

The State Of Karnataka Vs. Mounesh @ Mohana

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Court : Karnataka

Decided On : Dec-19-2023

Judge : Dr.H.B.Prabhakara Sastry and Umesh M Adiga

Appeal No. : CRL.A 1005/2018

Appellant : The State Of Karnataka

Respondent : Mounesh @ Mohana

Judgement :

- 1 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE19H DAY OF DECEMBER, 2023 PRESENT THE HON'BLE DR. JUSTICE H.B.PRABHAKARA SASTRY AND THE HON'BLE MR JUSTICE UMESH M ADIGA CRIMINAL APPEAL No.1005 OF2018(378) BETWEEN: THE STATE OF KARNATAKA BY HIGH GROUNDS POLICE STATION, BENGALURU REPRESENTED BY STATE PUBLIC PROSECUTOR, HIGH COURT BUILDING, BENGALURU-01 APPELLANT (BY SRI. B.N. JAGADEESHA, ADDITIONAL STATE PUBLIC PROSECUTOR) AND:

1. MOUNESH @ MOHANA S/O LATE AMBRAPPA GOWDA, AGED ABOUT24YEARS, R/AT SIDDAPURA B HEBBAL, K.HOBLI, SURUPURA TALUK YADAGIRI DISTRICT2 RAMESH S/O SANYASI, AGED50YEARS, - 2 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 NO.1, 5TH MAIN ROAD, 13TH CROSS, DHOBIGHAT, VASANTHANAGAR, BENGALURU RESPONDENTS (BY SRI. ASHOK PATIL, ADVOCATE FOR R1; SRI. S. RAJ PRABHU, ADVOCATE FOR R2) THIS CRIMINAL APPEAL IS FILED U/S.378 (1) & (3) OF CR.P.C TO GRANT LEAVE TO APPEAL AGAINST THE

JUDGMENT
AND

ORDER

DATED 06.12.2017 PASSED BY THE L ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BANGALORE IN SPL.C.C.NO.101/2017 INsofar AS IT RELATES TO ACQUITTING THE ACCUSED/RESPONDENT FOR THE OFFENCES P/U/S366 376 OF IPC AND SECTIONS 4 & 6 OF POCSO ACT. THIS APPEAL COMING ON FOR HEARING THROUGH PHYSICAL HEARING/VIDEO CONFERENCE THIS DAY, DR. H.B.PRABHAKARA SASTRY, J., DELIVERED THE FOLLOWING:

JUDGMENT

The State has filed this appeal under Section 378 (1) and (3) of the Code of Criminal Procedure, 1973 (hereinafter for brevity referred to as 'the Cr.P.C.'), challenging the judgment of acquittal dated 06.12.2017, passed by the L Additional City Civil and Sessions Judge, - 3 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 Bengaluru (hereinafter for brevity referred to as the 'Special Court') in S.C.No.101/2017, acquitting the accused of the offences punishable under Sections 366 and 376 of the Indian Penal Code, 1860 (hereinafter for brevity referred to as 'the IPC') and under Sections 4 and 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter for brevity referred to as 'POCSO Act').

2. The summary of the case of the prosecution as stated in the charge sheet is that, the accused-respondent No.1, on the date 30.09.2016, at about 2.30 p.m., from Vasanthanagar within the limits of the complainant police station - High Grounds, kidnapped the daughter of PWs-1 and 3, who is PW-2 (henceforth referred to as victim girl), knowing fully well that she was minor in her age and by

taking her with him to Siddapura of Yadagiri District made her to believe that he is going to marry her and against her will and consent, he subjected the said victim girl, to repeated sexual intercourse and thereby committed offences punishable under Sections - 4 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 366 and 376 of IPC and Sections 4 and 6 of POCSO Act. The same was registered by the complainant Police Station in Crime No.157/2016 against the accused. After completing the investigation, the complainant Police have filed charge sheet against the accused for the offences punishable under Sections 366 and 376 of IPC and Sections 4 and 6 of POCSO Act.

3. After perusing the materials placed before it and hearing both side, the Special Court framed charges against the accused for the offences punishable under Sections 366 and 376 of IPC and Sections 4 and 6 of POCSO Act. Since the accused pleaded not guilty, the trial was held, wherein, in order to prove the alleged guilt against the accused, the prosecution got examined in all twelve (12) witnesses as PW-1 to PW-12, got produced and marked documents from Exs.P.1 to P.20(a) and got produced nine Material Objects at MO-1 and MO-9. From the accused side no witnesses were examined, and one document was got marked as Ex. D.1.-. 5 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 4. After hearing both side, the Special Court, by its judgment dated 06.12.2017, acquitted the accused of the offences punishable under Sections 366 and 376 of IPC and Sections 4 and 6 of POCSO Act. Challenging the same, the appellant - State has preferred the present appeal.

5. The appellant -State is represented by the learned Addl. State Public Prosecutor and respondent No.1/ accused and respondent No.2, the defacto complainant are represented by their respective learned counsels. The learned Addl. State Public Prosecutor and the learned counsel for respondents No.1 and 2 are physically appearing in the Court.

6. The Special Court records were called for and the same are placed before this Court.

7. Heard the arguments from both side. Perused the materials placed before this Court, including the memorandum of appeal, impugned judgment and the Special Court records.-. 6 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 8. For the sake of convenience, the parties would be henceforth referred to as per their rankings before the Special Court.

9. Learned Addl. State Public Prosecutor for the appellant in his argument submitted that victim was minor as on the date of the alleged offence. Her SSLC Marks Card which is at Ex.P.3 and the date of Birth Certificate at Ex.P.8 clearly establishes that the victim girl was minor in her age. Even Rule-12 of Juvenile Justice (Care and Protection of Children), Rules, 2007 (hereinafter for brevity referred to as 'J.J.

Rules, 2017'), also requires to be believed and to consider matriculation certificate which is available as the most preferred document to prove the age of the alleged minor. However, the trial Court failed to notice this aspect and did not consider Exs.P.3 and P.8 which resulted in it erroneously expressing its doubt on the age of the victim, resultantly an erroneous judgment acquitting the accused from the alleged offences has came out.-. 7 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 Learned Addl. State Public Prosecutor further submitted that the victim girl being the minor in her age, the act of the accused taking her away without the consent of her parents amounts to kidnapping. The very intention of the accused was to have illicit intercourse with her, in which attempt he has succeeded, as such, Section 366 of IPC also stands established. The evidence of PWs-1, 2, 3 and 5 establishes that the accused had repeated sexual intercourse with the victim girl against her will and consent, as such, the very act of the accused is an act of rape upon a minor, attracting not only Section 376 of IPC, but, also Sections 4 and 6 of POCSO Act. Learned Addl. State Public Prosecutor further submitted that for the incident like sexual assault, no

independent witness can be expected, as such, the evidence of victim girl can be the sole basis for conviction. In support of his argument learned Addl. State Public Prosecutor relied upon few judgments of our Honble Apex Court which would be referred to at relevant places hereafterwards.-. 8 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 10. Per contra, learned counsel for respondent No.2/complainant in his argument though adopted the argument addressed by the learned Addl. State Public Prosecutor for the appellant, also supported the argument of the appellant by submitting that the school records produced by the prosecution, more particularly, the documents at Exs.P.3 and P.8 are the conclusive proof of the minority in the age of the victim girl. He also submitted that, from the accused side, a suggestion was made to PW-2 in her cross-examination that she was forced to have sexual intercourse with the accused, as such, the accused has admitted that he had sex with the victim girl. When the said victim girl is minor in her age, from act of the accused having sexual intercourse with her, has resulted in attracting the offence punishable under Section 376 of IPC and under Sections 4 and 6 of POCSO Act.

11. Learned counsel for respondent No.1/accused in his argument submitted that the victim girl in her - 9 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 statement recorded under Section 164 of Cr.P.C., which is at Ex.P.6, has herself stated that she had liking towards the accused. It was at the specific request of the victim girl, the accused had taken her with him. He contended that unless accused has taken a minor against her consent with some enticement or inducement, the ingredients of Section 361 of IPC, cannot be held as fulfilled. The learned counsel relied upon few judgments in his support, which would be considered at the relevant places hereinafterwards. Learned counsel for the accused further submitted that with respect to alleged act of rape, no final opinion was given by the doctor to that effect. The doctor had kept pending her final opinion awaiting the report from Forensic Science Laboratory (for short FSL), however, the Investigating Officer not placed the FSL report before the doctor and obtained her final opinion. As such, there is no clear evidence to believe that the accused had subjected the victim girl to sexual intercourse.-. 10 -

NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 Learned counsel further submitted that though PW-2 is shown to have stated that she had sexual intercourse with the accused, however, she has stated so only to see that her parents would somehow give their consent for her marriage with the accused, with whom she was in love since prior to the incident. Therefore, the alleged sexual intercourse between the accused and the victim girl has not been conclusively proved by the prosecution. Since there is doubt in that regard, the benefit of the same is to be given to the accused. Learned counsel for the accused with respect to the age of the victim girl contended that the victim girl was quite matured enough as can be seen from her statement made before the Investigating Officer and during the trial. Admittedly, she is not too young of an age of a small child or an adolescent. Therefore, it cannot be held that she was unable to understand the consequences of her act. With this, he submitted that the impugned judgment does not warrant any interference at the hands of this Court.-. 11 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 12. After hearing the learned counsels from both side, the points that arise for our consideration in this appeal are: (i) Whether the prosecution has proved beyond reasonable doubt that on the date 30.09.2016 in the afternoon at about 2.30 p.m., from an area called Vasanthanagar within the limits of complainant police stated the accused on the pretext of he marrying the victim girl and with an intention to have illicit intercourse with her kidnapped the victim girl knowing fully well that she was minor in her age and thus has committed an offence punishable under Section 366 of IPC?. (ii) Whether the prosecution has proved beyond reasonable doubt that the accused after kidnapping the victim girl on the date, time and place mentioned above took her to different places including Muneshwara temple at a place called Thinthani and then his grandfathers house where he committed rape on the victim girl on several times and thereby has committed an offence punishable under Section 376 of IPC?. - 12 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 (iii) Whether the prosecution has proved beyond reasonable doubt on the date time and place mentioned in point

No.2 above, the accused after kidnapping the victim girl and taking her to a place called Thinthani and to his grandfathers house has subjected the victim girl to penetrative sexual assault and thereby has committed the offence punishable under Section 4 of POCSO Act. (iv) Whether the prosecution has proved beyond reasonable doubt that after kidnapping the victim girl on the date, time and place mentioned at point No.1 taking her to different places shown in point No.2 above, the accused has subjected the victim girl to aggravated penetrative sexual assault and thereby committed an offence punishable under Section 6 of POCSO Act?. (v) Whether the judgment of acquittal under appeal warrants any interference at the hands of this Court?.

13. Before proceeding further in analysing the evidence led in the matter, it is to be borne in mind that it is an appeal against the judgment of acquittal of accused - 13 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 for the offences punishable under Sections 366 and 376 of IPC and under Sections 4 and 6 of POCSO Act. Therefore, the accused has primarily the double benefit. Firstly, the presumption under law is that, unless his guilt is proved, the accused has to be treated as an innocent person in the alleged crime. Secondly, the accused has already been enjoying the benefit of judgment of acquittal passed under the impugned judgment. As such, bearing the same in mind, the evidence placed by the prosecution in the matter is required to be analysed. (a) Our Honble Apex Court, in its judgment in the case of Chandrappa and others -vs- State of Karnataka, reported in (2007) 4 Supreme Court Cases 415, while laying down the general principles regarding powers of the Appellate Court while dealing in an appeal against an order of acquittal, was pleased to observe at paragraph 42(4) and paragraph 42(5) as below: 42(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under - 14 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having

secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court. 42(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court. (b) In the case of Sudershan Kumar -vs- State of Himachal Pradesh reported in (2014) 15 Supreme Court Cases 666, while referring to Chandrappas case (supra), the Honble Apex Court at Paragraph 31 of its Judgment was pleased to hold that, it is the cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of acquittal. The Appellate Court, in such a case, would interfere only for very substantial and compelling reasons. (c) In the case of Jafarudheen and others -vs- State of Kerala, reported in (2022) 8 Supreme Court Cases 440, - 15 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 at Paragraph 25 of its judgment, the Honble Apex Court was pleased to observe as below:

25. While dealing with an appeal against acquittal by invoking Section 378 Cr.P.C, the appellate Court has to consider whether the trial Courts view can be termed as a possible one, particularly when evidence on record has been analysed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the appellate Court has to be relatively slow in reversing the order of the trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters. The above principle laid down by it in its previous case was reaffirmed by the Honble Apex Court, in the case of Ravi Sharma -vs- State (Government of NCT of Delhi) and another reported in (2022) 8 Supreme Court Cases 536 and also in the case of Roopwanti Vs. State of Haryana and others reported in AIR 2023 SUPREME COURT 1199 - 16 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 It is keeping in mind the above principles laid down by the Honble Apex Court, we proceed to analyse the evidence placed by the prosecution in this matter.

14. According to prosecution the victim girl was minor in her age whose date of birth was 01.09.1999. Among the 12 witnesses examined by the prosecution, the witnesses who throw light on the age of the victim girl are PWs-1, 2, 3 and 6 and the documents are at Exs.P.3 and P.8.

15. PW-1 (CW-1) Ramesh, the father of the victim girl has stated in his evidence that, when the accused approached him stating that he is in love with the victim girl and that he is proposing to marry her, he stated to him that his daughter is still a minor and is yet to study further. PW-1 further in the very same examination-in-chief has stated that the date of birth of his daughter i.e., victim girl, was 01.09.1999. The said evidence of PW-1 that the date of birth of victim girl was 01.09.1999 has not - 17 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 been specifically denied in his cross-examination from the accused side.

16. PW-3 (CW-2) Smt. Rajeshwari the mother of the victim girl has denied a suggestion made to her in her cross-examination that on the date of the alleged incident, the age of her daughter was 18 years and that she was not minor. Thus, though this witness expressly did not state as to what is the date of birth of her daughter, however, specifically denied that she was major in her age as on the date of the incident.

17. PW-2 - the victim girl in her examination-in- chief has categorically stated that her date of birth is 01.09.1999. The said statement that her date of birth is 01.09.1999 has not been specifically denied in her cross- examination from the accused side. Though a suggestion was made to the witness that she has falsely stated that she has not attained the age of 18 years on the date of incident and that she was 18 years as on the date of the incident, but, the witness has not admitted those - 18 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 suggestions as true. Thus, in the evidence of father of the victim girl and the victim girl herself, the prosecution has elicited that the date of birth of the victim girl (PW-2) was 01.09.1999.

18. To corroborate the evidence that the victim girls date of birth as 01.09.1999, the prosecution has got examined PW-6 (CW-8) one Smt. Shobha Stephen, a retired in-charge Principal of Goodwill Girls High School and Composite PU College, Bengaluru. The said witness has stated that at the relevant point of time, in the year 2016, she was working as incharge Principal of the said school for six months. At the request of the Investigating Officer in this matter, who requested to furnish the date of Birth Certificate of the girl, based on the school records, she has issued a date of Birth Certificate of the girl on 07.10.2016 as per Ex.P.8. The witness has stated that before issuing the said certificate of date of birth, she had verified the Admission Register maintained in the School and after verifying the details registered in the Admission Register, she has shown the date of birth of the victim girl - 19 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 as 01.09.1999. No doubt, the said witness in her cross- examination has admitted a suggestion as true that the said date of birth shown as 01.09.1999 in the Admission Registrar was not after perusing the Birth Certificate, however, by mere statement that the said date of birth was recorded without seeing the Birth Certificate, itself would not take away the evidentiary value of PW-6. It is also nobody's case that the entries made in the School Admission Registrar showing the date of birth of victim girl as 01.09.1999 was incorrect or erroneous.

19. Lastly, the prosecution also got produced an attested true copy of the SSLC (Matriculation) Marks Card of the victim girl through PW-1, who is none else than the father of the victim girl. The said witness identifying the said Marks Card has stated that it is the Marks Card of his daughter i.e., the victim girl. The said document shows the date of birth of the victim girl as 01.09.1999. It is relying upon this evidence of PW-1, both oral and documentary, learned Addl. State Public Prosecutor vehemently - 20 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 submitted that as per Rule 12 (3) of the J.J.

Rules, 2017, for the age determination enquiry, the documents which can be relied according to the preference is, firstly, the Matriculation or equivalent certificate if

available, in the absence of the same, secondly, the date of birth from the school first attended and in the absence thereof, thirdly, the Birth Certificate issued by Corporation or Municipal authority or Panchayat and lastly, in the absence of any of the above, the medical opinion. With this, he submitted that since the Matriculation Certificate itself is available in the instant case at Ex.P.3, the date of birth of the victim stands proved that it is 01.09.1999.

20. Learned counsel for respondent No.1 in his argument submitted that for an offence triable under Indian Penal Code or POCSO Act, the J.J.

Rules 2007 is not applicable. Our Hon'ble Apex Court in the case of Mahadeo son of Kerba Maske v. State of Maharashtra and Another reported in (2013) 14 SCC637 was pleased to observe in - 21 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 paragraph -12 of its judgment that in the light of Statutory Rules in the form of J.J.

Rules 2007, prevailing for ascertaining the age of a juvenile, it is their opinion that the same yard stick could be rightly followed by the Court for the purpose of ascertaining the age of the victim as well. Therefore, in the light of the said judgment of the Hon'ble Apex Court, the argument of the learned counsel for respondent No.1 that J.J.

Rules 2007 are not applicable is not acceptable. 21.Hon'ble Apex Court in the case of Jarnail Singh Vs. State of Haryana Reported in (2013) 7 SCC263 has once again held in paragraph No.23 of its judgment that even though the Rule 12 of J.J.

Rules, 2007 is strictly applicable only to determine the age of the child in conflict with law, the aforesaid Statutory Provision should be the basis for determining age, even of a child who is a victim of crime. For, there is hardly any difference insofar as issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. With the - 22 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 said observation the Hon'ble Apex Court held that it would be just and appropriate for it to apply Rule 12 of J.J.

Rules, 2007 to determine the age of the prosecutrix in the case before it, who was alleged to be a victim of kidnapping and gangrape.

22. Learned counsel for respondent No.1 further contended that J.J.

Rules 2007 is not applicable in the instant case, but, it is the Juvenile Justice (Care and Protection of Children) Act, 2015 (J.J.

Act, 2015 for short) thereunder, is applicable in which, there is no provision akin to that of Rule 12(3) of J.J.

Rules 2007. The said argument of learned counsel for respondent No.1 is also not applicable for the reason that Section 94(2) of J.J.

Act, 2015 reads as below:

"94. Presumption and determination of age.-. (1) x x x (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 - 23 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 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."

The above extracted Section 94(2) of J.J.

Act, 2015 is akin to Rule 12(3) of J.J.

Rules, 2007 with slight variation. Still. the documents which have gained priority - 24 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 to ascertain date of birth of an alleged juvenile is again retained as birth certificate issued by the school, matriculation certificate or equivalent certificate from the concerned Examination Board as the documents of top priority. Thus, the evidence of PW-1 and PW-3 that their daughter was minor and evidence of PW-2 that she was minor on the date of alleged incident, has fully stands corroborated with the SSLC (Matriculation) Marks Card at Ex.P.3. It further stands corroborated by the date of birth certificate issued by School Authority at Ex.P.8 and thus, it stands established that PW-2 the victim girl was born on 01.09.1999, as such, her date of birth is 01.09.1999. The alleged offence is said to have taken place on the date 30.09.2016, as such, as on the said date, the victim girl was aged 17 years, as such, she was minor in her age in the eye of law.

23. About the incident of alleged kidnap with an intention to marry and/or to have sexual intercourse with the victim girl and the alleged incident of the rape and - 25 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 sexual assault on the minor, the prosecution has mainly relied upon the evidence of PWs-1, 2, 3, 5, 11 and PW-12.

24. PW-1 the father of the victim girl in his evidence has stated that he knows the accused, who was working in a house on the backside of the house of this witness. About three or four months after the witness shifted their house to Vasanthanagar, Bengaluru, in which area the accused was also working, the accused went to him and asked the witness to give in marriage to him (to the accused) his daughter i.e., the victim girl, otherwise, he can do anything. The witness has stated that he told the accused that they differ in their caste and language, moreover the girl was minor in her age and is yet to pursue her studies. Hearing the same, the accused stating that he can do anything he wants, left the place. At that time, the victim girl who is his daughter was studying in PUC and was also attending the computer classes in a computer centre.

25. The witness has further stated that on the 30th or 31st of September 2016, one day his daughter who had been to the computer centre, which was expected to work - 26 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 for half day on the said day, she did not return to home. She had gone there stating that she had whole day work there. In the afternoon about 2.30 p.m. or 3.00 p.m., his wife went to the said centre and she was informed by the people there that their daughter had left the centre in the morning by 10.30 and 11.00 O'clock. Having heard the same by his wife over the phone, while he was on his work at Peenya, he rushed to his house. Joined by his wife, they searched for their daughter at different places and joined by his neighbours, he lodged a complaint with the complainant police on 01.10.2016. The witness has identified his complaint at Ex.P.1. He also stated that since he was suspecting the accused, he has mentioned the name of the accused in his complaint. After registering a complaint, the police visited the spot which was shown by him, and drew a scene of offence panchanama as per Ex.P.2.

26. PW-1 has further stated that he also secured the cell-phone number of the accused from the house - 27 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 where the accused was working. The police making use of the said cell-phone number, traced that the accused was belonging to a place called Hunsagi towards Kalaburagi side. Himself, his wife and one Police Constable Chandrakantharao, went to the said place in a Car. They searched for the accused and victim girl at Hunsagi and informed the local police there. They stayed at Hunsagi for about four days. They have assured that the victim girl was with the accused. Thereafter, through an Advocate fifty persons came to Hunsagi Police Station and gave the possession of the victim girl to them. These people brought the victim girl to Bengaluru. After coming to Bengaluru, when enquired, the victim girl told that accused offered her that he would marry her and as such she went along with him. Having kept her in a relatives house for three days, the accused had committed rape upon her.

27. The witness further stated that the police got her daughter medically examined. He was also informed by - 28 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 the police after one or one and half month that the accused was also arrested by them.

28. In his cross-examination from the accused side, attempts were made to bring out from him that he being a Tamilian was unable to read and write Kannada language, as such, he does not know the contents of the complaint. Though the witness has admitted that he does not know the contents of the complaint and has admitted that he does not know reading of Kannada Language, however, he did not agree that he does know the contents of the complaint. He admitted a suggestion as true that he was aware about his daughter having love with the accused. He also admitted a suggestion as true that while taking back her daughter from Hunsagi to Bengaluru, he discussed with his daughter about the accused being in love with her and accused having taken her to the place. He denied a suggestion that victim girl was tutored as to what statement to be given before the learned Magistrate under Section 164 of Cr.P.C. He denied a suggestion that since the accused was loving his daughter, he has created - 29 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 a false story and lodged a false complaint against the accused.

29. PW-2 (CW-3) victim girl in her evidence has stated that she knows the accused who was working in a house opposite to their house at Vasanthanagar, Bengaluru. While she was playing outside the house, she was introduced with the accused. He exchanged his telephone number with her and was calling her over the phone and was telling that he was loving her. Since, five months prior to the incident, the accused was contacting her over the phone. In July 2016, the accused went to their house and approaching her parents, asked them to give her in marriage to him, however, her parents rejected his request. Stating that he would do whatever he wants to do, the accused left the place. Thereafter, the accused used to meet her and talking to her near Computer tuition class where she was going regularly. He was enquiring her about her relationship with her parents for which, she has - 30 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 stated that as she has committed a wrong to her parents, they were angry with her.

30. About the incident, PW-2 has stated that on the date 30.09.2016 in the morning at 9.00 O'clock, she had been to computer class. At that time, accused having approached her near the computer class, told her that in case if her parents are treating her with some cruelty, he would take her to his house and take care of her. Then without further thinking, she stated that she would go with him. It is then the accused took her to a place near Kalaburagi in a bus. They stayed in the said place for sometime and from there they went to maternal uncles house of the accused. They stayed in the said house on that night. On the next day, they went to another open land place and stayed there for the whole day time. Thereafter, the accused came to know through his elder brother that her parents were in search of her and the accused. Stating that the said place was not safe for them, the accused took her to his uncles house in the same - 31 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 place and on that night, they stayed in his uncles house. For these two nights, accused had not committing anything upon her. Next day in the same place, they went to another house. By that time, they came to know that her parents accompanied by the police are coming over there in search of them. Hearing the same, herself and the accused left the said place and went to the house of a friend of father of the accused that was in another town where they stayed for two days.

31. In the said place, the accused stating that in case if they establish sexual relationship, nobody can disturb them and even her parents would also agree to their marriage, insisted her to have sexual intercourse with him it is then she gave her consent. Thereafter, the accused had twice sexual intercourse with her. The victim girl further stated in her evidence that after coming to know that the police and her parents are coming to the said place also in search of them, on the next day the accused took her to the house of an Advocate. The said - 32 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 Advocate advised her that she being minor in her age, she has to go back with her parents, otherwise, she would be sent to Remand Home. To the said Advocate, she stated that after happening

of all those events how can she go with her parents. Then the Advocate suggested her to give the said statement before the police. Accordingly, she was brought to police station in a vehicle. By the time she went to the police station, her parents, her younger sister their neighbor and complainant police were all there in the Hunsagi Police Station. The accused who was coming with them had got down on the way from the jeep, as such, he did not come to the police station. The witness stated that she was very much ashamed after seeing her parents because of her shameless act. She told her parents that she is willing and prepared to die, however, her parents excused her and assured that they would not disturb her any more about the incident and took her with them.

32. In the complainant police station she has given a statement in that regard, which, she has identified as - 33 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 Ex.P.4. The witness has further stated that after they returned to Bengaluru, she was entrusted to Remand Home. The Police also sent her to medical examination with proper escort. She was medically examined by the Doctor, where she has given consent for medical examination in a document at Ex.P.5 as per Ex.P.5(a). She was subjected to a detailed medical examination by the Doctor.

33. The witness has further stated that she was also produced before the learned Judicial Magistrate, before whom, she has given her statement. The witness has identified the said statement at Ex.P.6. Further stating that a scene of offence panchanama was drawn after coming to know from her about the place of the offence, the witness has identified the said panchanama at Ex.P.7.

34. This witness was subjected to a detailed cross- examination from the accused side, wherein she has reiterated that the accused was a person known to her. It was suggested to the witness that the accused was - 34 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 working in a house in front row of the house of the victim. She gave more details as to how the love initiated between them and how they were talking to each other over the phone. She denied a suggestion that she does not know the contents of her statement at

Ex.P.4, rather, she stated that the police have got it typed what she has stated before them. She denied a suggestion that since her parents did not agree to give her in marriage to the accused, she on her own went with the accused. She denied a suggestion that she herself telephoned the accused and asked him to come to computer class and to take her with him. The said portion of her alleged statement before the Investigating Officer was marked at Ex.D.1. Stating that she can read Kannada language, she read over her alleged statement recorded under Section 164 of Cr.P.C at Ex.P.6 before the Court. She admitted a suggestion that after her return after the incident, before giving her statement to the learned Magistrate, she had sufficient time to think about the matter, making use of the said time gap, she has given her statement before the - 35 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 Magistrate. She denied that since she had runaway with the accused and there was difference in their caste, after her return, her parents joined by the relatives have created a false case against the accused. Thus, though some attempts were made in the cross-examination of PW-2 to shaken the credibility of her evidence made in examination-in-chief, but, the accused could not succeed in that regard, rather more details about acquaintance of the accused with the witness was elicited in the cross-examination of PW-2.

35. The evidence of PW-3(CW-2) Rajeshwari, the mother of the victim is on the lines of her husband i.e., PW-1. She too has stated about the accused being a known person to their family approaching them asking to give the victim girl in marriage to him and these people rejecting his request-cum-proposal. About the incident of alleged kidnapping, the witness has reiterated what PW-1 has stated by stating that, on the date of incident, their daughter (victim girl) did not return from the computer - 36 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 class to which she had been in the morning. It is thereafter, after searching for their daughter and having not found her, they have lodged a complaint with the police. She also sated that based upon the cell phone number provided to the police by her husband, the police traced the location of the accused to a place called Hunsagi, as such, they went there along

with the police in a Car. After searching for three days for the accused and the girl, on the fourth day in the evening a large gathering of 50 persons brought the victim girl to the police station. It is thereafter, taking their daughter, joined by police, they returned to Bengaluru. 36. The witness has stated that her daughter confessed her guilt before her that she had committed a wrong. The witness also stated that her daughter told her that, stating that he is going to marry her, the accused had committed rape upon her. The witness stated that her daughter i.e., victim girl was medically examined by the doctor, by which time, she too had accompanied her daughter and given her consent by putting her signature at Ex.P.5(b). She - 37 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 stated that because of this incident the neighbours are not giving them the proper respect.

37. In her cross-examination from the accused side, she adhered to her original version and gave more details about their tracing their daughter and bringing her back to Bengaluru. She also stated that the statement given by her daughter before the learned Magistrate was her statement alone without any tutoring. She denied a suggestion that since accused and victim girl had runaway, these people with an intention to separate them permanently, have created a false story and lodged a false complaint.

38. Thus, PWs-1, 2 and 3 have stated in their evidence that the accused was a known person to them, residing in a back house opposite to their house. The acquaintance of the accused, more particularly, with the victim girl and generally with PWs- 1 and 3 also has not been denied in the cross-examination of these three witnesses. Further, the evidence of PWs-1 to 3 that accused had approached PWs-1 and 3 and gave a proposal to marry the victim girl - 38 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 and the same was rejected by them was also not specifically denied in their cross-examination. As such, it stands established that the accused was a known person to the family of the victim girl, including the victim. A suggestion was made to PWs-1, 2 and 3 to the effect that accused and the victim girl were loving each other. By making the said suggestion, the accused himself has admitted not only his acquaintance with the victim girl and

her family, but, also he loving the victim girl.

39. About the incident PW-2 the victim girl has stated that, on the date 30.09.2016 in the morning at 9.00 a.m. she had been to computer class. The accused by meeting her there had told her that, in case, if she was ill- treated by her parents, he would take care of the her. Without any further thinking she agreed to go with him. Accordingly, the accused took her to a place near Kalaburagi in a bus and from there to his maternal uncles home and on the next day, to another place of his uncles home and day after next, to another house in the same - 39 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 place. After coming to know that parents of the victim, accompanied by the police, are proceeding to the said place in search of the victim girl and the accused, they went to another town to the house of the friend of father of the accused. There both of them were there for two days and during which period, the accused subjected her to sexual intercourse, however, later she was produced in the Police Station by a group of people. From there, the police, joined by her parents brought her back to Bengaluru.

40. As observed above, the evidence of PWs-1 and 3 are on the similar lines. However, admittedly they are only hearsay witnesses who have stated about the incident based upon the information said to have been given to them by the victim, who is none else than their daughter. The said evidence of PWs - 1, 2 and 3 which has come in uniformity go to show that on 30.09.2016, the accused and the victim girl both moved from the computer centre at Bengaluru to a distinct place near Kalaburagi. From - 40 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 there also to another place and thus, the victim was away from her parents for about four days. It is considering the evidence of PWs-1, 2 and 3, learned Addl. State Public Prosecutor vehemently submitted that the accused stating that he would marry the victim had enticed her, induced her and taken away her from the lawful custody of her parents to a distinct place and also subjected her to sexual intercourse and thus, has committed the offence punishable under Sections 366 and 376 of IPC and Sections 4 and 6 of POCSO Act. In his support about the alleged kidnapping of the victim, the learned Addl. State Public Prosecutor relied upon the judgment the Hon'ble Apex Court in

the case of Parkash Vs. State of Haryana reported in (2004) 1 SCC339 and another judgment of the Hon'ble Apex Court in Anversinh Alias Kiransinh Fatesinh Zala Vs. State of Gujarat reported in (2021) 3 SCC12 41. Learned counsel for respondent No.1 in his argument vehemently contended that the act of the - 41 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 accused would not constitute the offence of kidnapping under Section 361 of IPC, as such, Section 366 of IPC is not attracted. He submitted that there is no taking of the victim girl from Bengaluru to a distinct place by the accused either by enticing her or inducing her. On the contrary, it is the victim girl who herself has made the accused to take her with him and she has accompanied the accused to all those places, as such, the alleged offence punishable under Section 366 of IPC is not made out. Learned counsel relied upon the judgment of Hon'ble Apex Court in a case of S. Varadarajan Vs. State of Madras reported in AIR 1965 SC942 and a judgment of Co-ordinate Bench of this Court in Davelasab Vs. The State of Karnataka reported in 1977 Cri.L.J.

1255. 42. Section 366 of IPC reads as below:

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.-. Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order - 42 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 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 be punishable as aforesaid]..

43. In order to constitute an offence under Section 366 of IPC there ought to be primarily either kidnapping or abduction of a woman. The kidnapping from lawful guardianship is defined under Section 361 of IPC as below:

"361. Kidnapping from lawful guardianship.-. Whoever takes or entices any minor under [sixteen]. years of age if a male, or under [eighteen]. years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

- 43 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 44. In the instant case, as observed above, the victim girl is found to be a minor in her age of 17 years old as on the date of the alleged offence. Therefore, she can only be kidnapped from the lawful guardianship of her parents. In order to constitute her kidnapping, the another requirement under law is that, she should have been taken or enticed by the accused, out of the keeping of her parents without their consent. The Hon'ble Apex Court in S. Varadaran's case (supra) noticing the fact placed before it, that a college going girl was on the verge of majority telephoning the accused and meeting him, had gone with him to Sub Registrar's Office for registering marriage agreement, it was noticed that there was no threat or inducement on the part of the accused. On the other hand, girl's insistence was there to the accused to marry her. Under the said circumstance, Hon'ble Apex Court held that there was no taking of the minor girl by the accused. To arrive at such a conclusion, the Hon'ble Apex Court has explained - 44 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 the concept of 'taking' in its judgment in paragraph No.9 as below:

"There is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of S.361. Where the minor leaves her father's protection knowing and having capacity to know the full import of what she is

doing, voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian, Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

45. In Davelasab's case (supra) a coordinate Bench of this Court in a similar matter involving the offence defined under Section 361 of IPC, after relying upon the judgment of Hon'ble Apex Court in S. Varadarajan's case (supra) was pleased to observe in paragraph No.6 of its judgment - 45 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 that in order to prove the offence of kidnapping from the lawful guardianship under Section 361 of the IPC it was required of the prosecution to prove that the accused had taken or enticed the minor out of the keeping of her lawful guardian. Merely because the minor girl was seen in the company of the accused was not sufficient unless some evidence was forthcoming as to the taking or enticing by the accused out of keeping of her from the lawful guardianship. Thus, taking or enticing of a minor girl was considered to be sine quo non to bring the alleged act of the defendant of kidnap under Section 361 of IPC.

46. Learned counsel for the respondent No.1 stating that in the instant case, there is no evidence to the fact that the accused had either enticed the victim girl or impressed her to go with him submitted that the alleged offence punishable under Section 366 of IPC stands ruled out in the case on hand.

47. In Parkash's case (supra) the Hon'ble Apex Court had an occasion to discuss the scope of Section 361 of - 46 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 IPC. In the process the Hon'ble Apex Court relied upon its previous judgment in some cases and was pleased to observe in paragraph No.7 of its judgment as below:

". . . On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent which takes the case

out of its purview. Nor it is necessary that the taking or enticing must be shown to have been means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section."

In the same judgment at Para - 9 the Hon'ble Apex Court extracted a portion of its previous judgment in *Thakorlal D. Vadgama V. State of Gujarat* reported in (1973) 2 SCC413 wherein, paragraph No.10 of the said judgment the Hon'ble Apex Court was pleased to observe as below:

". . .The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter - 47 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 cannot be considered to have committed the offence as defined in Section 361 of IPC.

48. In *Anversinh's case* (supra) the Hon'ble Apex Court after referring to *S. Varadarajan's case* (supra) with respect to Sections 361, 363 and 366 of IPC was pleased to frame a question for analysis as to whether a consensual affair can be a defence against the charge of kidnapping a minor. In the circumstances of answering the said question, the Hon'ble Apex Court in paragraph Nos. 13, 15, 16, 17 and 19 of its judgment was pleased to observe as below:

"13. A perusal of Section 361 IPC shows that it is necessary that there be an act of enticing or taking, in addition to establishing the child's minority (being sixteen for boys and eighteen for girls) and care/keep of a lawful guardian. Such "enticement" need not be direct or immediate in time and can also be through subtle actions like winning over the affection of a minor girl (*Thakorlal D. Vadagama v. State of Gujarat*, (1973) 2 SCC413. However, mere recovery of a missing minor from the custody of a stranger would not ipso facto establish the offence of kidnapping. Thus, where the prosecution fails to prove that the - 48 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 incident of removal was committed by or at the instigation of the accused, it would be nearly impossible to bring the

guilt home as happened in King Emperor V. Gokaran reported in 1920 SCC OnLine Oudh JC32 and Emperor v. Abdur Rahman reported in 1916 SCC OnLine All 63.

14. x x x 15. Behind all the chaff of legalese, the appellant has failed to propound how the elements of kidnapping have not been made out. His core contention appears to be that in view of consensual affair between them, the prosecutrix joined his company voluntarily. Such a plea, in our opinion, cannot be acceded to given the unambiguous language of the statute as prosecutrix was admittedly below 18 years of age.

16. A bare perusal of the relevant legal provisions, as extracted above, show that consent of the minor is immaterial for purposes of Section 361 IPC. Indeed, as borne out through various other provisions in IPC and other laws like the Contract Act, 1872, minors are deemed incapable of giving lawful consent (Satish Kumar Jayanti Lal Dabgar v. State of Gujarat, (2015) 7 SCC 359 para 15). Section 361 IPC, particularly, goes beyond this simple presumption. It bestows the ability to make crucial decisions - 49 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 regarding a minor's physical safety upon his/her guardians. Therefore, a minor girl's infatuation with her alleged kidnapper cannot by itself be allowed as a defence, for the same would amount to surreptitiously undermining the protective essence of the offence of kidnapping.

17. Similarly, Section 366 IPC postulates that once the prosecution leads evidence to show that the kidnapping was with the intention/knowledge to compel marriage of the girl or to force/induce her to have illicit intercourse, the enhanced punishment of 10 years as provided thereunder would stand attracted.

18. x x x 19. Unfortunately, it has not been the appellant's case that he had no active role to play in the occurrence. Rather the eyewitnesses have testified to the contrary which illustrates how the appellant had drawn the prosecutrix out of the custody of her parents. Even more crucially, there is little to suggest that she was aware of the full purport of her actions or that she possessed the mental acuties and maturity to take care of herself. In addition to being young, the prosecutrix was

not much educated. Her support of the prosecution version and blanket denial of any voluntariness on - 50 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 her part, even if presumed to be under the influence of her parents as claimed by the appellant, at the very least indicates that she had not thought her actions through fully.

49. From a perusal of the above referred judgments from both side it is clear that in order to constitute an offence of kidnapping of a minor, the consent of the minor is totally not a material. She being a minor in her age her consent would not be of any material. However, there ought to be an act of enticement or inducement by the accused which has made the victim to allow herself to be taken away by the accused or the victim goes with the accused. According to Anwar's case (supra) such an enticement need not be direct or immediately in time and can also be through subtle occasion like winning over the affection of the minor girl.

50. In the instant case PW-2 the victim girl has stated that after he started contacting her over the phone, he was telling her that he was loving her. He was even visiting her and talking to her near the computer class and - 51 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 was enquiring about the reaction of parents, for which, she has stated to him that her parents were not happy with her and they were angry with her. In the meantime, as stated by PWs-1, 2 and 3 uniformly which has not been specifically denied by the accused side, the accused had already approached the parents of the victim girl and given his proposal of marrying their daughter i.e., victim girl, however, the said proposal was rejected by them. It is thereafter the parents of the victim girl were not happy with her.

51. On the date of incident i.e., on 30.09.2016 as has come out in the evidence of none else than PW-2 victim girl, the accused approached her near her computer classes and told the victim girl that in case, if, her parents are behaving with her in a cruel manner he would take her with him to his house and would take care of her. This statement of the accused, which has not been denied specifically in the cross-examination of PW-2, clearly go to show that the accused had put a thought in the mind of PW-2, the victim girl, that she has an opening of joining - 52 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 the accused and go away from the lawful custody of her parents. He has offered to her that, in case, if, she is not being treated properly in her house, he is there and prepared to take her with him and also take care of her. This offer of the accused to his alleged lover was sufficient enough for that girl, who also has not stated that she was not loving the accused, but, openly admitted that offer without any hesitation. As such, she has stated in her evidence that she without any further reaction agreed to join him and accompanied him to each and every place he has taken her thereafter. This act of the offer of the accused has induced the victim girl to join the accused. The act of the accused has created willingness on the part of the minor victim girl to be taken out of the keeping her away from the lawful guardian who were her parents. Thus, as observed by Hon'ble Apex Court in Parkash's case (supra) and in Anwar's case (supra) the act of accused in enticing the victim girl and thereby inducing her to decide to leave the guardianship from her parents to accompany the accused which need not always be - 53 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 direct, has made her to immediately join the accused. As such, the said act of inducing and enticing the victim girl has been committed by the accused, which has made him to take her with him by enticing her to leave the company of her parents and to go with him, thus fall squarely within the definition of kidnapping under Section 361 of IPC. The above observation gains its support from the few statements elicited or suggestions made to the witnesses in the cross-examination of PWs -1, 2 and 3. In cross-examination of PW-2 at page 8 and 9 a suggestion was made to the witness which reads as below:

"since the caste of we both was different though I had runaway with the accused after our return me joined by my parents and relatives have fabricated a story of accusations against the accused. The witness has not admitted the said suggestion as true. However, it cannot be ignored that accused himself has suggested to the witness that she had run away with him due to the love existing between them. Thus, accused has shown that on the pretext of love and marriage he had made the girl to - 54 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 join him which she has called that she had run away with him.

52. In the very same cross-examination of PW-2 the victim girl at another place in page No.6 it was suggested to the witness from the accused side that when the parents of the victim girl refused to give her in marriage to the accused and rejected the proposal of the accused she herself went with the accused. By making the said suggestion once again the accused has admitted that he had taken the victim to a different place without the consent or knowledge of the parents of the victim. Thus, evidence of PW-2 that she was taken to a place near Kalaburagi and after keeping her in two difference houses, in the same place she was taken to another town to the house of the friend of father of the accused and lastly she was produced in the police station at Hunsagi by a group of people from the accused side stands corroborated.-. 55 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 53. In the cross-examination of PW-1 the father of the victim also a suggestion was made to the witness which reads as below:

"It is true to suggest that while we were going back from Hunasagi to Bengaluru and discussing about the incident with my daughter we discussed about my daughter loving the accused and the accused taking her away.

54. By the said specific suggestion the accused has admitted that he had taken the accused otherwise he would not have suggested to the witness as "about the accused taking her away". It is not stated that victim accompanying the accused but it was suggested to the witness that accused taking the victim. Therefore the argument of the learned counsel for the respondent No.1 that accused had not taken the girl with him and she being a girl with the knowledge of Worldly affairs herself had accompanied the accused cannot be accepted. Thus it stands proved that it is the accused and accused alone who had enticed and induced PW-2 - the victim girl and taken her with him to the different places.-. 56 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 55. PW-2 - victim girl in her evidence has stated that though initially for two days the accused did not sexually

intercourse with her, however, on the last two days before the victim was produced before the police at Hunasagi police station, the accused on two occasions had sexually intercourse with her. The victim girl in her evidence has stated that accused stating to her that in case, if, they have sexual intercourse with each other, nobody can separate them and her parents also would accept their love, insisted her to have sexual intercourse with him. It is thereafter, they had sexual intercourse. Thus, the victim has shown that she had not given her free consent for the act, however, she was forced to have sexual intercourse with him, that too, more than once. Since, she had not stated the exact date and place of alleged sexual intercourse, at the request of the prosecution, the witness was treated as hostile and the prosecution was permitted to cross-examine her. In her cross-examination by the prosecution, she admitted a - 57 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 suggestion as true that she has given a statement before the police that on the date 02.10.2016 accused taking her to his grandfather's house forced her to have sexual intercourse on that night, since she did not agree to the same, he by force sexually intercourse with her. On the next day and day after also the accused sexually intercourse her.

56. Though in her cross-examination it was suggested to show that she being native of Tamil Nadu State she does not know the contents of Ex.P.4 which was written in Kannada language, the witness did not admit the said suggestion but stated that what are all she has stated only that much was typed in Ex.P.4. She also stated that contents of Ex.P.4 was read over to her, thus, she adhered to her statement at Ex.P.4 and reiterated that contents are true and was understood by her. According to her evidence, as well Ex.P.4, she was subjected to sexual intercourse against her will and consent for more than once.-. 58 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 57. In her further cross-examination recorded on the subsequent date, her statement before the Magistrate under Section 164 of Cr.P.C. was referred to the witness. The victim stated that the said statement was given due to some confusion. She has denied that she has stated before the Magistrate that it was her idea that accused should have intercourse with her so that parents would not separate them. She has also

given the reason that while she giving statement before the Magistrate she has stated that after her return to parents' home till she gave her statement before the Magistrate the neighbours in the locality were talking very meanly about her and by hearing all those talks and conversations she was in confusion as what to be stated. The said reasoning for her alleged confusion given by the witness was not denied from the accused side. Therefore, the reason for the alleged confusion given by the victim about the variation in her statement at Ex.P.6, has stood explained by the witness.-. 59 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 58. Even PW-1 and PW-3 parents of the victim have also stated that their daughter i.e., PW-2 - victim girl, has stated to them that she was subjected to rape by the accused while she was kept by him in his relatives house. Though their evidence in that regard is hearsay, however, as observed above, being the parents of the victim it was expected and natural on their part to enquire about the happenings during their daughter staying away from their house for those four days. Normally the parents would not easily admit that their daughter has been subjected to rape by a person since the same which would be a stigma upon their family. In spite of the same, PWs-1 and 3 being the parents of the victim girl have stated that their daughter was subjected to rape by the accused.

59. After the victim girl was brought back to Bengaluru, according to victim girl she was presented before a lady Doctor for her medical examination under the escort of the police and her mother. Even PW-3, the mother of the victim girl, also has stated that PW-2 was - 60 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 subjected to medical examination by a Doctor with their consent both PWs-2 and 3 have identified their signature in Ex.P.5 about their consent for medically examining PW- 2, the victim girl.

60. Even PW-11 (CW-14) Murthy, Investigating Officer has also stated in his evidence that after bringing back the victim girl to Bengaluru he sent the girl for her medical examination under proper escort and the Doctor after examining the girl collected articles from M.O.1 to M.O.9 from the girl and handed over it to him for their further examination.

61. PW-8 (CW-12) - Vanita, Woman Police Constable of the complainant police station has stated that it was she at the direction of the Investigating Officer had taken the victim girl to the hospital for her medical examination and after getting her medically examined by the Doctor she had collected articles from M.O.1 to M.O.9 which were collected from the victim girl by the Doctor and given to her by the doctor and produced the same before the Investigating Officer along with her report at Ex.P.10. The said doctor who is - 61 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 said to have been examined the victim is PW-5 (CW-8) Dr. Chaitra Krishna.

62. PW-5 (CW-8) - Dr. Chaitra Krishna in her evidence has stated that on 06.10.2016 she examined the victim girl, who was produced before her by woman police constable of the complainant police. The girl was accompanied by her mother. Both the girl and her mother gave their consent for medical examination of the girl. The evidence of the PW-5 -Doctor which is summarised in the above paragraph shows that though the victim girl had not sustained any injuries, however, the hymen was disturbed and was not in good condition. Based upon the statement of the victim girl she has written about the girl undergoing sexual intercourse. She stated that she has given a written opinion as per Ex.P.5, where she has shown that hymen was absent. She has also stated about she collecting articles from the victim girl from M.O.1 to M.O.9 which interalia includes the clothes worn by the victim girl at the time of medical examination and other articles including vaginal swab, vaginal smear, cervical swab, cervical - 62 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 smear, Nail clipping collected by the victim during her medical examination. The medical examination report at Ex.P.5 shows a history of sexual intercourse on 2nd, 3rd and 4th October 2016, with Mounesh (accused) and it also mentioned in the opinion paragraph that on local examination of evidence, signs of recent sexual intercourse were present. After giving such a report as to the presence of evidence of recent sexual intercourse the witness in her evidence has stated that her report at Ex.P.5 is a preliminary report but not the final report, since the FSL report was not produced before her she has not given her final report. Thus, the medical evidence of doctor

does not in clear terms confirms that there was signs of victim being subjected to sexual intercourse recently.

63. PW-7 (CW-11) - Shivaputra the police constable of the complainant police station has stated that he was sent by the Investigating Officer to take the parent of the victim girl i.e., CW-1 and CW-2 to a village called - 63 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 Thinthani in Surapura Taluk and Yadagiri District and search for the victim and accused and bring them back. Accordingly, they left the Bengaluru and based on the information received by them kept an observation at places called Hunsagi, Thinthani, Siddapura, Srinivasapura. However, while they were in search for the victim girl they got an information that on 05.10.2016 an Advocate has brought the victim girl to Hunsagi Police Station. Based on the said information these people went to the said police station where the victim girl was there. She was identified by her parents. Thereafter, she was brought back to Bengaluru. In this regard he has given his report to Investigating Officer as per Ex.P.9. His evidence that the girl was produced by an Advocate at Hunsagi Police Station on 05.10.2016 has not been denied in his cross-examination from the accused side. 64.The evidence of PW-7 corroborates the evidence of PW-2 - the victim girl that the accused took her to the Advocate and the said Advocate advised that she must be produced before the police so that she can give her statement before the - 64 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 police. It also corroborates the evidence of PWs-1, 2 and 3 that PW-2 was produced before the Hunsagi Police Station.

65. According to PW-11 the Investigating Officer it was after the victim girl was produced before him by his staff she was sent for her medical examination. Thus, when the evidence of PW-2 - the victim girl is considered that she was subjected to sexual intercourse by the accused for two times and her statement at Ex.P.4 that she was subjected to sexual intercourse on the nights of 2nd and 3rd October, 2016 by the time she was produced before the alleged Medical Officer i.e., PW-5 - Dr. Chaitra Krishna for her medical examination, more than two days have already passed. As such, there is no uncommon in the said Doctor not finding any signs of

recent sexual intercourse in PW-2. 66. Further the very history recorded by the said Doctor, though given by the victim, go to show that the victim girl has not only stated that she was subjected to sexual intercourse, but, also stated that it was the accused who committed sexual intercourse with her. The hymen was - 65 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 also ruptured in her. Therefore, it further makes clear of the act of the accused subjecting the victim to sexual intercourse.

67. Our Honble Apex Court, in the case of STATE OF PUNJAB VS. GURMIT SINGH AND OTHERS reported in (1996) 2 Supreme Court Cases 384, was pleased to observe in paragraph 8 of its judgment as below:

" .. .The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion?. The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge - 66 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the

prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and - 67 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.

68. In the case of Moti Lal vs. State of Madhya Pradesh reported in (2008) 11 Supreme Court Cases 20, which was a case involving offences punishable under Sections 375, 376 and 450 of the IPC, the question of conviction on the sole testimony of prosecutrix for the alleged offences was involved. The medical evidence was not helpful to the prosecution. The Hon'ble Apex Court in paragraph 12 of its judgment reiterated its observation made in its previous judgment in the case of OM PRAKASH VS. STATE OF UTTAR PRADESH reported in (2006) 9 Supreme Court Cases 787, wherein it was observed that it is a settled law that the victim of sexual assault is not treated as accomplice and as such her evidence does not - 68 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 require corroboration from any other evidence including the evidence of the Doctor. In a given case, even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of prosecutrix. In a normal course, a victim of sexual assault does not like to disclose such offence even before her family members, much less before the public or before the Police. The Indian women have a tendency to conceal such offence because it involves her prestige as well as the prestige of her family.

69. Our Hon'ble Apex Court in the case of PHOOL SINGH VS. STATE OF MADHYA PRADESH reported in (2022) 2 Supreme Court Cases 74, has summarised the principles as to when the sole testimony of the victim/prosecutrix be taken as a basis for conviction even in the absence of corroboration. The Hon'ble Apex Court relying upon its previous judgment in the case of STATE OF PUNJAB VS. GURMIT SINGH AND OTHERS reported in (1996) 2 Supreme Court Cases 384 and analysing the - 69 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 facts before it, observed that the prosecutrix in the case before it had fully supported the case of the prosecution and she had been consistent right from the very beginning, nothing had been specifically pointed out as to why the sole testimony of the prosecutrix should not be believed. The Court further observed that in the case before it, even after thorough cross-examination, she had withstood by what she had stated and had fully supported the case of the prosecution. With this the Hon'ble Apex Court observed that they see no reason to doubt the credibility and/or the trustworthiness of the prosecutrix.

70. In the instant case also, the evidence of PW-2 is trustworthy, reliable and does not show any reason for falsely implicating the accused in the case and herself declaring as a girl having sexually intercourse by a male person who according to her is the accused. As such, the evidence of PW-2 the victim girl is reliable and believable and creates confidence to believe in the mind of the Court. Admittedly, when articles at M.O.1 to M.O.9 were collected - 70 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 few days after the alleged incident and PW-2 after being brought back to Bengaluru has taken bath and there is no evidence that she continued wearing the same dress which she was wearing at the time of sexual intercourse, the non-detection of seminal stains or spermatozoa in those articles was not fatal to the case of the prosecution.

71. The evidence of PW-9 (CW-7) - Dr. Arul Dasan shows that he has examined the accused produced before him on 19.12.2016 by the complainant police with a request to ascertain the age of the accused by Radiological test. Accordingly, he subjected the accused for Radiological test and noticed that his age was more

than 18 years and less than 21 years. Accordingly, he has issued a medical report as per Ex.P.11. By stating that he has affixed the photograph of the person whom he examined in his report, he has identified the accused in the Court as it is the very same person. He was not cross-examined from the accused side, as such, evidence of PW-9 that he has examined the accused and found that he has attained the age of majority has remained un-denied and undisputed.-. 71 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 72. PW-12 (CW-9) Dr. K.V. Satish a Professor at Bowring Hospital at Bengaluru has stated that on 19.12.2016 in the afternoon on the request of complainant police station has examined the accused who was produced before him. By his examination he noticed that there was nothing in the accused to suggest that he was incapable of performing the sexual intercourse. This witness was also not cross-examined from the accused side, as such, it stands established that accused was capable of having sexual intercourse. This further corroborates the evidence of victim girl that she was subjected to sexual intercourse by the accused. Thus, it stands proved that the accused has subjected the victim girl for sexual intercourse on more than one occasion, without her consent and thus, has committed rape upon her. The said act, being an act committed against a girl, who was minor in her age, the same amounts to committing an offence both under Sections 4 and 6 of POCSO Act also.-. 72 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 73. The places of the alleged offences also have been stated by PWs-1, 2 and 3. However, among them evidence of PWs-1 and 3 would confine about the victim girl being their daughter staying with them in their house and attended to computer class. The first place was the house of the victim as shown by her father i.e., PW-1 and the second place was the computer centre where the victim girl was said to have gone to attend classes on the said day and it was from the said place she was found missing, which, later proved that the accused had taken her with him from the said place. These two places were visited by the Investigating Officer and as shown by PW-1 a scene of offence panchanama was drawn as per Ex.P.2. The evidence of PW-1, PW- 4 (CW-4) K. R. Rajashekhar the neighbour of PW-1 and evidence of PW-11 -Murthy, the Investigating Officer corroborates the same.

74. According to PW-11 the Investigating Officer based upon the credible information received by him he joined by his staff proceeded to Hunsagi village at Yadagiri District. They gave necessary information to the jurisdictional - 73 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 police station. Thereafter, an Advocate produced the victim girl in the said police station. Since the local people did not cooperate to be a pancha for the panchanama, he drew a scene of offence panchanama in the presence of one Chandrakantharao and Murugan near the house of the accused in Srinivasapura village as per Ex.P.7. His staff and parents of the victim girl were also present at that time. PW-2 has stated that she too has signed the Ex.P.7 Panchanama which signature she has identified at Ex.P.7(a). She has stated that it is she who gave the information to the police about the place of offence. Thus, she has stated that it was she who has stated to the police about the places where the offence upon her took place. The said panchanama at Ex.P.7 shows that it was drawn in the house of the grandfather of the accused at Srinivasapura village in Surapura Taluk of Yadagiri District, as the place where the victim was subjected to rape by the accused. Thus, even the place of the offence of rape and sexual assault upon the victim girl also stands established.-. 74 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 75. The defence of the accused which he has taken in the form of suggestion made to PWs-2 and 3 in their cross-examination is that, the victim had eloped with the accused. Since, their castes were different, after their return, the parents of the victim joined by the relatives have lodged a false complaint against him. However, the said suggestion was denied both by PWs-2 and 3. Except taking his defence in the form of a suggestion made to these two witnesses, the accused has not placed any evidence either oral or documentary to substantiate his defence. The suggestion made to PWs-2 and 3 in their cross-examination as his defence would in no-way affect the credibility of evidence of PWs-2 and 3 about the incident. The said defence was not sufficient to make the case of prosecution doubtful.

76. The accused had kidnapped the victim girl with an intention to marry her and to have illicit relationship with her and subjected her to rape and repetitive sexual intercourse. Thus, though the prosecution could able to establish the alleged guilt

against the accused beyond reasonable doubt, still, the - 75 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 Special Court only on its erroneous finding that prosecution has failed to prove that the victim girl was minor in her age, has proceeded to disbelieve the entire case of the prosecution including, the act of the accused committing the rape and sexual assault upon the victim girl. Resultantly, the judgment of the trial Court ended with an erroneous finding acquitting the accused of all the alleged offences. Since the said finding of the Special Court has proved to be erroneous, the same deserves to be set aside and the accused is required to be held guilty for the alleged offences. Accordingly, we proceed to pass the following:

ORDER

i. The Criminal Appeal No.1005/2018 stands allowed. ii. The judgment of acquittal passed in Special C.C. No.101/2017 dated 06.12.2017 passed by the L Additional City Civil and Sessions Judge, Bengaluru acquitting the accused of the offences punishable under - 76 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 Sections 366 and 376 of the Indian Penal Code, 1860, and Sections 4 and 6 of Protection of Children from Sexual Offences Act, 2012 stands set aside; iii. The accused Mounesh @ Mohana son of Late Ambrappa Gowda, aged about 24 years, residing at Siddapura B Hebbal, K. Hobli, Surupura Taluk, Yadagiri District is convicted for the offence punishable under Sections 366 and 376 of Indian Penal Code, 1860 and Sections 4 and 6 of Protection of Children from Sexual Offences Act, 2012. To hear on sentence, the matter is passed over. Sd/- JUDGE Sd/- JUDGE BVK - 77 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 Dr. HBPSJ & UMBAJ:

19. 12.2023 HEARING ON SENTENCE77 Heard the submission of the learned Addl. State Public Prosecutor for the appellant and learned counsel for respondents No.1 and 2 on the quantum of sentence.

78. Learned counsel for respondent No.1/accused submitted that the accused has now taken up responsibility towards his family and he is the person who has to

take care of dependents in the family. May be due to the age of both the accused and victim, some incident might have happened in a spur of a moment. The accused has no criminal antecedent, as such, most lenient view be taken and minimum sentence prescribed be ordered.

79. Per contra, learned Addl. State Public Prosecutor for the appellant/State and learned counsel for respondent No.2/complainant in their submission submitted that the offence is against a minor girl which has spoiled her entire career and future life. The alleged - 78 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 offence is one of the heinous sexual offence practiced against a minor girl, as such, maximum punishment prescribed for the proven guilt be ordered.

80. It is the sentencing policy that the sentence ordered must be proportionate to the gravity of the proven guilt. It shall be neither exorbitant nor for the name-sake. In the facts and circumstances of the case, the accused is not entitled for the benefit under Probation of Offenders Act. After considering the fact that the accused has no criminal antecedents and he is said to be burdened with the maintaining his alleged dependents and other mitigating factors and also the plight of the alleged victim as narrated by the learned counsels in their submission, we proceed to pass the following order.

ORDER

ON SENTENCE¹ The accused/respondent No.1- Mounesh @ Mohana son of Late Ambrappa Gowda, aged about 24 years, residing at Siddapura B Hebbal, K. Hobli, Surupura Taluk, Yadagiri District is sentenced to undergo three (3) years rigorous Imprisonment and to - 79 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 pay a fine of `2,000/- (Rupees Two Thousand Only), and in default of payment of fine, to undergo rigorous imprisonment for additional one month for the offence punishable under Section 366 of the Indian Penal Code, 1860.

2. For the proven guilt punishable under Section 6 of the POCSO Act, the accused/respondent No.1 shall undergo rigorous imprisonment for a period of ten (10) years and to pay a fine of `20,000/- (Rupees Twenty Thousand Only) and in default of payment of fine, to undergo further rigorous imprisonment for a period of six months.

3. Both sentences shall run concurrently.

4. Out of the fine amount, deposited, if any, by the accused, a sum of `18,000/- be paid to the victim (PW- 2), as victim's compensation under Section 357 of the Code of Criminal - 80 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 Procedure, 1973. The remaining sum of `4,000/- be paid to the State; 5. The victim (PW-2) is also entitled for compensation under Section 357A of the Code of Criminal Procedure, 1973; 6. The District Legal Services Authority, Bengaluru, is directed to decide the quantum of compensation payable to the victim (PW-2) under the Scheme under Section 357A of the Code of Criminal Procedure, 1973, and to take appropriate steps for compensating the victim (PW-2) under the Scheme at the earliest, but not beyond a period of six months from the date of receipt of a copy of this judgment.

7. The accused/respondent No.1- Mounesh @ Mohana son of Late Ambrappa Gowda, aged about 24 years, residing at Siddapura B Hebbal, K. Hobli, Surupura Taluk, Yadagiri District shall surrender before the Special Court, within - 81 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 thirty (30) days from today and serve the sentence; 8. The respondent No.1 (accused) is entitled for the benefit of set-off for the period, if any, undergone by him in Judicial Custody in the matter, under Section 428 of the Code of Criminal Procedure, 1973; 9. A free copy of this judgment be furnished to the accused, immediately by the Registry.

10. In view of the fact that the accused is also held guilty of the offence punishable under Section 6 of the POCSO Act, which is higher offence under the Special Act, no separate sentence for the offence punishable under Section 376 of IPC and Section 4 of POCSO is ordered.-. 82 - NC:

2023. KHC:46944-DB CRL.A No.1005 of 2018 Registry to transmit a copy of this judgment along with Special Court records to the concerned Special Court immediately, for doing needful in the matter. Registry also to send a copy of this judgment to the District Legal Services Authority, Bengaluru for doing needful in the matter. Sd/- JUDGE Sd/- JUDGE BVK List No.:

1. SI No.: 8

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