IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No.463 of 2023
Reserved on: 05.06.2025
Date of Decision: 21.06.2025

Vivek Kumar @ Gotia ...Appellant

Versus

State of H.P. ...Respondent

Coram

Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?[1]

For the Appellant : Mr. Arjun Lall, Advocate.

For the Respondent/State : Mr. Jitender Sharma, Additional Advocate General.

Rakesh Kainthla, Judge

The present appeal is directed against the judgment and order dated 16.03.2023, passed by learned Additional Sessions Judge, (Fast Track Court) Kangra, at Dharmshala, H.P. (learned Trial Court), vide which the appellant (accused before learned Trial Court) was convicted of the commission of offences punishable under Sections 363 and 366 of the Indian Penal Code

[1] Whether reporters of Local Papers may be allowed to see the judgment? Yes.

(IPC) and Section 4 of the Protection of Children from Sexual Offences Act (POCSO Act) and was sentenced as under:

Under Section 363 of the IPC	Sentenced to undergo simple imprisonment for two years, pay a fine of ₹ 2000/- and in default of payment of fine to further undergo simple imprisonment for two months.
Under Section 366 of the IPC	Sentenced to undergo simple imprisonment for three years, pay a fine of ₹ 3000/- and in default of payment of fine to further undergo simple imprisonment for three months.
Under Section 4 of POCSO Act	Sentenced to undergo simple imprisonment for seven years, pay a fine of ₹ 5000/- and in default of payment of fine to further undergo simple imprisonment for five months.

The substantive sentences of imprisonment were directed to run concurrently.

(Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience.)

2. Briefly stated, the facts giving rise to the present appeal are that the police presented a challan before the learned Trial Court for the commission of offences punishable under

Sections 363, 366 and 376 of the IPC and Section 6 of the POCSO Act. It was asserted that the victim (name being withheld to protect her identity) had gone to her school on 03.08.2018 at about 08.30 a.m., however, she did not return to her home. Her parents made an enquiry from the school and found that she had not visited the school. Her father also made enquiries from his relatives and found that the accused was also missing from his home. He suspected that the accused had kidnapped the victim. He filed an application (Ex.PW1/A) before the police. FIR (Ex.P1/PW12) was registered at the police station. SI Ashwani Thakur (PW22) conducted the investigation. He searched for the victim and the accused and found that they had traveled from Khanyara to Mandi in the vehicle driven by Shammi Kumar (PW13). SI Ashwani Thakur went to the house of the accused, but the accused was not present at home. His father disclosed that the accused had left the home on 03.08.2018. SI Ashwani Thakur directed him to inform the police in case of the return of the accused. Jagdish Chand, the father of the accused, informed the police on 09.08.2018 that the accused and the victim had reached the house. The police went to the house of the accused. The victim and the accused were found sitting in a room. The victim's

parents identified her. One blue bag containing the clothes of the accused and the victim was kept near the accused. The police separated the clothes of the victim and the accused. These were put in separate parcels, and each parcel was sealed with seal "X". Seal impression (Ex. P1/PW22) was taken on a separate piece of cloth, and the seal was handed over to the victim's father after the use. The parcels were seized vide memo (Ex.PW1/B). SI Ashwani Thakur prepared the site plan (Ex. P2/PW10). He took the photographs (Ex. P2/PW15 to P12/PW15). The statement of the victim was recorded. The video recording was transferred to the DVD (Ex. P1/PW13). An application (Ex. P2/PW22) was filed for conducting the medical examination of the victim. Dr. Deepika (PW9) conducted the victim's medical examination and found that the possibility of sexual intercourse could not be ruled out. She issued the MLC (Ex. P2/PW7). She preserved the samples and handed them over to the police official accompanying the victim. The accused was interrogated and arrested. An application (Ex. PW8/A) was filed for conducting his medical examination. Dr. Kumar Saurav (PW8) conducted the medical examination of the accused and found that there was nothing to suggest that the accused was incapable of performing sexual

intercourse. He issued the MLC (Ex.PW8/B). He preserved the samples and handed them over to the police official accompanying the accused. An application (Ex. P3/PW22) was filed before the learned Judicial Magistrate 1st Class, Dharmshala, for recording the statement of the victim under Section 164 of Cr.P.C. Statement (Ex.P10/PW14) was recorded by the learned Judicial Magistrate 1st Class. An application (Ex.PW3/A) was filed before the Head Master of the school in which the victim was studying for issuing the date of birth certificate of the victim. Rupali (PW3) issued a copy of the Matriculation Certificate (Ex.PW3/B) showing that the victim was born on 30.10.2001 and an extract of the daily attendance record (Ex.PW3/C). An application (Ex.PW4/A) was filed for obtaining the Birth Certificate of the victim from the Secretary, Gram Panchayat. Surinder Kumar (PW4) issued a Date of Birth Certificate (Ex.PW4/B) showing that the victim's date of birth was 30.10.2001. The site plan of the place, where the victim was kept in an old dilapidated house (Ex. P6/PW22), was prepared. The victim also identified the place from which she was kidnapped. Site plan (Ex. P7/PW22) was prepared. The accused identified the hotel, where he had stayed with the victim for three days. Site

plan (Ex. P7/PW22) was prepared. CCTV footage of the hotel (Ex.P9/PW22) was seized. The copy of the driving license (Ex.P2/PW17), which the accused had handed over in the hotel, was also seized. The copy of the bill book (Ex. P3/PW17) was taken into possession. The case property was sent to FSL Junga for analysis, and the results (Ex. P1/PW23 and Ex. P1/PW24) were issued stating that human semen was detected in the lower trousers, underwear of the victim and underwear of the accused. The DNA profile obtained from the trousers and underwear of the victim matched the DNA profile of the accused. The statements of proseuction witnesses were recorded as per their version, and after the completion of the investigation, the challan was prepared and presented before the Court.

3. The learned Trial Court charged the accused with the commission of offences punishable under Sections 363 and 366 of the IPC and Section 6 of the POCSO Act, to which the accused pleaded not guilty and claimed to be tried.

4. The prosecution examined 24 witnesses to prove its case. The father of the victim (PW1) reported the matter to the police. Shakti Chand (PW2), Rupali (PW3) and Surinder Kumar (PW4) produced the record of the date of birth of the victim. Sahil

Kumar (PW5) and Deep Raj (PW6) handed over SIM cards issued in their names to the accused. LHHC Promila Devi (PW7) accompanied the victim to the hotel and carried the samples to the police station. Dr. Kumar Saurav (PW8) medically examined the accused. Dr. Deepika (PW9) conducted the medical examination of the victim. The mother of the victim (PW10) stated that the victim was missing. She witnessed the recovery of various articles. Devender Verma (PW11) produced the call detail records. Bharat Bhushan (PW12) was working as MHC with whom the case property was deposited. Shammi Kumar (PW13) is the driver of the taxi in which the accused and the victim travelled to Mandi. Victim (PW14) narrated the incident. Ravi Nandan (PW15) is the witness to the recovery of the mobile phone. Suresh Kumar (PW16) video recorded the statement of the victim in the Court. Sukhdev Kumar (PW17) is the manager of the hotel in which the accused and the victim had stayed together. He produced the record. Birbal (PW18) is the waiter at the hotel. Inspector Priyanka Chauhan (PW19) recorded the statement of the victim. HASI Ravi Shankar (PW20) carried the case property to FSL Junga. Sunil Rana (PW21) signed the FIR. SI Ashwani Thakur (PW22) conducted the investigation. Dr. Surinder Kumar

Pal (PW23) and Dr. Arun Sharma (PW24) proved the reports issued by the FSL.

5. The accused in his statement recorded under Section 313 of Cr.P.C. denied the prosecution's case, except that he was medically examined. He stated that Shammi Kumar and Pradhan of the Gram Panchayat are relatives of the victim. The relatives of the victim deposed falsely against him due to their enmity. No defence was adduced by the accused.

6. The learned Trial Court held that the victim was proved to be a minor on the date of the incident. Statement of Shammi Kumar (PW13) proved that the accused had hired his taxi in which the accused and the victim travelled together. They stayed in a hotel in Manali, where the accused maintained physical relations with the victim. The statement of the victim was duly corroborated by the statement of Dr. Deepika (PW9) and the reports issued by the FSL. The victim was a minor and incapable of giving consent. Once the foundational facts were established, the burden shifts upon the accused to disprove the prosecution's case. There was nothing on record to rebut this presumption. The victim’s testimony was satisfactory and could be relied upon. The defence version that the witnesses Shammi

Kumar and Pradhan were related to the victim was not sufficient to discard their testimonies. Therefore, the accused was convicted and sentenced as aforesaid.

7. Being aggrieved by the judgment and order passed by the learned Trial Court, the accused has filed the present appeal, asserting that the learned Trial Court erred in convicting and sentencing the accused. There were material contradictions in the statements of the prosecution's witnesses. It was not proved that the SIM card was being used by the accused. The evidence regarding the recovery of the clothes was also contradictory, and the result of the DNA could not have been relied upon. There is no evidence that the accused had taken/enticed the victim. The victim stated that she left her home on her own. The victim accompanied the accused to Chandigarh. She never raised any protest while going to Manali or Chandigarh or returning to Dharamshala, which falsifies the prosecution's case regarding the kidnapping. The victim was aged 17 years and was studying in class 12. She had physical relations with the accused before the incident. The accused cannot be held liable for consensual intercourse. The integrity of the case property was not established; therefore, it was prayed that the present appeal be

allowed and the judgment and order passed by the learned Trial Court be set aside.

8. I have heard Mr. Arjun Lall, learned counsel for the appellant/accused and Mr. Jitender Sharma, learned Additional Advocate General, for the respondent/State.

9. Mr. Arjun Lall, learned counsel for the appellant/accused, submitted that the learned Trial Court erred in convicting and sentencing the accused. There was no evidence that the accused had taken/enticed the victim. The evidence showed that the victim had accompanied the accused on her own. The learned Trial Court relied upon the report of the analysis, but the integrity of the case property was not established, and the reports of analysis could not have been used to convict the accused. The victim never raised any protest while she was being taken to Manali, Chandigarh or to the house of the accused, which shows that the victim was a consenting party. She was 17 years old and knew the accused before the incident. The consensual relationship between the parties should not be criminalised under the POCSO Act. Therefore, he prayed that the present appeal be allowed and the judgment and order passed by the learned Trial Court be set aside. He relied upon the judgments

of Hon'ble Apex Court in Shyam Singh Vs. State 2025 SCC Online Del 990, Nirmal Prem Kumar and anr. Vs. State rep by Inspector of Police 2024 SCC Online SC 260, S. Varadarajan Vs. State of Madras AIR 1965 SC 942, State (NCT of Delhi) Vs. Vipin Sharma 2023 SCC Online 1456, Ritesh Badrinath Borde Vs. State of Maharashtra and Anr. 2024 SCC Online Bom 2557 and Tilku alias Tilak Singh Vs. The State of Uttarakhand 2025 INSC 226 in support of his submissions.

10. Mr. Jitender Sharma, learned Additional Advocate General, for the respondent/State, submitted that the evidence on record showed that the accused had taken the victim from her home to TTS, from where a taxi was hired, in which the victim was taken to Mandi. Hence, the essential requirement of taking the victim was duly satisfied. The victim categorically stated that the accused had committed sexual intercourse with her. She was a minor on the date of the incident, and her consent is immaterial. Her testimony was duly corroborated by the statement of the Medical Officer and the report of the FSL. The integrity of the case property was duly established. Therefore, he prayed that the present appeal be dismissed.

11. I have given considerable thought to the submissions made at the bar and have gone through the records carefully.

12. The age of the victim was not disputed in the evidence. Shakti Chand (PW2), who produced the abstract of the death and birth certificate register. Rupali (PW3), who produced the Matriculation Certificate, and Surinder Kumar (PW4), who issued the Certificate of the Gram Panchayat showing the date of birth of the victim, were not cross-examined at all, which means that their testimonies are not disputed by the accused. Abstract of the Death and Birth register (Ex.PW2/B), Matriculation Certificate (PW3/B), and certificate of Gram Panchayat (Ex.PW4/B) show the date of birth of the victim as 30.10.2001. Thus, it was duly proved that the victim was aged less than 18 years old on the date of the incident.

13. The victim (PW14) stated that she was studying in class 12th in February 2018. The accused proposed to her for friendship. He came to her house in February 2018 during the night and maintained physical relations with her despite her protests. He left the house at around 2-3 a.m. The accused handed over a mobile phone with a SIM to her. She went to her aunt's house at Chandigarh on 15.07.2018 and returned with the

accused on 01.08.2018, who had met her at the Chandigarh bus stand. She went to her school on 03.08.2018 at around 08.30 a.m. The accused told her that they had to go to Manali. The accused came to her home and took her to TTS. He asked her to change her school uniform in a dilapidated house at TTS. She changed the uniform. They boarded a taxi at TTS and went to Palampur. The accused filled the petrol in the taxi at Palampur and paid ₹1000/- for the same. They went to Mandi in a taxi. The taxi driver refused to take them to Manali. The accused paid the taxi fare of ₹ 1000/- to the driver. They boarded an HRTC bus at the bus stand in Mandi and went to Manali. The accused took her to a hotel in Manali and maintained physical relations with her in the hotel. She and the accused took a bus to Delhi on 05.08.2018. They reached Delhi in the evening. They could not stay in Delhi as the hoteliers were demanding her ID proof. They went to Chandigarh on 06.08.2018 and stayed at the bus stand in Chandigarh. They went to Dadh on 07.08.2018 and kept on roaming around at Chamunda. They boarded a bus for Dharmshala at night, at around 9-11 p.m. They stayed in the tea garden during the night. The next morning, the accused took her to his house. Her father had lodged a missing report with the

police. The police visited the house of the accused and recovered her from the house. Her custody was handed over to her mother. The accused had emotionally blackmailed her that if she did not accede to his request, he would harm himself and commit suicide. He used to say that someone was blackmailing him that he would upload her photographs on social media, and the person was demanding ₹ 2,00,000/-.

14. She stated in her cross-examination that many houses exist near her house. She admitted that her uncles and their family members reside in those houses. She volunteered to say that all of them have their separate houses. She admitted that no one had enquired about the mobile phone. She volunteered to say that the accused had asked her not to disclose/show the mobile phone to her parents, and they were not aware of the mobile phone. She was residing on the ground floor. She had not told her parents that the accused had visited her home and maintained physical relations with her. She volunteered to say that the accused used to blackmail her and say that in case of disclosure of the incident to anyone, he would commit suicide. She admitted that she had not told this fact to the police. She admitted that she had told the Court that she had asked the

accused to elope. She volunteered to say that she had done so at the instance of the accused, as he had threatened her that he would cause harm to her and her parents in case this fact was not told to the Court. She denied that the road leading to TTS is busy. She had taken one pair of clothes with her to Manali. The police might have taken her clothes. She admitted that she had told the learned Magistrate that someone was blackmailing her. She volunteered to say that the accused used to blackmail her as his SIM number used to appear on her mobile. She admitted that she had not disclosed to anyone at Manali that the accused had kidnapped her or had maintained physical relations with her. She denied that the accused had not taken her and that she was making a false statement.

15. It was submitted that she did not make any hue and cry when she was taken to Mandi, Manali, Delhi and Chandigarh. This submission will not help the accused. It was duly proved on record by the Matriculation Certificate (Ex.PW3/B) and abstract of the Death and Birth Register (Ex.PW2/B) that the victim was born on 30.10.2001; therefore, she was less than 18 years old on the date of the incident.

16. Section 361 of the IPC defines kidnapping from lawful guardianship as under:

> **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.

17. It is apparent from the bare perusal of the Section that the offence of kidnapping is committed against the guardian, and the consent of the minor is immaterial. It was laid down by the Hon'ble Supreme Court in ***Parkash v. State of Haryana, (2004) 1 SCC 339: 2004 SCC (Cri) 290: 2003 SCC OnLine SC 1339*** that the offence of kidnapping is for the protection of the minor and the only consent of the guardian can take it out of the purview of Section 361. It was observed at page 342:

> "**7.** ...The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the age specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor ... out of the keeping of the lawful guardian of such minor" in Section 361 are significant. The use of the word "keeping" in the context connotes the idea of charge, protection, maintenance and control; further,

the guardian's charge and control appears to be compatible with the independence of action and movement of the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section, the consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person, which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian, would be sufficient to attract the section.

8. In ***State of Haryana v. Raja Ram [(1973) 1 SCC 544: 1973 SCC (Cri) 428]*** English decisions were noticed by this Court for the purpose of illustrating the scope of the protection of minor children and of the sacred right of the parents and guardians to the possession of their minor children under the English law. The decisions noticed were ***R. v. Job Timmins [169 ER 1260: Bell 276], R. v. Handley [175 ER 890: 1 F & F 648] and R. v. Robb [176 ER 466: 4 F & F 59].*** In the first case, Job Timmins was convicted of an indictment framed upon 9 Geo. IV, ch. 31, Section 20 for taking an unmarried girl under sixteen out of the possession of her father, and against his will. It was observed by Erle, C.J., that the statute was passed for the protection of parents and for preventing unmarried girls from being taken out of possession of their parents against their will. Limiting the judgment to the facts of that case, it was said that no deception or forwardness on the part of the girl in such cases could prevent the person taking her away from being guilty of the offence in question. The second decision is authority for the view that in order to constitute an offence under 9 Geo. IV, ch. 31, Section 20, it is sufficient if by moral force a willingness on the part of the girl to go away with the prisoner is created; but if her going away with the prisoner is entirely voluntary, no offence is committed. The last case was of a conviction under the statute (24 & 25 Vict.., ch. 100, Section 55). There

inducement by previous promise or persuasion was held sufficient to bring the case within the mischief of the statute. In the English statutes, the expression used was "take out of the possession" and not "out of the keeping" as used in Section 361 IPC. But that expression was construed in the English decisions not to require actual manual possession. It was enough if at the time of the taking the girl continued under the care, charge and control of the parent — see ***R. v. Mankletow [(1853) 6 Cox Criminal Cases 143: 169 ER 678].*** These decisions were held to confirm the view that Section 361 is also designed to protect the sacred right of the guardians with respect to their minor wards.

9. The position was again reiterated in ***Thakorlal D. Vadgama v. State of Gujarat [(1973) 2 SCC 413: 1973 SCC (Cri) 835: AIR 1973 SC 2313]*** wherein it was, inter alia, observed as follows : (SCC p. 421, para 10)

"The expression used in Section 361 IPC is 'whoever takes or entices any minor'. The word 'takes' does not necessarily connote taking by force, and it is not confined only to the use of force, actual or constructive. This word merely means 'to cause to go', 'to escort' or 'to get into possession'. No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word 'entice' seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately, or it may create a continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purpose of successful inducement. The two words 'takes' and 'entices', as used in Section 361 IPC, are, in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise,

> offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361 IPC."

18. This position was reiterated in ***Anversinh v. State of Gujarat, (2021) 3 SCC 12: (2021) 2 SCC (Cri) 18: 2021 SCC OnLine SC 19***, and it was held at page 20:

> **16.** A bare perusal of the relevant legal provisions, as extracted above, shows that the consent of the minor is immaterial for purposes of Section 361 IPC. Indeed, as borne out through various other provisions in the 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 : (2015) 3 SCC (Cri) 108] Section 361 IPC, particularly, goes beyond this simple presumption. It bestows the ability to make crucial decisions 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.

19. Therefore, the consent of the minor would be immaterial, and no advantage can be derived from the fact that the victim had not raised any protests when she was with the accused.

20. It was submitted that the victim left her home voluntarily, and no offence of kidnapping is made out. This submission is not acceptable. It was held by the Orissa High Court in ***Bagula Naik v. State of Orissa, 1999 SCC OnLine Ori 118:***

(1999) 87 CLT 808: 1999 Cri LJ 2077, that even if the victim had left the home voluntarily, but the accused had taken her to his house or some other place, the offence punishable under Section 363 of IPC would be attracted. It was observed at page 810:

> "**6.** Second contention of the petitioner, as noted above, is twofold. Learned counsel for the petitioner, while arguing on this point, has contended that p.w. 3 having left her house of her own, the petitioner cannot be accused of kidnapping for merely accompanying her to certain places, and therefore, his conduct cannot be termed as kidnapping or abduction. In that context, he relied upon the decisions reported in ***A.I.R. 1965 S.C. 942: S. Vardarajan v. State of Madras; 1979 Crl. L.J. 1094: Pramod Kumar v. State*** and ***1983 Crl. L.J. 1819: Lawrence Kanandas v. The State of Maharashtra***.
>
> **7.** In the case of ***S. Vardarajan*** (supra), a college-going girl on the verge of majority from her side telephoned the accused and thereafter both of them went to the Sub-Registrar's office for registering the marriage agreement. The Apex Court judged the totality of the facts and circumstances and held it not to be a case of kidnapping. No such evidence is available in the record so far, the present case is concerned, that it is at the instance of the p.w. 3 that the petitioner took her to his house or Athgarh. Hence, the aforesaid ratio is not applicable to the present case.
>
> **8.** In the case of ***Pramod Kumar*** (supra), a grown-up boy aged about 16 years, committing theft of gold ornaments from his house, moved away from his town along with the accused. Prosecution alleged that said accused was instrumental in the kidnapping of that boy. From the facts and evidence available in the record, it was found that the boy, of his own not only left the house but also accompanied the accused and voluntarily stayed with him for a considerable period. Under such circumstances, the

Allahabad High Court held it was not a case of kidnapping. Needless to say, the facts of that case are quite distinguishable from the present case.

9. In the case of ***Lawrence Kanandas*** (supra), a school-going girl aged about 13 to 14, after attending the examination on the date of kidnapping, went away with the accused-petitioner, and he was convicted for the offence u/s. 363, I.P.C.. Learned Single Judge of Bombay High Court, taking into consideration the evidence suggesting to the fact that it was the girl who had induced the accused to come to her School and to take her to different places and also the other facts and circumstances existing in that regard, found the appellant not guilty. Facts and circumstances of the present case are not similar since there is no evidence worth the name to make an inference that p.w. 3 ever requested the petitioner to take her away, either to his house or to Athgarh. Even the accused has not taken such a stand while cross-examining witnesses or giving his statement u/s 313, Cr. P.C.. Hence, the aforesaid decision of the Bombay High Court is of no help to the petitioner.

21. It was laid down by Hon'ble Supreme Court in ***State of Haryana v. Raja Ram, (1973) 1 SCC 544: 1973 SCC (Cri) 428: 1972 SCC OnLine SC 497***, that accused cannot escape conviction because he had not gone to the house of the victim to bring her, if the victim was persuaded by the act of the accused in leaving the home, he would be guilty. It was observed at page 549: -

> "**9.** In the present case the evidence of the prosecutrix as corroborated by the evidence of Narain Das, PW 1 (her father), Abinash Chander PW 3 (her brother) and Smt Tarawanti PW 4 (her mother) convincingly establishes beyond reasonable doubt: (1) that Jai Narain had tried to become intimate with the prosecutrix and to seduce her to

go and live with him and on objection having been raised by her father who asked Jai Narain not to visit his house, Jai Narain started sending message to the prosecutrix through Raja Ram, respondent; (2) that Raja Ram, respondent, had been asking the prosecutrix to be ready to accompany Jai Narain; (3) that at about 12 noon on April 4, Raja Ram went to see the prosecutrix at her house and asked her to visit his house when he would convey Jai Narain's message to her; (4) that on the same day after some time Sona was sent by her father to the house of the prosecutrix to fetch her to his house where the prosecutrix was informed that Jai Narain would come that night and would take the prosecutrix away and (5) that Raja Ram accordingly asked the prosecutrix to visit his house at about midnight so that she may be entrusted to Jai Narain. This evidence was believed by the learned Additional Sessions Judge who convicted the respondent, as already noticed. The learned Single Judge also did not disbelieve her statement. Indeed, in the High Court, the learned Counsel for Raja Ram had proceeded on the assumption that the evidence of the prosecutrix is acceptable, the argument being that even accepting her statement to be correct, no offence was made out against Raja Ram. Once the evidence of the prosecutrix is accepted, in our opinion, Raja Ram cannot escape conviction for the offence of kidnapping her from her father's lawful guardianship. It was not at all necessary for Raja Ram to have gone to the house of the prosecutrix to bring her from there on the midnight in question. It was sufficient if he had earlier been soliciting or persuading her to leave her father's house to go with him to Jai Narain. It is fully established on the record that he had been conveying messages from Jai Narain to the prosecutrix and had himself been persuading her to accompany him to Jai Narain's place, where he would hand her over to him. Indisputably the last message was conveyed by him to the prosecutrix when she was brought by his daughter Sona from her own house to his and it was pursuant to this message that the prosecutrix decided to leave her father's house on the

> midnight in question for going to Raja Ram's house for the purpose of being taken to Jai Narain's place. On these facts, it is difficult to hold that Raja Ram was not guilty of taking or enticing the prosecutrix out of the keeping of her father's lawful guardianship. Raja Ram's action was the proximate cause of the prosecutrix going out of the keeping of her father, and indeed, but for Raja Ram's persuasive offer to take her to Jai Narain the prosecutrix would not have gone out of the keeping of her father, who was her lawful guardian, as she actually did. Raja Ram actively participated in the formation of the intention of the prosecutrix to leave her father's house. The fact that the prosecutrix was easily persuaded to go with Raja Ram would not prevent him from being guilty of the offence of kidnapping her. Her consent or willingness to accompany Raja Ram would be immaterial, and it would be equally so even if the proposal to go with Raja Ram had emanated from her. There is no doubt a distinction between taking and allowing a minor to accompany a person. But the present is not a case of the prosecutrix herself leaving her father's house without any inducement by Raja Ram, who merely allowed her to accompany him."

22. Similarly, it was held in ***Anversinh v. State of Gujarat, (2021) 3 SCC 12: (2021) 2 SCC (Cri) 18: 2021 SCC OnLine SC 19*** that where the accused had the intent to marry the victim, her enticement was duly proved. It was observed at page 20:-

> "**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. Vadgama v. State of Gujarat, (1973) 2 SCC 413***, para 10: ***1973 SCC (Cri) 835***] 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 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 [King Emperor v. Gokaran, 1920 SCC OnLine Oudh JC 32: AIR 1921 Oudh 226***] and ***Emperor v. Abdur Rahman [Emperor v. Abdur Rahman, 1916 SCC OnLine All 63: AIR 1916 All 210***].

23. In the present case, the victim specifically stated that the accused had told her that they had to go to Manali. She also stated that the accused used to emotionally blackmail her and threatened her to cause harm to himself, in case the victim did not accede to his request. Therefore, it is proved that the accused had created the circumstances, which resulted in her leaving the house with the accused. Hence, the fact that the victim had left her home voluntarily will not help the accused.

24. In ***S. Varadarajan*** *(supra)*, the victim left her home with no intention to return, and the accused permitted her to accompany him to his home. It was held by the Hon'ble Supreme Court that allowing a minor to accompany a person does not amount to taking. In the present case, the victim had left the home at the instance of the accused, and it is not a case where the victim had left the home on her own, and the accused had permitted her to accompany her. The statement of the victim to

this effect is duly corroborated by the evidence on record, which shows that the accused had taken her to TTS in a vehicle and thereafter from TTS to Mandi in a taxi. There is no evidence that the victim was found abandoned outside her home, and the accused had merely allowed her to accompany him; rather, it shows that they had a prior plan of going to Manali, and this plan was materialised by the acts of the accused in taking the victim to TTS and thereafter to Manali. Hence, the judgments of ***S. Varadarajan*** *(supra)*, ***Vipin Sharma*** *(supra)*, ***Ritesh Badrinath Borde*** *(supra)* and ***Tilku alias Tilak Singh*** *(supra)* do not apply to the present case, and no advantage can be derived from these judgments.

25. The victim categorically stated that the accused maintained physical relations with her. This was duly corroborated by the statement of Dr. Deepika (PW9), who conducted the medical examination of the victim and found that the possibility of sexual intercourse could not be ruled out. She preserved the samples and handed them over to the police official accompanying the victim. The clothes of the accused and the victim were seized by SI Ashwani Thakur (PW22) vide memo (Ex.PW1/B) when the victim was recovered from the house of the

accused. These samples and clothes were sent to FSL, and as per the report (Ex.P1/PW23), human semen was detected on the trousers/lower, trousers/pyjama, lower/pyjama and underwear of the victim and the underwear of the accused. As per the report of the analysis (Ex.P1/PW24), the DNA profile obtained from the trousers/lower and underwear of the victim was consistent with the DNA profile obtained from the blood sample of the accused and the victim. Therefore, it was duly proved by these reports that human semen and the DNA of the accused were found in the clothes of the victim. The accused did not provide any explanation for the presence of his semen & DNA in the clothes of the victim, and the explanation provided by the victim has to be accepted as correct, that the human semen/DNA appeared on her clothes as a result of physical relations maintained by the accused with her.

26. It was submitted that the integrity of the case property was not established. This is not acceptable. The report of the analysis (Ex.P1/PW23) shows that the parcels were received for examination in the biology and serology divisions. The seals on the parcels were intact and tallied with the specimen sent with the docket. It was held in ***Baljit Sharma vs. State of H.P 2007 HLJ***

707, where the report of analysis shows that the seals were intact, the case of the prosecution that the case property remained intact is to be accepted as correct. It was observed:

> "A perusal of the report of the expert Ex.PW8/A shows that the samples were received by the expert in a safe manner, and the sample seal was separately sent, tallied with the specimen impression of a seal taken separately. Thus, there was no tampering with the seal, and the seal impressions were separately taken and sent to the expert also."

27. Similar is the judgment in ***Hardeep Singh vs State of Punjab 2008(8) SCC 557,*** wherein it was held:

> "It has also come to evidence that to date, the parcels of the sample were received by the Chemical Examiner, and the seal put on the said parcels was intact. That itself proves and establishes that there was no tampering with the previously mentioned seal in the sample at any stage, and the sample received by the analyst for chemical examination contained the same opium, which was recovered from the possession of the appellant. In that view of the matter, a delay of about 40 days in sending the samples did not and could not have caused any prejudice to the appellant."

28. In ***State of Punjab vs Lakhwinder Singh 2010 (4) SCC 402,*** the High Court had concluded that there could have been tampering with the case property since there was a delay of seven days in sending the report to FSL. It was laid down by the Hon'ble Supreme Court that the case property was produced in the Court, and there was no evidence of tampering. Seals were found to be

intact, which would rule out the possibility of tampering. It was observed:

> "The prosecution has been able to establish and prove that the aforesaid bags, which were 35 in number, contained poppy husk, and accordingly, the same were seized after taking samples therefrom, which were properly sealed. The defence has not been able to prove that the aforesaid seizure and seal put in the samples were in any manner tampered with before it was examined by the Chemical Examiner. There was merely a delay of about seven days in sending the samples to the Forensic Examiner, and it is not proved as to how the aforesaid delay of seven days has affected the said examination, when it could not be proved that the seal of the sample was in any manner tampered with. The seal having been found intact at the time of the examination by the Chemical Examiner and the said fact having been recorded in his report, a mere observation by the High Court that the case property might have been tampered with, in our opinion, is based on surmises and conjectures and cannot take the place of proof.
>
> 17. We may at this stage refer to a decision of this Court in ***Hardip Singh v. State of Punjab reported in (2008) 8 SCC 557*** in which there was a delay of about 40 days in sending the sample to the laboratory after the same was seized. In the said decision, it was held that in view of cogent and reliable evidence that the opium was seized and sealed and that the samples were intact till they were handed over to the Chemical Examiner, the delay itself was held to be not fatal to the prosecution case. In our considered opinion, the ratio of the aforesaid decision squarely applies to the facts of the present case in this regard.
>
> 18. The case property was produced in the Court, and there is no evidence to show that the same was ever tampered with."

29. Similar is the judgment of the Hon'ble Supreme Court in ***Surinder Kumar vs State of Punjab (2020) 2 SCC 563***, wherein it was held: -

> "10. According to learned senior counsel for the appellant, Joginder Singh, ASI, to whom Yogi Raj, SHO (PW-3), handed over the case property for producing the same before the Illaqa Magistrate and who returned the same to him after such production was not examined, as such, link evidence, was incomplete. In this regard, it is to be noticed that Yogi Raj, SHO, handed over the case property to Joginder Singh, ASI, for production before the Court. After producing the case property before the Court, he returned the case property to Yogi Raj, SHO (PW-3), with the seals intact. It is also to be noticed that Joginder Singh, ASI, was not in possession of the seals of either the investigating officer or Yogi Raj, SHO. He produced the case property before the Court on 13.09.1996 vide application Ex.P-13. The concerned Judicial Magistrate of First Class, after verifying the seals on the case property, passed the order Ex.P-14 to the effect that since there was no judicial malkhana at Abohar, the case property was ordered to be kept in safe custody, in Police Station Khuian Sarwar, till further orders. Since Joginder Singh, ASI, was not in possession of the seals of either the SHO or the Investigating Officer, the question of tampering with the case property by him did not arise at all.
>
> 11. Further, he has returned the case property, after production of the same, before the Illaqa Magistrate, with the seals intact, to Yogi Raj, SHO. In that view of the matter, the Trial Court and the High Court have rightly held that the non-examination of Joginder Singh did not, in any way, affect the case of the prosecution. *Further, it is evident from the report of the Chemical Examiner, Ex.P-10, that the sample was received with seals intact and that the seals on the sample tallied with the sample seals. In that view of the matter, the chain of evidence was complete*."

(Emphasis supplied)

30. Therefore, the submission that the integrity of the case property has not been established cannot be accepted.

31. It was submitted that the recovery of clothes is suspicious, as the victim's clothes were taken into possession by the police from the house of the accused and the clothes were also seized by the Medical Officer. This submission will not help the accused. The victim was wearing some clothes at the time of her recovery, and not all her clothes were seized by the police. She handed over the clothes worn by her to the Medical Officer, who conducted her medical examination, and this aspect will not make the prosecution's case suspect.

32. It was submitted that the victim had stated in her statement before the learned Magistrate that they went from Chandigarh to Manali and thereafter to Dharmshala, which is contrary to her statement on oath that the victim and the accused went to Dadh from Chandigarh. This submission will not help the accused. The attention of the victim was not drawn to the previous statement recorded by the learned Magistrate, and it is impermissible to rely upon the statement recorded by the learned Magistrate to contradict the witness. It was laid down by

the Hon'ble Supreme Court in ***Binay Kumar Singh Versus State of Bihar, 1997 (1) SCC 283***, that if a witness is to be contradicted with his previous statement, his attention must be drawn towards it. It was observed: -

> "11. The credit of a witness can be impeached by proof of any statement which is inconsistent with any part of his evidence in Court. This principle is delineated in S. 155 (3) of the Evidence Act, and it must be borne in mind when reading S. 145, which consists of two limbs. It is provided in the first limb of S.145 that a witness may be cross-examined as to the previous statement made by him without such writing being shown to him but the second limb provides that "if it is intended to contradict him by the writing his attention must before the writing can be provided, be called to those parts of it which are to be used for the purpose of contradicting him." There is thus a distinction between the two vivid limbs, though subtle it may be. The first limb does not envisage impeaching the credit of a witness, but it merely enables the opposite party to cross-examine the witness with reference to the previous statements made by him. He may at that stage succeed in eliciting materials to his benefit through such cross-examination even without resorting to the procedure laid down in the second limb. But if the witness disowns having made any statement which is inconsistent with his present stand his testimony in Court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of S. 145.
>
> 12. In ***Bhagwan Singh's case (AIR 1952 SC 214)***, Vivian Bose, J. pointed out in paragraph 25 that during the cross-examination of the witnesses concerned the formalities prescribed by S. 145 are complied with. The cross-examination, in that case, indicated that every circumstance intended to be used as a contradiction was

put to him point by point and passage by passage. Learned Judges were called upon to deal with an argument that witnesses' attention should have been specifically drawn to that passage in addition thereto. Their Lordships were, however, satisfied in that case that the procedure adopted was in substantial compliance with S. 145, and hence held that all that is required is that the witness must be treated fairly and must be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner. On the facts of that case, there is no dispute with the proposition laid therein.

13. So long as the attention of PW 32 (Sukhdev Bhagat) was not drawn to the statement attributed to him as recorded by DW-10 (Nawal Kishore Prasad) we are not persuaded to reject the evidence of PW-32 that he gave Ex. 14 statement at the venue of occurrence and that he had not given any other statement earlier thereto."

33. A similar view was taken in ***Alauddin v. State of Assam,*** ***2024 SCC OnLine SC 760*** wherein it was observed:

"**7.** When the two statements cannot stand together, they become contradictory statements. When a witness makes a statement in his evidence before the Court which is inconsistent with what he has stated in his statement recorded by the Police, there is a contradiction. When a prosecution witness whose statement under Section 161(1) or Section 164 of CrPC has been recorded states factual aspects before the Court which he has not stated in his prior statement recorded under Section 161(1) or Section 164 of CrPC, it is said that there is an omission. There will be an omission if the witness has omitted to state a fact in his statement recorded by the Police, which he states before the Court in his evidence. The explanation to Section 162 CrPC indicates that an omission may amount to a contradiction when it is significant and relevant. Thus, every omission is not a contradiction. It becomes a contradiction provided it satisfies the test laid down in the

explanation under Section 162. Therefore, when an omission becomes a contradiction, the procedure provided in the proviso to sub-Section (1) of Section 162 must be followed for contradicting witnesses in the cross-examination.

8. As stated in the proviso to sub-Section (1) of section 162, the witness has to be contradicted in the manner provided under Section 145 of the Evidence Act. Section 145 reads thus:

> **"145. Cross-examination as to previous statements in writing**.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

The Section operates in two parts. The first part provides that a witness can be cross-examined as to his previous statements made in writing without such writing being shown to him. Thus, for example, a witness can be cross-examined by asking whether his prior statement exists. The second part is regarding contradicting a witness. While confronting the witness with his prior statement to prove contradictions, the witness must be shown his prior statement. If there is a contradiction between the statement made by the witness before the Court and what is recorded in the statement recorded by the police, the witness's attention must be drawn to specific parts of his prior statement, which are to be used to contradict him. Section 145 provides that the relevant part can be put to the witness without the writing being proved. However, the previous statement used to contradict witnesses must be proved subsequently. Only if the contradictory part of his previous statement is proved the contradictions can be said to be proved. The usual practice is to mark the portion

or part shown to the witness of his prior statement produced on record. Marking is done differently in different States. In some States, practice is to mark the beginning of the portion shown to the witness with an alphabet and the end by marking with the same alphabet. While recording the cross-examination, the Trial Court must record that a particular portion marked, for example, as AA was shown to the witness. Which part of the prior statement is shown to the witness for contradicting him has to be recorded in the cross-examination. If the witness admits to having made such a prior statement, that portion can be treated as proved. If the witness does not admit the portion of his prior statement with which he is confronted, it can be proved through the Investigating Officer by asking whether the witness made a statement that was shown to the witness. Therefore, if the witness is intended to be confronted with his prior statement reduced into writing, that particular part of the statement, even before it is proved, must be specifically shown to the witness. After that, the part of the prior statement used to contradict the witness has to be proved. As indicated earlier, it can be treated as proved if the witness admits to having made such a statement, or it can be proved in the cross-examination of the concerned police officer. The object of this requirement in Section 145 of the Evidence Act of confronting the witness by showing him the relevant part of his prior statement is to give the witness a chance to explain the contradiction. Therefore, this is a rule of fairness.

9. If a former statement of the witness is inconsistent with any part of his evidence given before the Court, it can be used to impeach the credit of the witness in accordance with clause (3) of Section 155 of the Evidence Act, which reads thus:

> "**155. Impeaching credit of witness. —** The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him—

(1) .....

(2) .....

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

It must be noted here that every contradiction or omission is not a ground to discredit the witness or to disbelieve his/her testimony. A minor or trifle omission or contradiction brought on record is not sufficient to disbelieve the witness's version. Only when there is a material contradiction or omission can the Court disbelieve the witness's version either fully or partially. What is a material contradiction or omission, depending upon the facts of each case? Whether an omission is a contradiction also depends on the facts of each individual case.

10. We are tempted to quote what is held in a landmark decision of this Court in the case of ***Tahsildar Singh* v. *State of U.P., 1959 Supp (2) SCR 875.*** Paragraph 13 of the said decision reads thus:

> "**13.** The learned counsel's first argument is based upon the words "in the manner provided by Section 145 of the Indian Evidence Act, 1872" found in Section 162 of the Code of Criminal Procedure. Section 145 of the Evidence Act, it is said, empowers the accused to put all relevant questions to a witness before his attention is called to those parts of the writing with a view to contradict him. In support of this contention, reliance is placed upon the judgment of this Court in ***Shyam Singh v. State of Punjab [(1952) 1 SCC 514: 1952 SCR 812***]. Bose, J. describes the procedure to be followed to contradict a witness under Section 145 of the Evidence Act, thus at p. 819:
>
> > Resort to Section 145 would only be necessary if the witness *denies* that he made the former statement. In that event, it would be necessary to prove that he did, and *if the*

former statement was reduced to writing, then Section 145 requires that his attention must be drawn to these parts, which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case, all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made."

It is unnecessary to refer to other cases wherein a similar procedure is suggested for putting questions under Section 145 of the Indian Evidence Act, for the said decision of this Court and similar decisions were not considering the procedure in a case where the statement in writing was intended to be used for contradiction under Section 162 of the Code of Criminal Procedure. *Section 145 of the Evidence Act is in two parts: the first part enables the accused to cross-examine a witness as to a previous statement made by him in writing or reduced to writing without such writing being shown to him; the second part deals with a situation where the cross-examination assumes the shape of contradiction: in other words, both parts deal with cross-examination; the first part with cross-examination other than by way of contradiction, and the second with cross-examination by way of contradiction only. The procedure prescribed is that, if it is intended to contradict a witness by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to Section 162 of the Code of Criminal Procedure only enables the accused to make use of such a statement to contradict a witness in the manner provided by Section 145 of the Evidence Act. It would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of*

cross-examining a witness within the meaning of the first part of Section 145 of the Evidence Act. Nor are we impressed by the argument that it would not be possible to invoke the second part of Section 145 of the Evidence Act without putting relevant questions under the first part thereof. The difficulty is more imaginary than real. The second part of Section 145 of the Evidence Act clearly indicates the simple procedure to be followed. To illustrate: A says in the witness box that B stabbed C; before the police, he had stated that D stabbed C. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness box. If he admits his previous statement, no further proof is necessary; if he does not admit it, the practice generally followed is to admit it, subject to proof by the police officer. On the other hand, the procedure suggested by the learned counsel may be illustrated thus: If the witness is asked "Did you say before the police officer that you saw a gas light?" and he answers "Yes", then the statement which does not contain such recital is put to him as a contradiction. This procedure involves two fallacies: one is that it enables the accused to elicit by a process of cross-examination what the witness stated before the police officer. If a police officer did not make a record of a witness's statement, his entire statement could not be used for any purpose, whereas if a police officer recorded a few sentences, by this process of cross-examination, the witness's oral statement could be brought on record. This procedure, therefore, contravenes the express provision of Section 162 of the Code. The second fallacy is that by the illustration given by the learned counsel for the appellants, there is no self-contradiction of the primary statement made in the witness box, for the witness has not yet made on the stand any

> assertion at all which can serve as the basis. The contradiction, under the section, should be between what a witness asserted in the witness box and what he stated before the police officer, and not between what he said he had stated before the police officer and what he actually made before him. In such a case, the question could not be put at all: only questions to contradict can be put, and the question here posed does not contradict; it leads to an answer which is contradicted by the police statement. This argument of the learned counsel based upon Section 145 of the Evidence Act is, therefore, not of any relevance in considering the express provisions of Section 162 of the Code of Criminal Procedure." (emphasis added)

This decision is a *locus classicus*, which will continue to guide our Trial Courts. In the facts of the case, the learned Trial Judge has not marked those parts of the witnesses' prior statements based on which they were sought to be contradicted in the cross-examination."

34. It was held in ***Anees v. State (NCT of Delhi), 2024 SCC OnLine SC 757*** that the Courts cannot suo motu take cognisance of the contradiction and the same has to be brought on record as per the law. It was observed:

> "**64.** The court cannot *suo motu* make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words '*if duly proved*' used in Section 162 Cr. P.C. clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway, nor can be looked into, but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the

Investigating Officer. The statement before the Investigating Officer can be used for contradiction, but only after strict compliance with Section 145 of the Evidence Act, that is, by drawing attention to the parts intended for contradiction.

65. Section 145 of the Evidence Act reads as under:

> *"**145. Cross-examination as to previous statements in writing.**— A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."*

66. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of the witness is drawn to that part and this must be reflected in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need for further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process, the contradiction is merely brought on record, but it is yet to be proved. Thereafter, when the Investigating Officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the Investigating

> Officer who, again, by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out the part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot *suo motu* make use of statements to police not proved in compliance with Section 145 of the Evidence Act, that is, by drawing attention to the parts intended for contradiction." [See: ***V.K. Mishra v. State of Uttarakhand : ((2015) 9 SCC 588***]

35. It was submitted that Deep Raj (PW6) did not support the prosecution's case that the accused was using the SIM obtained by him (Deep Raj). This aspect will not make any difference. The use of the SIM would have been corroborative. However, the statement of the victim is satisfactory and does not require any corroboration; hence, the fact that Deep Raj did not support the prosecution's case regarding the handing over of the SIM will not make the prosecution's case suspect.

36. Therefore, it was duly proved on record that the victim is a child, she was taken out of the keeping of her father to commit sexual intercourse, and the sexual intercourse was committed with her. Hence, a presumption will arise that the accused has committed the offence. Section 29 of the Protection

of Children from Sexual Offences Act, 2012 reads that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 & 9 of the Act, the Special Court shall presume that such person had committed or abetted or attempted to commit the offence as the case may be unless the contrary is proved. This Section was considered by the Bombay High Court in ***Amol Dudhram Barsagade vs. State of Maharashtra 2019 AllMR(Cri) 435,*** and it was held that once the foundation of the prosecution case is laid by legally admissible evidence, it becomes incumbent upon the accused to establish from the record that he has not committed the offence. It was observed:-

> "5. The learned Additional Public Prosecutor Shri S.S. Doifode would strenuously contend that the statutory presumption under Section 29 of the POCSO Act is absolute. The date of birth of the victim, 12.10.2001, is duly proved and is indeed not challenged by the accused, and the victim, therefore, was a child within the meaning of Section 2(d) of the POCSO Act, is the submission. The submission that the statutory presumption under Section 29 of the POCSO Act is absolute must be rejected if the suggestion is that even if foundational facts are not established, the prosecution can invoke the statutory presumption. Such an interpretation of Section 29 of the POCSO Act would render the said provision vulnerable to the vice of unconstitutionality. The statutory presumption would stand activated only if the prosecution proves the foundational facts, and then, even if the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond a

reasonable doubt. Suffice it if the accused is in a position to create a serious doubt about the veracity of the prosecution case or the accused brings on record material to render the prosecution version highly improbable."

37. Similar is the judgment of the Tripura High Court in ***Joubansen Tripura v. State of Tripura, 2021 SCC OnLine Tri 176***, wherein it was observed:

> **"12.** Upon meticulous reading of Section 29 and 30 of the POCSO Act, according to us, prosecution will commence the trial with an additional advantage that there will be presumption of guilt against the accused person, but, in our considered view, such presumption cannot form the basis of conviction, if that be so, it would offend Article 20(3) and 21 of the Constitution of India. Perhaps, it is not the object of the legislature to incorporate Sections 29 and 30 under the POCSO Act.
>
> **13.** As we have said in the first part of this paragraph, the prosecution will commence trial with an additional advantage of presumption against the accused, but the prosecution is legally bound to establish foundational facts which set the prosecution's case in motion. If the prosecution succeeds to establish the foundational facts, then it will be the obligation of the accused to prove his innocence, but the standard of proof again will be on the basis of preponderance of probabilities. Keeping in view the aforesaid principles, we shall proceed to decide as to whether the prosecution has been able to establish the foundational facts of the instant case. Foundational facts in the POCSO Act include:—
>
> (i) the proof that the victim is a child;
>
> (ii) that the alleged incident has taken place;
>
> (iii) that the accused has committed the offence; and
>
> (iv) whenever physical injury is caused, to establish it with supporting medical evidence.
>
> **14.** *If the fundamental facts of the prosecution case are laid by the prosecution by leading legally admissible evidence, the duty of the*

accused is to rebut it by establishing from the evidence on record that he has not committed the offence. This can be achieved by eliciting patent absurdities or inherent infirmities in the version of prosecution or the oral testimony of witnesses or the existence of enmity between the accused and victim or bring out material contradictions and omissions in the evidence of witnesses, or to establish that the victim and witnesses are unreliable or that there is considerable and unexplained delay in lodging the complaint or that the victim is not a child. The accused may reach that end by discrediting and demolishing prosecution witnesses by effective cross-examination. Only if he is not fully able to do so, he needs only to rebut the presumption by leading defence evidence. Still, whether to offer himself as a witness is the choice of the accused. Fundamentally, the process of adducing evidence in a POCSO case does not substantially differ from any other criminal trial, except that in a trial under the POCSO Act, the prosecution is additionally armed with the presumptions and the corresponding obligation on the accused to rebut the presumption. It is imperative to mention that in POCSO cases, considering the gravity of sentence and the stringency of the provisions, an onerous duty is cast on the trial court to ensure a more careful scrutiny of evidence, especially, when the evidence let in is the nature of oral testimony of the victim alone and not corroborated by any other evidence—oral, documentary and medical. ***(emphasis supplied)***

15. Legally, the duty of the accused to rebut the presumption as arises only after the prosecution has established the foundational facts of the offence alleged against the accused. The yardstick for evaluating the rebuttable evidence is limited to the scale of preponderance of probability. Once the burden to rebut the presumption is discharged by the accused through effective cross-examination or by adducing defence evidence or by the accused himself tendering oral evidence, what remains is the appreciation of the evidence let in. *Though it may appear that in the light of presumptions, the burden of proof oscillates between the prosecution and the accused, depending on the quality of evidence let in, in practice, the process of adducing evidence in a POCSO case does not substantially differ from any other criminal case.* Once the recording of prosecution evidence starts, the cross-examination of the witnesses will have to be undertaken

by the accused, keeping in mind the duty of the accused to demolish the prosecution case by an effective cross-examination and additionally to elicit facts to rebut the statutory presumption that may arise from the evidence of prosecution witnesses. Practically, the duty of prosecution to establish the foundational facts and the duty of the accused to rebut presumption arise, with the commencement of the trial, progress forward along with the trial and the establishment of one, extinguishes the other. To that extent, the presumptions and the duty to rebut presumptions are co-extensive. ***(emphasis supplied)***

16. If an accused is convicted only on the basis of presumption as contemplated in Sections 29 and 30 of the POCSO Act, then it would definitely offend Articles 20(3) and 21 of the Constitution of India. In my opinion, it was not the object of the legislature. Presumption of innocence is a human right and cannot *per se* be equated with the fundamental right under Article 21 of the Constitution of India. The Supreme Court, in various decisions, has held that provisions imposing the reverse burden must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the Statute. [***See State of Bombay v. Kathi Kalu Oghad, (1962) 3 SCR 10: AIR 1961 SC 1808 : (1961) 2 Cri LJ 856***].

17. It may safely be said that presumptions under Sections 29 and 30 of the POCSO Act do not take away the primary duty of prosecution to establish the fundamental facts. This duty is always on the prosecution and never shifts to the accused. POCSO Act has no different connotations. Parliament is competent to place a burden on certain aspects on the accused, especially those which are within his exclusive knowledge. It is justified on the ground that prosecution cannot, in the very nature of things, be expected to know the affairs of the accused. This is specifically so in the case of sexual offences, where there may not be any eyewitnesses to the incident. Even the burden on the accused is also a partial one and is justifiable on the larger public interest. [***State of Bombay v. Kathi Kalu Oghad, (1962) 3 SCR 10: AIR 1961 SC 1808: (1961) 2 Cri LJ 856; Noor Aga v. State of***

Punjab, (2008) 16 SCC 417; Abdul Rashid Ibrahim v. State of Gujarat, (2000) 2 SCC 513]

38. It was laid down by the Hon'ble Supreme Court in ***Sambhubhai Raisangbhai Padhiyar v. State of Gujarat*, *(2025)* 2 *SCC 399: 2024 SCC OnLine SC 3769*** that when the prosecution has established the foundational facts, the burden shifts upon the accused to rebut the presumption. It was observed at page 413:

> **34.** Sections 29 and 30 of the Pocso Act read as under:
>
> "**29.** ***Presumption as to certain offences***.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.
>
> **30.** ***Presumption of culpable mental state***.—(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."
>
> **35.** It will be seen that presumption under Section 29 is available where the foundational facts exist for commission of an offence under Section 5 of the Pocso Act. Section 5 of the Pocso Act deals with aggravated penetrative sexual assault, and Section 6 speaks of punishment for aggravated penetrative sexual assault.

Section 3 of the POCSO Act defines what penetrative sexual assault is. The relevant sections are extracted hereinbelow:

"**3.** ***Penetrative sexual assault.***—A person is said to commit "penetrative sexual assault" if—

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

***

5. ***Aggravated penetrative sexual assault.***—(*a*)-(*h*) * * *

(*i*) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

***

(*m*) whoever commits penetrative sexual assault on a child below twelve years; or

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

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

36. The manner in which the appellant enticed the deceased child under the pretext of buying ice cream in spite of being dissuaded by the aunt (PW 10) and without the consent of the lawful guardians also makes out an offence under Section 364 IPC. The aggravated penetrative sexual assault clearly establishes an offence under Section 377 IPC and Sections 4 and 6 of the POCSO Act. The appellant has not rebutted the presumption by adducing proof to the contrary."

39. The foundational facts were explained by the Madras High Court in ***B. Mooventhan v. State of T.N., 2023 SCC OnLine Mad 5241*** as under:

> **30.** In Criminal jurisprudence, the prosecution has to prove the case. However, in view of Section 29 of the POCSO Act, where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the POCSO Act, the Court shall presume that such person has committed or abetted or attempted to commit the offence as the case may be unless the contrary is proved. The presumption to be drawn under Sections 29 and 30 of the POCSO do not absolve the prosecution of its duty to establish the foundational facts. The prosecution has to establish the *prima facie* case by adducing evidence. Only when the fundamental and primary facts are established by the prosecution will the accused be under an obligation to rebut the presumptions by adducing cogent evidence where the standard of proof required to rebut the presumption is a preponderance of probabilities. In short, the basic, primary and fundamental facts are to be established by the prosecution.
>
> **31.** The term 'foundational facts' in the POCSO Act includes the following:
>
> (i) The victim is a child
>
> (ii) The alleged incident has occurred
>
> (iii) The accused has committed the offence
>
> (iv) Medical evidence to support the physical injury, if any."

40. Similar is the judgment in ***State of Haryana v. Vishal, 2022 SCC OnLine P&H 3827,*** wherein it was observed:

> **17.** Learned counsel for the State argued that, in view of provision of Sections 29 and 30 of the POCSO Act, a statutory presumption arises against the respondent/accused, and, the onus is upon him to prove his innocence, and that, in the present case, he has failed to prove his innocence, therefore, the statutory presumptions stand against him and he is liable to be convicted for the charges framed against him. A cumulative reading of Sections 29 and 30 of the POCSO Act would provide that, once the foundational facts have been proved by the prosecution, only then is the statutory presumption raised against the accused, and the onus shifts upon the accused to prove his innocence. In the present case, as we have discussed above in detail, the prosecution has failed to prove the foundational facts upon which statutory presumption can be raised. "*Presumption*" is a rule of law which enables the Court to presume the existence of a fact on the basis of certain proved facts. The Court cannot presume the existence of certain facts in a vacuum. The prosecution has to discharge its initial burden by proving those facts which are essential to raise the statutory presumption. In the case at hand, the prosecution has failed to discharge its initial onus; therefore, the statutory presumption cannot be raised at the instance of the prosecution.

41. Thus, the learned Trial Court had rightly held the accused guilty of the commission of offences punishable under Section 363, 366 of the IPC and Section 4 of the POCSO Act.

42. It was submitted that the POCSO Act does not criminalise the consensual physical relations between minors. Reliance was placed upon the judgment of the Delhi High Court in ***Shyam Singh*** (supra) and ***Vipin Sharma*** (supra). This

submission is not acceptable. The POCSO Act provides that sexual intercourse with a minor aged less than 18 years is a crime. It is impermissible for the Court to say that any exception has been created regarding the consensual relationship between the minors. Once the legislature has not created such an exception, the Courts cannot create the exception by the process of interpretation. They are bound to follow the law. In this context, the statement made by Mahatama Gandhi, in his sedition trial in 1912, is highly relevant when he said:

> "The only course open to you, the Judge and the assessors, is either to resign your posts and thus dissociate yourselves from evil, if you feel that the law you are called upon to administer is an evil, and that in reality I am innocent, or to inflict on me the severest penalty, if you believe that the system and the law you are assisting to administer are good for the people of this country, and that my activity is, therefore, injurious to the common weal."

43. Hence, it is impermissible to modify the legislation, and the Judge is bound to give effect to the legislation as long as he holds his post. Thus, the submission that an exception should be created in favour of a consensual relationship between minors cannot be accepted.

44. Learned Trial Court sentenced the accused to undergo simple imprisonment for two years and pay a fine of ₹ 2000/- for

the offence punishable under Section 363 of IPC, simple imprisonment for three years and pay a fine of ₹ 3000/- for offence punishable under Section 366 of IPC and simple imprisonment for seven years and pay a fine of ₹ 5000/- for an offence punishable under Section 4 of the POCSO Act. Section 4 of the POCSO provided a minimum imprisonment of seven years, and the learned Trial Court has imposed the minimum imprisonment; therefore, no further interference is required with the sentence imposed by the learned Trial Court.

45. No other point was urged.

46. In view of the above, the present appeal fails and the same is dismissed.

47. Registry is directed to send down the records alongwith copy of this judgment to the learned Trial Court.

(Rakesh Kainthla)
Judge

21st June, 2025
(Rupsi)