

Majidkhan Vs. the State of Karnataka

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SooperKanoon Citation : sooperkanoon.com/375498

Court : Karnataka

Decided On : Dec-18-1992

Reported in : 1993CriLJ907; 1993(1)KarLJ176

Judge : N.D.V. Bhat, J.

Appeal No. : Criminal Appeal No. 546 of 1987 (Against the Judgment passed by the S.J., Karwar, D/- 14/17-8-1987)

Appellant : Majidkhan

Respondent : The State of Karnataka

Advocate for Def. : Sri Y.R. Jagadish, Adv.

Advocate for Pet/Ap. : Sri M.V. Devaraju, Adv.

Judgement :

1. This appeal is preferred against the judgment dated 14/17-8-1987 passed by the Sessions Judge, Karwar, Uttar Kannada convicting the accused-appellant for the offences punishable under Ss. 366, IPC and 376, IPC and contenting him to undergo Rigorous Imprisonment for a period of five years and to pay a fine of Rs. 1,000/- for the offence punishable under S. 366, IPC and to undergo Rigorous Imprisonment for a period of five years and to pay a fine of Rs. 1,000/- for the offence punishable under S.376, IPC. The facts constituting the case of the prosecution, briefly stated, are as under :-

2. P.W. 5 - Prafulla Kumari is the daughter of P.W. 3 - Prabhakar Parbhu and P.W. 4 - Smt. Geetha. P.W. 3 - Prabhakar Prabhu was working as an Assistant Engineer, Micro-waves at Karwar. During the period from 1982 to July 1986 he was residing in the Staff Quarters allotted to him along with his wife-Geetha, his son - Krishna Prabhu and his daughter Prafulla Kumari. During the relevant period that is to say, during the year 1985 Prafulla was studying in Tenth Standard in St. Michael's Convent at Karwar. Accused-Majidkhan was residing in a house adjacent to the quarters of P.W. 3 - Prabhakar Prabhu. Prafulla used to go to her school by catching a bus at a place near Arjun Theatre every day. While she and her brother were going to the school, the accused used to talk to them car his house. The accused developed acquainted with these two youngsters in that way. The accused used to invite them to witness the T.V. programmes occasionally and Prafulla and her brother used to go to his house to witness the T.V. programmes. Taking advantage of the said situation, the accused lured the minor girl to go to Bombay along with him by painting a glamorous picture of Bombay City. It appears that the minor girl refused to go with him in the first instance. However, she was persuaded to accompany him. As a culmination of the same, on 15-5-1986 at about 10.00 p.m. at the instruction of the accused who was waiting behind his house, P.W. 5 Prafulla left her house and joined the accused. The accused took her in an Auto rickshaw to a nearby Ice Factory situated by the side of the National Highway where a car was kept ready. From that place the accused and P.W. 5 proceeded in that car which was driven by P.W. 11-Liakhathali Khan. The accused and Prafulla were dropped by the Driver at a place called Mastikatta. It appears that the accused wanted to take the girl to Bombay from that place in a Bus. They caught hold of a Bus leaving for Bombay and reached Bombay on 16-5-1986. At Bombay the accused took her to the house of P.W. 8 Estrilina Dias and started staying there. During the stay at Bombay, the accused purchased gold, silver and plastic articles as also clothes for the use of prosecutrix. After purchasing the articles, on 22-5-1986 the accused took the prosecutrix to Andheri along with P.W. 8 Estrilina Dias and after taking the signatures of the prosecutrix on several typed papers, the accused got performed Nikha through P.W.7 Syed Abdulla as per Ex. P. 6 P.W. 8 left Bombay to Goa on the pretext that one of her relatives died at Goa and left accused and prosecutrix to stay exclusively in her house and during the

night of 22-5-1986 the accused had sexual inter-course with the prosecutrix much against her will.

3. In the meantime, P.W. 3 Prabhakar Prabhu, the father of P.W. 5 - Prafulla got up from his sleep at about 4.30 a.m. on 16-5-1986. He found his daughter Prafulla missing. He searched for her in the bedroom and elsewhere in the house, but to no avail. After finding that the girl was disappearing from the house, he awakened his wife. Thereafter P.W. 3 went in a jeep to Karwar Bus Stand generally used to leave at 5.30 a.m. However, he did not find his daughter there. He went to Karwar Town Police Station and gave a missing complaint as per Ex. P. 28 to P.W. 21 - Ravikumar who registered a case in Crime No. 136/86. Thereafter, P.W. 3 made enquires in the house of his relatives and started searching for his daughter. However, she was not to be found anywhere in the locality. It came to the notice of P.W. 3 Prabhakar Prabhu that the accused was also missing from his house. He, therefore, smelt a rat. To check up as regards the whereabouts of the accused P.W. 3 met his elder brother and made enquires in that behalf. Elder brother of the accused informed P.W. 3 that on the night of 15-5-1986 the accused had left for Belgaum for some work and that he was likely to return within a couple of days. After waiting for two more days P.W. 3 again approached the elder brother of the accused. With the assistance of the elder brother of the accused, a phone call was booked to P.W. 10.- Abdul Gani at Bombay. Abdul Gani when contacted on phone informed that the accused and P.W. 5 Prafulla were at Bombay. He also informed them that the accused was advised by him to go back to Karwar along with Prafulla. Naturally, therefore, P.W. 3 Prabhakar Prabhu waited for two or three days with the hope that the accused would return to Karwar along with his daughter. On 27-5-1986, Abdul Gani was again contacted. P.W. 3 came to know from him that the accused and his daughter who had left Bombay again came back to Bombay as they had no mind to go to Karwar. P.W. 3 took the address of Abdul Gani at Bombay from the brother of the accused and he left for Bombay and reached Bombay on 29-5-1986. After reaching Bombay P.W. 3 went to Andheri Police Station and informed the Inspector as regards as to what transpired. The Police Inspector after verifying the address of Abdul Gani informed P.W. 3 to contact Sahar Airport Police Station as the residence of the person at the address shown by P.W. 3 came within the jurisdiction of the said Police Station. Thereafter,

P.W. 3 and the Constable contacted Abdul Gani who was working at Godrej Philips India at about 3.30 p.m. They were informed by Mr. Gani that the accused and Prafulla had come to his house the previous day and had gone back from his house. Thereafter, P.W. 3 and the Constable went to the house of Mr. Gani along with the latter. When they went there, P.W. 3 found accused and his daughter sitting on a cot along with the family members of Mr. Gani. The Constable told them that there was a complaint against them, with the result, all of them came to the Sahar Airport Police Station. It appears P.W. 3 who had come earlier to the said Police Station had given a complaint as per Ex. P8 to P.W. 9 Sridhar. On the basis of the information as per Ex. P. 8 P.W. 9 Sridhar took charge of the girl under S. 78 of the Children's Act and arrested the accused under S. 41 for an offence punishable under S. 366, IPC. He made the necessary entries in the lock-up register at Ex. P. 9. On the same day, he sent the girl to Children's Home for safe custody. On the next day, i.e., 30-5-1986 Prafulla was produced before the Juvenile Court for Remand and the accused was produced before the Metropolitan Magistrate, 22nd Court, Andheri and he was remanded to Police custody. On 31-5-1986 the accused and the girl were taken to Police Hospital, Nagpada. In the meanwhile, P.W. 3 contacted his wife Geetha and instructed her to file a complaint before the Karwar Police Station against the accused. P.W. 3 also approached the Juvenile Court on 30-5-1986 and made the necessary application for taking back his daughter.

4. In the meantime, P.W. 21 Ravikumar, P.S.I., Karwar Town Police Station on information given by P.W. 4 - Geetha registered a case in Crime No. 136/1986 of Karwar Town Police Station for the offence punishable under S. 366, IPC and after completing the initial formalities proceeded to Bombay on 30-5-1986. He gave an application to the 22nd Metropolitan Magistrate to give the custody of the accused to him. The Metropolitan Magistrate allowed the application. The custody of the accused was given to P.W. 21 Ravikumar. The Juvenile Court directed the custody of the minor girl to be given to her father P.W. 3 - Prabhakar Prabhu. All of them came to Karwar. P.W. 22 - Balasaheb Patil, Dy. S.P. took over the further investigation from P.W. 21 - Ravikumar. He also visited Bombay. After completing the investigation he filed the charge-sheet against the accused on 11-11-1986 before the Chief Judicial Magistrate, Karwar. On the same day he sent a

requisition letter as per Ex. P. 31 to Chief Judicial Magistrate, Karwar praying that the Sections of the IPC referred to therein be added with reference to Crime No. 136/86 of Karwar Town Police Station.

5. The Chief Judicial Magistrate, Karwar committed the case of the accused to the Court of Sessions at Karwar. The learned Sessions Judge framed the charges for the offences punishable under Ss. 366, I.P.C. and 376, I.P.C. against the accused. In support of the case of the prosecution, the prosecution examined 23 witnesses. Exhibits P1 to P31 and M.Os. 1 to 17 were marked for the prosecution. During the course of cross-examination of the prosecution witnesses, the photographs as per Exts. D2 to D7 and the specimen signature of the prosecutrix as per Ext. D1 were also marked. After examining the accused under S. 313, Cr.P.C. and on a consideration of the evidence on record, the learned Sessions Judge convicted the accused-appellant for the offences with which he was charged. The accused was sentenced to rigorous imprisonment for a period of five years and a fine of Rs. 1,000/- for each of the aforesaid offences with a further direction that the substantive sentences shall run concurrently. Hence, the instant appeal.

6. I have heard Sri M. V. Devaraju, learned counsel for the appellant and Sri Jagdish, learned High Court Government Pleader.

7. Sri Devaraju, learned counsel for the appellant challenged the judgment of the trial court on two counts. In the first place, learned counsel contended that the conviction of the accused persons is vitiated on account of the non-compliance of the provisions of S. 233, Cr.P.C. The learned Counsel also challenged the judgment on merits. The learned High Court Government Pleader appearing for the respondent-State supported the judgment of the trial Court.

8. In the light of the submissions made at the Bar, the following points arise for consideration :

1. Whether the conviction of the accused is vitiated for not calling upon him to enter on his defence in terms of S. 233, Cr.P.C.

2. Whether the prosecution has established by acceptable evidence that the accused has committed the offences with which he is charged

3. What order

Point No. 1 :

9. In the instant case, it is seen that the learned Sessions Judge after the evidence of the prosecution was closed, examined the accused under S. 313, Cr.P.C. After putting him certain questions with reference to the evidence on record, the learned Sessions Judge put to him the last question viz., Question No. 59, as under :

Question No. 59 : Have you got anything else to say

Answer No. 59 : (vernacular matter is omitted - Ed.)

Thereafter, it appears that the learned Sessions Judge heard the arguments of the learned counsel appearing on either side and after reserving the judgment pronounced the judgment of conviction and sentence.

10. Sri Devaraju, learned counsel appearing for the appellant contended that the procedure followed by the learned Sessions Judge is not in conformity with the provisions of Ss. 232 and 233, Cr.P.C. The learned Counsel dilates on this aspect argued that the question of calling upon the accused to enter on his defence arises only when the judge makes up his mind that the case is not the one for recording an acquittal under S. 232 Cr.P.C. The learned counsel contended that the provisions of Ss. 232 and 233, Cr.P.C. are enacted with an avowed objective. The objective being to afford abundant opportunity to the accused person to successfully carry out his defence. It is pointed out by Sri Devaraju that if the mandatory requirement of Ss. 232 and 233, Cr.P.C. are not followed in a given case, the same would cause prejudice to the accused. At any rate, it is argued, failure to comply with the provisions of S. 233, Cr.P.C. would vitiate the conviction. It is therefore, contended by the learned Counsel that the conviction of the accused person is liable to be set at naught and the matter deserves to be remanded back to the trial court for proceeding from the stage where the error has been committed by the learned Sessions Judge. In support of his submission the

learned counsel for the appellant has mainly relied on the decision in *Sivamani v. State of Kerala*, 1992 (3) Crimes 136. In the said case the High Court of Kerala has held that answers by an accused that he does not wish to adduce evidence in his defence, during his statement under S. 313, Cr.P.C. in a Sessions trial, is no reason to by-pass the two steps envisaged in Ss. 232 and 233, Cr.P.C. It is further pointed out that when there is some evidence connecting the accused with the crime it is the duty of the Judge to pass on to S. 233 and conviction recorded in violation of the aforesaid procedure is liable to be set aside.

At Para No. 8 therein, the High Court of Kerala has held as under :

'8. On account of a legal snag we are disabled from considering the merits of the contentions of both sides. Learned Sessions Judge went into the details of the evidence and evaluated it at the penultimate stage of trial when he was only concerned whether 'there is no evidence that the accused committed the offence'. Learned Sessions Judge questioned the accused under S. 313 of the Code of Criminal Procedure (for short 'the Code') during which he asked them, as the last question, whether they have any evidence. True they answered is no reason to bypass the two steps envisaged in Ss. 232 and 233 of the Code. Even if arguments were heard next after questioning the accused under S. 313 of the Code, such arguments would only be beneficial to consider whether there is no evidence that the accused committed the offence as provided in S. 232 of the Code.'

Then again at Para No. 13 of its judgment, the Court observed as follows :

'13. A Division Bench of this Court in *State of Kerala v. Mundan*, 1981 KLT 624 : (1981 Cri LJ 1795) has observed after referring to the above instances that 'All these are cases where it can be said that there is no evidence that the accused committed the offence and S. 232 can be invoked. But in a case where there is some evidence connecting the accused with the commission of crime, it is the duty of the judge to pass on to S. 233 and not to appreciate that evidence and find out whether it was reliable or not, to pass an order under S. 232 of the Code. Their Lordships also observed that the words 'no evidence' in S. 232 cannot be considered or interpreted to mean absence of satisfactory or trustworthy or

conclusive evidence in support of the charge. S. K. Kader, J., speaking for the Bench further stated thus : 'If there is any evidence to show that the accused had committed the offence, then the Judge has to pass on to the next stage. It is not open to him to evaluate or consider the reliability of the evidence at this stage. It is salutary principle in a sessions trial that no final opinion as to the reliability or acceptability of the evidence should be arrived at by the Judge until the whole evidence is before him and has been duly considered. It is only after the accused is called upon to enter his defence under S. 233 and after the evidence, if any, adduced on behalf of the accused and hearing the counsel appearing for both sides, the Judge hearing the case after due consideration of the evidence decides whether the evidence adduced on behalf of the prosecution is reliable or trustworthy.'

Pressing into service the said decision, the learned Counsel contended that the conviction of the trial Court is liable to be set aside on this ground alone and the matter deserves to be sent back to the trial Court for complying with the procedure and proceeding with the case in accordance with law.

10. On the other side, the learned High Court Government Pleader submitted that the failure on the part of the learned Sessions Judge to strictly conform to the provisions of S. 232 or 233, Cr.P.C. will not in all cases vitiate the conviction. It is argued by the learned High Court Government Pleader that in the facts and circumstances of this case no prejudice can be said to have been caused to the accused and even if any irregularity has been committed by the learned Sessions Judge, the same is cured under S. 465, Cr.P.C.

11. I have given my anxious consideration to the submissions made on either side. The modus operandi adopted by the learned Sessions Judge is already alluded to earlier. It is not necessary to risk repetition here again. The procedure followed by the learned Sessions Judge would, certainly go to show that he has not strictly complied with the provisions of Ss. 232/233, Cr.P.C. However, the question that arises for consideration is as to whether the failure on the part of the learned Sessions Judge to strictly comply with the aforesaid provisions would vitiate the conviction

12. If one has to go by the ratio laid down by the High Court of Kerala, it is possible to say that the conviction is vitiated. However, with great respects, I would like to point out that the proposition laid down by the Hon'ble High Court of Kerala, is too wide in approach and in my opinion, such a proposition is not warranted in the context of the provisions of S. 232/233, Cr.P.C. It is necessary to state here, that S. 232/233, Cr.P.C. lay down the procedure to be followed by the Sessions Court in the process of trial of an accused person. It is one thing to say that the said procedure should be complied with. However, it is quite another thing to say that failure on the part of Sessions Court to comply with the said procedure would ipso facto vitiate the conviction. In my opinion, the failure on the part of the Judge to call upon the accused person to enter on his defence in terms of S. 233, Cr.P.C., would not in all cases vitiate the conviction, if there are materials to indicate that no prejudice whatsoever has been caused to the accused. When I take this view, I am fortified by a decision of the Bombay High Court in Hanif Banomiya Shikalkar v. The State of Maharashtra, 1981 Cr LJ 1622. In the said case, the Division Bench of the Bombay High Court has, in Para No. 35 of its judgment held as under :

'35. As is pointed out above, the statement of the accused was recorded on 8th January, 1976. There is no endorsement or indication in the order sheet, nor there is any separate order showing that after the arguments were heard on 16-1-1976, the accused was called upon to enter on his defence. The case was posted for judgment to 21st January, 1976, It would, however, appear from the statement of the accused recorded on 8th January, 1976 that a question was asked at the end of that statement whether the accused had any witness to produce in his defence, the reply was in the negative. It is true that this question should not have been put before the trial entered the stage of S. 233. It may be mentioned that the judgment in the case was delivered about a fortnight thereafter i.e., on 28th January, 1976. Before delivering the judgment the arguments were heard on 16th January, 1976. No any grievances seems to have made either at the time of the arguments at any time before the delivery of the judgment that the accused was, in fact, prejudiced or was likely to be prejudiced by his not having been called upon to enter on his defence in terms laid down in S. 233 of the Code. No ground suggesting that any such prejudice has been caused to the accused has been taken in the Appeal

Memo. It has not been shown that any prejudice has been caused to the accused because the accused was not formally called upon to enter on his defence. It has not been shown to us that the accused would have led some evidence in the Court which he did not do, because he was not formally called upon to enter upon his defence. The prosecution had examined as many as four witnesses, who claimed to be the eye witnesses, and that, therefore, the learned trial Judge must have been clear in his mind that this could not be a case of 'no evidence at all'. It does not appear from the record that any argument was advanced on behalf of the accused when the trial was in stage of S. 232 of the Code that this was the case of no evidence at all. In view of all this material, we are inclined to hold that in spite of the failure on the part of the learned Sessions Judge to strictly comply with the provisions of Ss. 232 and 233 of the Code, no failure of justice has been occasioned to the accused. We, therefore, reject the contention sought to be urged on behalf of the appellant that the conviction of the appellant has been vitiated.'

A careful perusal of the observations made by the Bombay High Court in the aforesaid decision, would indeed indicate that the question as to whether failure on the part of the learned Sessions Judge would vitiate the conviction or not, would depend upon the facts of each case. In other words, if on the facts of a particular case, no prejudice can be said to have been caused on account of the failure to comply with the procedure as laid down S. 233, Cr.P.C., conviction cannot be said to be vitiated. It is necessary to mention here that the Kerala High Court in Sivamani's case has made a reference to the decision of this Court in *Kumar Naik v. State of Karnataka* (1976 (1) Kant LJ 58 : 1978 Cri LJ 1168). However, it is necessary to state that in *Kumar Naik's* case the question as to whether the conviction is vitiated on account of the violation of the mandatory requirement of S. 233, Cr.P.C. did not arise for consideration. In the said case this Court has pointed out that under S. 232 of the new Code the Sessions Judge has to decide whether there is evidence to show that the accused had committed the offences, but at that stage he should not consider what value should be attached to such evidence. If he finds that there is no evidence, then he has power to acquit the accused. It is further pointed out that it is necessary for the Judge to look into the prosecution evidence adduced before him and the material brought out in the examination of

the accused and then decide whether there is evidence or not. It is significant to notice in the said case that the prosecution evidence was closed on 14-8-1975 and on that day, the defence contended after examination of the accused and during the hearing of the prosecution and the defence by the learned Additional Sessions Judge, that the accused namely the appellants before the High Court were entitled to be acquitted under S. 232, Cr.P.C. 1973. The learned Additional Sessions Judge rejected the contention of the defence and called upon the accused to enter on their defence. It was that order which was challenged in the Criminal Petition before this Court in Kumar Naik's case. It was in that context that this Court had made the observation, referred to earlier. A careful perusal of the said decision would indeed go to show that the same would not be helpful to decide the question as to whether in a given case, failure on the part of the Sessions Judge to follow the procedure in terms laid down under S. 233, Cr.P.C. would vitiate the conviction. However, as pointed out earlier, the decision of the Bombay High Court in Hanif Banomiya Shikalkar's case is on the point and I respectfully agree with the observation made in the said decision and with great respect I am unable to agree with the view of the Kerala High Court in Sivamani's case.

13. If that be so, it will have to be seen as to whether in the facts and circumstances of this case, prejudice can be said to have been caused to the accused in the context of the procedure followed by the trial Court.

14. It is seen that the learned Sessions Judge had before him the evidence of P.W. No. 3-Prabhakar Prabhu, the father of the girl, P.W. No. 4 Geeta, the mother of the girl, P.W. No. 5 Kumari Prafulla kumari and the evidence of P.W. No. 11 Liakatalikhan, who is said to have carried the accused in his car up to Masthikatta. There was also the evidence of P.W. No. 8 Estolian Dias, who has deposed that accused and P.W. No. 5 Prafulla came to her house at Bombay on 16-5-1986. There was also the evidence of P.W. No. 7 Syed Abdulla, who is said to have performed the marriage of the accused and P.W. No. 5 Prafulla on 22-5-1986. Further, there was also the evidence of P.W. No. 16 V. V. Patavardhan, Joint Registrar of Marriages, who is said to have issued marriage registration certificate. In addition to the above, there was medical evidence. It appears that in the context

of the same, the learned Sessions Judge appears to have felt that there was evidence in the case and that therefore, it was not a case for recording an order of acquittal under S. 232, Cr.P.C. and in that context he appears to have questioned the accused as to whether he had any evidence to lead, to which the accused is shown to have replied that he has no evidence. I hasten to add here that there is no specific question to the effect that as to whether the accused would like to lead defence evidence. However, the answer elicited in the way and manner as shown with reference to question No. 59 clearly goes to show that the Sessions Judge did ask a question in that behalf to which the reply as above, is shown to have been given by the accused. It is seen that no grievance appears to have been made as regards the procedure adopted by the learned Sessions Judge in the course of the proceeding before him. I have carefully, perused the grounds of appeal and the same also do not disclose any such grievance in that behalf. It is also not the case of the accused that he would have led some evidence had the procedure been followed in the manner as prescribed under S. 233, Cr.P.C. Under these circumstances, I do not find any prejudice having been caused to the accused. Accordingly, I hold that the contention of the accused that the conviction is liable to be set aside on the ground that the provision of S. 233, Cr.P.C. were not strictly followed, is not tenable.

Point No. 2 :

15. Under this point it is required to be seen as to whether the prosecution has established by acceptable evidence that the accused committed the offence with which he was charged. It is seen that the charges framed against the accused person are for the offences punishable under Ss. 366 and 376 of I.P.C. The precise allegation against the accused is that on 15-5-1986 at about 10.30 p.m. at Kajubag in Karwar the accused kidnapped the minor girl Prafulla, daughter of P.W. No. 3 Prabhakar Prabhu with intent that she may be compelled to marry the accused against her will and also in order that she may be seduced to illicit intercourse with him. The further accusation against the accused was that on the night of 22-5-1986, in plot No. 10 of Swagat Building, Amrut Nagar, Ghatkopar at Bombay the accused committed rape on the said minor girl.

The lower Court in the course of its judgment has reached a conclusion that P.W. No. 5 Prafulla was below 15 years of age at the time of incident. While reaching that conclusion the lower Court has mainly relied on the evidence of P.W. No. 3 Prabhakar Prabhu, and P.W. No. 4 Geetha, the parents of P.W. No. 5 Prafulla. Reliance was also placed on the evidence of P.W. No. 13 Dr. Dilip Ramchandra Waze, as also on the document as Exs. P. 1 and P. 2 namely, the school certificate and the birth certificate, respectively; and the corresponding evidence of P.W. No. 1 Sister Marry Hilda and P.W. No. 2 Prabhakar Annappa Naik, the incharge Chief Officer of Karwar Municipality.

The lower Court placing reliance on the evidence of P.W. No. 3 Prabhakar Prabhu, P.W. No. 8 Estolina Dias, P.W. No. 5 Kumari Prafulla,

P.W. No. 10 Abdul Ghani, P.W. No. 17 P. N. Bhanupriya, P.W. No. 7 Sayed Abdulla, who is said to have performed the marriage, P.W. No. 16 V. V. Patvardhan, Joint Registrar of Marriages, and other evidence on record has held that 'the accused with intent compelled P.W. No. 5 Kumari Prafulla to marry him against her will in order she may be seduced to illicit intercourse.'

The lower Court placing reliance on the evidence of P.W. No. 5 Kumari Prafulla, P.W. No. 13 Dr. Dilip Ramachandra Waze and P.W. No. 14 Dr. I. S. Patil and the documentary evidence reflected in Ex. P. 18 the certificate issued by her, as also on the documents referred to in the course of its judgment, took the view that the offence of rape has been successfully driven home to the accused.

16. It will have to be seen as to whether the conclusions reached by the lower Court for the offences with which the accused has been charged are justified on the basis of the evidence on record.

17. Sri Devaraju, learned Advocate for the accused has not, and rightly so, disputed the fact that P.W. No. 5 Kumari Prafulla was below the age of 16 years. Further the evidence on record is overwhelming to indicate that P.W. No. 5 Kumari Prafulla was below 15 years at the relevant point of time. The evidence of P.W. No. 3 Prabhakar Prabhu, the father of P.W. No. 5, the evidence of P.W. No. 4 Geetha, the mother of P.W. No. 5, the evidence of P.W. No. 1 Sister Marry, the

evidence of P.W. No. 2 Prabhakar Naik, the in-charge Chief Officer of Karwar Municipality, the evidence of P.W. No. 13 Dr. Dilip Ramachandra Waze, coupled with the documents Ex. P. 1 the school certificate, and Ex. P. 2 the birth certificate, Ex. P. 14, certificate issued by P.W. No. 13 Dr. Dilip Ramachandra Waze, and Ex. P. 16 the X-ray got produced during the course of his evidence, would unmistakably go to show that P.W. No. 5 Kumari Prafulla was below 16 years of age on the date of the incident. Since Sri. Devaraju has not disputed this aspect in the course of his argument, it is not necessary for me to dilate any further in this behalf.

18. Sri Devaraju, learned Counsel appearing for the appellant, however, submitted that the judgment of the trial Court suffers from infirmities both on facts and in law. Dilating on this aspect the learned Counsel had taken this Court to the evidence of some of the witnesses and has argued that the same would go to show that P.W. No. 5 Kumari Prafulla if at all went with the accused on her own accord without any pressure having been brought to bear upon her by the accused at all. Highlighting some of these circumstances in this behalf which will be alluded to herein below and placing reliance on the decision of the Supreme Court in *S. Varadarajan v. State of Madras* : 1965 CriLJ33 the learned counsel contended that the conclusion reached by the lower Court that the prosecution has established the offence punishable under Section 366 of I.P.C. against the accused is wrong. The learned Counsel further submitted that the conclusion reached by the lower Court with reference to offence of rape is also wrong. In this connection the learned Counsel invited the attention of this Court to the evidence of the two doctors who are examined in this case. It is pointed out by Sri Devaraju that neither the evidence of Dr. Dilip Ramachandra Waze nor the evidence of Dr. I. S. Patil is of any assistance to the prosecution. The learned Counsel in particular arrested the attention of this Court to the fact that the story regarding rape was disclosed by P.W. No. 5 Kumari Prafulla only for the first time on 8-6-1986, whereas it is alleged that rape was committed on P.W. No. 5 Kumari Prafulla on 22-5-1986. The learned Counsel also invited the attention of this Court to the Certificate Ex. P. 18 issued by Dr. I. S. Patil, which reflects that rape must have been committed a week earlier to her examination. Sri Devaraju, also invited the attention of this Court to other infirmities in the case, particularly with reference to

the marriage certificate issued by P.W. No. 7 Syed Abdulla and the marriage register maintained in that behalf. Summing up his submissions on these lines, the learned Counsel Sri Devaraju submitted that the judgment of the trial Court is liable to be set at naught and the accused deserves to be acquitted.

19. On the other hand, the Government Pleader supported the judgment of the lower Court on the grounds reflected in the judgment of the lower Court.

20. It will have to be seen as to whether there is any merit in the contention raised by the learned Counsel for the appellant. As pointed out earlier, P.W. No. 5 Kumari Prafulla was below the age of 16 on the date on which the incident in question took place. It is also not in dispute that P.W. No. 5 Kumari Prafulla and the accused Majidkhan were next door neighbours. Without much discussion it can safely be concluded that P.W. No. 5 Prafulla Kumari was visiting the house of the accused quite a good number of times. It is in the evidence of P.W. No. 5 Kumari Prafulla that when she and her brother were going to the school the accused used to talk to them near his house. It is also in evidence that once the accused invited her and her brother to witness the T.V. and occasionally they used to go to his house to see T.V. programme. At this juncture, it is necessary to state that when this evidence was put to the accused in his examination under Section 313, Cr.P.C., the accused has admitted the same. This is clear from his answer in relation to Question No. 15. It is further in the evidence of P.W. No. 5 Kumari Prafulla that in the last week of April, 1986 the accused met her near his house and told her to go to Bombay along with him. It is her evidence that she refused to go along with him (in the first instance). However, it is her evidence that he told her that Bombay is a big city and there are many nice places to be seen and that both of them could see the film actors and that therefore, her mind was converted to go to Bombay. It is also her evidence that on the morning of 15-5-1986 the accused met her on the road near his house and told her to come out of her house at about 10-30 p.m. quietly and stealthily and accordingly as per his instructions she left her house at 10-30 p.m. through the back door. She has also given the other details which will be referred to at the appropriate place. Whether the portion of the evidence which is culled out immediately herein above is acceptable, can be considered little later. However, it is necessary to mention here that the evidence

on the aspect that the accused and P.W. No. 5 Kumari Prafulla left Karwar on night of 15-5-1986 at or at about 10-30 p.m. and reached Bombay on the 16th May, 1986, does not appear to have been disputed by the accused in the course of his examination under Section 313, Cr.P.C. On the other hand, it is seen, particularly with reference to question Nos. 19, 20 and 21 that the accused has admitted having taken P.W. No. 5 Kumari Prafulla to Bombay and having stayed at the house of P.W. No. 8 Estelina Dias. In fact, P.W. No. 8 Estelina Dias though treated as hostile has corroborated this aspect. It is needless to say that the evidence of a hostile witness is not completely washed off from the record. It is certainly possible to make use of the evidence of even an hostile witness by way of corroboration. Further the evidence of P.W. No. 10 Abdul Ghani will go to show that the accused and P.W. No. 5 Kumari Prafulla visited his house on 3 or 4 occasions. It is necessary to point out here that this evidence is not cross-examined at all by the defence. Then again the evidence of P.W. 6 Kirit Chabrildas Ajmir would go to show that the accused has come to his photo studio on 17-5-1986 along with the girl and photo was taken on that day as per Ex. P. 4. His evidence further discloses that on 22-5-86, again, the accused and the girl had come to his studio and their photo was taken on that day as per Ex. P. 5. P.W. No. 6 has referred to the negatives of the same as at Exs. P. 4(a) and P. 5(a). It will suffice if it is stated that the evidence of this witness in this behalf is not challenged by the accused. On the other hand, the accused has admitted the same in the course of his examination under Section 313, Cr.P.C. with reference to question Nos. 21 and 24. Further the evidence of P.W. No. 7 Sayed Abdulla, who is a Khaji (priest) at Andheri, Bombay, goes to show that the accused came to him along with P.W. No. 5 Kumari Prafulla and P.W. No. 8 Estelina on 22-5-86 and gave all the particulars and then P.W. No. 7 Sayed Abdula performed 'Nikha' and the accused declared payment of Rs. 525/- as Mahar and in that regard P.W. 7 had issued Ex. P. 6 which is an extract of Marriage Certificate. He has referred to details of the same. It is true, as rightly contended by Sri Devaraju, the learned Counsel appearing for the appellant, that the Original of Ex. P. 6 is not produced. However, I am of the view that the same does not detract the value of the evidence of P.W. No. 7 if it is otherwise acceptable. No interestedness is attributed to this witness, much less established. On a careful perusal of the evidence of this

witness, I find that the evidence of this witness bears an impress of truth. It is also true that P.W. No. 8. Estelina Dias has not supported this aspect in the course of her evidence. The plight of P.W. No. 8 Estelina Dias is understandable. She is the lady who allowed the accused and P.W. No. 5 to harbour in her house. If in that context she has prevaricated on certain aspects, the same cannot be made use of to taint the evidence of P.W. No. 7 Sayed Abdulla. As pointed out earlier, the evidence of P.W. No. 7 Sayed Abdulla is believable and that therefore, acceptable. It is relevant to point out here that this witness is a resident of Andheri in Bombay. The accused and P.W. No. 5 Kumari Prafulla are from Karwar which is a 'far cry' from Anderi. It would be indeed unrealistic to conceive that this witness can have any axe to grind. Under these circumstances, I have no hesitation whatsoever in accepting the evidence of this witness as has been done by the learned Sessions Judge.

21. Further evidence of P.W. No. 16 V. V. Patvardhan, Joint District Registrar of Marriages also discloses that he registered the marriage between the accused and P.W. No. 5 Kumari Prafulla on 22-5-86 and issued the certificate, the true copy of which is marked at Ex. P. 20. On a careful perusal of his evidence I find, anything worthwhile in the course of his cross-examination which would detract his evidence or cast a cloud over his evidence. Further the evidence of P.W. No. 17 P. N. Bhanupriya would go to show that the accused and P.W. No. 5 Kumari Prafulla had stayed at Hotel Ayodhaya at Hubli on 25-5-1986 at Room No. 40.

22. I have crystallised the evidence of the witnesses relevant for consideration, in the context of the consideration of the question as to whether the accused can justifiably be found guilty of the offence punishable under Section 366, I.P.C. It is not necessary at this state to refer to the evidence of other witnesses like the panch witness or the evidence of the police officer either at Bombay or at Karwar or for that matter the other evidence in the case.

23. It is in the context of the evidence marshalled hereinabove, the question raised by Sri Devaraju, learned Counsel appearing for the appellant, is required to be resolved. As pointed out earlier, the main thrust of the submission made by Sri Devaraju, is that the evidence indicted hereinabove, even if it can be accepted the

same would not, and cannot indicate the factum of P.W. No. 5 Kumari Prafulla having been taken out of the keeping of the lawful guardian. It is further pointed out that the circumstances of the case do not reflect any element of criminal intention on the part of the accused. Dilating on this aspect, the learned Counsel Sri Devaraju pointed out that the circumstances of the case as reflected in the evidence referred to hereinabove would unmistakably go to show that P.W. No. 5 Kumari Prafulla went out of her house on her own accord and out of her own free will. The learned Counsel pointed out that no pressure was brought to bear on her by the accused. The learned Counsel argued that P.W. No. 5 Kumari Prafulla, notwithstanding the fact that she had not attained the age of majority, had certainly attained the age of discretion. Arguing further the learned Counsel submitted that the calendar of events disclosed in the evidence of the prosecution would go to show that P.W. No. 5 Kumari Prafulla took voluntary and active part and that therefore, the ingredients of either the provisions of Section 361, I.P.C. or the provisions of Section 366, I.P.C. are not attracted. The learned Counsel, in this connection has mainly relied upon the decision of the Supreme Court reported in *S. Varadarajan v. State of Madras* : 1965 CriLJ33 .

In order to appreciate the submission made by Sri Devaraju, the learned Counsel appearing for the appellant, in the context of the observation made by the Supreme Court in Varadarajan's case, it is indeed necessary to refer to a few facts of the said case. In fact, the Hon'ble Supreme Court has succinctly summarised the facts in the said case in Paras 2 to 5 of its judgment, which read as under :

'(2) Savitri, P.W. 4, is the third daughter of S. Natarajan, P.W. 1 who is an Assistant Secretary to the Government of Madras in the department of Industries and Co-operation. At the relevant time, he was living on 6th Street, Lake area, Nangumbakkam, along with his wife and two daughters, Rama, PW 2, and Savitri, P.W. 4. The former is older than the latter and was studying in the Madras Medical College while the latter was a student of the second year B.Sc. class in Ethiraj College.

(3) A few months before September 30, 1960 Savitri became friendly with the appellant Varadarajan who was residing in a house next door to that of S.

Natarajan. The appellant and Savitri used to carry on conversation with each other from their respective houses. On September 30, 1960 Rama found them talking to each other in this manner at about 9.00 a.m and had also seen her talking like this on some previous occasions. That day she asked Savitri why she was talking with the appellant, Savitri replied saying that she wanted to marry the appellant. Savitri's intention was communicated by Rama to their father when he returned home at about 11.00 a.m. on that day. Thereupon Natarajan questioned her. Upon being questioned Savitri started weeping but did not utter a word. The same day Natarajan took Savitri to Kodambakkam and left her at the house of a relative of his, K. Natarajan, P.W. 6, the idea being that, she should be kept as far away from the appellant as possible for some time.

(4) On the next day, i.e., on October 1, 1960 Savitri left the house of K. Natarajan at about 10.00 a.m. and telephoned to the appellant asking him to meet her on a certain road in that area and then went to that road herself. By the time she got there the appellant had arrived there in his car. She got into it and both of them went to the house of one P. T. Sami at Mylapore with a view to take that person along with them to the Registrar's office to witness their marriage. After picking up Sami they went to the shop of Govindarajulu Naidu in Netaji Subhas Chandra Bose Road and the appellant purchased two grounds and Tirumangalyam which were selected by Savitri and then proceeded to the Registrar's Office. Thereafter the agreement to marry entered into between the appellant and Savitri, which was apparently written there, was got registered. Thereafter, the appellant asked her to wear the articles of jewellery purchased at Naidu's shop and she accordingly did so. The agreement which these two persons had entered into was attested by Swami as well as by one P. K. Mar, who was a co-accused before Presidency Magistrate but was acquitted by him. After the document was registered the appellant and Savitri went to Ajanta Hotel and stayed there for a day. The appellant purchased a couple of sarees and blouses for Savitri the next day and then they went by train to Sattur. After a stay of a couple of days there, they proceeded to Sirukulam on October 4, and stayed there for 10 or 12 days. Thereafter they went to Coimbatore and then on the Tanjore where they were found by the police who were investigating into a complaint of kidnapping made by S. Natarajan and were then brought to Madras on November 3rd.

(5) It may be mentioned that as Savitri did not return to his house after she went out on the morning of October 1st, K. Natarajan went to the house of S. Natarajan in the evening and enquired whether she had returned home. On finding that she had not, both these persons went to the railway station and various other places in search of Savitri. The search having proved fruitless. S. Natarajan went to the Nangumbakkam Police Station and lodged a complaint stating there that Savitri was a minor on that day and could not be found. Thereupon the police took up investigation and ultimately apprehended, as already stated, the appellant and Savitri at Tanjore.'

In the context of the aforesaid facts, the Supreme Court has observed in Para No. 7, as under :

'(7) The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that 'taking' of Savitri out of the keeping of her father has not been established. The offence of 'kidnapping from lawful guardianship' is defined thus in the first paragraph of S. 361 of the Indian Penal Code :

'Whoever takes or entices any minor under sixteen years of age if a male, 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.'

It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what we have to find out is whether the part played by the appellant amounts to 'taking' out of the keeping of the lawful guardian of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan she still continued to be in the lawful keeping of the former but then the question remains as to what is it which

the appellant did that constitutes in law 'taking'. There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says than she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's Office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force of blandishments or anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her side. The appellant by complying with her wished can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of cause implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling he not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area. The learned Judge of the High Court was referred to the

decision in Abdul Sathar v. Emperor, 54 Mad LJ 456 : AIR 1928 Mad 585 : 29 Cri LJ 635 in which it was held that where the evidence disclosed that, but for something which the accused consented to do and ultimately did, a minor girl would not have left her husband's house, or would not have been able to leave her husband's house, there was sufficient taking in law for the purpose of S. 363 and expressing agreement with this statement of the law observed : 'In this case the minor, P.W. 4 would not have left the house but for the promise of the appellant that he would marry her.' Quite apart from the question whether this amounts to blandishment we may point out that this is not based upon any evidence direct or otherwise. In 54 Mad LJ 456 : AIR 1928 Mad 585 : (29 Cri LJ 635). Srinivasa Aiyangar, J., found that the girl whom the accused was charged with having kidnapped was desperately anxious to leave her husband's house and even threatened to commit suicide if she was not taken away from there and observed :

'If a girl should have been wound up to such a pitch of hatred of her husband and of his house or household and she is found afterwards to have gone out of the keeping of her husband, her guardian, there must undoubtedly be clear and cogent evidence to show that she did not leave her husband's house herself and that her leaving was in some manner caused or brought about by something that the accused did.'

In the light of this observation, the learned Judge considered the evidence and came to the conclusion that there was some legal evidence upon which a court of fact could find against the accused. This decision, therefore, is of little distance in this case because, as already stated, every essential step was taken by Savitri herself; it was she who telephoned to the appellant and fixed the rendezvous she walked up to that place herself and found the appellant waiting in the car; she got into the car of her own accord without the appellant asking her to step in and permitted the appellant to take her wherever he liked. Apparently, her one and only intention was to become the appellant's wife and thus be in a position to be always with him.'

Then again at para No. 9 the Hon'ble Supreme Court has held as under :

'(9) It must, however, be borne in mind that there is a distinction between 'taking' and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be guarded as meaning the same thing for the purpose of S. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping 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.'

24. A careful perusal of the facts in Vardarajan's case would indeed go to show that the minor girl Savitri in the said case had taken an active part in going out of the house of Natarajan, where she was left by her father to keep her away from the accused. The evidence did disclose that she had expressed her desire to marry the accused. Further she on going out of the house of Natarajan took upon herself to telephone to the accused to come to a particular place and as desired by her the accused came there in his car and there upon they went to the shop of one Govindarajulu Naidu and then they proceeded to the Registrar's Office and thereafter the agreement to marry entered into between Savitri and the accused was apparently written there and was got registered. Further there was not even a whisper in the evidence of Savitri, as regards her going out of the house of Natarajan at the instance of the accused. It was in the context of these circumstances that the Supreme Court has observed as indicated in the relevant paras of its judgment, which is extracted in extenso herein above.

25. However the background of this case leading to P.W. No. 5 Kumari Prafulla going out of her house as disclosed in the evidence of P.W. No. 5 Kumari Prafulla is quite different. Her evidence would indeed go to show that in the last week of April, the accused told her to go to Bombay and she refused to go with him, but when the accused told her that Bombay is a big city and there are many places to

be seen and told her that they could see cinema actors, and that therefore on account of these persuasion her mind was converted. It is further in her evidence, that on 15-5-86 in the morning, the accused met her on the road near his house and asked her to come out of the house after 10-30 p.m. quietly and stealthily and accordingly she left the house at 10-30 p.m. and the accused was waiting for her outside on the road. The rest of the events that followed are already referred to earlier as disclosed in the evidence of various witnesses and it is not necessary to repeat the same. It is significant to notice here that when a question was put to the accused as at Question No. 17 that on 15-5-86, he met her near her house at 10-30 p.m. stealthily he has answered in the affirmative. Further it is only the accused and P.W. 5 Prafulla who are aware as regards as to what transpired between them on 15-4-86. When P.W. 5 Prafulla had come out with her own version and when several incriminating circumstances as deposed to by her were put to him in the course of his examination under S. 313, Cr.P.C., and if the accused does not choose to explain them away giving his own version, such conduct on the part of the accused would indeed assume significance and render credibility to the version given by P.W. No. 5 Kumari Prafulla. I hasten to add here that there is no duty cast upon the accused to prove that he is innocent. However, the purpose of examination under S. 313, Cr.P.C. is to afford an opportunity to the accused person to explain away the incriminating circumstances and if the accused does not avail that opportunity to explain away the incriminating circumstances which he is indeed capable of explaining away, if really he has got any valid version, the said circumstances would indeed have its own significance and would be a factor along with other factors in the process of reaching a conclusion. Further the evidence marshalled earlier herein above would go to show as to how the accused took an active part in taking P.W. No. 5 Kumari Prafulla to the house of P.W. No. 8 Estelina, Dias, to the house of P.W. No. 10 Abdulghani, to the Photo Studio of P.W. No. 6 Kirit Chabrildas Ajmer, to the place of P.W. No. 7 Sayed Abdulla and to the office of P.W. No. 16. V. V. Patwardhan, District Registrar. These circumstances if appreciated in conjunction would indeed render effective corroboration to the evidence of P.W. No. 5 Kumari Prafulla. It is true that there is no direct evidence corroborating the evidence of P.W. No. 5 Kumari Prafulla as regards her having been taken out of the keeping of her father. However, in the

facts and circumstances of this case, it would be idle to expect any direct evidence by way of corroboration. Further often time circumstances established by acceptable evidence provide a more assuring corroboration than even direct evidence. Further the totality of the evidence on record would indeed go to show that P.W. No. 5 Kumari Prafulla was a girl like any other average girl in a middle class family. The totality of the evidence does not even remotely disclose anything special about her. Further, if really she on her own accord had gone to Bombay along with the accused without having been induced to do so, and if the rest of the events also had taken as desired by her it would be indeed unrealistic to believe that she would have come out with a version like the one which she has given in the course of her evidence before the Court.

26. At this juncture even at the risk of repetition, it is necessary to remember that in the case dealt with by the Hon'ble Supreme Court, Savitri had not made any accusation against the accused/appellant. Further no previous enmity was also alleged, much less established between the family of the accused and the family of P.W. No. 5 to which Kumari Prafulla belongs. Under these circumstances, I have no hesitation whatsoever, in holding that the going away of P.W. No. 5 Kumari Prafulla from the house of her father on the night of 15-5-1986 was on account of inducement on the part of the accused. What was his intention in inducing her to go with him to Bombay can be inferred without any hesitation whatsoever from what took place thereafter. What took place thereafter, is already alluded to in the course of the evidence discussed hereinabove. The said events that took place at Bombay would stare at the accused and the only conclusion which can be drawn is that the accused was responsible for taking her away from the keeping of her father for the purpose reflected in S. 366, IPC.

27. It is seen that the learned Sessions Judge has dealt with this aspect in the course of his judgment and has considered the various decisions of different High Courts in Para Nos. 39, 40, 42, 43, 44 and 45 of his judgment. It is not necessary to refer to those decisions over and again in this judgment. In the light of the exhaustive treatment on the subject in Varadarajan's case, it is not necessary to refer to the other decisions. On a careful consideration of the judgment of the trial Court and for the reasons stated hereinabove, I find it difficult to hold that the

judgment of the learned Sessions Judge on this aspect is not right.

28. If that be so, the next point which is required to be considered is as to whether the charge of rape alleged against the accused can be said to have been established by acceptable evidence..

29. The main evidence which is relevant for consideration is that of P.W. No. 5 Kumari Prafulla and the evidence of P.W. No. 14 Dr. (Smt.) I. S. Patil. The certificate issued by P.W. No. 14 would also assume significance. It is necessary to state here that though P.W. 13 Dr. Dilip Ramachandra Waz had examined P.W. No. 5 Kumari Prafulla on 31-5-86 there is nothing useful in the course of his evidence or for that matter in the certificate issued by him at Ex. P. 14 to connect the accused with the charge of rape. It is therefore convenient to consider the evidence of P.W. No. 5 Kumari Prafulla and P.W. No. 14 Dr. (Smt.) I. S. Patil in the first instance. P.W. No. 5 Kumari Prafulla is the prosecutrix. Her evidence which is relevant for consideration, in the context of the offence punishable under S. 366, had already been considered. At this juncture it will suffice if only her evidence relevant in the context of the offence of rape is referred to and dealt with. P.W. No. 5 Kumari Prafulla has in the course of her evidence at Para No. 10 deposed as under :

'10. On 22-5-1986, the accused took me to some office and took my signature on some papers. In the same compound, a marriage was performed between me and the accused according to the customs of the Mohammadans against my will. On the same day, we again went to the same studio and took a photograph as per Ex. P. 5. In the afternoon of 22-5-86, Mrs. Dias said that one of her relatives had died in Goa and she went there. She told the accused that he can stay along with me in her house and if we wanted to go out, the key should be handed over to the adjoining apartment. On 22nd night the accused forced me to have sexual intercourse with him.'

30. P.W. No. 14 Dr. (Smt.) I. S. Patil, who was the Assistant Surgeon in the District Hospital at Karwar for the period from 1983 to 1987 has in the course of her evidence deposed that she had examined Kumari Prafulla on 11-6-1986 and on examination she did not notice any injuries over her chest, face, breasts, back,

abdomen, thighs and upper limbs. She has further deposed as under :

'4. Pelvic examination :-

- 1) There were signs of vulvovaginitis like redness of vulva vagina with purulent white discharge.
- 2) The hymen was torn and there was infected wound at the introitus at the posterior aspect of vagina.
- 3) Vagina admits two fingers easily.
- 4) Finger palpation was painful because of wound and infection.'

She has opined that the said girl had sexual intercourse about more than one week back, prior to the date of her examination. She has also stated that she has issued certificate as per Ex. P. 18 in that behalf. She has further stated in the course of her evidence that she gave the opinion about the sexual intercourse having taken place about one week earlier to her examination on the basis of the infection which generally used to take place one or two weeks after the injury.

31. In the course of her cross-examination she has stated that it was her first case she examined in respect of a matter relating to rape. She has stated that she has studied Medical Jurisprudence written by Dr. Modi. She has further stated that injury may be caused even by self infliction or thumb impression. She volunteered to state that usually such an injury would be found in the anterior aspect only. She has denied a suggestion that though there are no signs of sexual intercourse, to help the police she has given a false certificate.

32. Sri. Deveraju, learned counsel appearing for the appellant/accused attacked the evidence of these two witnesses for reasons more than once. In the first place, the learned counsel submitted that the doctors who had examined the girl had not even remotely spoken having seen any signs of sexual intercourse. It was also argued by the learned Counsel for the appellant/accused that the version regarding rape came at a very late stage, that is to say, on 8-6-1986, whereas it is alleged that rape was committed on 22-5-1986. The learned counsel submitted

that the evidence of P.W. No. 5 Kumari Prafulla in this behalf cannot be given any credence whatsoever. It is argued by the learned counsel that this girl has by her own conduct, discredited herself with reference to this aspect. It is pointed out by the learned Counsel that in all probability pressure must have been brought to bear upon her to depose according to the tune of some one else. The learned counsel further submitted that the evidence of P.W. No. 14 Dr. (Smt.) I. S. Patil even if it can be taken on its face value, will not at all corroborate the evidence of P.W. No. 5 Kumari Prafulla, because according to P.W. No. 14 Dr. I. S. Patil rape took place about a week next before she examined P.W. No. 5 Kumari Prafulla. P.W. No. 5 Kumari Prafulla was admittedly examined by her on 11-6-1986. Under these circumstances, the learned counsel submitted that her evidence cannot and will not take the incident to 22-5-1986 at all. The learned counsel Sri Devaraju also pointed out that P.W. 5 - Prafulla and the accused were said to be together for the period from 15th to 29th May 1986 and that the rape is said to have been committed only on the night of 22-5-1986 and P.W. 5 has not alleged rape on any other date. The circumstance, according to Sri Devaraju, learned Counsel for the accused, would militate against the version regarding rape on 22-5-1986 and would improbable the whole version relating to rape. The learned Counsel also pointed out that the statement of Prabhakar Prabhu which was recorded on 9-6-1986 also does not disclose P.W. 5 - Prafulla having told him anything in that behalf. In sum, the learned counsel argued that the evidence of P.W. 5, apart from being inherently infirm has remained uncorroborated and corroboration has to be insisted upon in a case like this by way of prudence though not as a rule of law. The learned counsel also invited the attention of the Court to a passage in Taylor's 'Principles and Practice of Medical Jurisprudence' at page 78 (12th Edition).

33. I have given my anxious consideration to the submission made by the learned Counsel Sri Devaraju. Sri Devaraju is right in submitting that the evidence on record does not disclose P.W. 5 having told anyone regarding rape, till 8-6-1986 when her statement was recorded by P.W. 22 Balasaheb Patil. It is also true that she has not alleged rape on any other date. It is also seen that the evidence of P.W. 14 Dr. I. S. Patil does not mathematically fit in with reference to the date of alleged rape. Further the other circumstances highlighted by Sri Devaraju, learned Counsel for the appellant and alluded to hereinabove, are there as they are.

However, the question for consideration is as to whether the evidence of P.W. 5 Prafulla can be discarded in this behalf, in the context of the aforesaid circumstances. At this juncture, it is necessary to point out that in our Indian Society the chastity of a woman is considered to be a precious factor to be preserved and protected. P.W. 5 Prafulla was a girl in her teens at the relevant point of time. She was born in a fairly well to do family. Her father Prabhakar Prabhu is an Assistant Engineer in Telecommunication. However, the turn of events jeopardised her prospects. Her future itself was in stake. Her marriage prospects were almost in ruins. It is in the context of this background the circumstances highlighted by Sri Devaraju, will have to be considered. It is in that context, the question as to whether P.W. 5 Prafulla could have falsely implicated the accused, will have to be considered. Having regard to the totality of the background referred to earlier, I find that there is nothing unnatural if P.W. 5 did not disclose about rape earlier to 8-6-1986. She must have been taken aback by the events that took place in quick succession ever since she was induced to go away from her abode. She must have felt absolutely embarrassed by the turn of events. In that context, if she felt hesitant to disclose the incident relating to rape which would cast a stigma on her chastity, there does not appear to be anything unnatural. It is necessary at this juncture to bear in mind that different persons react differently to a given situation. Further it would be indeed unrealistic to believe that P.W. 5 has falsely implicated the accused with reference to the incident relating to rape, just to gain a conviction in a criminal case against him. Further her evidence, or for that matter, the evidence of her parents, does not disclose any prior enmity between them on the one hand and the accused on the other. P.W. 5 Prafulla did indeed risk her future by disclosing the incident relating to rape. It would be wholly unrealistic to believe that she would have hazarded that risk had it not been a fact. The totality of her evidence indeed goes to show that she is not over anxious to state anything against the accused. Further this aspect relating to the incident of rape will have to be appreciated by taking an integrated look at the entire evidence relating to the events covering the period from 15th to 29th May 1986. It is significant to notice here that it was on 22-5-1986 that the accused and Prafulla had an occasion or opportunity to stay exclusively in the house of P.W. 8 - Estrilina Dias who had left for Goa. It is on that day that the

accused went to P.W. 7 - Sayed Abdullah to get the Nikah performed. It was on that day that the accused took P.W. 5 to the office of P.W. 16 - V. V. Patavardhan, District Registrar of Marriages. It is further seen that the accused had taken P.W. 7 on that day also that is to say, on 22-5-1986 to the Studio of P.W. 6 - Kirti Chabrildas Ajmer and got the photos of his (accused) and P.W. 5 taken. These events which took place on that very day and the fact that Estrilina Dias was not in her house on that night would indeed provide sufficient assurance and would satisfy the consensus of the Court in relation to the evidence of P.W. 5 - Prafulla that on the night of 22-5-1986 accused had sexual intercourse with her against her will and consent. I may point out here that the question of consent or for that matter, the question of resistance and that fact that P.W. 5 did not have any injuries which would disclose resistance on her side, would not assume significance in this case, since P.W. 5 was a lass of 15 years of age. The Supreme Court in the decision in Gurucharan Singh v. State of Haryana : 1973 CriLJ179 has pointed out that a prosecutrix cannot be considered as an accomplice and, that therefore, her testimony cannot be equated with that of an accomplice in an offence. It is pointed out by the Supreme Court that as a rule of prudence, however, court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated. The Supreme Court with reference to the earlier decision rendered by the Supreme Court and some other decisions has, in para 10 of its judgment, observed as under :

'The point most seriously canvassed in this Court on behalf of the appellant was that the solitary statement of the prosecutrix without corroboration in material in material particulars is not enough to sustain the conviction of the appellant. The learned counsel appearing for Gurcharan Singh contended that Dalip Singh and Sanjha Ram may have been rightly convicted. But so far as the appellant is concerned the evidence against him is neither reliable for sufficient for bringing home to him the offences of abduction and rape beyond reasonable doubt. The basic question which, therefore, arises is as to how far the testimony of the prosecutrix before us can form the basis of the appellant's conviction. It is well settled that the prosecutrix cannot be considered as an accomplice and, therefore her testimony cannot be equated with that of an accomplice in an offence. As a

rule of prudence, however, court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated. The matter is not res integra and this Court has, on more occasions than one, considered and enunciated the legal position. In *Rameshwar v. State of Rajasthan* : 1952 CriLJ547 , this Court observed (at page 550 (of Cri LJ) :

'Now a woman who has been raped is not an accomplice. If she was ravished she is the victim of an outrage. If she consented there is no offence unless she is a married woman, in which case questions of adultery may arise. But adultery presupposes consent and so is not on the same footing as rape. In the case of a girl who is below the age of consent, her consent will not matter so far as the offence of rape is concerned, but if she consented her testimony will naturally be as suspect as that of an accomplice. So also in the case of unnatural offences. But in all these cases a large volume of case law has grown up which treats the evidence of the complainant somewhat along the same lines as accomplice evidence though often for widely different reasons and the position now reached is that the rule about corroboration has hardened into one of law. But it is important to understand exactly what the rule is and what the expression 'hardened into a rule of law' means.'

After referring to the well-known English decision in *King v. Baskerville*, (1916) 2 KB 658 from which the observations of Lord Reading, the Lord Chief Justice of England, were quoted with approval, the law in India was the accomplices are concerned and it was observed that in case of sexual offences it could not be any higher. The view taken by the High Court in that case that as a matter of law no conviction without corroboration was possible was disapproved. The true rule, after consideration of decided cases is that thus :

'In my opinion, the true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the judge. In a jury case he must tell the jury of it and in a judge case he must show that it is present to his mind by indicating that in his judgment. But he should also point out that corroboration can be dispensed with if, in the particular circumstances of the case,

before him, either the jury, or, when there is no jury, he himself, is satisfied that it is safe to do so. The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child, coupled with other circumstances appearing in the case, such for example as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.'

Adverting to the nature and extent of corroboration required when it is not considered safe to dispense with it this Court added :

'It would be impossible, indeed it would be dangerous to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with circumstances of each case and also according to the particular circumstances of the offence charged.'

A careful perusal of the observation made by the Supreme Court would go to show that the rule of prudence must be present to the mind of the Judge and should be understood and appreciated by him and that there is no rule of practice that there must in every case be corroborated before a conviction can be allowed to stand. In the instant case, I have pointed out as to how the different circumstances referred to immediately hereinabove would lend assurance to the evidence of P.W. 5. I have also pointed out as to how her failure to disclose about the incident of rape earlier to 8-6-1986 cannot militate against her version. Further the fact that the evidence of P.W. 13 Dr. Dilip Ramachandra Waje does not assist much to corroborate the rape alleged against the accused, also is not a circumstance which would militate against the version of P.W. 5 Prafulla. It is true that the

evidence of P.W. 14 - Dr. I. S. Patil does not, as pointed out earlier, mathematically fit in with reference to the date of rape. However, it will suffice if it is observed that her evidence can be taken as one of the several circumstances which would lend assurance to the evidence of P.W. 5 - Prafulla. I would even say that the evidence of P.W. 5 even if it is taken on its own is indeed such as should satisfy the consensus of the Court. Further, the learned Sessions Judge, who had an occasion to see the demeanour of the witness, has chosen to rely on her evidence. Under these circumstances, I have no hesitation whatsoever in accepting her evidence. Under these circumstances, it would follow that the finding of the learned Sessions Judge with reference to the offence relating to rape deserves to be confirmed.

34. Thus on a careful re-appraisal of the entire evidence on record and after carefully considering the submissions made by the learned Counsel at the Bar, it is not at all possible to say that the judgment passed by the learned Sessions Judge is not correct.

35. For the reasons stated hereinabove, I hold that the prosecution has successfully established that the accused-appellant has committed the offences with which he was charged. In so far as the question of sentence is concerned, I find that the learned Sessions Judge has awarded Rigorous Imprisonment only for a period of five years and in my opinion, the same cannot be considered to be harsh by any standard.

Point No. 2 is answered as above.

36. In the result, I pass the following order :

The appeal is dismissed confirming the conviction and sentence passed by the Sessions Judge, Uttar Kannada, at Karwar in Sessions Case No. 1/1987.

37. Appeal dismissed.