



Judgment

471 apeal892.22 & 690.23

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

**CRIMINAL APPEAL NO.892 OF 2022
AND
CRIMINAL APPEAL NO.690 OF 2023**

CRIMINAL APPEAL NO.892 OF 2022

Akash s/o Wamanrao Sathone,
aged about 27 years, occupation labourer,
r/o Yerangaon, tahsil Hinganghat,
district : Wardha. **Appellant.**

:: VERSUS ::

State of Maharashtra, through
PSO, Wardha City Police Station,
tahsil and district Wardha. **Respondent.**

Shri Usaiduddin E.Quazi, Counsel for the Appellant.
Shri N.R.Rode, Additional Public Prosecutor for the State.

CRIMINAL APPEAL NO.690 OF 2023

Saurabh s/o Anil Wankar,
aged about 26 years, occupation:
nil, r/o Masala, Wardha (MH),
Convict No.C/11158, Central
Prison, Nagpur. **Appellant.**

:: VERSUS ::

State of Maharashtra,
through Police Station Officer,
Wardha (City), tahsil, district
Wardha.

..... Respondent.

**Shri Piyush Rewatkar, Advocate h/f Shri C.R.Thakur,
Counsel for the Appellant.
Shri N.R.Rode, Additional Public Prosecutor for the State.**

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 11/08/2025

PRONOUNCED ON : 22/09/2025

COMMON JUDGMENT

1. By these appeals, appellant Akash s/o Wamanrao Sathone, who is original accused No.2, and appellant Saurabh s/o Anil Wankar, who is original accused No.1, (hereinafter are referred as the accused persons) have challenged judgment and order dated 20.10.2022 passed by learned Extra Joint Additional Sessions Judge and Special Judge, Wardha (learned Judge of the trial court) in Special (Child Act) Case No.27/2018.

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2. By the said judgment impugned in these appeals, accused No.1 Saurabh is convicted for offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act) and sentenced to suffer rigorous imprisonment for 10 years and to pay fine Rs.5000/-, in default, to suffer further simple imprisonment for 6 months.

Accused No.1 Saurabh and accused No.2 Akash are convicted for offence under Section 367 read with 34 of the IPC and sentenced to suffer rigorous imprisonment for 4 years and to pay fine Rs.3000/-, in default, to suffer further simple imprisonment for 3 months.

They are also convicted for offence under Section 324 read with 34 of the IPC and sentenced to suffer rigorous imprisonment for 2 years and to pay fine

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Rs.1000/- each, in default, to suffer further simple imprisonment for 2 months.

3. Brief facts of the prosecution case are as under:

The victim girl aged about 17 years, residing along with her parents, is working in Dafe Stores Wardha. Accused No.1 Saurabh is a fruit seller and accused No.2 Akash is his maternal uncle. As accused No.1 Saurabh was frequently visiting the said store, he developed friendship with the victim. As per the allegations, the victim was called by accused No.1 Saurabh in the month of August 2017 near Government Hospital and accused No.1 took her on his scooty to his rented room in Mahila Ashram Area and on the promise of marriage, he subjected her for the forceful sexual assault. Thereafter also, he subjected her for the repeated forceful assaults on various occasions. Due to the physical relationship

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between accused No.1 Saurabh and the victim, the victim got pregnant of five months. The victim disclosed about her pregnancy to accused No.1 Saurabh telephonically. On 7.2.2018, accused No.1 Saurabh called the victim to Railway Station at Wardha. The victim went there and disclosed about her pregnancy and insisted him to perform marriage with her, whereupon accused No.1 Saurabh straightway refused to marry with her and told her to terminate the pregnancy. On 8.2.2018, accused No.1 Saurabh telephonically called the victim and asked her to come at Bajaj Chowk, Wardha at about 7:00 pm. At the relevant time, accused No.2 Akash was also present along with him. They took the victim to Mohare Hospital and she undergone sonography test. Dr.Mohare informed that pregnancy of the victim cannot be terminated. Accused No.1 Saurabh obtained the papers of sonography test from the victim and dropped her near the railway

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station. On 9.2.2018, he again called the victim near Komal Medical Stores and gave her some pills for termination of pregnancy. Both the accused persons forcibly took her on two-wheeler. Though she shouted, accused No.1 Saurabh pressed her mouth and put cutter on her neck and carried her towards Deoli via Waigaon. But, the accused persons took her in a field and accused No.2 Akash caught hold of the victim and accused No.1 Saurabh inflicted injuries on her right leg with cutter. Her pink colour salwar was torn at two places and it was soaked with blood as had received bleeding injuries. Thereafter, she was taken to the house of accused No.2 Akash at Hinganghat wherein her mobile phone was snatched. As her salwar was soaked with blood and torn, the wife of accused No.2 Akash gave her another salwar of black colour to wear. The victim overheard the talk between the accused persons that they would take her to

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Madhya Pradesh and accused No.1 Saurabh left the place and did not return back during the night. In the early morning of 10.2.2018, the victim saw that accused No.2 Akash and his wife were in deep sleep, she eloped from the house, came to the bus stop, made phone call to her brother, and called him at Hinganghat. Thereafter, she disclosed the incident to him and they approached to the police station and lodged report.

4. On the basis of the said report, the police registered the crime against the accused persons.

5. During the investigation, the investigating officer has visited the alleged spot of the incident, drawn spot panchanama, and also seized stained salwar of the victim from the house of accused No.2 Akash. He has also seized black colour salwar on the persons of the victim. The other clothes of the victim are also seized. The

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clothes of the accused are also seized. The victim has shown spot of incident to the investigating officer as well as panchas. Accordingly, spot panchanamas are drawn. The victim was referred for medical examination and medical examination was carried out. During medical examination, injuries are found on her person. The accused persons are arrested. The DNA Samples of the victim as well as the accused are obtained. The medical certificate from Dr.Mohare was collected. The extract of PCPNDT register was also seized. The victim has delivered a male child. After filing of the FIR on 16.6.2018, all incriminating articles as well as blood samples are forwarded to the chemical analysis as well as DNA examination and after completion of the investigation, chargesheet was submitted.

6. Learned Judge of the trial court framed charge vide Exh.52. The contents of the charge are read over to

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the accused persons and they pleaded not guilty and claimed to be tried.

7. In support of the prosecution case, the prosecution examined in 9 witnesses, as follows:

PW Nos.	Names of Witnesses	Exh. Nos.
1	The victim	61
2	Siddharth Ghodke, pancha on seizure panchanama as well as recovery panchanama	71
3	Manoj Kharikar, pancha on spot panchanama	83
4	Dr.Shailaja Kale, Medical Officer	90
5	Dr.Manisha Nasare, Medical Officer	95
6	Dr.Nitinkumar Nimodiya, Medical Officer	100
7	Dr.Ujwala Mohare, Medical Practitioner	104
8	Smita Thakare, Gram Sewak	111
9	Babasaheb Thorat, the Investigating Officer	115

8. Besides the oral evidence, the prosecution placed reliance on seizure memo Exh.63, birth certificate

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Exh.65, requisition for calling panchas Exh.72, letter by forest office Exh.73, memorandum statement of accused No.2 Akash Exh.75, recovery panchanama Exh.76, electricity bill Exh.77, requisition to call panchas Exh.84, spot panchanama Exh.87, spot panchanama of assault by cutter Exh.86, requisition letter to the medical officer Exh.91, injury report Exh.92, query letter Exh.93, query letter Exh.94, requisition letter to the medical officer Exh.96, medial report Exh.97, requisition letter to the medical officer Exh.101, medical certificate Exh.102, requisition letter Exh.105, extract of the register maintained as per the provisions of the PCPNDT Act, sonography report Exh.107, requisition Exh.112, arrest panchanama of accused No.2 Akash Exh.117, letter to CA for calling DNA Kit Exh.118, letter to CA for preserving DNA samples Exh.119, arrest panchanama of accused No.1 Saurabh Exh.120, seizure memo Exhs.121, letter to

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the medical officer for obtaining samples of accused No.2 Akash Exh.123, letter to CA to obtain DNA kit to collect samples of accused No.1 Saurabh Exh.124, seizure memo as seizure of samples of accused No.1 Saurabh Exh.125, letter to CA Exh.126, seizure of samples of victim Exh.127, seizure memo of vehicle Exh.128, letter to CA Exh.129, and CA reports Exhs.132 to 134.

9. On the basis of the said oral as well as the documentary evidence, the prosecution claimed that the prosecution has proved its case beyond reasonable doubt.

10. All incriminating evidence is put to the accused persons in order to obtain their explanations regarding the evidence appearing against them. The defence of the accused persons is of total denial and of false implication.

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11. Learned Judge of the trial court, after appreciating the evidence, held the accused persons guilty and convicted them as the aforesaid.

12. Heard learned counsel Shri Usaiduddin E.Quazi for accused No.2 Akash, learned counsel Shri Piyush Rewatkar for accused No.1 Saurabh, and learned Additional Public Prosecutor Shri N.R.Rode for the State.

13. Learned counsel for accused No.1 submitted that though the victim has stated that she was below 18 years of age, her age is not proved by the prosecution. The entire evidence of the victim sufficiently shows that out of love affair, she joined the company of accused No.1 Saurabh and physical relationship was developed between them. Thus, it is consensual act and physical relationship was by the consent of the victim. He further submitted that mere breach of promise to perform the marriage is

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not sufficient to attract offences under Section 6 of the POCSO as well as under Section 376(2)(n) of the IPC. The evidence of the victim is suffering from various infirmities and the same infirmities are proved by the defence during the cross examination of the investigating officer. Learned Judge of the trial court has not considered that the alleged incident has occurred out of love affair and the victim herself had joined the company of accused No.1 Saurabh. The DNA report is also not supporting the prosecution case as the accused is exonerated as biological father of the child delivered by the victim girl. Thus, the entire prosecution case fails and, therefore, the judgment impugned in these appeals deserves to be quashed and set aside.

14. In support of his contentions, learned counsel for accused No.1 Saurabh placed reliance on following decision:

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1. Criminal Appeal No.181/2019 (Bhaiyya s/o Vijay Chakre vs. State of Maharashtra and anr) decided by this court on 23.7.2024;

2. xxxxxxxx vs. Inspector of Police, reported in 2025 SCC OnLine Mad 3178, and

3. Kattavellai @ Devakar vs. State of Tamilnadu, reported in 2025 LiveLaw (SC) 703.

15. Learned counsel for accused No.2 Akash submitted that as far as accusations against the accused are concerned, the same are only to the extent of offence under Section 367 of the IPC that the kidnapping or abducting in order to subject a person to grievous hurt and slavery etc. Even accepting the evidence of the victim as it is, it nowhere shows that it was accused No.2 Akash who either kidnapped her by using force and thereby caused her any injuries. Therefore the offence against accused No.2 Akash is not established. Learned Judge of

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the trial court has not considered the same and erroneously convicted the accused person.

16. In support of his contentions, learned counsel for accused No.2 has placed reliance on following decisions:

1. Shashipal alias Shishu vs. State (NCT of Delhi), reported in (2022)9 782;

2. Gadadhar Chandra vs. The State of Bengal, reported in 2022 ALL SCR (Cri) 690; and

3. Mohammad Iqbal Mangu Ismail vs. The State of Maharashtra, reported in 2024 ALL MR (Cri) 711.

17. *Per contra*, learned Additional Public Prosecutor for the State submitted that in order to prove the charges, the prosecution has examined the victim who narrated about the alleged incident, which is corroborated by the medical evidence. The allegation of the victim,

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that she was assaulted by the accused, is substantiated by the medical report which shows that on medical examination, two incised wound are found on her person. The intention of accused No.1 Saurabh can be gathered from the circumstance that on the false promise of marriage, he subjected her for the forceful sexual assault and when it revealed that the victim has not terminated the pregnancy, he took the victim to the medical practitioner PW7 Dr.Ujwala Mohare, who has also denied to carry out termination of the pregnancy. Thereafter, he attempted to administer her pills for termination of the pregnancy. Thereafter, he took her at the house of accused No.2 Akash. Prior to that, she was taken in field and assaulted by accused No.1 Saurabh by using the cutter.

18. Another incriminating circumstance, that the victim has testified that her salwar was soaked in a blood and was torn at two places, is substantiated by the

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evidence of the victim as well as the recovery of the said blood stained salwar from the house of accused No.2 Akash.

19. Thus, there is not only the oral evidence of the victim but also the said evidence is substantiated by the circumstance of the recovery of blood stained salwar. The medical certificate shows that the victim was subjected for the forceful sexual assault which resulted into her pregnancy. At the relevant time, she was 17 years of age. Therefore, her consent was not relevant. Merely because the DNA Report exonerated the accused is not sufficient to acquit the accused as there may be several reasons for not concluding the accused as biological father. When the evidence of the victim is corroborated by the other circumstances, the said evidence is to be acted upon and the appeal being devoid of merits deserves to be dismissed.

20. Accused No.1 Saurabh is charge for the offence under Section 6 of the POCSO Act and accused No.1 Saurabh and accused No.2 Akash are facing charges under Sections 367 and 324 of the IPC. As per the allegations of the victim, accused No.1 Saurabh promised her that would marry with her and subjected her for sexual assault, which resulted into her pregnancy. It is further alleged that she was forcefully taken by the accused and assaulted her with the co-accused.

21. Whether the victim was minor at the time of the incident, the victim has narrated her birth date as 13.10.1999. The alleged first incident of sexual assault on her took place in August 2017.

22. To prove the age of the victim, the prosecution placed reliance on the evidence of the victim. She specifically narrated that her birth is 13.10.1999.

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23. During the investigation, the investigating officer has collected her birth certificate which is issued by the Health Department of the Gram Panchayat, Sawangi (Zade) and to prove the date of birth, PW8 Smita Thakare, Gram Sewak, who was serving as Gram Sewak, was examined. As per her evidence, the victim birth date was recorded as 13.10.1999. She received requisition for issuance of said birth certificate. She deposed that the register as to the entries of births and deaths is maintained in her office. On the basis of the information received, that birth of the victim took place at Sawangi (Zade) at house, the entry was taken. The grandfather of the victim has given the said information on 26.10.1999 and accordingly, the entry was taken.

PW8 Smita Thakare, is cross examined and she admitted that the signature of the person who gave the information is to be obtained on the register. In the

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present case, no such signature is obtained. Except that admission, nothing incriminating is brought on record. The birth date of the victim is not at all challenged during the cross examination. The extract of the register Exh.113 shows that on the basis of the information given by the grandfather, entry as to the birth date was taken in the register on 26.10.1999. As far as the birth date of the victim is concerned, her evidence shows that she has narrated her birth date as above. Though she is cross examined at length, she is not cross examined as to her age.

24. Thus, as far as the evidence of the victim as to her age is concerned, the same is remained unchallenged. The birth certificate, Exh.65, collected by the investigating officer during the investigation, is issued under Sections 12 and 17 of the Registration of Births

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and Deaths Act, 1969 and Rules 8 and 13 of the Maharashtra Registration of Births and Deaths Rules.

25. As per provisions of Rule 9 of the Maharashtra Registration of Births and Deaths Rules, 1976, this Certificate is issued by the Sub-Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969. Section 7 thereof deals with appointment of Registrars for each local area comprising the area within the jurisdiction of the Municipality, Panchayat or other local authority. It is the duty of the Registrar to register every birth and every death which takes place in his jurisdiction. This Act mandates that the Registrar should discharge his duties carefully. Section 8 of this Act mandates each head of the house to report birth in the family to the Registrar. The Act provides for maintenance of register for recording birth and death within the local area. That is how, certificate came to be issued by the

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Sub-Registrar as per provisions of Sections 12 and 17 of the said Act. The Birth Certificate, as such, is issued by the Public Officer and it is a document forming the record of the acts of the Public Officer and therefore the same is a public document within the meaning of the said term as per provisions of Section 74 of the Indian Evidence Act, 1872. The same is admissible in evidence by mere production thereof in view of provisions of Section 77 of the Evidence Act.

26. Section 17 of the Registration of Births and Deaths Act, 1969, provides for search of Birth Register and supply of extract thereof by certifying the same by the Registrar or other authorized Officer. Section 17 of the said Act provides that such extract shall be admissible in evidence for the purpose of proving birth or death to which the entry relates. The Birth Certificate is, in fact, the extract of Birth Register in respect of entry of birth of

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the victim child and as such, admissible in evidence. Section 35 of the Evidence Act, 1872, makes it clear that if entry is made by public servant in the official book in discharge of his official duty, then such entry becomes the relevant fact and admissible in evidence. Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by

law. It is, thus, clear that the Birth Certificate issued by the statutorily appointed competent authority is relevant and admissible. The birth certificate is a public document and primary evidence which can be proved by production in view of Section 77 of the Indian Evidence Act.

27. The Hon'ble Apex Court, in the case of **Mahadeo vs. State of Maharashtra and anr, reported in (2013)14 SCC 637** 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. Said Rule 12(3) reads as under:

“Rule 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-

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

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

iii. the matriculation or equivalent certificates, if available;

(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.

28. 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 the one year, and, while passing orders in such case shall, after taking into consideration such

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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 the law.

29. Thus, in the present case, as per the evidence of the victim and PW8 Smita Thakare, Gram Sewak, date of birth of the victim is 13.10.1999, which remained unchallenged and is corroborated by the birth certificate as well as the extract of the birth register.

30. Thus, the prosecution is succeeded in proving that the victim was below 18 years of age. Thus, when the first incident of sexual assault occurred in August 2017, she was below 18 years of age.

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31. The accused persons are also chargesheeted for the offence punishable under Section 367 of the IPC.

32. Section 367 of the IPC reads as under:

“367. Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc. -

Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subject to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine”.

33. Thus, in view of Section 367 of the IPC, whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to

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be put in danger of being subject to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

34. The evidence of the victim shows that on 8.2.2018 accused No.1 Saurabh called her at Bajaj Chowk near Komal Medical Store. By informing her mother, she left the house and went to meet the accused whereat both the accused persons were present. They insisted her to sit on two-wheeler and when she shouted, accused No.1 Saurabh pressed her mouth and put sharp cutter on her neck. At the relevant time, accused No.2 Akash was riding two-wheeler. They took her by Wardha-Waigaon Road at a distance of two kilometers and brought her to a field. Accused No.2 Akash caught hold her and accused No.1

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Saurabh has given blow by that cutter on her right leg thigh and calf portion. Due to which, she sustained grievous injuries. Even her pink colour salwar was torn and also blood stained. Both the accused persons have taken her to the house of accused No.2 Akash wherein wife of accused No.2 Akash provided her another salwar and her blood stained salwar was at the house of accused No.2 Akash.

35. To corroborate this version, the prosecution has examined PW2 Siddharth Ghodke, who acted as a pancha on memorandum statement of accused No.2 Akash and recovery of articles at his instance. He deposed that on 15.2.2018 at the police station wherein another pancha was also present. In their presence, accused No.2 Akash gave memorandum statement that he will show the place where he kept the cutter, blood stained salwar, mobile phone, and the medical documents of the victim. The said

memorandum statement was reduced into writing at Exh.75. Thereafter, the accused led them towards his house and produced the blood stained salwar, one cutter, sonography test report of the victim, and one mobile phone which was of the victim. Accordingly, panchanama was drawn. The victim sustained injuries, as per her evidence, due to assault by accused No.1 Saurabh and to prove this circumstance, the prosecution placed reliance on the evidence of PW4 Dr.Shailaja Kale who examined the victim on 10.2.2018. Her evidence shows that she was serving as Medical Officer in General Hospital, Wardha since 2006 to 2018. On 10.2.2018, she received a requisition letter from Police Station, Sawangi (Meghe) for medical examination of the victim. The requisition letter is at Exh.19. On her examination, she found incised wound at lower thigh lateral aspect oblique direction downward and medial side. Size of injury was 10x2x1/2

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cm brownish colour meaning thereby injury was not fresh and incised wound on lower part of right knee joint oblique direction downward and medial side. Size of injury was 8x2x1/2 cm brownish colour. The injury was grievous and caused due to hard and sharp object. She further deposed that the above injuries could be caused by cutter having sharp edge. Both the injuries might have been caused before 24 hours of examination of the victim. Accordingly, she has issued injury report. On 17.3.2018, she received query report and the weapon was forwarded to her. She has examined the weapon. The weapon was a cutter having iron blade and plastic handle. The size of the blade 6 cm x 1/2 cm and the handle was of the size 14 cm in length and 2 cm in breadth. It was of red colour. It was sharp object. She replied to the query that injury received by the victim may be possible by the said

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produced object. The medical certificate is at Exh.92 and query report is at Exh.94.

36. On this aspect, the victim is cross examined by the defence. The attempt was made to bring on record that there was love affair between her and accused No.1 Saurabh. During the cross examination, the fact of assault on her was put in the form of denial, but the victim specifically explained that the injury marks are on her thigh as well as on her leg. Thus, as far as assault on her by accused No.1 Saurabh in presence of accused No.2 Akash is concerned, the same was not shattered. On the contrary, this aspect, that her salwar was blood stained, is corroborated by the evidence of PW2 Siddharth Ghodke, who stated that in his presence accused No.2 Akash has made a memorandum statement and led them towards his house and produced not only the cutter but also the said blood stained salwar. Though he is cross examined

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at length, as far as voluntary statement is concerned, the cross examination nowhere affects the evidence of PW2 Siddharth Ghodke as far as voluntary statement by accused No.2 Akash is concerned. The evidence of PW2 Siddharth Ghodke, as to the discovery of fact, that the said incriminating articles were kept at the house of accused No.2 Akash, is further established and no effective cross examination was carried out to falsify the said version. The said incriminating article, salwar, was referred along with the requisition letter by the investigating officer for chemical analysis. The CA Report Exh.132 shows that Article-1 marked as A2 pyjama torn was stained with blood which is human blood. The CA Report Exh.132 shows that it has moderate number of blood stains ranging from about 01 cm to 10 cm in diameter from right portion and it is of Blood Group "A".

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Exh.138 shows that Blood Group of the victim is Blood Group "A".

37. Thus, the victim was taken by accused persons by calling her on a pretext of meeting at Komal Medical Store on 9.2.2018 and they have forcefully taken her on two-wheeler, thereafter, taken her in agricultural field, accused No.1 Saurabh assaulted her by cutter, and accused No.2 Akash caught hold her at the relevant time, due which she sustained grievous injuries, are established by the evidence of the victim and by the evidence of PW4 Dr.Shailaja Kale who examined the victim. Though PW4 Dr.Shailaja Kale is cross examined, it was to the extent that size size of injury No.1 was 10 cm in length and 2 cm in breadth 1/2 cm in depth. Size of injury No.2 was 8 cm in length and 2 cm in breadth and 1/2 cm in depth. The general cross examination was carried out as to the fact that breadth of injury may depend upon the thickness of

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the object. She admitted that breadth of the injury cannot be more than the thickness of the object. She has not mentioned as to the thickness of the blade in her report. She further admitted that in both the injuries scab was formed. She further admitted that if scab is found over the injury, depth cannot be measured, but she explained that since the injuries were not fully filled up, there was gap and, therefore, she could measure the depth of the injuries.

Thus, the evidence of Medical Officer PW4 Dr.Shailaja Kale also corroborates the version that the victim has sustained the injuries on her person.

38. Thus, not only the evidence of the victim but also the evidence of pancha witness PW2 Siddharth Ghodke, who proves seizure of blood stains on salwar and cutter at the instance of accused No.2 Akash from his

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house, wherein blood stains of Blood Group of the victim were found and also corroborated by the medical evidence.

39. To prove the charge of kidnapping for causing grievous hurt, in view of Section 367 of the IPC, the prosecution has adduced the evidence of the victim, which shows that she was taken by both the accused persons on two-wheeler by threatening her by means of sharp weapon like cutter and by causing her injuries. Though she is cross examined and the defence has denied the fact, the evidence as to the recovery of her salwar from the house of accused No.2 Akash is established by PW2 Siddharth Ghodke and blood stains found on the said salwar of Blood Group "A", which is of a victim, as per CA Reports Exhs.132 and 133. The aspect of injury sustained by her is also established by PW4 Dr.Shailaja Kale, who observed the incised wound on the person of

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the victim, which are two in numbers. Thus, the evidence of the victim that on disclosure by her that she is pregnant and Medical Officer PW7 Dr.Ujwala Mohare shown her inability to terminate the pregnancy and also advised that pregnancy cannot be terminated, accused No.1 Saurabh made an attempt by calling her on 9.2.2018, by giving her pills for termination of pregnancy, took her in agricultural field, and assaulted her, took her to the house of accused No.2 Akash, but somehow she rescued herself and contacted her brother and returned the home. This evidence sufficiently establishes that she was taken by both the accused persons from lawful guardianship of her parents. Admittedly, on receipt of call from accused No.1 Saurabh, when she came at the spot in front of Komal Medical Store, she was forcefully taken by the accused.

40. The victim was minor at the relevant time. She was taken by enticing her out of keeping of lawful

guardian. which is an essential ingredient of the offence of kidnapping.

41. This aspect is considered by the Hon'ble Apex Court in the case of **S.Varadarajan vs. State of Madras, reported in AIR 1965 SC 942** wherein it has been held that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Admittedly, 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 circumstance can the two be regarded as meaning the same thing for the purposes of Section 361 of the IPC.

42. In the present case, the victim left her father's protection till she reaches near Komal Medical Store.

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Subsequent to that, there was no voluntarily joining the accused persons, but these two accused persons have taken her along with them by using force and caused her injuries, which is established by the prosecution.

43. Thus, the allegation, that she was taken by both the accused persons with an intent to cause grievous hurt, is established by the prosecution.

44. The aspect of sexual assault on the victim, as per the prosecution, is established on the basis of the evidence of the victim and corroborated by the medical evidence.

45. The evidence of the victim shows that in August 2017 accused No.1 Saurabh called her near Civil Hospital. At the relevant time, she was working in Dafe Stores, Wardha. She met accused No.1 Saurabh who took her in a rented room and on the promise of marriage with

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her, he subjected her for forceful sexual assault and, thereafter, on various occasions, he subjected her for the forceful sexual assaults, which resulted into her pregnancy. When accused No.1 Saurabh came to know about the pregnancy, he took her to the hospital of Dr.Ujwala Mohare. Dr.Mohare has carried out the Ultrasound Sonography Test and disclosed that pregnancy cannot be terminated. The accused obtained test report and dropped her at the railway station. Again, on 9.2.2018, he called her near Komal Medical Store on the pretext that he would give her some pills to terminate the pregnancy. Thereafter, both the accused persons forcefully took her in the field and accused No.1 Saurabh assaulted her and at the relevant time, accused No.1 Akash was holding her hands, due to which she sustained injuries on right thigh and on right leg. Her salwar was blood stained due to bleeding injuries. The wife of

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accused No.2 Akash provided her another salwar and that blood stained salwar was in the house of accused No.2 Akash. accused No.1 Saurabh left her at the house of accused No.2 Akash and did not return back. In the early morning of 10.2.2018, she witnessed that accused No.2 and his wife are in sleep. She rescued herself, came at Hinganghat Bus Stand, called her brother, her parents came at Hinganghat Bus Stand, and took her at the Sawangi Police Station. She was referred by the police for medical examination. After witnessing the injuries on her person, her statement was recorded. She has narrated the said incident to the Medical officer.

Her cross examination shows that there was love affair between her and accused No.1 Saurabh, but she denied that physical relationship was developed with her consent out of the love affair. She specifically stated that accused No.1 Saurabh forcefully subjected her for

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sexual assault. The fact of the assault on her was tried to be denied by accused No.1 Saurabh. However, she explained that the said marks of said injuries are still on her left thigh and left leg. Thus, the defence of the accused, that out of love affair physical relationship was developed, is denied by the victim.

46. To corroborate her version of the sexual assault, the prosecution has examined PW5 Dr.Manisha Nasare and PW7 Dr.Ujwala Mohare.

The evidence of PW5 Dr.Manisha shows that on 12.2.2018 she received requisition from Wardha City Police Station for medical examination of the victim. She was brought by LPC Bakkal No.1356. The requisition letter is at Exh.96. After obtaining her consent, she examined her. The victim narrated the incident that she was having love affair with accused No.1 Saurabh and

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there was physical relationship with him. The last intercourse was occurred prior to 2 months. As she disclosed about her pregnancy to accused No.1 Saurabh, he assaulted her on over right leg by knife on 9.2.2018 at 8:13 pm in the field. She was admitted in the Government Hospital, Wardha on 11.2.2018. On examination, PW5 Dr.Manisha has seen two sutured wounds over right thigh of size 16 cm in length and 14 cm over right leg lateral to posterior aspect and third wound was linear abrasion of size 15 cm x 0.5 cm over right thigh adjacent to the above wounds present. On examination, she found that the victim is carrying 21 weeks pregnancy. She collected the blood samples of the victim for DNA analysis. She also advised for the ultrasound sonography. Accordingly, she issued medical certificate Exh.97. The victim was indoor patient in the hospital from 11.2.2018 to 17.2.2018. On 15.2.2018, the

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police have brought DNA kit along with identification and declaration form. She filled the same form and obtained blood samples of the victim in the presence of LPC Ranjita and two nurses. The identification declaration form is at Exh.98. During the cross examination, only it was brought on record that she has not personally treated the injuries of the victim. She admitted that the injury report of the victim was not seen by her. Rest of the cross examination is in the denial form.

PW7 Dr.Ujwala Mohare, is the private practitioner practising at Wardha. As per her evidence, in her hospital, the test of Ultrasound Sonography is carried out and necessary register is maintained in view of the provisions of PCPNDT Act. On 8.2.2018, the victim was brought to her hospital and she conducted the Ultrasound Sonography. She has taken entry in the said register at Sr.No.47. The victim was unmarried. The entry in the

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register was taken by nurse. On her examination, the victim was found pregnant of 22 weeks. Accordingly, she issued report Exh.107. She has also provided extract of register to the Investigating Officer. Perusal of the extract of the register Exh.106, name of the victim is at Sr.No.47 dated 8.2.2018. Though she is cross examined, nothing incriminating is brought on record. She only admitted that as per MTP Act, she cannot mention that the victim came to her hospital for termination of pregnancy.

47. Thus, the evidence of the victim corroborated by the evidence of PW5 Dr.Manisha and PW7 Dr.Ujwala Mohare sufficiently shows that there was sexual activity with the victim and the victim was pregnant of 22 weeks, when she was examined.

48. Learned defence counsel vehemently submitted that the DNA Report exonerate accused No.1 Saurabh as

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biological father and, therefore, the version of the victim is falsified. Perusal of the evidence of PW5 Dr.Manisha shows that she obtained blood samples of the victim in a DNA Kit as per requisition of the investigating officer.

49. PW6 Dr.Nitinkumar Nimodiya, is the another Medical Officer, who has examined accused No.1 Saurabh. As per his evidence, he received requisition letter from the Police Station, Wardha of accused No.1 Saurabh. The requisition letter is at Exh.101. The accused has given history of the incident. As per the history, he had friendship with the victim and the alleged sexual assault with the victim for the period of September 2017 to November 2017. On his examination, he found that there is nothing to suggest that the accused is not capable of performing coitus.

50. The core of the submissions of learned counsel for accused No.1 Saurabh is that as the analysis of DNA Samples exonerated him as a biological father of the child delivered by the victim, there is no material evidence to connect him with the alleged offence.

51. The evidence of the victim shows that she was examined by PW5 Dr.Manisha Nasare and her blood samples are obtained by the Medical Officer. This fact is also substantiated by PW5 Dr.Manisha Nasare which shows that on examination, she found that the victim was carrying 21 weeks pregnancy and, therefore, she collected DNA Samples as per the police requisition and handed over the same to the investigating officer.

52. The evidence of Investigating Officer PW9 Babasaheb Thorat also shows that he has communicated with the Deputy Director, Forensic Science Laboratory,

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Nagpur to obtain DNA Kit by communications dated 14.2.2018 and 20.2.2018 and obtained the DNA Kit for obtaining samples. Admittedly, the said samples are obtained vide panchanama Exh.125 dated 22.2.2018 and 18.2.2018. The said samples are forwarded on 22.2.2018 and the samples were analyzed from 22.2.2018 to 3.6.2019. There is no evidence that the samples obtained were in intact condition and there is no chance of tampering since it was seized till the same were forwarded to the DNA Analysis.

53. The Hon'ble Apex Court in the case of **Ranu Thakur vs. Dayashanker**, reported in 2015 ALL MR CRI 3676 held that having regard to the facts and circumstances of the case, particularly the allegation of rape against an unmarried helpless alleged minor girl in consequence of which she begotten the child after the rape committed by respondent No. 1, are the glaring

facts, which make us to exercise the power and grant of permission to maintain the appeal by the appellant herein. We are also not satisfied with the reason assigned by the learned Division Bench of the High Court in the impugned order in holding that DNA test of the child was conducted, which reveals that the respondent No. 1 was not the biological father of the child. We are of the considered view that the High Court is required to obtain second opinion of DNA by obtaining fresh samples of respondent No. 1 and the child and get the DNA test done afresh from the competent authority by taking all necessary safeguards/steps in this regard for the reasons mentioned *supra*.

54. In the case of **xxxxxxx vs. Inspector of Police** *supra*, the Hon'ble Apex Court has dealt with the issue value of the DNA evidence and by referring its earlier decision in **Mukesh v. State (NCT of Delhi), (2017) 6 SCC**

1 to point out the value of the DNA evidence and reproduced the observations, as follows:

“DNA technology accurately identifies criminals that DNA profiling is not statutory scheme under Section 53-A of the CrPC, and such profiling is must in case of examination of raped victim. As per Section 164-C of the CrPC, DNA report deserves to be accepted unless it is absolutely dented – if the sampling is proper and if there is no evidence of tampering of samples, DNA report is to be accepted.

DNA analysis is 100% accurate and at present a pre-dominant forensic technique for identifying criminals. DNA is genetic blue print of life - no two persons except identical twins have identical DNA that DNA finger print is identical for every part of body whether it is blood, saliva, brain, kidney or foot or any part of body – a burning or cutting can change the

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mistake of a finger print, but DNA cannot be changed, no matter whatever happens to body.

DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued information about the tending features of identification of criminals. The recent advancement in modern biological research has regularized Forensic Science resulting in radical help in the administration of justice. In our country also like several other developed and developing countries, DNA evidence is being increasingly relied upon by courts. After the amendment in the Criminal Procedure Code by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner.

Similarly, under Section 164A inserted by Act 25 of 2005, for medical examination of the

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victim of rape, the description of material taken from the person of the woman for DNA profiling is must.

From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non acceptance of the same, it is to be established that there had been no quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted.”

In paragraph Nos.15, 16, and 17, it is further observed that “the prosecution case has two aspects – firstly, the accused allegedly committed penetrative sexual assault on the victim girl thrice and secondly, the victim girl became pregnant through the accused. However, DNA report contradicts the later claim. Despite this, the prosecution may still prove the penetrative sexual assault

charge. The possibility remains that another individual impregnated the victim, resulting in birth of male child.

It is shocking that despite the negative DNA report, the prosecution has not sought court permission for further investigation or pursued identifying the individual responsible for the pregnancy. Two possibilities exist: (1) two perpetrators, with one responsible for the pregnancy, or (2) a single perpetrator responsible for both the assault and pregnancy, potentially exonerating the petitioner. Further investigation is crucial to determine the actual culprit and the petitioner's involvement, if any.

The POCSO offences are serious in nature, attracting more severe punishment and warrant meticulous investigation to ensure justice. Unfortunately, some cases exhibit casual and mechanical investigation, disregarding consequences. It is high time for the

prosecution to ensure thorough and proper investigation upholding the gravity of the cases”.

55. The Hon’ble Apex Court in the case of **Kattavellai @ Devakar vs. State of Tamilnadu** *supra* issued guidelines for handling DNA evidence. These guidelines mentioned in para No.44 are reproduced, as under:

“44. This lack of a common procedure to be followed, is concerning. As such, we issue the following directions which shall be followed henceforth, in all cases where DNA Evidence is involved:

1. The collection of DNA samples once made after due care and compliance of all necessary procedure including swift and appropriate packaging including a) FIR number and date; b) Section and the statute involved therein; c) details of I.O., Police station; and d) requisite serial number shall be duly documented. The

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document recording the collection shall have the signatures and designations of the medical professional present, the investigating officer and independent witnesses. Here only we may clarify that the absence of independent witnesses shall not be taken to be compromising to the collection of such evidence, but the efforts made to join such witnesses and the eventual inability to do so shall be duly put down in record.

2. The Investigating Officer shall be responsible for the transportation of the DNA evidence to the concerned police station or the hospital concerned, as the case may be. He shall also be responsible for ensuring that the samples so taken reach the concerned forensic science laboratory with dispatch and in any case not later than 48-hours from the time of collection. Should any extraneous circumstance present itself and the 48-hours timeline cannot be complied with, the reason for the delay shall be duly recorded in the case

diary. Throughout, the requisite efforts be made to preserve the samples as per the requirement corresponding to the nature of the sample taken.

3. In the time that the DNA samples are stored pending trial appeal etc., no package shall be opened, altered or resealed without express authorisation of the Trial Court acting upon a statement of a duly qualified and experienced medical professional to the effect that the same shall not have a negative impact on the sanctity of the evidence and with the Court being assured that such a step is necessary for proper and just outcome of the Investigation/Trial.

4. Right from the point of collection to the logical end, i.e., conviction or acquittal of the accused, a Chain of Custody Register shall be maintained wherein each and every movement of the evidence shall be recorded with counter sign at each end thereof stating also the reason

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therefor. This Chain of Custody Register shall necessarily be appended as part of the Trial Court record. Failure to maintain the same shall render the I.O. responsible for explaining such lapse.

The Directors General of Police of all the States shall prepare sample forms of the Chain of Custody Register and all other documentation directed above and ensure its dispatch to all districts with necessary instruction as may be required.

56. Thus, in view of the said guidelines, the collection of DNA samples shall be after due care and compliance of all necessary procedure including swift and appropriate packaging and the transportation of the DNA evidence to the concerned police station. The DNA samples are to stored pending trial appeal etc.. No package shall be opened, altered or resealed without

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express authorisation of the Trial Court acting upon a statement of a duly qualified and experienced medical professional to the effect that the same shall not have a negative impact on the sanctity of the evidence.

57. In the light of the above guidelines, if the evidence in the present case is taken into consideration, there is nothing on record to show that the samples of the newly born child delivered by the victim were obtained and forwarded to analysis. Merely because the DNA report is negative and is not supporting the prosecution, the prosecution may still prove penetrative sexual assault charged.

58. In the present case, the evidence of the victim which categorically states that on the promise of marriage, she was called by accused No.1 Saurabh and subjected for the sexual assault. When she disclosed the

fact of her pregnancy, on 9.2.2018, she was called by accused No.1 Saurabh in front of Komal Medical Store and she was forcefully taken by both the accused persons in an agricultural field. Accused No.2 Akash has caught hold of her and accused No.1 Saurabh caused injuries to her. Thereafter, she was taken at the house of accused No.2 Akash. Her evidence further shows that due to the assault by accused No.1 Saurabh, with the help of accused No.2 Akash, she sustained bleeding injuries and her salwar was soaked with blood. The wife of accused No.2 Akash provided her another salwar. The circumstance, that blood stained salwar was seized from the house of accused No.2 Akash, during house search panchanama of accused No.2 Akash, is proved by pancha PW2 Siddharth Ghodke. The evidence of PW2 Siddharth Ghodke also proved recovery of the cutter and seizure of the salwar of the victim from the house of accused No.2 Akash. This

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fact is further established by the prosecution by examining Medical Officer PW4 Dr.Shailaja Kale who immediately on 10.2.2018 examined the victim and noticed the injuries on her person. The injuries are in the nature of incised wound at lower thigh lateral aspect oblique direction downward at medial side. Size of injuries were 10 x 2 x 1/2 cm brownish colour meaning thereby the injury was not fresh and incised wound of right knee joint oblique direction downward and medial side. Size of injury having 8 x 2 x 1/2 cm was brownish colour. The injury was grievous and caused due to hard and sharp object. This fact is further corroborated by the medical certificate Exh.92 and by the evidence of PW5 Dr.Manisha Nasare who has also observed the said injuries on the persons of the victim.

59. Thus, not only the evidence of the victim but also the injury certificate proved by PW4 Dr.Shailaja Kale

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and corroborated by PW5 Dr.Manisha Nasare, CA Reports show that the salwar of the victim which was seized from the house of accused No.2 Akash was stained with blood on front right portion of Blood Group "A". The CA Report is at Exh.132. Exh.133 shows that blood group of the victim is of Blood Group "A". Though the defence of the accused is of total denial and of false implication, cross examination and explanation given by the accused No.1 Saurabh shows that there was a physical relationship between him and the victim. His explanation shows that it was the victim who was insisting him to perform the marriage, but he has denied to perform the marriage.

Thus, this explanation and the cross examination sufficiently establishes the nature of relationship between the victim and accused No.1 Saurabh was having.

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60. As per the prosecution case, minor girl was subjected for sexual assault by the accused on the promise of marriage. Whereas, as per the contention of the defence, it was consensual act of the victim as she was insisting accused No.1 Saurabh to preform marriage with her.

61. Now, only question remains is, whether consent of the victim can be taken into consideration.

62. Admittedly, the victim was below 18 years of age at the time of the incident. It is not case of love affair between the victim and the accused. The prosecution has come with specific case that the victim was promised for marriage and on the promise of marriage, her consent was obtained and she was subjected for sexual assault.

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63. Section 375 of the Indian Penal Code, defines the offence of “rape” and enumerates six descriptions of the offence.

The first clause states, where the woman is in possession of her senses and, therefore, capable of consenting, but the act is done against her will.

The second clause states, where it is done without her consent and third, fourth and fifth clauses operate when there is a consent, but it is not such a consent as excuses the offender, because it is obtained by putting her in fear of death or any hurt.

The expression “against her will” means that the act must have been done in spite of the opposition of the woman.

64. Section 90 of the Indian Penal Code defines “consent”, which is reproduced hereinafter:

“90. Consent known to be given under fear or misconception. - A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.— if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.— unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”

65. Thus, Section 90 of the Indian Penal Code though does not define the term 'consent', but, in negative terms it describes what does not amount to consent. The “consent” may be express or implied, must be actuated, obtained through deceit or fraud. If the consent is given by the victim under misconception of

fact, it vitiates. The consent for the purpose of Section 375 of the Indian Penal Code, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.

66. Whether there was consent or consent was obtained under misconception of fact?

67. The Hon'ble Apex Court, in the of **Uday vs. State of Karnataka (2003)4 SCC 46**, has considered a wherein the victim aged about 19 years old had given a consent for physical relationship with the accused with whom she was deeply in love, on a promise that he would marry her on a later date. She was subjected for

the sexual intercourse which resulted into her pregnancy. The complaint was lodged on failure of the accused to marry her. It was held that the consent cannot be said to be given under the misconception of fact. It was held in paragraph Nos.21 and 23 as under:

“21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the

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surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

23. Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant,

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and in fact succumbed to it. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily, and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.”

68. The Hon’ble Apex Court, in the case of **Deelip Singh vs. State of Bihar**, reported in (2005)1 SCC 88 framed two questions relating to consent:-

(1) Is it a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a conscious decision on the part of the prosecutrix knowing fully the nature and

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consequences of the act she was asked to
indulge in? and

(2) Whether the tacit consent given by the
prosecutrix was the result of a
misconception created in her mind as to the
intention of the accused to marry her?

While answering these questions, the Hon'ble Apex Court held that the girl had taken a conscious decision, after active application of mind to the events that had transpired. It was further held that at best, it is a case of breach of promise to marry rather than a case of false promise to marry, for which the accused is prima facie accountable for damages under civil law.

69. The Hon'ble Apex Court, in the case of **Deepak Gulati vs. State of Haryana, reported in (2013)7 SCC 675**, has drawn distinction between “rape” and

“consensual sex” and held that the physical relationship between the parties had clearly developed with the consent of the prosecutrix, as there was neither a case of any resistance, nor had she raised any complaint anywhere at any time despite the fact that she had been living with the accused for several days, and had travelled with him from one place to another.

70. The Hon’ble Apex Court, in the case of **Shivashankar vs. State of Karnataka**, reported in **(2019)18 SCC 204** held that it is difficult to hold sexual intercourse in the course of a relationship which has continued for eight years is 'rape'.

In **Dr.Dhruvaram Murlidhar vs. The State of Maharashtra and ors**, reported in **(2019)18 SCC 191**, the Hon’ble Apex by referring the above decision held that, “thus, there is a clear distinction between rape and

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consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated

differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence of “rape.”

71. In the case of **Pramod Suryabhan Pawar vs. The State of Maharashtra**, reported in (2019)9 SCC 608 also the Hon’ble Apex Court held that, “where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a “misconception of fact” that vitiates the woman’s “consent”. On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The “consent” of a woman under Section 375 is

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vitiating on the ground of a “misconception of fact” where such misconception was the basis for her choosing to engage in the said act.”

72. In the instant case, it is admitted position that there was no love affair between accused No.1 Saurabh and the victim. They were having acquaintance with each other. It is also not the case that accused No.1 Saurabh expressed about his feelings for her. On the contrary, he stated that it was the victim who was insisting him to perform marriage with her, but he denied for the same. The act of accused No.1 Saurabh, that when it was disclosed to him that the victim is pregnant, he took her with the help of accused No.2 Akash in isolated field and assaulted her with the help of accused No.2 Akash, was not honest. He kept promising that he will marry with her and as soon as she disclosed that she is pregnant, he kidnapped her from lawful guardianship

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of her parents and assaulted her by causing her grievous injuries. The consent obtained by accused No.1 Saurabh under the promise of marriage cannot be said to be consent because she was under misconception of fact that accused No.1 Saurabh intends to marry her and, therefore, she submitted herself for the physical relationship. It is more than clear that accused No.1 Saurabh made a false promise that he would marry with her, from the fact that no circumstances are brought on record by accused No.1 Saurabh to show that at the relevant time, he was intending to marry with her, but the circumstances are such that he could not perform the marriage with her. The contention of accused No.1 Saurabh, that it was the victim, who was insisting him to perform the marriage, appears to be not *bona fide* since beginning. Accused No.1 Saurabh completely misled her by promising her for marriage. This kind of consent

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taken by accused No.1 Saurabh with clear intention not to fulfill the promise and he persuade a girl to believe that he is going to marry and obtained her consent for sexual intercourse under total misconception cannot be treated to be a consent.

73. Where promise to marry is false and intention of maker at the time of making promise itself was not to abide by it but to deceive a girl to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates girl's "consent". It is not merely a case of breach of promise but it is a case only to seduce. The false promise was made and the victim was subjected for sexual assault on misconception of fact. Moreover, the victim who was below eighteen years of age and her consent is not relevant as it is not consent at all.

74. Thus, it is evident that at the initial stage itself accused No.1 Saurabh had no intention to keep his promise to marry the victim. Accused No.1 Saurabh has not brought on record a circumstance to show that he could not fulfill the promise due to unavoidable circumstances. In such circumstances, the case of the prosecution, that her consent was obtained under misconception of facts, is established.

75. Accused No.2 Akash, is facing charge of the offences punishable under Sections 367 and 326 read with 34 of the IPC.

It is vehemently submitted by learned counsel for accused No.2 Akash that merely because accused No.2 Akash is maternal uncle, he is implicated in the alleged offence. He further submitted that there is no evidence to show that he was sharing the common intention. In

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support of his contentions, he placed reliance on the decision in the case of **Shashipal alias Shishu** *supra*. Perusal of the said decision reveals that the Hon'ble Apex Court interpreted Section 34 and observed that Section 34 of the IPC creates a deeming fiction by infusing and importing a criminal act constituting an offence committed by one, into others, in pursuance to a common intention. Onus is on the prosecution to prove the common intention to the satisfaction of the court. The quality of evidence will have to be substantial, concrete, definite and clear. When a part of evidence produced by the prosecution to bring the accused within the fold of Section 34 of the IPC is disbelieved, the remaining part will have to be examined with adequate care and caution.

What is required is, proof of common intention. It is a team effort. The intendment of Section 34 of the IPC is to remove the difficulties in distinguishing

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the acts of individual members of a party, acting in furtherance of a common intention. There has to be a simultaneous conscious mind of the persons participating in the criminal action of bringing about a particular result. A common intention qua its existence is a question of fact and also requires an act “in furtherance of the said intention. It is for the court to come to the conclusion on cumulative assessment. In an offence committed physically, the presence of an accused charged under Section 34 of the IPC is required, especially in a case where the act attributed to the accused is one of instigation/exhortation. The word “furtherance” indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion. There may be cases where all acts, in general, would not come under the purview of Section 34 of the IPC, but only those done in furtherance

of the common intention The existence of common intention is obviously the duty of the prosecution to prove.

76. On analyzing the evidence adduced by the prosecution, the evidence of shows that it was both the accused persons who took the victim on 9.2.2018 and at the relevant time, accused No.2 Akash was riding two-wheeler and accused No.1 Saurabh sat on two-wheeler holding her pointing the cutter on her neck. They took her at one agricultural field and accused No.2 Akash hold her and accused No.1 Saurabh inflicted blows by the cutter on her right leg. This evidence is substantiated by the medical evidence i.e. the evidence of PW4 Dr.Shailaja Kale and PW5 Dr.Manisha Nasare who witnessed the injuries on the person of the victim. This fact is further substantiated that as per the evidence of the victim, due to the injuries, her salwar was soaked with blood. After

the incident, accused No.2 Akash took her at his house. The wife of accused No.2 Akash provided her another salwar and she fled from the house of accused No.2 Akash when accused No.2 Akash and his wife were asleep. This evidence is corroborated by the circumstance that the cutter as well as blood stained salwar of the victim was seized from the house of accused No.2 Akash. It is further corroborated through the CA Report which shows blood detected on Exh.1 pyjama, having blood stains of Blood Group "A", i.e. of the victim.

77. Thus, ingredients of offence under Section 367 of the IPC that kidnapping or abducting in order to subject a to grievous hurt is established by the prosecution.

78. Learned Judge of the trial court has appreciated the entire evidence and held that

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presumption under Section 29 of the POCSO Act is attracted. The said presumption is not rebutted. Section 30 of the POCSO Act speaks of presumption of culpable mental state and it shall be the defence of the accused to prove the fact that he had no mental state. The presumption is applicable as the prosecution has proved the charge beyond reasonable doubt. The charges against accused No.1 Saurabh was of culpable mental state which includes intention, motive, knowledge of fact and belief. The charge against accused No.2 Akash is that in furtherance of common intention he kidnapped the victim from lawful guardianship of her parents and assisted accused No.1 Saurabh to cause her grievous hurt, is also established.

79. In the light of the above evidence, as discussed, the prosecution has succeeded in proving the charge against both the accused persons. Thus, no grounds are

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made out by both the accused persons to interfere with the findings recorded by learned Judge of the trial court.

80. In this view of the matter, the appeals being devoid of merits are liable to be dismissed and the same are **dismissed**.

81. Accused No.2 Akash, who is on bail, shall surrender his bail bonds within a period of two weeks from today. Else, learned Judge of the trial court shall take appropriate steps to secure the presence of accused No.2 Akash to serve the jail sentence.

Appeals stand **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

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