an injured witness, and such evidence of the witness who has sustained injury in the occurrence is considered to be a good witness, in the sense, that she is least likely to shield the real culprit, the evidence of victim of a sexual offence is entitled to gain

weight even in absence of corroboration as noted in **State of Punjab v. Gurmit Singh** reported in (1996) 2 SCC 384 and reiterated in **Ranjit Hazarika v. State of Assam** reported in (1998) 8 SCC 635. The relevant observation follows as :-

“Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or girl subject to sexual assault is not an accomplice to the crime but is a victim of another person’s lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.” (emphasis in original).

107. The reliance on the sole testimony of the victim can be made provided it inspires confidence. Here the conduct of the prosecutrix becomes important to be examined, her eloping frequently with the accused, speaks volumes of her relation with the accused. The criminal intent of the accused has not been proved. The evidence of age of prosecutrix has become doubtful. The prosecutrix was competent at the relevant time to make her own decision.

108. In the case of **Raju and Others v. State of Madhya Pradesh** reported in (2008) 15 SCC 133, it was held as under :-

“10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

*12. Reference has been made in **Gurmit Singh** case [(1996) 2 SCC 384 : 1996 SCC (Cri) 316] to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose*

presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”

109. The Leaving Certificate though becomes admissible evidence but that itself would not be sufficient to prove the age of the prosecutrix unless the material on which the age was recorded would be proved. The corroborative piece of evidence to believe the leaving certificate had not been brought on record. This loophole in investigation certainly will extend the benefit to the accused. As analysed before considering the ratio laid down in **Rajak Mohammad** (supra), the age established by radiological examination might not be precise, and sufficient margin of error must be allowed. The upper estimated age can be considered since the benefit of doubt can be extended to the accused. Thus, accordingly prosecutrix's age at the time of complaint-Exhibit 8 can be considered above 18 years, thus failing prosecution, to draw the ingredients of Sections 361 and 375 of IPC against the accused to prove the case under

Sections 363, 366 and 376 of IPC.

110. On the basis of analysis of evidence and the principle of law ruled in the referred and relied upon judgments with the relevant provisions of law, the Appeal succeeds.

111. In the result, the judgment and order dated 26.08.2002 passed by the learned Additional Sessions Judge, Ahmedabad, Court No.10 in Sessions Case No.140 of 2000 is set aside. The appellant is acquitted of all the charges levelled against him. Bail and bail bond stands discharged. Record and proceedings be sent to the concerned Trial Court forthwith.

Sd/-
(GITA GOPI,J)

CAROLINE, PANKAJ & MAULIK / DB # 1