

Exhibit : _____

FORM - A

**IN THE COURT OF SPECIAL COURT FOR EXCLUSIVE TRIAL OF
CASES UNDER POCSO ACT
CITY CIVIL & SESSIONS COURT NO.11,
AHMEDABAD CITY**

Present : Paresh M. Sayani, Special Judge (POCSO),
[Date of Judgment :23/09/2023]

SPECIAL (POCSO) CASE NO. 233 OF 2022

WITH

SPECIAL (POCSO) CASE NO. 267 OF 2022

(Offences punishable under Sections: 363, 366, 376(1), 376(2)(n), 114 of the Indian Penal Code ('IPC' for short) and under Sections: 4, 6, 17 & 18 of the Protection of Children from Sexual Offences Act ('POCSO Act' for short), registered vide C.R.No.A/11191024220704/2022 with Rampl Police Station, Ahmedabad City)

Complainant	State of Gujarat
Represented By	Mr. V.C.Chavda, learned APP
Versus	
Accused	1
	Rahul S/o Ramdas Shyamlal Yadav, Age: 19 years, Residing at : Village- Hasvapar, Thana- Belharkala, Post- Gopalpur, District- Kabirnagar, Uttar Pradesh.

2	Abhishekkumar Shyamlal Yadav, Age: 31 years, Residing at: Boisargam, Navapura Road, Dhodi Puja Chali, Taluka – Sarvali, District – Palghat, Maharashtra Native Place: - Village - Hasvapar, Post- Gopalpur, Agiyona Sant Kabirnagar, Uttar Pradesh.
Represented by	Mr.H.A.Parmar, learned Advocate

FORM - B

Date of Offence	20/08/2022
Date of FIR	23/08/2022
Date of Charge-sheet	02/10/2022 against accused No.1 and 13/11/2022 against the accused No.2
Date of Framing of Charges	25/11/2022
Date of commencement of evidence	14/03/2023
Date on which judgment is reserved	23/09/2023
Date of the Judgment	23/09/2023
Date of Sentencing Order, if any.	---

Accused Details

Rank of the Accused	Name of Accused	Date of Arrest	Date of Release on Bail	Offences charged with	Whether Acquitted or convicted	Sentence Imposed	Period of Detention undergone during Trial for purpose of section 428 Cr.P.C.
A-1	Rahul S/o Ramdas Shyamlal Yadav	01/09/2022 (15:30 hours)	21/09//2022	U/Ss. 363, 366, 376(1), 376(2)(n), 114 of the IPC, U/ S.4, 6, 17 & 18 of the POCSO Act	Acquitted	-	01/09/2022 to 20/09/2022
A-2	Abhishekkumar Shyamlal Yadav	24/10/2022 (14:00 hours)	24/10/2022 (Granted Anticipatory Bail)				--

FORM - C**LIST OF PROSECUTION. DEFENCE/COURT WITNESSES****A. Prosecution :**

Rank	Exh.	Name of witness	Nature of Evidence
PW 1	12	Ikbal Abulsattar Shaikh	Panch Witness
PW 2	17	Complainant	Complainant
PW 3	18	Mother of the victim	Mother of the victim
PW 4	19	Victim	Victim
PW 5	20	Brother of the victim	Brother of the victim
PW 6	22	Dr.Harshad Kantilal Rathod	Medical Officer
PW 7	23	Dr.Hetal Chinubhai Patel	Medical Officer
PW 8	27	Sajrulhasan Mahedihasan Ansari	I/c Head Teacher of the xxx School
PW 9	30	Manilal Chandubhai Chauhan	Police Witness
PW 10	35	Chhatrapalsinh Raghuvirsinh Rana	Police Witness (I.O.)

B. Defence Witnesses, if any : NIL**C. Court Witnesses, if any : NIL****LIST OF PROSECUTION.DEFENCE/COURT EXHIBITS****A. Prosecution :**

Sr. No.	Exh.	Description
1	P-1/PW-1	Panchnama of the seizure of clothes of the victim and the accused
2	P-2/PW-1	Panch slips (collectively)
3	P-1/PW-2	Copy of school register showing the birth-date of the victim
4	P-2/PW-2	Copy of Aadhar Card of the victim
5	P-3/PW-2	Original complaint

Sr. No.	Exh.	Description
6	P-1/PW-4	Statement of the victim under Section: 164 of the Cr.P.C.
7	P-2/PW-4	Certificate given by Saunak Films, Ahmedabad along with C.D.
8	P-1/PW-6	Police yaadi for obtaining necessary samples and to issue injury certificate of the accused Rahul Ramdas
9	P-2/PW-6	Injury certificate of the accused Rhul Ramdas Yadav
10	P-1/PW-7	Police yaadi for obtaining necessary samples and to issue injury certificate of the victim
11	P-2/PW-7	Injury certificate of the victim
12	P-1/PW-8	True copy of Register maintained by the xxx School
13	P-1/PW-9	Report u/s.157 of the Cr.P.C.
14	P-1/PW-10	Report for addition of Sections
15	P-2/PW-10	Dispatch Note
16	P-3/PW-10	Receipt of FSL
17	P-4/PW-10	Letter of FSL
18	P-5/PW-10	Report of FSL
19	P-6/PW-10	Serology report

B. Defence : NIL

C. Court Exhibits : NIL

D. Material Objects : NIL

COMMON JUDGMENT

1 The accused No.1 Rahul S/o Ramdas Shyamdas Yadav was arrested on 01/09/2022 and the charge-sheet was filed against him before the Court on 02/10/2022 and it was numbered as Special POCSO

Case No.233/2022 and thereafter, the absconding accused No.2 Abhishekkumar Shyamlal Yadav had remained present before the concerned I.O. as directed by the Court while granting anticipatory bail to him vide order passed in Criminal Misc. Application No.7353/2022 dtd.19/10/2022. Thereafter, supplementary charge-sheet was filed against the accused No.2 which was numbered as Special POCSO Case No.267/2022. Since both the cases are arising from the same offences, Ld.APP has given an application at Exh.6 to consolidate both the aforesaid cases and the evidence be adduced in the Special POCSO Case No.233/2022, which was allowed vide order dtd.25/11/2022. In view of the above, both these cases are to be decided and disposed of by this common judgment.

2 The accused persons have been facing charges for the commission of the offences punishable under Sections: 363, 366, 376(1), 376(2)(n), 114 of the Indian Penal Code (for short 'IPC') and under Sections: 4, 6, 17 & 18 of the Protection of Children From Sexual Offences Act (for short 'POCSO Act').

3 The factual matrix as narrated by the prosecution case stands as under:-

That on 23/08/2022, the complainant (name withheld in

view of Section: 33(7) of the POCSO Act and hereinafter referred to as “complainant”) has filed the complaint with Ramol Police Station, inter-alia, stating therein that, he is residing at xxxx , near Singhavai Mata-na Mandir, C.T.M., Ramol, Ahmedabad with his wife, one son, wife of his son and two daughters. His eldest son is residing at Pune and another son is residing at Gota, Ahmedabad. Before two months from the date of filing the complaint, they were residing at their native Uttar Pradesh. He has three sons and two daughters. His youngest daughter (name withheld in view of Section:33(7) of the POCSO Act) (hereinafter referred to as “victim or prosecutrix”), who is aged 16 years & 20 days, has studied upto 5th standard and is helping her mother in household work. On 20/08/2022, at 08:00 a.m., he and his wife were out of home for labour work and his both daughters, son and wife of his son were at his home. At 06:00 p.m., he and his wife have returned home after doing their labour work, at that time, his victim daughter was not present at his home. Hence, he has asked to his daughter-in-law about his victim daughter and she has stated that the victim has gone out of home by saying that she was going to Temple for worship and did not returned to home. Thereafter, they have searched the victim in the Temples in the vicinity and relatives and at their native place, but no information was obtained. Hence, he has come to file the complaint before Ramol Police Station. In these circumstances, the complaint has been filed by the complainant against unknown person who has kidnapped

the victim from his lawful guardianship. The present case was registered bearing C.R.No.A/11191024220704/2022 with Ramol Police Station, under Section: 363 of the IPC, whereupon a Report under Section: 157 of the Criminal Procedure Code (hereinafter referred to as “**the Code**” or “**Cr.P.C.**”) was submitted to higher authorities as per Exh.:P-1/PW-9.

4 After registration of the case, the investigation in the present case was commenced. Statements of the concerned witnesses were recorded. The accused No.1 Rahul S/o Ramdas Shyamlal Yadav was arrested on 01/09/2022 at 15:30 hours. The accused No.1 Rahul S/o Ramdas Shyamlal Yadav was granted regular bail by this Court vide order passed in Criminal Misc. Application No.6283/2022 dtd.13/09/2022. After finding a case against the accused No.1, ‘Final Report’ under Section: 173 of the Code was forwarded to the Court for trial against the accused. Since sufficient evidence was found against the accused No.1, charge-sheet came to be filed against him.

5 The accused No.2 Abhishekkumar Shyamlal Yadav was absconding. Thereafter, the accused No.2 Abhishekkumar Shyamlal Yadav was granted anticipatory bail by this Court vide order passed in Criminal Misc. Application No.7353/2022 dtd.13/10/2022 and as per the aforesaid order, the accused No.2 had remained present before the

Police Station on 24/10/2022 and was released on bail on the same day. After finding a case against the accused No.2, 'Final Report' under Section: 173 of the Code was forwarded to the Court for trial against the accused No.2. Necessary panchnamas were drawn, yaadi were sent for medical examination of the accused No.1 and the victim and obtained medical certificates of the victim and the accused No.1. Since sufficient evidence was found against the accused No.2, charge-sheet came to be filed against him.

6 Copy of final report under Section:173 of the Code was supplied free of cost to the accused persons as envisaged under Section:207 of the Code.

7 After hearing both the sides under Section: 226 of the Code, and finding a *prima facie* case against the accused persons, charges were framed against the accused persons by this Court at Exh.4 in the Special POCSO Case No.233/2022 and at Exh.3 in the Special POCSO Case No.267/2022 under Sections: 363, 366, 376(1), 376(2)(n), 114 of the IPC and under Sections: 4, 6, 17 & 18 of the POCSO Act. The charges were read over and explained to the accused persons to which they did not plead guilty and claimed to be tried vide their statements at Exh.5 in the Special POCSO Case No.233/2022 and at

Exh.4 in the Special POCSO Case No.267/2022.

8 After completion of recording of the evidence of the prosecution, a pursis was filed by the prosecution at Exh.36 for closing the prosecution evidence.

9 After closure of evidence of the prosecution, statements of the accused persons under Section: 313 of Cr.P.C. was recorded on 23/09/2023, in which all the incriminating material was put before the accused persons, but the accused persons have denied all the allegations and contended that false complaint was filed against them and they have not committed the alleged offence. They are innocent.

10 I have heard the Learned APP for State and Learned Advocate for accused persons and gone through the case file very carefully.

ARGUMENTS OF LD.APP MR.V.C.CHAVDA:-

11 Mr.V.C.Chavda, Ld.APP has submitted that total ten witnesses have been examined by the prosecution to prove its case. It is argued that the Pw-1 Ikbal Abdulsattar Shaikh at Exh.12 has supported the panchnama of the seizure of the clothes of the victim and the accused

No.1 at Exh.P-1/PW-1. Pw-1 has identified his signature in the said panchnama as Panch No.2 and has identified the muddamal. Pw-1 has also identified his signature in the panch slips at Exh.P-2/PW-1.

12 Mr.V.C.Chavda, Ld.APP, has argued that the complainant Pw-2 at Exh.17 has though stated that he does not remember the birth-date of his victim daughter, but has given the copy of birth certificate of his victim daughter at the time of filing the complaint at Exh.P-1/PW-2. Pw-2 has stated that the copy of the Aadhar card of the victim at Exh.P-2/PW-2 was given by him. Pw-2 has stated that his victim daughter was found after 2 – 3 days.

13 Mr.V.C.Chavda, Ld.APP, has argued that the mother of the victim has been examined as Pw-3 at Exh.18 wherein, she has stated that she does not remember the birth-date of her victim daughter, but at the time of the incident, she was of 15 years. Pw-3 has stated that her victim daughter was found after 2 – 3 days.

14 Mr.V.C.Chavda, Ld.APP, has argued that the victim Pw-4 at Exh.19 has stated that she does not remember her birth-date, but she was born in the year 2006 and she was of 17 years at the time of the incident. It is argued that the victim has turned hostile and not supported

the prosecution case.

15 Mr.V.C.Chavda, Ld.APP, has argued that the Pw-5, who is brother of the victim, at Exh.20 has also turned hostile and not supported the prosecution case.

16 Mr.V.C.Chavda, Ld.APP, has argued that the Pw-6 Dr.Harshadkumar Kantilal Rathod at Exh.22 has examined the accused and in the history before him, the accused has stated that he was in love with the victim and has made physical intercourse with the victim on several occasions.

17 Mr.V.C.Chavda, Ld.APP, has argued that the Pw-7 Dr.Hetal Chinubhai Patel at Exh.23 has examined the victim and in the history before her, the victim has stated that she has voluntarily gone with Rahul to Mumbai.

18 Mr.V.C.Chavda, Ld.APP, has argued that the Pw-8 Sajrulhasan Mahedihasan Ansari at Exh.27 has stated that he is the I/c Head Teacher in Primary School, Hasvapar. As per the register maintained by his school at Exh.P-1/PW-8, the birth-date of the victim is 03/08/2006. Thus, the Ld.APP has argued that at the time of the incident,

the victim was minor.

19 Mr.V.C.Chavda, Ld.APP, has argued that the Pw-9 Manilal Chandubhai Chauhan at Exh.30 has written the complaint as narrated by the complainant at Exh.P-3/PW-2. Pw-9 has supported the case of the prosecution.

20 Mr.V.C.Chavda, Ld.APP, has argued that the Pw-10 Chhatrapalsinh Raghuvirsinh Rana at Exh.35 has investigated the case and recorded the statements of the concerned witnesses. Pw-10 has supported the case of the prosecution.

ARGUMENTS OF MR.H.A.PARMAR, LA, FOR THE ACCUSED PERSONS:-

21 Mr.H.A.Parmar, LA, for the accused persons has submitted that the prosecution has examined total ten witnesses. The main witnesses i.e. complainant, the victim, the mother of the victim and the brother of the victim have not supported the case of the prosecution.

22 Mr.H.A.Parmar, LA, for the accused persons has argued that the complainant has stated that her victim daughter has returned after two three days and stated him to that she has gone to her aunt's home.

The mother of the victim has also deposed same as deposed by the complainant.

23 Mr.H.A.Parmar, LA, for the accused persons has argued that the victim has not identified the accused persons before the Court. She has stated that police has not inquired her with respect to any incident. The victim cannot write and read Gujarati language and she has signed as instructed by police. She has also stated that she has gone to her aunt's home and returned after two three days.

24 Mr.H.A.Parmar, LA, for the accused persons has argued that the brother of the victim has stated that at the time of the incident, he has gone to his village and come to know that quarrel took place between his victim sister and his mother and hence, his victim sister has gone somewhere.

25 Mr.H.A.Parmar, LA, for the accused persons has argued that the Pw-6 Dr.Harshadkumar Kantilal Rathod has perused the police yaadi in which short facts of the incident have been mentioned.

26 Mr.H.A.Parmar, LA, for the accused persons has argued that the Pw-7 Dr.Hetal Chinubhai Patel has stated that in the history before her, the victim has not stated she was enticed away and kidnapped and

she was raped.

27 Mr.H.A.Parmar, LA, for the accused persons has submitted that there is no evidence against the accused persons to prove the charges framed against them. The prosecution has miserably failed to prove any charges levelled against the accused persons. Hence, the accused persons may be acquitted from the charges levelled against them.

28 As per the oral as well as documentary evidence on record in the case and arguments advanced by both the sides, the following points are raised for determination by this Court:

POINTS

- 1 Whether the prosecution proves that the victim was minor on the date of incident ?
- 2 Whether the prosecution proves that on 20/08/2022, as instructed by the accused No.1, the accused No.2 has kidnapped the victim from Jashodanagar Char Rasta, by alluring her to marry with her from the lawful guardianship of the complainant without his consent and the accused No.1 has made physical intercourse with the victim on several occasions though he was having knowledge that the victim was minor

and the accused No.2 has abetted the accused No.1 in the offence of penetrative sexual assault and aggravated sexual assault on the victim and thereby, they have committed the offences u/s. 363, 366, 376(1), 376(2)(n), 114 of the IPC as well as under Sections: 4, 6, 17 and 18 of the POCSO Act?

3 What order?

29 My findings on the above points are as under with the reasons mentioned herein under:

FINDINGS

- 1 In the affirmative.
- 2 In the negative.
- 3 As per the final order.

// R E A S O N S //

POINT NO.1:-

30 The first thing, which the prosecution has to prove is the age of the victim. The prosecution has produced the copy of the school register at Exh.P-1/PW-2, copy of Aadhar Card of the victim at Exh.P-2/PW-2, true copy of the concerned page of the Admission Register maintained by the xxxx School at Exh.P-1/PW-8. As per the aforesaid documents, the birth-date of the victim is 03/08/2006.

31 The complainant, who is the father of the victim, has been examined as Pw-2 at Exh.17 wherein, he has stated that he does not remember the birth-date of his victim daughter, but his victim daughter was born in the year 2006. At the time of filing the complainant, the complainant has given the copy of school register of the victim at Exh.P-1/PW-2. The complainant has also given the copy of the Aadhar Card of the victim at Exh.P-2/PW-2.

32 The prosecution has examined the mother of the victim at Exh.18 as Pw-3 wherein, she has stated that she does not remember the birth-date of her victim daughter, but her victim daughter was of 15 years at the time of the incident.

33 The prosecution has examined the victim as Pw-4 at Exh.19 wherein, she has stated that she does not remember her birth-date, but she was born in the year 2006. She has stated that at the time of the incident, she was of 17 years.

34 The prosecution has examined the brother of the victim as Pw-5 at Exh.20 wherein, he has stated that he does not remember the birth-date of his victim sister.

35 The prosecution has examined Sajrulhasan Mahedihasan Ansari as Pw-8 at Exh.27 wherein, he has stated that he is in-charge Head Teacher of the Primary School, Hasvapar. In his school, register is maintained showing admission and leaving school by the students. On the basis of the summons, he has brought original register for the year 2013 to 2020, in which at G.R.No.74, particulars of the victim have been mentioned and her birth-date has been mentioned as 03/08/2006. He has produced the true copy of the concerned page of the Register maintained by his School at Exh.P-1/PW-8. He was being shown the school register at Exh.P-1/PW-2 and has stated that it was as per his school record. Hence, there is no reason to disbelieve the birth-date of the victim as 03/08/2006.

36 The incident has occurred on 20/08/2022 and hence, at the time of the incident, the victim was minor of 16 years and 17 days. Hence, this Court is of the view that the prosecution has proved that the victim was minor at the time of the alleged incident.

37 I have also considered the Section: 34 of the POCSO Act and it provides about the procedure for determination of age by Special Court. Looking to Section: 34(1) of the POCSO Act, I have also considered the requirement provided to determine age of victim under

Juvenile Justice (Care and Protection of Children) Act, 2015. As provided in Section: 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and Section: 94 runs as under:

94. Presumption and determination of age.—

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

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

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from

the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

38 Therefore, looking to the provisions of Section: 94 of the Juvenile Justice Act and with reference to evidence adduced by the prosecution, in my opinion, the prosecution has proved and established the age of the victim by appropriate and legal evidence. If we also consider above evidence with reference to Section:35 of the Indian Evidence Act, which runs as under:

Section 35. Relevancy of entry in public record or an electronic record made in performance of duty. -

An entry in any public or other official book, register or record or an electronic record stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record is kept, is itself a relevant fact.

39 The Hon'ble Supreme Court, in 2013 (0) AIJEL-SC 54136 SUPREME COURT OF INDIA Jarnail Singh Vs State Of Haryana has observed in para-20 & 21 that :-

20 On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove 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 or 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 appearance 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 7A, 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."

Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub- rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.

21 Following the scheme of Rule 12 of the 2007 Rules, it is apparent that the age of the prosecutrix VW - PW6 could not be determined on the basis of the matriculation (or equivalent) certificate as she had herself deposed, that she had studied upto class 3 only, and thereafter, had left her school and had started to do household work. The prosecution in the facts and circumstances of this case, had endeavoured to establish the age of the prosecutrix VW-PW6, on the next available basis, in the sequence of options expressed in Rule 12(3) of the 2007 Rules. The prosecution produced Satpal (PW4), to prove the age of the prosecutrix VW - PW6. Satpal (PW4) was the Head Master of the Government High School, Jathlana, where the prosecutrix VW - PW6 had studied upto class 3. Satpal (PW4) had proved the certificate Exhibit- PG, as having been made on the basis of the school records indicating, that the prosecutrix VW - PW6, was born on 15.5.1977. In the scheme contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause. We are therefore of the view, that the High Court was fully justified in relying on the aforesaid basis for establishing the age of the prosecutrix VW - PW6. It would also be relevant to mention, that under the scheme of Rule 12 of the 2007 Rules, it would have been improper for the High Court to rely on any other material including the ossification test, for determining the age of the prosecutrix VW-PW6. The deposition of Satpal-PW4 has not been contested. Therefore, the date of birth of the prosecutrix VW - PW6 (indicated in Exhibit P.G., as 15.7.1977) assumes finality. Accordingly it is clear, that the prosecutrix VW-PW6, was less than 15 years old on the date of occurrence, i.e., on 25.3.1993. In the said view of the matter, there is no room for any doubt that the prosecutrix VW - PW6 was a minor on the date of occurrence. Accordingly, we hereby endorse the conclusions recorded by the High Court, that even if the prosecutrix VW-PW6 had accompanied the accused-appellant Jarnail Singh of her own free will, and had had consensual sex with him, the same would have been

clearly inconsequential, as she was a minor.

40 The Hon'ble High Court of Gujarat, in 2018(o) AIJEL-HC 239688 in the case of Naranbhai Shantilal Tadvī vs. State of Gujarat has laid down in para-7.3 to 7.6 as under:

7.3 *In the instant case, it could be noticed from the deposition of both the parents, (Mother PW8) Madhuben Rameshbhai Vaghri and (father PW-11) Rameshbhai Kalyanbhai Vaghri that they had five children and out of five children, two sons had died. At the time when they deposed, they had three children and the prosecutrix is the eldest of these three. Her date of birth is 02.03.1999, of course the father had admitted in the cross-examination that he had not got her birth registered with the Panchayat and when he went to the school for admitting the girl, he had entered her birth date on presumption only. She was studying in 7th standard at the time the incident in question happened and therefore it was almost before 7-8 years of the same, her birth date in the School was registered as 02.03.1999. It would not have been contemplated that she would be victim at any point of time of such crime and there may be a need of any manipulation of her birth date.*

7.4 *The decision in the case of State of Madhya Pradesh vs Anoop Singh reported in (2015) 7 SCC 773, which speaks of determination of the age of the prosecutrix of rape deserves reference at this stage. The Apex Court has held that ossification test is not a must for determination of the age when birth certificate and school leaving certificate are available. It was the case where there were two certificates and the theory of consent was propounded by the accused. The Court referred the decision of Mahadeo S/o Kerba Maske versus State of Maharashtra and Another reported in (2013) 14 SCC 637 to hold that it is applicable in determining the age of*

victim of rape, which speaks about Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007.

7.5 The findings and observations are reproduced as under : -

"14. This Court in the case of Mahadeo S/o Kerba Maske Vs. State of Maharashtra and Anr., (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

"12(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."

15. This Court further held in paragraph 12 of Mahadeo S/o Kerba Maske (supra) 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." (Emphasis supplied)
This Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix. In paragraph 13, this Court observed:

"13. In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her V standard and in the school leaving certificate issued by the school under Exhibit 54, the date of birth has been clearly noted as 20.05.1990 and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.05.1990. the reliance placed upon the said evidence by the Courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of occurrence was perfectly justified and we do not find any grounds to interfere with the same."

16. In the present case, we have before us two documents which support the case of the prosecutrix that she was below 16 years of age at the time the incident took place. These documents can be used for ascertaining the age of the prosecutrix as per Rule 12(3) (b). The difference of two days in the dates, in our considered view, is immaterial and just on this minor discrepancy, the evidence in the form of Exts. P/5

and P/6 cannot be discarded. Therefore, the Trial Court was correct in relying on the documents.

17. The High Court also relied on the statement of PW-11 Dr. A.K. Saraf who took the X-ray of the prosecutrix and on the basis of the ossification test, came to the conclusion that the age of the prosecutrix was more than 15 years but less than 18 years. Considering this the High Court presumed that the girl was more than 18 years of age at the time of the incident. With respect to this finding of the High Court, we are of the opinion that the High Court should have relied firstly on the documents as stipulated under Rule 12(3)(b) and only in the absence, the medical opinion should have been sought. We find that the Trial Court has also dealt with this aspect of the ossification test. The Trial Court noted that the respondent had cited *Lakhan Lal Vs. State of M.P.*, 2004 Cri.L.J. 3962, wherein the High Court of Madhya Pradesh said that where the doctor having examined the prosecutrix and found her to be below 18 years, then keeping in mind the variation of two years, the accused should be given the benefit of doubt. Thereafter, the Trial Court rightly held that in the present case the ossification test is not the sole criteria for determination of the date of birth of the prosecutrix as her certificate of birth and also the certificate of her medical examination had been enclosed.

7.6 The prosecutrix herself had stated her age to be of 12 years. This version is being supported by the school leaving certificate of victim, which of course has been proved through father of the victim and it is not challenged at all either in the cross examination or subsequently before the trial Court. It has been duly exhibited and at no stage, there was any dispute of the said document or fact of age. As held in this judgment referred to herein above, the ossification test would not be necessary once the birth date is proved by way of certificate and as per the said decision also, when school leaving certificate is providing the age of victim and when

there was no challenge at any point of time, there does not arise the question of doubting her age. Again also considering the parents' oral version and chronology of birth of siblings of the prosecutrix, we hold that the trial Court has rightly held the age of victim as 12 years 8 months. It is also to be remembered that the Court is dealing with the girl of 12 years and it is not the case of the appellant being tried due to technical reason where girl is averred to be a major. Moreover, relationship of appellant with the prosecutrix also cannot be lost sight of while considering such submissions. It is noticed from the version of both the parents that custody of the prosecutrix had been entrusted to maternal uncle as all of them were supposed to attend the marriage of son of her another maternal aunt. The parents were not in position to attend the marriage because of their poor financial position. Therefore, the daughter was sent with maternal uncle i.e. the appellant on 08.11.2011. The maternal aunt had insisted on prosecutrix reaching early so that she would get some help in the marriage. The appellant had left with the prosecutrix on 08.11.2011 and she returned only on 20.11.2011. The marriage was on 10.11.2011. The appellant and the prosecutrix had reached on 09.11.2011 for wedding and they had left that place on 11.11.2011 after attending the marriage. It is also confirmed by PW-9 Ramilaben Arjunbhai Parmar who is the maternal aunt at whose place, she attended the marriage.

41 The Hon'ble High Court of Gujarat, in 2020(0) AIJEL – HC 241889 in the case of Prajapati Shaileshkumar Naranbhai vs. State of Gujarat, has observed in para-7 to 10 that:-

7 Learned APP submitted that the certificate of ossification cannot be considered when the school leaving certificate is on record which is issued by the Prakash Vidhyalaya. Birth certificate issued by Gram Panchayat is also on record. To support her submission, the learned APP has

referred to and relied upon the judgment of the Hon'ble Apex Court reported in (2018) 17 SCC 658 in case of State of Madhya Pradesh v. Preetam and submitted that the Hon'ble Apex Court in para 10 and 11 has observed as under:

"(10) In our considered view, the answer elucidated in the cross-examination of Dr. Vasnik (PW-6) cannot be taken as a final opinion on the age of the prosecutrix (PW-1). It is to be relevant to note that before the trial court the prosecution has examined Bhaulal (PW-8), Head master/Head teacher of Primary School Chor Pind Ke Par, District Balaghat. In his evidence, Bhaulal (PW-8) has stated that the date of birth of the prosecutrix (PW-1) was 16th May, 1981 which means that on the date of the occurrence i.e. 6th March, 1993, the prosecutrix (PW-1) was only aged about 12 years. The trial court has neither acted upon the evidence of Bhaulal (PW-8) nor on the school certificate on the ground that the person who has admitted the prosecutrix in the school was not examined.

11) In our considered view, the approach of the trial court was not correct. In each and every case the prosecution cannot be expected to examine the person who has admitted a student in the school. The school registers are the authentic documents being maintained in the official course, entitled to credence of much weight unless proved otherwise. In our view, considering the evidence of head master, Bhaulal (PW-8), and the school certificate produced by him i.e. Ex.P/13-A, age of the victim has to be taken as 12 years at the time of occurrence."

8 The prosecution has examined PW-8 Babubhai Purshottamdas Patel at Exh.31. This witness is Talati- cum- Mantri of the Vamaj Gram Panchayat. He has deposed on oath that he is working as Talati- cum- Mantri at Vamaj Gram Panchayat. He has brought the birth and death register of the year 1984 with him. He has further deposed that at Sr No.46 of Page No.9 of the birth and death register, the birth was

registered on 24.8.1984 and in the column of birth date 18.8.1984 is written. He has narrated the facts stated in the register in his deposition. That the name Munni; Father's name Popatlal Chimanlal; Name of person who came to register birth date is Shantaben Ambalal Patel - Mother name Kanchanbahen.

8.1 That the birth was registered by Shantaben Ambalal Patel. It is also stated that at the time of registration of birth, if the name is not given to the child the parents generally call their child Munno or Munni. In such case he used to register as in that way. He has produced xerox certified copy of Sr. No.46 at page No.9 of the said register. This witness is cross-examined by the defence Advocate. Nothing adverse is revealed which can damage the case of the prosecution.

9 The prosecution has examined PW-7 Ranjanben Chhotalal Shah at Exh.28. She is Principal of Prakash Vidyalaya School, Borisana, Taluka Kalol, District Mahesana. She has deposed that she has brought general register of the school wherein the details as regards to the name of child, Srl., sex, birth date and the name of last school etc. is mentioned. She has deposed that on page no.33 at Sr. 1026, name of the prosecutrix, Hindu Kadwa Patidar, birth of place Vamaj Taluka, Kadi, District Mehsana, last school attended Prakash Vidhyalaya, Borisana, etc. are mentioned. Her birth date is shown as 1.6.1984. She has also issued one certificate as regards to the birth date. She has identified signature of former principal Mr. A.K.Patel on the certificate. The said certificate is exhibited at Exh.29. She has produced copy of extract of page no. 33 of the general register of the school which is exhibited at Exh.30. It is also deposed that no discrepancy is found during regular inspection made on 22.12.2001. During cross examination this witness has explained details of most of the column of the the register.

9.1 On perusing the oral evidence of the Principal and

documentary evidence produced on record, the birth date of the victim is shown as 1.6.1984. If we consider the birth date as per school leaving certificate, at the time of incident, the prosecutrix was 14 years 11 months and 25 days i.e. below 16 years.

10 Considering the ratio of the judgment referred as above and evidence as regards to the birth i.e. certificate issued by Talaticum-Mantri and certificate issued by the school authorities, the certificate issued by the Talati-cum-Mantri is more reliable and trustworthy as it is first in point of time and entry was made at the relevant point of time. On perusing Exh.32, the prosecution has established that the birth date of the prosecutrix is 18.8.1984. The incident took place on 25.5.1999. So, this court is of the opinion that the age of the prosecutrix at the time of incident as 14 years 9 months and 7 days i.e. below 16 years. General Principal for Appreciation of Evidence:

42 Therefore, considering the aforesaid ratio laid down by the Hon'ble Supreme Court and the Hon'ble High Court of Gujarat in the aforesaid matters and also considering Section: 34 of the POCSO Act with Section: 94 of the J.J.Act and with Section: 35 of the Indian Evidence Act and with reference to evidence adduced by the prosecution, in my opinion, the prosecution has proved by legal and cogent evidence through deposition of the I/c Head Teacher of the xxx School Sajrulhasan Mahendihasan Ansari at Exh.27 as Pw-8 and through the register maintained by the school at Exh.P-1/PW-8 and through the admission register of the school at Exh.P-1/PW-2 and also through the copy of the

Aadhar Card of the victim at Exh.P-2/PW-2. I have also considered the rival submissions and evidence adduced through cross-examination of the complainant and the victim, it appears that any contradictory or different fact is not adduced or proved by the defence. Hence, it can safely be concluded that the victim was minor at the time of the alleged incident. Therefore, looking to the above said legal provisions and looking to the pronouncement of the Hon'ble Apex Court in the above-stated judgments, it can be safely held that the prosecution has proved the basic fact of the present case that the present victim was minor when the incident in question has happened. Hence, this Court is of the view that the prosecution has proved that the victim was minor of 16 years and 17 days at the time of the alleged incident. In view of the above, I answer the point No.1 in the affirmative.

POINT NO.2:-

43 To prove its case, the prosecution has examined **Ikbai Abdulsattar Shaikh as Pw-1 at Exh.12**. He has stated that on 01/09/2022, police personnel has come to his Office with yaadi. On the basis of the said yaadi, he has remained present before Ramol Police Station and he has shown his willingness to remain as a panch in panchnama where the father of the victim has submitted two clothes of the victim and the accused has submitted his three clothes. All these things

were seized by the police in the panchnama. He was being shown the panchnama of the seizure of the clothes of the victim and the accused at Exh.P-1/PW-1 and has identified his signature in it as Panch No.2 and Sanjaykumar Pravinchandra Sutariya, who was also with him in the procedure of panchnama, has signed as Panch No.1 in it and has identified signature of Panch No.1 in it. He has identified the muddamal articles No.1 to 5 and has also identified his signatures in the panch slips at Exh.P-2/PW-1 as Panch No.2 and has also identified signatures of Sanjaykumar Pravinchandra Sutariya as Panch No.1 in panch slips.

44 The prosecution has examined **the complainant as Pw-2 at Exh.17**. He has stated that at the time of the incident, he and his wife have gone to do labour work and when they have returned at evening, his victim daughter was not present at his home. His victim daughter was searched in the vicinity and relatives, but she was not found and hence, he has filed the complaint with Ramol Police Station. He was being shown the complaint at Exh.P-3/PW-2 and has identified his signature in it. His victim daughter was found after 2 -3 days. After returning, his victim daughter has stated to him that she has gone to her aunt's home. Except this, she has not stated anything about any incident. He knows the accused Rahul Yadav, who belongs to his village and hence, has identified the accused before the Court. He has also identified Abhishek Yadav, who is uncle of

Rahul.

45 During the cross-examination by the learned advocate for the accused persons, the complainant has stated that he cannot read and write Gujarati. It is true that police has asked him to sign and hence, he has signed. It is true that he has not read the papers and it was not read over and heard to him. It is true that his victim daughter has returned after two three days from her aunt's home.

46 The prosecution has examined **the mother of the victim as Pw-3 at Exh.18**. She has stated that at the time of the incident, she and her husband have gone to do labour work and returned back at evening, at that time, her victim daughter was not present at her home. Her victim daughter was searched in the vicinity and relatives, but she was not found. Her husband has filed the complaint with Ramol Police Station. Her victim daughter has returned after two three days. After returning, her victim daughter has stated to her that she has gone to her aunt's home. Except this, she has not stated anything about any incident. She knows the accused Rahul, who belongs to her village and has identified him before the Court. She also knows Abhishek Yadav, who is uncle of Rahul and has identified him before the Court.

47 During the cross-examination by the learned advocate for the accused persons, the mother of the victim has stated that she cannot read and write Gujarati. It is true that police has asked her to sign and hence, she has put her thumb impression. It is true that she has not read the paper on which she has put her thumb impression and the said paper was not read over and heard to her. It is true that her victim daughter has returned after two three days from her aunt's home.

48 The prosecution has examined the victim as Pw-4 at Exh.19. She has stated that she does not know that as to why her father has filed the complaint. She does not know the accused persons. She does not know that her father has filed the complaint against both accused persons. She was taken to Ramol Police. Except this, no incident has occurred. Police has not inquired her about any incident. She was taken to Hospital for treatment. She does not remember that whether her clothes were given to Police Station or not. She was taken to Gheekanta Court for recording her statement where she has given her statement before the Ld. Magistrate. She was being shown her statement recorded under Section: 164 of the Cr.P.C. at Exh.P-1/PW-1 and has identified her signature in it. Before the present incident, complaint was filed against the present accused regarding quarrel in U.P.

49 Since the victim has turned hostile, the Ld. APP was permitted to ask the questions which can be asked in cross-examination of the said witness, however, she has not supported the case of the prosecution nor anything has been brought on the record in favour of the prosecution.

50 During the cross-examination by the learned advocate for the accused persons, the victim has stated that she cannot read and write Gujarati. It is true that police has asked to sign her and hence, she has signed. It is true that she has not read the paper which was signed by her and it was not read over and heard to her. It is true that she has gone to her aunt's home and returned after two three days. It is true the police has only asked her name and address and written her statement on their own. It is true that police has neither read nor explained her statement to her. It is true that before giving her statement before the Ld. Magistrate, police has instructed her what statement was to be given and in such way, she has given her statement. It is true that the accused persons have never committed bad act upon her.

51 The prosecution has examined **the brother of the victim as Pw-5 at Exh.20**. He has stated that at the time of the incident,

he was at his village and he has come to know that quarrel took place between his sister and his mother and hence, his sister has gone anywhere. Hence, his father has filed the complaint. His victim sister has returned after two three days. After returning, his victim sister has not stated any facts to him. Except this, he does not know anything about any incident.

52 Since the brother of the victim has turned hostile, the Ld. APP was permitted to ask the questions which can be asked in cross-examination of the said witness, however, he has not supported the case of the prosecution nor anything has been brought on the record in favour of the prosecution.

53 During the cross-examination by the learned advocate for the accused persons, the brother of the victim has stated that he cannot read and write Gujarati. Police has only asked his name and address. It is true that nothing was written by him about the incident to police.

54 The prosecution has examined **Dr.Harshadkumar Kantilal Rathod as Pw-6 at Exh.22**. He has stated that since the year 2008 he has been discharging his duties as Medical Officer in the Civil

Hospital, Ahmedabad. During his duties, on 02/09/2022, at 03:59 hours, Rahul S/o Ramdas Shyamlal Yadav, aged 19 years, was brought by Police Constable having Buckle No.13219, Ramol Police Station, for medical examination along with police Yaadi. His consent was taken for medical examination and necessary samples were obtained. He was conscious and co-operative in examination. His identification marks were obtained. He has written the history verbatim as narrated by the accused. He has stated that no external marks of injury was found over the body of the accused. Secondary sexual characters of the accused were well developed. No matting of pubic hair. No external injury marks was found over the private parts of the accused. No smegma over glans penis. His medical samples were taken and sealed and handed over to Police Constable having Buckle No.13219, Ramol Police Station. He has brought police yaadi with him at Exh.P-1/PW-6. He was being shown the injury certificate of the accused at Exh.P-2/PW-6 and has stated that it was in his handwriting and his signature as Medical Officer and Seal were in it.

55 During the cross-examination by the learned advocate for the accused persons, Pw-6 has stated that he has perused the yaadi in which short facts of the incident have been mentioned.

56 The prosecution has examined **Dr.Hetal Chinubhai Patel as Pw-7 at Exh.23**. She has stated that since the year 2010 she has been discharging her duties as Medical Officer in the Civil Hospital, Ahmedabad. During her duties, on 31/08/2022, at 10:46 p.m., the victim was brought from Ramol Police Station by W.P.C. having Buckle No.3889, for medical examination along with police yaadi. Her consent was taken before examining her. Her identification marks were obtained. She has written the history verbatim as narrated by the victim. Secondary sexual characters of the victim were well developed. The victim was in conscious and co-operative. No external mark of injury over the body of the victim. No stain or marks over the body or clothes of the victim. No matting of pubic hair. Her medical samples were taken and sealed and handed over to W.P.C. having Buckle No.3889, Ramol Police Station. For further examination, the victim was referred to Gynecologist. Gynecologist Dr.Hafsa Vohra has examined the victim. Old hymen tear was present. Pw-7 has brought police yaadi with her at Exh.P-1/PW-7. She was being shown the injury certificate of the victim at Exh.P-2/PW-7 and has stated that it was in her handwriting and her signature as Medical Officer and Seal were in it.

57 During the cross-examination by the learned advocate

for the accused persons, Pw-7 has stated that it is true that in the history before her, the victim has not informed that she was kidnapped or physical intercourse was made with her with her consent or against her consent or she was raped. It is true that the yaadi submitted was perused at the relevant time in which short facts of the incident were mentioned.

58 The prosecution has examined **Manilal Chandubhai Chauhan as Pw-9 at Exh.30**. He has stated that in the year 2022, he was present on his duties as Unarmed Constable in Investigation Squad of Ramol Police Station. During that period, the complainant has given the complaint against the accused before him regarding the incident took place on 20/08/2022 with his victim daughter aged 16 years and he has written the complaint as narrated by the complainant. He has identified his signature in the complaint at Exh.P-3/PW-2. At the time of registering the complaint, copy of school register showing the birth-date of the victim at Exh.P-1/PW-2 was submitted and he has identified it. At the time of registering the complaint, Aadhar card at Exh.P-2/PW-2 was submitted and he has identified it. Thereafter, report under Section: 157 of the Cr.P.C. at Exh.P-1/PW-9 was prepared and he has identified his signature in it. Further investigation was assigned to Police Inspector Shri C.R.Rana.

59 During the cross-examination by the learned advocate

for the accused persons, Pw-9 has stated that he has only taken the complaint and obtained birth certificate of the victim. Except this, he has not conducted any procedure.

60 The prosecution has examined **Chhatrapalsinh Raghuvirsinh Rana as Pw-10 at Exh.35**. He has stated that on 23/08/2022, he was present on his duties as Senior Police Inspector, Ramol Police Station. At that time, FIR being I-C.R.No.704/2022 was registered before A.S.I. Shri Manilal Chandubhai and after registering the complaint by PSO, investigation was assigned to him. Thereafter, statements of the concerned witnesses were recorded. On submitting the victim and the accused by the personnel of Surveillance after searching them, statement of the victim was recorded before Woman Police as well as seized the clothes of the victim and the accused in presence of panchas. He was being shown the panchnama of the seizure of the clothes of the victim and the accused at Exh.P-1/PW-1 and has stated that the said panchnama was prepared by him in presence of two Panchas. Thereafter, procedure was conducted to send the victim to Hospital for medical examination. Thereafter, the accused was arrested and procedure was conducted to send him to Hospital for medical examination. Thereafter, report for addition of Sections was prepared. He was being shown the report for addition of Sections at Exh.P-1/PW-10 and has stated

that he has prepared the said report.

61 Pw-10 has further stated that thereafter, procedure was conducted to obtain the statement of the victim under Section: 164 of the Cr.P.C. Thereafter, procedure was conducted to send the obtained samples of the accused and the victim to FSL. He was being shown the dispatch note at Exh.P-2/PW-10 and has stated that he has prepared the said. He was being shown the receipt of the FSL at Exh.P-3/PW-10 and has stated that on receiving the same, it was kept in case file. He was being shown the letter of the FSL at Exh.P-4/PW-10 and has stated that on receiving the same, it was kept in case file. He was being shown the report of the FSL at Exh.P-5/PW-10 and has stated that on receiving the same, it was kept in case file. He was being shown the serology report at Exh.P-6/PW-10 and has stated that on receiving the same, it was kept in case file.

62 Pw-10 has stated that he knows the accused persons. Exemption was granted to the accused persons to remain present before the Court on the day when this witness was examined. As there were sufficient evidence against the accused persons, charge-sheet was filed against them. He has identified the muddamal articles No.1 to 5. He has identified his signatures in the panch slips at Exh.P-2/PW-1.

63 During the cross-examination by the learned advocate for the accused persons, Pw-10 has stated that he has not taken the compliant. It is true that after registering the complaint, work was assigned to him.

64 To prove its case, the prosecution has examined total ten witnesses, including the complainant, the victim, mother of the victim and brother of the victim.

65 If we analysis entire evidence with reference to the crime committed and if we first analysis and examine entire evidence with reference to crime committed under Sections: 363 and 366 of the IPC, before discussing the evidence on these sections, it would be relevant to consider the relevant Sections of Indian Penal Code, they are as under:

Section: 361 IPC 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.

ESSENTIAL INGREDIENTS:-

- (a) A person takes or entices another person.
- (b) The person taken or entices is
 - (i) a minor under 16 years of age, if a male, or
 - (ii) a minor under 18 years of age if a female, or
 - (iii) a person of unsound mind.
- (c) Such person is taken out of the keeping of his unlawful guardian
- (d) There is no consent by the lawful guardian.

Section: 363 of IPC Punishment for kidnapping.- Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section: 366 of IPC 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 another person shall also be punishable as aforesaid.

ESSENTIAL INGREDIENTS:-

- (a) A person kidnaps or abducts any woman.
- (b) The act is done -
 - (i) with intent that she may be compelled to marry any person against her will, or
 - (ii) knowing it to be likely that she will be so compelled, or
 - (iii) in order that she may be forced or seduced to illicit intercourse, or
 - (iv) knowing it to be likely that she will be so forced or seduced.

66 The charge is also framed against the accused persons under Section: 114 of the IPC, which runs as under:-

Abettor present when offence is committed.—Whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

67 If we analysis the entire evidence with above requirements of law, the first requirement for kidnapping is that victim girl should be below age of 18 years. As discussed earlier, the prosecution has safely proved this fact by cogent evidence. If we further analysis this evidence on the aspect with requirements to Section: 363 and 366 of the IPC, it is necessary that one should take or entice the girl and take with him is also essential requirement. If we consider the evidence of the complainant, he has stated that at the time of the incident, he and his wife have gone to do labour work and when they have returned at evening, the victim was not present in his home. He has searched the victim in the vicinity and relatives, but the victim was not found. He has stated that his victim daughter has returned after two three days. After returning, his victim daughter has stated to him that she has gone to her aunt's home.

68 Pw-3 – mother of the victim has also stated that she has stated that at the time of the incident, she and her husband have gone to do labour work and when they have returned at evening, the victim was not present in her home. She has searched the victim in the vicinity and relatives, but the victim was not found. She has stated that her victim daughter has returned after two three days. After returning, her victim daughter has stated to her that she has gone to her aunt's home.

69 Thus, looking to the evidence of the complainant and the mother of the victim, it is clear that they were not present at home when the victim has left her home. They cannot read and write Gujarati language. They have signed as asked by the police. They have not read the paper.

70 Pw-4 – the victim has stated that she does not know the accused persons. She has stated that police has not inquired her for any incident. She cannot read and write Gujarati language. She has signed as asked by the police. She has stated that she has gone to her aunt's home and returned after two three days. Police has only asked her name and address and written her statement on their own. Her statement was not read over by police to her. Before giving her statement to Ld. Magistrate, police has instructed how to give statement and in such way, she has given her statement before the Ld. Magistrate.

71 Pw-5 – brother of the victim has stated that he was at his village on the day of the incident. He has come to know that quarrel took place between his victim sister and his mother and hence, his victim sister has gone somewhere. He does not know the accused persons. He cannot read and write Gujarati language. Police has only asked his name and

address. Looking to his evidence, it is clear that he was not present at his home at the time of the incident.

72 Thus, looking to the evidence of the victim, the complainant, mother of the victim and the brother of the victim, it is proved that the victim has left her home on her own and gone to her aunt's home and returned after two to three days.

73 If we consider the situation with the pronouncement of the Hon'ble Supreme Court, it appears that there is distinction between taking and allowing minor to accompany of a person. The Hon'ble Apex Court in the case of **S. Varadarajan v. State of Madras AIR 1965 SC 942**, has held that there is clear distinction between taking and allowing minor to accompany a person. Important para-9 and 10 of this judgment runs as under:

Para-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 S. 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 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.

Para-10

It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion, if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because of after she has actually left her guardian's house or a house where her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the manor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

74 Looking to the ratio laid down by the Hon'ble Apex Court and looking to the case before this Court, it appears that the victim has willingly and voluntarily left her home and gone to her aunt's home, does not attract the requirements of Sections: 363 and 366 of the IPC and the accused cannot be convicted for these Sections.

75 It appears that the accused are also charged for the offences committed under Sections: 376(1), 376(2)(n), 114 of the IPC and under Sections: 4, 6, 17 & 18 of the POCSO Act i.e. penetrative sexual assault and aggravated penetrative sexual assault. When any accused are

charged for the offences committed under Sections: 3, 5, 7 & 9 of the POCSO Act, presumption U/s.29 and presumption U/s.30 of the POCSO Act comes in picture. Therefore, the entire evidence is required to be discussed and analyzed in the light of the requirements of Sections: 29 and 30 of the POCSO Act and these Sections run as under:

Section: 29 Presumption as to certain offences. - Where a persons is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

Section: 30 Presumption of culpable mental state. - (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation. - In this section, “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

76 Therefore, considering above provisions of the POCSO Act, this Court is supposed to presume that the accused have committed present crime and contrary was required to be proved by the accused persons U/s.29 of the POCSO Act. U/s.30 of the POCSO Act, this Court is

supposed to presume about the existence of culpable mental state for the act charged against the accused persons, it is the duty of the accused persons to prove otherwise under these provisions. Therefore, both these Sections cumulatively suggests that the Special Court is duty bound to raise the presumption of crime committed by the accused persons with guilty mind and the accused persons are obliged to disprove this fact by rebuttal evidence. Therefore, the presumption of innocence is not available to the accused persons under this Act and this Court is duty bound to presume the offence alleged against the accused persons.

77 If we further consider the requirements of Sections: 375 and 376 of the IPC and go through the said provisions it runs as under:

Section: 375 of IPC Rape.- A man is said to commit “rape” if he -

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetrative into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven description:-

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, at the time of giving such consent, by reason of unsoundness of mind or intoxication or 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 eighteen years of age.

Seventhly. - When she is unable to communicate consent.

ESSENTIAL INGREDIENTS:-

- (a) A man has sexual intercourse with a woman.
- (b) Such intercourse falls under one of the seven clauses of the Section.
- (c) The case does not fall within the exception to the Section.

Section: 376 of IPC Punishment for rape. - (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever. -

- (a) being a police officer, commits rape.-
 - (i) within the limits of the police station to which such police officer is appointed; or
 - (ii) in the premises of any station house; or
 - (iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or
- (b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or
- (c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or
- (d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time

being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place of institution; or
(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or
(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or
(g) commits rape during communal or sectarian violence; or
(h) commits rape on a woman knowing her to be pregnant; or
(i) commits rape on a woman when she is under sixteen years of age; or
(j) commits rape, on a woman incapable of giving consent; or
(k) being in a position of control or dominance over a woman, commits rape on such woman; or
(l) commits rape on a woman suffering from mental or physical disability; or
(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or
(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

78 If we also consider the relevant requirements of the POCSO Act i.e. Sections: 3 to 6, 17 & 18 they run as under:

Section:3 Penetrative sexual assault. - A person is said to commit "penetrative sexual assault" if -

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

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other

person.

Section: 4 Punishment for penetrative sexual assault. - (1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

Section: 5 Aggravated penetrative sexual assault. - (a) Whoever, being a police officer, commits penetrative sexual assault on a child -

(i) within the limits of the police station or premises at which he is appointed; or

(ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as, a police officer, or

(b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child -

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the forces or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where the said person is known or identified as a member of the security or armed forces; or

- (c) whoever being a public servant commits penetrative sexual assault on a child, or
- (d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or
- (e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or
- (f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or
- (g) whoever commits gang penetrative sexual assault on a child.

Explanation.- When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault withing the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

- (h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or
- (i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or
- (j) whoever commits penetrative sexual assault on a child, which -
 - (i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently;
 - (ii) in the case of female child, makes the child pregnant as a consequences of sexual assault;
 - (iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks;
 - (iv) causes death of the child; or
- (k) whoever, taking advantage of a child's mental or physical

disability, commits penetrative sexual assault on the child; or
(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or
(m) whoever commits penetrative sexual assault on a child below twelve years; or
(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or
(o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or
(p) whoever being a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or
(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or
(r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or
(s) whoever commits penetrative sexual assault on a child in the course of communal or sectarian violence or during any natural calamity or in similar situations; or
(t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or
(u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public,
is said to commit aggravated penetrative sexual assault.

Section: 6 Punishment for aggravated penetrative sexual assault.-

(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section(1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

Section:17 Punishment for abetment.

Whoever abets any offence under this Act, if the act abetted is committed in consequence of the abetment, shall be punished with punishment provided for that offence.

Section: 18 Punishment for attempt to commit an offence. -

Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

79 The first and most important piece of evidence in any criminal case is the statement of the victim. It is the statement of the victim which lays down the foundation of any conviction. But, in the present case, the victim has stated that she does not know the accused persons. She does not know whether her clothes were given by her to police or not. She has stated that the accused has never committed any bad act upon her. She cannot write and read the Gujarati language. Police has only asked her name and address and written her statement in their own.

80 The complainant, who is father of the victim, has stated that after returning, his victim daughter has stated that she has gone to her aunt's home. Except this, the victim has not stated anything to the complainant.

81 The mother of the victim has stated that the victim has stated to her that she has gone to her aunt's home and the brother of the victim has stated that as quarrel took place between his victim sister and his mother, the victim has gone somewhere and after returning, except this, the victim has not stated anything to them. Thus, all these witnesses have not supported the basic version of the prosecution case at all. Therefore, the depositions of these witnesses are also not useful to the prosecution to prove the charges.

82 I have considered the deposition of Dr.Harsahd K. Rathod as Pw-6 at Exh.22 and deposition of Dr.Hetal Chinubhai Patel and considering entire evidence on record, any immediate proof of sexual assault is not recorded by Doctors hence, such evidence is not available on record to connect the alleged crime with the accused. These Doctors have stated that there was no external injury mark over the body of the victim and the accused. There was no stain over clothes and private parts of the victim and there was no external mark of injury over the private part of the accused. I have also considered the FSL report and more particularly, biological report, it appears that any stain was not found on the clothes of the victim and even any stain was also not found on the clothes of the accused. I have also considered the report on medical samples of both the victim and the accused. It appears that nothing useful is surfaced from these reports also. Therefore, considering medical and FSL report, it appears that these evidence are also not directly pointing to the guilt of the accused.

83 The prosecution witnesses have been examined by the prosecution including the complainant, victim, mother and brother of the victim, but none of them have supported the case of the prosecution. The doctors or the police officials who are not eye witness to the incident and were only on official duties cannot prove the case. They can at the most corroborate the version of the eye witnesses. In the absence of any witness deposing against the accused persons, it cannot be said that prosecution has been able to bring home the charge framed against the accused persons.

84 If we analysis and consider the above entire evidence on record, it appears that the prosecution has materially failed to prove the foundation fact of the case. I have also considered the provisions of Sections: 29 and 30 of the POCSO Act. Even with the help of such presumption, in my opinion, the prosecution has not safely proved the basic fact of the case. In my opinion, and as per settled legal position, presumption can be raised as and when foundation facts can be proved by reliable and genuine evidence adduced by the prosecution. As discussed earlier, the main witness i.e. victim has not supported the case basic facts of the prosecution case. I have also considered the evidence adduced by the other witnesses i.e. the complainant, who is the father of the victim, mother and brother of the victim. They have also not supported from any point of the case. Therefore, the other evidence are corroborative evidence and cannot take the place of basic evidence. Therefore, considering entire oral as well as documentary evidence, in my opinion, the prosecution has failed to establish the basic incriminating facts and

material to connect the crime with the accused. If we consider the ratio laid down by the Hon'ble High Court of Gujarat, in such circumstances, the Hon'ble Gujarat High Court has held in **Criminal Appeal No.1840 of 2019 in the case of Madhuben Prajapati Valaji Thakore vs. Thakore Prakashji Kapurji & Anr.**, vide order dtd.07/02/2022, has observed in para-10.7 that:-

“Thus, on re-appreciation of the documentary evidence, oral evidence and medical evidence, we find that the trial Court has rightly come to the conclusion and has rightly acquitted the accused from the charges levelled against him. Since the victim herself has denied about the so-called incident, merely the medical evidence and the evidence of the prosecution witness do not prove the offence against the accused. The evidence of the doctors and the police are the corroborative evidence and not the conclusive evidence. When the victim does not support the case of the prosecution and denied clearly in her deposition about the incident and merely on the ground that victim is minor, the prosecution can not be succeeded by proving case beyond reasonable doubt and therefore, the trial Court has rightly acquitted the accused.”

85 The Hon'ble High Court of Gujarat has also taken the same view and held as under in para-5 of the **R/Criminal Appeal No. 1542 of 2019 Hansaben Ramabhai Dhanabhai Parmar Vs. Tejabhai Kalabhai Dama.**

“Having regard to the submissions made by the learned advocates for the respective parties and to the documents on record, more particularly, the depositions of the witnesses and the findings recorded by the Special Court, it appears that the victim was aged about 17 years and 6 months on the date of alleged incident on 06/03/2018, however, in her evidence before the Special

Court, she had stated that she had left the house as her mother had scolded her and she had gone to the house of the maternal uncle. She had further stated that after four days of the incident, her mother having telephoned her, her maternal uncle had again brought her back to her parents. In short, the victim herself had not supported the case of the prosecution that the respondent – accused had forcibly taken her from the lawful custody of her parents and committed rape on her, as alleged by the prosecution. The other witnesses i.e. the brother and Bhabhi of the victim also had turned hostile. Thus, the material witnesses having turned hostile, there was hardly any evidence connecting the respondent – accused with the alleged crime. It is needless to say that when two views are possible, the appellate court should be slow in interfering with the judgment of acquittal. The Special Court having recorded the findings that the prosecution had failed to prove the charges levelled against the respondent – accused beyond reasonable doubt, this Court is not inclined to interfere with the said findings, more particularly, when Ms.Pandey, learned advocate for the appellant, has failed to point out any illegality or infirmity in the impugned judgment and order passed by the Special Court. “

86 The Hon’ble High Court of Karnataka in **Criminal Appeal No.848 of 2017 in the case of Sri G.S. Venkatesh vs. The State of Karnataka** has observed in para-36 that:

*“..... “Presumption” is only an inference of certain facts drawn from other true facts. In the words of the Hon’ble Supreme Court in **APS FOREX SERVES PVT. LTD. VS. SHAKTI INTERNATIONAL FASHION LINKERS & Others, AIR 2020 SC 945,** “Presumptions are devices by use of which the Courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence.” Presumption does not relieve the prosecution of discharging its burden to prove the guilt of the accused with the standard of proof laid down under the general law. It is only when the foundational facts constituting the offence*

charged against the accused is proved by the prosecution, the presumption gets attracted. It is trite law that merely on the basis of presumption, a finding of guilt cannot be recorded against an accused facing prosecution for criminal offences.”

87 The Hon’ble Karnataka High Court has observed in **Criminal Appeal No.200098/2019 in the case of The State of Karnataka vs. Sandeep S/o Shivaji Rathod** that only if the initial burden is discharged by the prosecution, presumption under Sections: 29 and 30 can be drawn. Since the prosecution has failed to prove guilt against the accused, no presumption can be drawn against the accused.

88 If we consider the medical evidence on record and also the statement recorded under Sec. 164 of the Cr.P.C., these evidence are not directly incriminating evidence, but these evidence are certainly relevant and required consideration. The judgment delivered by Hon’ble Apex Court is relevant in given set of facts. Hon’ble Apex Court has laid down about the evidentiary value of extra-judicial confession. The relevant paragraphs of citation of Hon’ble Apex Court in **AIR 2020 Supreme Court 180 Shailendra Rajdev Pasvan Vs. State of Gujarat etc.** is reproduced as under.

“It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not

appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.”

“Elaborating on the jurisprudence that has evolved with regard to extra-judicial confessions, this Court in Sahadevan (supra) had stipulated the principles that are required to be kept in mind while relying on extra-judicial confession as evidence. These principles have been succinctly mentioned in Jagroop Singh v. State of Punjab as:

“30. Recently, in Sahadevan v. State of T.N., (AIR 2012 SC 2435) after referring to the rulings in S.K.Yusuf v. State of W.B. (AIR 2011 SC 2283) and Pancho v. State of Haryana (AIR 2012 SC 523), a two-Judge Bench has laid down that the extra-judicial confession is a weak evidence by itself and it has to be examined by the court with greater care and caution; that it should be made voluntarily and should be truthful; that it should inspire confidence; that an extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence; that for an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities; and that such statement essentially has to be proved like any other fact and in accordance with law.”

89 I have considered the entire record and I have also considered the duty cast on this Court to adequately compensate the victim of the crime. Analyzing entire record, it appears that the victim was 16 years and 17 days at the time of the offence. The victim has stated that she has gone to her aunt's home on her own. The victim was not kidnapped by the accused. The victim was not raped by the accused. Therefore, I am of the clear view that in the present case, this Court should

not offer any money through victim compensation scheme. I have also considered the effect of this crime on the victim. It appears that any rehabilitation help was also not required to offer to the present victim.

90 Here, in the present case also, the victim herself has denied about the so-called incident. Even the complainant, who is father of the victim, and the mother and brother of the victim have also not supported the case of the prosecution. Since the victim herself does not support the prosecution case, there would not be any evidentiary value of the evidence of the other witnesses. Since the other witnesses also do not support the case of the prosecution vis-a-vis the deposition of the victim herself, the charges levelled against the accused persons do not prove. Thus, the material witnesses have not supported the prosecution case and there is hardly any evidence connecting the accused persons with the alleged crime. Hence, as discussed above, the prosecution has miserably failed to prove the charges against the accused persons under Sections: 363, 366, 376(1), 376(2)(n) of the IPC read with Sections: 4 & 6 of the POCSO Act. As the accused No.1 has not committed any offence, there is no question of abetment by co-accused to the main accused hence, the prosecution has failed to prove the charges under Section: 114 of the IPC as under Section: 17 of the POCSO Act. The accused persons have not attempted to commit any offence punishable under the POCSO Act and hence, the prosecution has also failed to prove the charges under Section: 18 of the POCSO Act. In view of the above, I answer point No.2 in the negative.

POINT NO.3:-

91 In view of the aforesaid discussions and conclusion arrived at, it is hereby concluded that the prosecution has failed to prove charges under Sections: 363, 366, 376(1), 376(2)(n), 114 of the IPC read with Sections: 4, 6, 17 & 18 of the POCSO Act. As such, it can be concluded that the accused has not committed any offence.

92 In view of the aforesaid, I pass the following order:

ORDER

- (1) The accused No.1 **Rahul S/o Ramdas Shyamdas Yadav and No.2 Abhishekkumar Shyamlal Yadav**, are hereby acquitted under Section: 235(1) of Cr.P.C. from the charges under Sections: 363, 366, 376(1), 376(2)(n), 114 of the IPC read with Sections: 4, 6, 17 & 18 of the POCSO Act., framed against them.
- 2) Muddamal articles are ordered to be disposed off as per rules on expiry of appeal period and in case of filing of an appeal, as per the direction of Hon'ble Appellate Court.
- 3) The accused persons shall appear before the Appellate Court in case any appeal is filed by the prosecution against the present judgment and for that purpose they are directed to furnish a Solvent Surety of Rs.15,000/- and Personal Bond of

like amount by each accused as provided under Section:437-A of the Code of Criminal Procedure.

- 4) Previous surety bonds of the accused persons stand discharged.

Copy of this judgment be kept in the Special POCSO Case No.267/2022.

Pronounced in the open Court today on this 23rd day of September, 2023.

**(PARESH M. SAYANI)
SPECIAL JUDGE (POCSO),
COURT NO.11,
CITY SESSIONS COURT,
AHMEDABAD.
(UNIQUE ID CODE NO.GJ00575)**

*malek