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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 122 of 1996

With
R/CRIMINAL APPEAL NO. 25 of 1996

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**NO**
5	Circulate this judgment in the subordinate judiciary.	

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STATE OF GUJARAT
Versus
RAMESHCHANDRA RAMABHAI PANCHAL

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Appearance:
MR CHINTAN DAVE, APP (2) for the Appellant(s) No. 1
MR BP MUNSHI(1035) for the Opponent(s)/Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 17/01/2020

COMMON ORAL JUDGMENT

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(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. As both the appeals arise from a common judgment and order passed by the Additional Sessions Judge, Ahmedabad Rural, Ahmedabad dated 24th November, 1995 in the Sessions Case No.229 of 1994, those were heard analogously and are being disposed of by this common judgment and order.

2. The Criminal Appeal No.25 of 1996 is at the instance of a convict-accused of the offence punishable under Sections-363 & 366 of the Indian Penal Code and is directed against the judgment and order of conviction passed by the Additional Sessions Judge, Ahmedabad Rural, Ahmedabad dated 24th November 1995 in the Sessions Case No.229 of 1994.

3. On the other-hand, the Criminal Appeal No.122 of 1996 is at the instance of the State of Gujarat being dissatisfied with the judgment and order of acquittal passed by the trial Court so far as the offence of rape punishable under Section-376 of the Indian Penal Code is concerned.

4. It appears that the accused came to be convicted for the offence punishable under Section-366 of the Indian Penal Code and has been sentenced to undergo seven years of simple imprisonment with fine of Rs.700/- and in default of payment of the amount of fine, to undergo further seven months of simple imprisonment. The accused has also been convicted for the offence punishable under Section-363 of the Indian Penal Code and has been sentenced to undergo three years of simple imprisonment with fine of Rs.500/- and in default of the payment of the amount of fine, to undergo further five months of simple

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imprisonment.

5. The trial Court, however, acquitted the accused so far as the charge of rape punishable under Section-376 of the Indian Penal Code is concerned.

6. ***Case of the Prosecution:-*** It is the case of the prosecution that the victim viz.Hansaben Shankarbhai, a resident of Village-Gyaspur Bhatha, Taluka Daskroi, District-Ahmedabad while was on her way to answer nature's call early in the morning of 26th March 1994 was hit by the accused with a weapon called 'Dato' and forcefully took her away. The victim was forcefully taken away by the accused to his village by name 'Godha'. According to the case of the prosecution, the accused kept the victim at his house for few days and thereafter at the house of his brother situated at Kadi. While the victim was in custody and confinement of the accuzed, she was ravished forcefully.

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7. It appears from the materials on record that although the victim went missing from 26th March 1994, yet the F.I.R., Exh.14 came to be lodged by the mother of the victim viz.Kamuben Shankarbhai on 10th April 1994 at the Aslali Police Station.

8. Upon registration of the F.I.R., the investigation had commenced. The investigation revealed that the victim was confined at the house of the brother of the accused viz.Bhagabhai situated at village-Kadi. The Investigating Officer reached village-Kadi and was able to arrest the accused. The victim was also found present at the house of Bhagabhai i.e. the brother of the accused. The victim was thereafter forwarded for medical examination with a police yadi. The accused was also sent for medical examination with a police yadi. The Investigating Officer

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collected the Certificate evidencing the date of birth, Exh.19 from the Principal of the Primary School, Gyaspur, where the victim studied for some time. The Investigating Officer also collected the admission certificate, Exh.20 from the school authority. The birth date as indicated in the Exhs.19 and 20 respectively is 1st June 1978. Indisputably, on the date of the alleged offence, she was less than 16 years of age.

9. The statements of the witnesses were recorded in the course of the investigation. The medical certificate Exh.10 issued by the Civil Hospital, Ahmedabad as regards the victim was also collected. At the end of the investigation, the police filed chargesheet in the Court of the Chief Judicial Magistrate. As the offence was exclusively triable by the Sessions Court, the Chief Judicial Magistrate committed the case to the Court of Sessions under the provisions of Section-209 of the Code of Criminal Procedure. The committal culminated in the Sessions Case No.229 of 1994 in the Court of the Additional Sessions Judge, Ahmedabad Rural, Ahmedabad.

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10. The trial Court framed the Charge, Exh.3 against the accused vide order dated 24th July 1995. The Charge Exh.3 reads thus:-

:: Charge ::

I, Bipinchandra D. Soni, Additional Sessions Judge, Ahmedabad (Rural), frame the charge against you accused Rameshchandra Ramabhai Panchal, age – 24, residing at – Godha, Taluka – Meghraj, that :

On 26/03/94, when Hansaben D/o Shankarbhai Mohanbhai, age - 16, went to relieve herself amongst babool at around four o'clock in the early morning, you came over there and allured her and forcefully took her with you to Godha village against her will, and thereby, you have committed an offence punishable u/s 363 of IPC.

You have committed an offence u/s 366 of IPC by kidnapping

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Hansaben at the above stated time and place with an intention to have illicit intercourse with her against her will.

You have committed an offence punishable u/s 376 of IPC by kidnapping Hansa at the above stated time and place and taking her to Godha village and thereafter, committing rape on her in the night and thereafter having intercourse with her daily for twenty days against her consent.

Since the aforesaid offence has been committed within the jurisdiction of this court, I pass the order to conduct judicial procedure against you in this regard.

11. The accused pleaded not guilty to the aforesaid charge and claimed to be tried.

12. The prosecution led the following oral evidence.

(1) *P.W.-1, Hitesh Chandulal Shukal, Exh.7.*

(2) *P.W.-2, Gafurbhai Khengarbhai, Exh.8.*

(3) *P.W.-3, Dr. Grishma Divyang Patel, Exh.9.*

(4) *P.W.-4, Chhaniben Gafurbhai, Exh.12.*

(5) *P.W.-5, Kamuben Shankarbhai Raval, Exh.13.*

(6) *P.W.-6, Shankarbhai Mohanbhai Raval, Exh.15.*

(7) *P.W.-7, Baluben Manabhai Vaghela, Exh.18.*

(8) *P.W.-8, Hansaben Shankarlal [Victim], Exh.21.*

(9) *P.W.-9, Motibhai Karshanbhai Vaghela, Exh.22.*

(10) *P.W.-10, Rambhai Chhaganbhai Patel, Exh.23.*

(11) *P.W.-11, Pruthvibhai Rumalbhai Parmar, Exh.25.*

13. The prosecution also led the documentary evidences.

14. On conclusion of the recording of the evidence, the trial Court recorded the statement of the accused under Section-313 of the Code of Criminal Procedure. The accused stated that the case instituted against

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him was false and he had not committed any offence as alleged.

15. Upon appreciation of the oral as well as the documentary evidence on record, the trial Court ultimately held the accused guilty of the offences punishable under Sections-363 and 366 of the Indian Penal Code respectively and passed the order of sentence as aforesaid. However, the trial Court acquitted the accused of the charge of rape punishable under Section-376 of the Indian Penal Code on an erroneous assumption that on the date of the offence, the victim was major.

16. We are deciding a very unique acquittal appeal. We are saying so because the entire appreciation of the oral evidence on record by the trial Court, more particularly, the evidence of the victim is on the basis as if the victim was major at the time of the commission of the offence and was a consenting party. It is only at the time when the trial Court heard the prosecution and the defence on the point of sentence that the trial Court realized that it had committed a mistake in calculating the age of the victim. At one stage, the trial Court has recorded in its judgment that the victim, at the time of commission of offence, was aged 16 years 06 months and 25 days old. Later, the trial Court realized that she was less than 16 years of age. In fact, the trial Court has also acknowledged its mistake, but declined to do anything in the matter, as the order of acquittal was already pronounced.

17. For the purpose of deciding the two appeals, we need to look into the evidence of the prosecutrix. The prosecutrix, P.W.-8, Exh.21 has deposed that the accused used to work with one Gafurbhai Bharwad. The accused used to ply the tractor of Gafurbhai. Many times, in the course of the day, the accused used to pass through the house of the victim driving tractor. The accused used to look towards the victim with

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a smile. However, according to the victim, she never responded to such gestures of the accused. According to the victim, on the date of the incident at around 5 O'clock in the early morning, while she was on her way to answer nature's call, the accused all of a sudden came from behind and hit her with an object Dato. She has deposed that thereafter the accused took her at his village-Ghoda. The accused took the victim to village-Ghoda in a Jeep. She has further deposed that on reaching the house, the accused forcefully had sexually intercourse with her. According to her, she started bleeding from her private parts. According to her, while the accused ravished her periodically, she did not do anything. For a period of one month, the victim was kept at village-Ghoda by the accused. For about 4 to 5 times in one month, the accused had indulged in sexually intercourse with her and too without her consent. She has further deposed that the accused never used to allow her to go outside the house. One day, the brother of the accused came from his village-Kadi and took the victim and his brother alongwith him to Kadi. After reaching Kadi, the accused took up a job. While the accused was at his job, the victim used to stay at home. She has further deposed that the other employees in the factory used to inquire with her whether she had got married with the accused. She used to reply that she had not got married. The employees used to inquire with the victim why the accused was beating her. In reply, the victim used to say that the accused had forcibly brought her alongwith him and if she would say no to anything, the accused would assault. In her evidence, the victim has further deposed that the accused was told by his brother viz.Bhagabhai to go and drop her at her house, however, the accused declined. Later, the victim was able to run away from the custody of the accused and somehow reached the house of her parents. She has deposed that before the incident she was married. However, she did not reside even for one day with her husband after her marriage. She did not

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maintain any relations as a wife with her husband.

18. In her cross-examination, she has deposed that she had not disclosed before anyone that the accused had brought her alongwith him. She has deposed in her cross-examination that she did not disclose before anyone that the accused used to beat her. She was married 12 months before the incident at village-Kasindra. Many suggestions have been put by the defence counsel, however, all those suggestions have been denied by the victim. The victim in her cross-examination has admitted that she has not stated in her police statement that while she was on her way to answer the nature's call at around 5 o'clock in the early morning, the accused came from behind and hit her with a 'Dato'. The defence counsel also tried to bring the other contradiction in the form of omissions on record but unfortunately, the defence counsel failed to prove such contradictions in the form of omissions through the evidence of the Investigating Officer.

In the cross-examination, the defence counsel has put a very deadly suggestion to the victim. The reply of the victim to such suggestion goes against the accused.

19. In the cross-examination, the victim has stated in reply to the suggestions made by the defence counsel that there is a temple in the factory premises and one Bapu sits in the said temple. The victim had informed the Bapu that the accused had brought her by force and she wanted to go back to her parental home. The Bapu inquired as to why the victim came at the house of the accused as the accused not a good person. Later, the Bapu hired a rickshaw and made the victim sit in the rickshaw and accordingly, the victim reached her parental house.

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20. In the aforesaid context, we may refer to and rely upon a decision of this Court in the case of ***Tarjubhai Narsingbhai Rathwa Vs. State of Gujarat; Criminal Appeal No.2083 of 2008; decided on 14/02/2014***.

> *"During the course of cross-examination with a view to discredit the witness or to establish the defence on preponderance of probabilities suggestions are hurled on the witness, but if such suggestions, answer to those incriminate the accused in any manner, then the same would definitely be binding and could be taken into consideration along with other evidence on record in support of the same."*

21. We shall now look into the evidence of Dr. Grishma Divyang Patel, P.W.-3, Exh.9. Dr. Patel in her evidence has deposed that a girl by name Hansaben was brought at the hospital on 2nd August 1994 at 2:15 hours in the afternoon by police with a yadi for medical examination. She has deposed that the medical examination revealed the following:-

(i) The body of the patient was well built. No external signs or injuries were noted on the body. No external marks of any kind were noted or found on the body of the victim.
(ii) The hair on her private part was found matted. No hair found on the underarms.
(iii) Two fingers could easily be inserted in her vagina. Her breasts were fully developed.

22. She has further deposed that the internal examination revealed the following:-

> *No semen was found on the vaginal swab. The hymn was found torned.*

There is no cross examination of the P.W.3, Dr. Grishma Patel.

23. The contents of the medical certificate, Exh.10 are quite disturbing. It appears that in the course of the medical examination of the victim, the two-finger test was conducted.

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24. The two-finger test also known as the PV (Per Vaginal) refers to an intrusive physical examination of a woman's vagina to figure out the laxity of vaginal muscles and whether the hymen is distensible or not. In this, the doctor puts two fingers inside the woman's vagina and the ease with which the fingers penetrate her are assumed to be in direct proportion to her sexual experience. Thus, if the fingers slide in easily the woman is presumed to be sexually active and if the fingers fail to penetrate or find difficulty in penetrating, then it is presumed that she has her hymen intact, which is a proof of her being a virgin.

25. It is relevant to quote Section-146 of the Indian Evidence Act. It reads thus:-

> ***146. Questions lawful in cross-examination.***—*When a witness is cross-examined, he may, in addition to the questions herein-before referred to, be asked any questions which tend—*
> (1) to test his veracity,
> (2) to discover who he is and what is his position in life, or
> (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture: 1[Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character.]

26. Despite the aforesaid proviso, the two-finger test leading to the formation of the medical opinion regarding consent allows the past sexual history of the victim to cause prejudice to her testimony.

27. The test itself is one of the most unscientific methods of examination used in the context of sexual assault and has no forensic value. Whether a survivor is habituated to sexual intercourse prior to the assault has absolutely no bearing on whether she consented when the

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rape occurred. Section 155 of the Indian Evidence Act, does not allow a rape victim's credibility to be compromised on the ground that she is "of generally immoral character.

28. The two-finger test is unconstitutional. It violates the right of the victim to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot *ipso facto*, give rise to presumption of consent. In view of the International Covenant on Economic, Social, and Cultural Rights 1966 and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, the victim of sexual assault are entitled to legal recourse that does not traumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with their privacy. ***[See: Lilu @ Rajesh and Anr. Vs. State of Haryana; (2013) 14 SCC 643]***

29. We quote the relevant observations made by the Supreme Court in the case of ***Lilu @ Rajesh [Supra]***.

> *"12. In State of Punjab v. Ramdev Singh, AIR 2004 SC 1290, this court dealt with the issue and held that rape is violative of victim's fundamental right under Article 21 of the Constitution. So, the courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme*

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honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against basic human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution.

13. In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.

14. Thus, in view of the above, undoubtedly, the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent."

30. Recently, the Supreme Court in ***Re: Assessment of The Criminal Justice System in Response To Sexual Offences in SMW (Cri.) No(s).04 of 2019*** passed an order dated 18th December, 2019. We quote the relevant paragraphs of the said order.

14. The Ministry of Health and Family Welfare, Government of India had prepared "Guidelines & Protocols: Medico- legal care for survivors/victims of sexual violence".

15. The Ministry of Women and Child Development has designed a Medical Kit for examination of the victim and the accused in cases of rape. The Union Government and the State Government have not provided this medical kit to all the Primary Health Centers or Community Health Centers. This Medico Forensic Kit is essential for

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collection of Medical/DNA evidence.

16. Further, Per-Vaginum examination commonly referred to as 'Two-finger test' has been held to be of no consequence and violative of the dignity of woman. In the case of Lillu alias Rajesh and Anr. v. State of Haryana, (2013) 14 SCC 643 it was observed as follows:-

> *"In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not re-traumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender- based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.*

Thus, in view of the above, undoubtedly, the two-finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity."

17. Thus, we consider it appropriate to call for status report with regard to the following:-

(1) whether the Medical Opinion in the cases relating to rape and similar offences is being given in compliance with the mandate of Section 164A of Cr.P.C.?

(2) whether the Medical Opinion in the cases relating to rape and similar offences is being given in tune with definition of rape under Section 375 of IPC as it stands today?

(3) whether the states have adopted the Guidelines & Protocols of The Ministry of Health and Family Welfare, Government of India or have they prepared their own Guidelines & Protocols?

(4) whether requisite Medico-forensic kit are available with all the hospitals/health centres run by the Government or by local authorities?

(5) whether the medical experts have done away with the Per-Vaginum examination commonly referred to as 'Two-finger test' and whether

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any directions have been issued by the states in this regard?

(6) whether medical experts have done away with the practice of giving opinion on the previous sexual experience of the victim or any directions have been issued by the states in this regard?

(7) whether lady medical practioners, if mandated, are available at all district and sub-divisional headquarters to draw up the medical examination report of the victim?

31. The learned APP submitted that he is not sure whether the State of Gujarat has issued any directions to do away with the Per-Vaginum examination i.e. the "two-finger test". As the Supreme Court is looking into this issue, we need not to go further in the matter. Our endeavour is to remind the trial Courts as well as the medical fraternity that the "two-finger test" is unconstitutional, as it violates the right of the victim of sexual assault to privacy, physical and mental integrity and dignity. If the trial Court comes across any such medical certificate, wherein, there is a reference of such test, then it should take cognizance of the same and do the needful in the matter.

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32. We take notice of the fact that the Maharashtra Government has done away with finger test on rape victims by issuing a Government Resolution in 2013. The Resolution says that such test is non-scientific most of the time, often resulting in hurdles in the investigations and miscarriage of justice. This GR was issued based on a report by eight member panel appointed by the Maharashtra Government. The GR explained that the procedure of finger test is degrading and crude and medically and scientifically irrelevant. Information about the past sexual conduct has been considered irrelevant and the doctor need not verify if the victim habitually has sexual intercourse.

33. The Planning Commission's Working Group headed by the

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Secretary, Women and Child Development Ministry, in its report in January, 2012 recommended abolition of this test in order to protect the victims of sexual abuse from further mental trauma. The group also suggested to review the Code of Criminal Procedure to make the procedures more women and child friendly. The social activists have for long been demanding a ban on the "archaic and outdated" practice. They termed the test "unscientific and degrading".

34. Undoubtedly, the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot *ipso facto*, be given rise to presumption of consent. The Medical procedures should not be carried out in a manner that constitutes cruel, inhuman or degrading treatment and health should be of paramount consideration while dealign with the gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with her privacy. Keeping in mind the International Covenant on Economic, Social, and Cultural Rights 1966 and the UN Declaration of Basic Principles of Justice for victims of Crime and Abuse of Power 1985, the apex Court said, rape survivors are entitled to legal recourse that does not re-traumatize them or violate their physical or mental integrity and dignity. They are also entitled to medial procedures conducted in a manner that respect their right to consent.

35. We need not discuss the oral evidence of any other witness.

36. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls

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for our consideration is whether the trial Court committed any error in holding the accused guilty of the offence of kidnapping punishable under Section-366 of the IPC and acquitting the accused of the offence of rape punishable under Sections-376 of the IPC.

37. It would be relevant to reproduce some portion of the operative part of the order passed by the trial Court.

> *"The advocate for the accused is not present. Shri Mahida for the prosecution, states that considering the age of the victim, which is 2 months short in 16 years, maximum sentence should be imposed under section 363, 366 of IPC.*
>
> *I presumed the age of the victim to be above 16 years. It is an error of calculation in the judgment and when the accused has been acquitted for the offence under section 376 of IPC because of error in counting the age, nothing can be done now in that respect because the judgment has been pronounced. In this case, victim's father Shankarbhai Mohanbhai Raval has stated the victim's age to be 17 to 18 years. Moreover, the intercourse was with the consent of the victim. Considering these facts, I pass the order as follows:"*

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38. The picture that emerges from the materials on record is that the victim remained in custody of the accused for a period of about one month. Initially, the victim and the accused stayed at village-Ghoda. Thereafter, for some time at the house of the brother of the accused situated at village-Kadi. The victim has deposed in clear terms that the accused used to forcibly have sexual intercourse with her. There are two ways of looking into the evidence on record. The overall evidence on record may give an impression that the victim was a consenting party. The story as narrated by the victim that she was kidnapped by the accused early in the morning at around 5 o'clock on the date of incident does not prima-facie inspire confidence. It appears that the victim left her parental home on her own free will and volition alongwith the accused. Even if we hold that the victim was a consenting party and had

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some relations with the accused, there is no escape from the fact that the victim was minor. The documentary evidence on record in the form of the Certificate evidencing the date of birth and the admission certificate Exhs.19 and 20 respectively indicates the birth date of the victim as 01/06/1978. The victim is alleged to have been kidnapped and ravished from 26/03/1994 onwards. Indisputably, she was less than 16 years of age. This part of the evidence has not been challenged on behalf of the accused.

39. The documentary evidence in the form of Exhs.19 & 20 respectively i.e.the certificate evidencing the date of birth and the admission certificate has been proved by the prosecution through the evidence of the P.W.7, Exh.18, Baluben M. Vaghela. The P.W.7 Baluben has been examined by the prosecution in her capacity as the Principal of the Primary School, Gyaspur Bhatha.

40. Be that as it may, once the victim is found to be a minor at the time of the commission of offence, more particularly, when it comes to the offence of rape, the accused cannot plead in his defence that the victim was a consenting party.

41. The act will fall in clause sixthly of Section 375 which reads as under :-

> "***Rape***
> ***375.*** *A man is said to commit "rape" who,except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :-*
> ... ...
> ***Sixthly.-*** *With or without her consent, when she is under sixteen years of age."*

42. Next comes the question whether the ingredients of Sections 363

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and 366, I.P.C. are made out.

43. Section 361, I.P.C. reads :

> "***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.*
>
> *Explanation.- The words 'lawful guardian' in this section include any person lawfully entrusted with the care of custody of such minor or other person.*
>
> *Exception.- This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.*"

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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 ages 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 in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. <u>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</u>

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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.

44. In ***State of Haryana v. Raja Ram (1973 (1) SCC 544)*** English decisions were noticed by the Supreme Court for the purpose of illustrating the scope of the protection of minor children and of the sacred right of their parents and guardians to the possession of minor children under the English law. The decisions noticed were *Reg v. Job Timmins (169 English Reports 1260); Reg v. Handley and another, (175 English Reports 890) and Reg v. Robb (176 English Reports 466). In the first case Job Timmins* was convicted of an indictment framed upon *9 Geo. IV, Clause 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. Limitation 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, Clause 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 and 25 Vict. Clause 100, Section 55). There inducement by previous promise or persuasion was held sufficient to bring the case within the mischief of the State. In the English Statutes the expression used was "*take out of the possession*" and

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not "*out of the keeping*" as used in Section 361, I.P.C. 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 Reg v. Manketelow (6 Cox Criminal Cases 143)***. These decisions were held to confirm the view that Section 361 is designed also to protect the sacred right of the guardians with respect of their minor wards.

45. The position was again reiterated in ***Thakorlal D. Vadgama v. The State of Gujarat (AIR 1973 SC 2313)*** wherein it was, *inter alia*, observed as follows : *1973 Cri LJ 1541 (para 9)*

> *"The expression used in Section 361, I. P. C. is "whoever takes or entices any minor". The word "takes" does not necessarily connote taking by force and it is not confined only to 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 continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purposes of successful inducement. The two words "takes" and "entices", as used in Section 361, I. P. C. 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, I. P. C."*

46. Even if the evidence relating to use of force or fraud is excluded the accused must be held to have taken the prosecutrix from her lawful guardianship for the purpose of having sexual intercourse with her and, therefore, he has been rightly held guilty for the offence under Section

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366, IPC.

47. We see no reason to disbelieve the testimony of the prosecutrix as regards the sexual intercourse with her. It is extremely unlikely that a young girl will falsely allege sexual intercourse with her, since she knows that by making such an accusation, she would be sacrificing what is most dear to her. In a tradition bound non-permissive society like ours, a young girl would be reluctant even to admit an incident of sexual intercourse with her, conscious as she would be of being criticized not only by the society but also by her own family members, relatives and neighbours who may somehow or the other hold her at least partly responsible for the incident which happened with her. Even the parents of an unmarried girl would not report such an incident to the police unless they are absolutely sure of its truthfulness. The parents of an unmarried girl would always be aware of the risk that comes to be associated with the marriage of an unmarried girl who is subjected to sexual intercourse and that too by two young boys professing an altogether different religion. They know that if such an incident becomes public it would be difficult for them to find a suitable match for their daughter from a respectable family. Their natural inclination would be to avoid giving publicity to such an incident lest their family name and family honour is brought under disrepute on account of an adverse publicity. Therefore, we find no good ground to reject the testimony of the prosecutrix to the effect that she was subjected to sexual intercourse by the appellant.

48. Unfortunately, the trial Court realized its mistake in calculating the age of the victim at a very late stage. The trial Court had already pronounced the judgment of acquittal so far as the offence of rape is concerned. While the trial Court was hearing the accused and the

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prosecution at the point of sentence it realized that the victim was a minor. In such circumstances, the trial Court found itself in a helpless situation as it could not have reviewed its order of erroneous acquittal or illegal acquittal so far as the offence of rape is concerned.

49. We are left with no other option but to hold the accused guilty of the offence of rape punishable under Section-376 of the IPC. At the same time, we do not found any error in the judgment of the trial Court holding the accused-appellant guilty of the offence of kidnapping punishable under Section-366 of the IPC.

50. In view of the aforesaid discussion, the conviction appeal preferred by the accused should fail and on the other-hand, the acquittal appeal preferred by the State of Gujarat should succeed.

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51. In the result, the Criminal Appeal No.25 of 1996 preferred by the accused stands dismissed. The judgment and order of conviction passed by the Additional Sessions Judge, Ahmedabad Rural, Ahmedabad, dated 24th November, 1995 in the Sessions Case No.229 of 1994 for the offences punishable under Sections-363 and 366 respectively of the Indian Penal Code is hereby affirmed.

The Criminal Appeal No.122 of 1996 preferred by the State of Gujarat is allowed. The accused viz. Rameshchandra Ramabhai Panchal is held to be guilty of the charge of having committed offence of rape punishable under Section-376 of the Indian Penal Code.

52. As we are allowing the acquittal appeal of the State of Gujarat holding the accused guilty of the offence, we need to hear him on the point of sentence. In such circumstances referred to above, the Registry

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is directed to issue notice to the accused viz. Rameshchandra Ramabhai Panchal asking him to personally remain present before this Court on **31/01/2020**. Failing which, a non-bailable warrant of arrest shall be issued.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

aruna