Priya Soparkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 188 OF 2023

Mr. Deepak Babasaheb Gaikwad,
Age: 34 years,
R/at : Vasahat No.1, Indiranagar,
Dist. Nashik.
(Presently lodged in Nashik Road Central Prison) …Appellant

Versus

1. The State of Maharashtra
(Through Ambad Police Station, Nashik, Dist. Nashik)
2. XYZ (Through Ambad Police Station, Nashik, Dist. Nashik) …Respondents

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Mr. Sandeep Karnik, Legal-aid appointed Advocate, for the Appellant.
Ms. Deepa Punjabi, Legal-aid appointed Advocate, for Respondent No.2.
Ms. G. P. Mulekar, APP, for Respondent No.1/State.

CORAM: SUMAN SHYAM &
SHYAM C. CHANDAK, JJ.
RESERVED ON : 29th JULY, 2025.
PRONOUNCED ON: 14th AUGUST, 2025.

JUDGMENT *(Per : Suman Shyam J.)*:-

1. Heard Mr. Sandeep Karnik, learned Legal-aid counsel appearing for the Appellant. Also heard Mr. G. P. Mulekar, learned APP appearing for the State/Respondent No.1 and Ms. Deepa Punjabi, learned Legal-aid counsel appearing for Respondent No. 2.

2. This criminal appeal, preferred under Section 374(2) of the Code of Criminal Procedure, 1973 (**Cr.P.C.**) arises out of the judgment and order dated 30th September, 2015 passed by the learned Additional Sessions Judge, Nashik in connection with Sessions Case No. 106 of 2014, whereby the sole Appellant was convicted for committing the offence punishable under Sections 376(2)(f), 377 and 363 of the Indian Penal Code (**IPC**). For committing the offence punishable under Section 376(2)(f) of the IPC, the Appellant/Accused was sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.10,000/-; for the offence punishable under Section 377 of the IPC, he was sentenced to suffer rigorous imprisonment for life and also to pay fine of Rs.5,000/-; and for the offence punishable under Section 363 of the IPC, he was sentenced to undergo rigorous imprisonment for 3 years and to pay fine of Rs. 5,000/-. All the sentences were to run concurrently.

3. The prosecution story, as unfolded from the material on record, is to the effect that the victim is the daughter of

Complainant – Sanjay Babasaheb Gaikwad, who was aged about 3 years at the time of the incident. The brother of the Complainant, viz., Deepak Babasaheb Gaikwad i.e. the Accused/Appellant had come to the house of the Complainant on 3rd October, 2013 at around 10 a.m. and took the victim girl with him from the custody of her mother on the pretext of purchasing new dresses for her. The victim, however, did not return home. A missing complaint was, therefore, lodged by the father of the victim on 3rd October, 2013. Thereafter, he had lodged a report on 4th October, 2013, based on which Crime No. 313 of 2013 of Ambad Police Station was registered. After four days from the date of her disappearance, the victim was found at the Mumbra Railway Station by the search team lead by a PSI who was accompanied by the father of the victim. At that time, she was in a naked condition with her knicker removed. The victim was then shifted to Ambad Police Station. At that time, the victim girl wanted to answer nature's call for which her mother had rendered the necessary assistance. Then the victim complained of pain in her lower abdomen. When the complaint regarding abdominal pain was examined by the mother of the victim, it transpired that there were injuries and swelling in the private parts of the victim. On being enquired by her mother, the victim had narrated that the Accused had committed sexual assault on her. The victim had stated that the accused had removed her knicker and inserted his private part into her private part. When she started crying, he had shut her mouth and slapped her.

4. After completion of investigation, police had submitted charge-sheet against the Accused, based on which charge was framed under Sections 201, 363, 376(2)(f) and 377 of the IPC and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (**POCSO**). The Accused had pleaded innocence, hence, he was made to face trial.

5. The prosecution case is based on circumstantial evidence. In order to bring home the charge framed against the Accused, the prosecution had examined eight witnesses including the Doctor (PW 3) who had examined the victim, the PSI (PW 6) who had arrested the Accused and sent the muddemal articles for chemical analysis as well as the Investigating Officer (PW 7) who had conducted investigation of the case.

6. The case of the Accused is of total denial. He had, however, not adduced any evidence.

7. PW 1, namely, Smt. Suman Sanjay Gaikwad is the mother of the victim. She has deposed that at the time of the incident, the victim was three years old. On the day of the incident, the accused, who is her brother-in-law, had come to her house at about 9.00 a.m. At that time, she was giving bath to her daughter. The Accused made certain comments which did not go down well with her. As such, being annoyed with such comment, she replied by saying “Me tujhi vahini ahe, tula laj vatu de” to which the Accused replied back by saying “Vahini mhanje ayichya jagi ahe”. At that

time, the Accused came near her and told that he wanted to purchase some new clothes for the victim girl. PW 1 had, however, resisted such request of the Accused. Notwithstanding the same, the Accused forcefully took the victim alongwith him. However, neither the Accused nor the victim returned back home till 10.00 p.m. As such, she, alongwith her husband searched for the victim and the Accused in the shopping complex, but could not find them. As such, they approached the police and her husband had lodged a missing report. After four days her daughter was found at Mumbra Railway Station by the police and her husband who were searching for the victim. At that time, the victim was wearing black coloured shirt but there was no knicker on her person.

8. PW 1 has further deposed that the victim was brought to Ambad Police Station. After reaching the Ambad Police Station, her daughter (victim) had told her that she wanted to go for nature's call. She then took the victim for nature's call. At that time, the victim had complained that she was having pain in her private parts. When she examined her private parts, she found that the victim had sustained injuries on her private parts and there was swelling. On being inquired further, the victim had disclosed that the Accused took her to the railway station at Nashik. He gave her chocolates, biscuits and peanuts. Thereafter, he committed mis-deeds. The victim had told her that "He removed her knicker and inserted his private part into her private part". The victim started crying, but he shut her mouth and slapped her. According to PW 1, there was bleeding from the private parts of the victim. The

Accused had wiped out the bleeding from her knicker and washed her private parts under the tap at the railway station and threw away the knicker in the railway station. PW 1 has further deposed that she had narrated the entire incident, as disclosed to her by the victim as well as the injuries witnessed by her, to her husband and the police. Thereafter, the victim was referred to the Nashik Civil Hospital, wherein she remained admitted for about 15 days. During her cross-examination, PW 1 has replied that Accused Deepak used to stay in the railway station and he did not come home. She has admitted that she had disliked the Accused visiting her home. However, she had denied the suggestion that the Accused used to help her husband financially. The witness has further denied the suggestion that the victim was unable to speak and has clarified that her daughter was able to communicate with her in their "Vadari" language.

9. The father of the victim who is the Complainant in this case, viz, Sanjay Babasaheb Gaikwad, was examined as PW 2. In his testimony he has deposed that the victim is his daughter. The incident took place on the day of Bakari Eid of last year. He was a labourer by profession. On that day, he went to work at about 9.00 a.m. living his wife and children at home. He came to know that in his absence, his brother-Deepak Gaikwad had come to his house. His wife (PW 1) told him that Accused Deepak took away his daughter alongwith him. PW 2 has confirmed that he had lodged report with the police against the Accused. Exh. 16 is the report. The witness has further deposed that his daughter was found at

Mumbra railway station in a naked condition. In his cross-examination, PW 2 has confirmed that the Accused is his brother. He has also stated that the Accused had assaulted his uncle as the latter was not inclined to give him the room. As a result of the assault on his uncle, he has received possession of the room. The witness has also denied his suggestion that he has deposed falsely so as to punish the Accused in order to avoid giving his share in the residential property.

10. PW 3-Dr. Vaishali Vitthal Giri was the Medical Officer attached to Civil Hospital, Nashik. She was on duty on 7th October, 2013, when she received a letter for examining the victim girl. After obtaining the consent of the father of the victim, she started examining the victim girl. During her examination, PW 3 had noted that there was no external injuries found on the victim. However, on local examination, she had found that there were bruises on the Labia Majora and it was edematous. Labia Minora was having bruises and edematous. Fourchette was having laceration 4/1.5 x 1.5 c.m. Vulva was having laceration involving forced vaginal wall fourchettee. Perineum fresh tear on anal canal was present. She has further deposed that there was thick, yellowish, greenish discharge from vagina and cervix. Tear was present in anus alongwith thick, yellowish and greenish discharge. PW 3 has opined that there was sexual assault on the victim. PW 3 has further deposed that the vaginal tear was due to forceful sexual assault. In her cross-examination, PW 3 has stated that the sexual assault may have occurred 2-3 days prior.

11. PW 4-Sopan Gangaram Jadhav is a panch witness. He has deposed that on 5th October, 2013, police had called him near the house of Sanjay Babasaheb Gaikwad at Indiranagar to act as a panch. Another panch-Bhikaji Laxman was also present alongwith him. PW 4 has proved his signature in the panchanama drawn at about 9.00 a.m. to 9.30 a.m. on 5th October, 2023 at Exh. 26. Cross-examination of this witness was declined.

12. Ms. Ashwini Ashok Patil, PSI who was asked to search for the victim girl, was examined as PW 5. She has deposed that while she was attached to Ambad Police Station on 6th October, 2013, her superior PSI Gavit directed her to visit Kolsewadi. Accordingly, she had visited Kolsewadi, District-Thane in search of the victim girl. However, she could not find the girl in the vicinity of Kolsewadi. At that time, the father of the victim was alongwith her. Thereafter, she went to Mumbra railway station. There was a slum area near Mumbra Police station. She found the victim girl lying on the floor outside one hut. She was wearing shirt. Father of the victim (PW 2) had identified the girl. Thereafter, they brought the victim girl to Ambad Police Station and she was handed over to PSI Gavit. She had forwarded the report to PSI Gavit.

13. Dhanshri Anandrao Patil was also attached to Ambad Police Station in the month of August, 2013. She was examined as PW 6. This witness has deposed that on 23rd October, 2013, she had received the investigation of Crime No. 313 of 2013. The clothes of the victim girl and samples for chemical analysis was forwarded by

her on 24th November, 2013. She had arrested the Accused on 3rd February, 2014 by drawing arrest panchanama. After his arrest, the Accused was referred for medical examination. She had later collected the clothes and samples of the Accused and forwarded the same for chemical analysis. This witness had further deposed that she had visited the spot of the incident at Nashik road railway station and had drawn up spot panchanama (Exh. 36) which bears her signature. She has also proved Exh. 37 by which she had referred the Accused for medical examination; Exh. 38 is the letter dated 7th November, 2014 by means of which, she had forwarded clothes of the victim girl and samples for chemical analysis. This witness has further proved Exh. 40 which is the arrest panchanama. PW 6 has denied the suggestion during her cross-examination that she had prepared false panchanama only to show it in the investigation.

14. PW 7-Maheshwar Mahadu Gavit was the Investigating Officer who had carried out major part of the investigation in connection with Crime No. 313 of 2013 and submitted charge-sheet against the Accused person. He was examined as PW 7. During his examination-in-chief, PW 7 has deposed about the usual steps taken by him during investigation. According to PW 7, on 7th October, 2013, the squad formed by him brought the victim girl from Mumbra to Nashik. Mother of the victim was called to the Police Station. She took the victim girl to answer nature's call. The mother of the victim had disclosed that the victim girl was having pain in discharging urine. When she examined the private parts of

the victim, she found that the victim had sustained injuries in her private parts. At that time, the mother of the victim had raised an alarm that her daughter might have suffered sexual assault. Therefore, the victim was referred for medical examination vide letter-Exh. 18, which bears his signature. The Investigating Officer has also confirmed that the clothes of the victim i.e. a shirt was seized by drawing seizure panchanama in presence of panch. The shirt was deposited with the Muddemal Clerk and receipt (Exh. 43) was obtained which bears his signature. Further investigation in the matter was handed over to PSI Ghodke who had recorded supplementary statements of the Complainant and the victim girl. In his cross-examination, PW 7 has deposed that the squad which was sent for investigation purposes had not recorded the statements of the witnesses from Mumbra.

15. Ms. Lilabai Ramdas Pithekar is a key witness in this case. She is a resident of the slum area by the name Indira Gandhi Aawas Yojana and knows the Complainant and the victim who are her neighbourers. She was examined as PW 8. This witness has deposed that on the day of the incident, she had seen the Accused near Ganpati Temple alongwith the victim girl. It was about 10.00 a.m. in the morning. She had disclosed the said fact to the mother of the victim. The witness has further deposed that when the police had enquired with her, she had also disclosed that she had seen the victim girl with the Accused on the day of the incident. Her statement was recorded by the police. This witness had also identified the Accused in the Court. During her cross-examination

PW 8 has admitted that when the police came to the slum for the fist time, she had not disclosed about the fact that she had seen the Accused with the victim girl. The witness has denied the suggestion put to her to the effect that she did not have good relation with the Accused and that she was deposing falsely about the fact that she had seen the Accused taking the victim girl alongwith him.

16. After recording the evidence of the prosecution side, the statement of the Accused was recorded under Section 313 of the Cr.P.C. wherein, he had denied all the incriminating circumstances put to him. The Accused had taken the plea of innocence and has further stated that he has been falsely implicated in the matter due to the property dispute between himself and his brother. The Accused, however, did not adduce any evidence. On conclusion of trial, the learned Additional Sessions Judge had convicted the Appellant under Section 376(2)(f), 377 and 363 of the IPC and sentenced him as aforesaid.

17. A careful examination of the judgment and order passed by the learned Court below goes to show that the learned trial Court is of the opinion that sexual assault on the victim girl has been established by the prosecution by adducing cogent evidence on record in the form of testimony of PW 3 and the medical documents. It also appears that the learned Court below has heavily relied on the last seen together circumstance which was

brought on record by the PW 1 and 8, so as to connect the Accused/Appellant with the offences.

18. Assailing the impugned judgment dated 13th September, 2025, Mr. Sandeep Karnik, learned counsel representing the Appellant has argued that the prosecution has completely failed to establish the charge brought against the Appellant under Sections 376(2)(f) and 377 of the IPC and therefore, the Accused/Appellant deserves to be acquitted in respect of those charges.

19. By referring to the fact that the victim girl was not examined as a witness, although her statement was recorded by the Investigating Officer PSI Ghodke and despite the fact that she was able to narrate the incident to her mother, Mr. Karnik has further argued that the victim girl was the best witness of the occurrence. However, neither the victim has been examined by the prosecution nor has the Investigating Officer- Mr. Ghodke appeared as a witness. There is also no explanation as to why, the victim could not be examined as a witness. Mr. Karnik therefore, submits that the crucial witness in this case, viz., the victim girl has been deliberately withheld by the prosecution, since she would not have supported the prosecution case. Contending that the present is a fit case for the Court to draw an adverse inference by invoking Section 114(b) of the Indian Evidence Act. Mr. Karnik submits that the appeal preferred by the Appellant deserves to be allowed by setting aside the impugned judgment and order passed by the Trial Court.

20. The learned counsel for the Appellant has further argued that the learned Court below has erroneously placed reliance on Section 106 of the Act to convict the Appellant in as much as the prosecution has failed to establish that there was any fact which was especially within the knowledge of the Accused which he had failed to disclose. Contending that there was no duty on the part of the Accused/Appellant to explain as to under what circumstances the victim girl has suffered sexual assault, Mr. Karnik has argued that having regard to the totality of evidence brought on record, the Appellant at best could have been convicted for committing offence under Section 363 of the IPC, for which he has already undergone the maximum jail sentence. In support of his above arguments, Mr. Karnik has relied upon the following decisions:-

1.	*Kattavellai @ Devakar Vs. State of Tamilnadu, reported in (2025) SCC Online SC 1439.*
2.	*Rahil and anr. Vs. State (Government of N.C.T. of Delhi), reported in (2025) SCC Online SC 1481*
3.	*Anees Vs. State Government of NCT, reported in (2024) SCC Online SC 757*
4.	*Balvir Singh Vs. State of Uttarakhand, reported in (2023) 16 SCC 575*
5.	*Reena Hazarika Vs. State of Assam, reported in (2019)13 SCC 289*
6.	*Vinubhai Haribhai Malaviya and ors Vs. State of Gujarat and anr., reported in (2019)17 SCC 1*

21. By referring to the decision of the Supreme Court in the case of *Kattavellai @ Devakar Vs. State of Tamilnadu* (supra), Mr. Karnik has argued that the “last seen together circumstance” being

weak evidence, conviction cannot be based solely on such circumstance. Therefore, the impugned judgment and order passed by the learned Trial Court suffers from serious infirmity. Mr. Karnik has further argued that since the conviction of the Appellant is entirely based on the last seen together theory, hence, the impugned judgment and order passed by the learned Trial Court suffers from serious infirmity warranting interference by this Court.

22. Mr. Karnik has summed up by contending that by failing to give an opportunity to the Appellant to cross-examine the victim girl, the Appellant has been denied a fair trial. Contending that the right to fair trial of the Accused is inbuilt in the fundamental right guaranteed under Article 21 of the Constitution of India, Mr. Karnik has argued that denial of fair trial, in an appropriate case, could be sufficient to vitiate the trial as well as the judgment of conviction passed by the learned Trial Court.

23. Resisting the above arguments, Ms. G. P. Mulekar, learned APP for the State of Maharashtra has argued that the learned Court below has rightly placed reliance on the testimonies of PWs 1 and 8 to come to the conclusion that it was none other than the Appellant who had taken the victim alongwith him from the custody of her mother and committed sexual assault on her. Since he has failed to return the victim back to her home and has also failed to offer any plausible explanation as to the circumstances under which the victim has suffered assault in her private parts,

hence, this case would come within the ambit of Section 106 of the Act. Therefore, submits Ms. Mulekar, failure on the part of the Appellant to offer any plausible explanation would constitute an additional link in the chain of circumstances raising a strong presumption of guilt of the Accused. The learned APP has, however, submitted in her usual fairness that although the victim girl could narrate the incident to her mother and her statement was also recorded by PSI Ghodke, there is no explanation available on record to show as to why, the victim was not examined as a witness during trial.

24. We have considered the submissions made at the bar and have also carefully scanned the material available on record. After examining the evidence on record, it appears that there is no controversy about the fact that on 3th October, 2013, at about 10.00 a.m. the Appellant had come to the house of the victim and thereafter, took the victim girl from the lawful custody of her mother on the pretext of buying clothes for her. The aforesaid fact has come out from the evidence of PW 1- i.e. the mother of the victim. The testimony to the above effect also finds due corroboration from the evidence of PW 8. PW 1 has also deposed that when the Accused/Appellant had expressed his intention to take the victim alongwith him, she had resisted the same. However, the Accused forcefully took the victim alongwith him. During cross-examination, such testimony of PW 1 could not be shaken. It is, therefore, clearly established that on the morning of 3rd October, 2013, it was the Appellant who had taken the victim

girl alongwith him from her home. However, there is nothing to indicate that the Accused had returned with the victim.

25. Evidence on record further indicates that since 3rd October, 2013, the whereabouts of the victim were not known for about 3-4 days, i.e. the time till when she was recovered from Mumbra railway station by a police team. A police squad headed by the PW 5 went in search of the victim. At that time, the father of the victim was also present with them. Victim was found at Mumbra Station. She was thereafter, brought to Ambad police station. At that time, she felt the urge to urinate and asked her mother to take her out, but when she went to urinate, at that time the victim had complained of pain in her lower abdomen. When the mother of the victim (PW 1) had examined the place, she found that there were signs of injury on the private parts of the victim. Later on, the victim was examined by Doctor-PW 3 who had confirmed that the victim had suffered sexual assault. Therefore, the fact that the victim was subjected to sexual assault is also established beyond doubt. What would, however, fall for the consideration of this Court, in the present proceedings, is as to whether, the prosecution has succeeded in establishing the fact that it was none other than the Accused who had committed the offence punishable under Section 376(2)(f) and 377 of the IPC on the victim girl. In other words, since the victim was taken by the Accused on 3rd October, 2013, merely on account of his failure to offer explanation within the ambit of Section 106 of the Act, can it be said that such

evidence would be sufficient to convict the Appellant in the manner that has been done by the impugned judgment.

26. In the above context, we deem it appropriate to mention herein that by a catena of the decisions rendered by the Apex Court, law has been firmly settled that last seen together circumstance is a weak piece of evidence. In the case of *Kattavellai @ Devakar Vs. State of Tamilnadu* (supra), the Hon'ble Supreme Court, while discussing the various earlier decisions of the Court on the subject, has held that the last seen theory being a weak piece of evidence, cannot be the sole basis of conviction.

27. As has been noted hereinabove, in the present case, although we find that the prosecution has established the fact that the Accused had taken the victim from the custody of her mother (PW 1), what cannot, however, be ignored by the Court is the fact that she was found after four days in a railway station, lying in front of a hut. Railway station, it must be noted, is a public place frequented by number of travellers/ visitors each day. Notwithstanding the same, the prosecution has failed to examine any witness who had seen the victim in the company of the Appellant in the Mumbra Station. There is also no explanation as to how the victim had reached Mumbra station. Moreover, the time gap since the Accused was last seen in the company of the victim and when she was recovered from Mumbra railway station, is nearly four days which is a substantial gap. There is nothing on record to indicate as to what the victim girl went through during

these 3-4 days. Therefore, the victim's testimony was essential. In these circumstances, it is not possible for the Court to presume that there was no scope of the victim girl to be sexually abused by any other person saved and except the Appellant.

28. Since the prosecution had heavily relied upon the burden on the part of the Appellant under Section 106 of the Evidence Act to offer some explanation and has relied upon the consequences of his failure to offer explanation, we deem it appropriate to discuss the legal principles touching up the issue as laid down by various judicial pronouncement of the Apex Court.

29. In case of *Reena Hazarika Vs. State of Assam* (supra) the Supreme Court has observed that without the requisite facts and circumstances, it will not be sufficient to shift the onus upon the Accused under Section 106 of the Act. The observations made in paragraph No.9 of the said decision would be relevant for the purpose of this case and therefore, are being reproduced below for ready reference:-

> "9. The essentials of circumstantial evidence stand well established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it to observe that in a case of circumstantial evidence the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. Mere invocation of the last seen theory, sans the facts and evidence in a case, will not suffice to shift

> the onus upon the accused under Section 106 of the Evidence Act, 1872 unless the prosecution first establishes a *prima facie* case. If the links in the chain of circumstances itself are not complete, and the prosecution is unable to establish a *prima facie* case, leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused, and the benefit of doubt will have to be given."

30. In the case of *Balvir Singh Vs. State of Uttarakhand* (supra) the Hon'ble Supreme Court has dealt with the question of burden of proof where some facts are within the personal knowledge of the Accused. By referring to the decision rendered in the case of State of ***State of West Bengal Vs. Mir Mohammad Omar and ors***[1], it was observed that the Court should apply Section 106 of the Act in criminal cases with great care and caution. Although it cannot be said that Section 106 of the Act has no application to criminal cases, yet, the onus of proof in a criminal trial would lie on the prosecution so as to prove the guilt of the Accused. Such onus is in no way modified by the provisions contained in Section 106 of the Act. It has also been held that Section 106 of the Act would have no application to cases where, the fact in question, having regard to his nature as such, is capable of being known not only by the Accused but also by others, if they happened to be present when the offence took place. The observations made in paragraph Nos.46 and 47 of the said decision are reproduced herein below:-

> "46. But Section 106 has no application to cases where the fact in question having regard to its nature is such as to be capable of being known not only by the accused but

1 (2000) 8 SCC 382

also by others if they happened to be present when it took place. From the illustrations appended to the section, it is clear that an intention not apparent from the character and circumstances of the act must be established as especially within the knowledge of the person whose act is in question and the fact that a person found travelling without a ticket was possessed of a ticket at a stage prior in point of time to his being found without one, must be especially within the knowledge of the traveller himself.

47. A manifest distinction exists between the burden of proof and the burden of going forward with the evidence. Generally, the burden of proof upon any affirmative proposition necessary to be established as the foundation of an issue does not shift, but the burden of evidence or the burden of explanation may shift from one side to the other according to the testimony. Thus, if the prosecution has offered evidence which if believed by the Court would convince them of the accused's guilt beyond a reasonable doubt, the accused is in a position where he should go forward with countervailing evidence if he has such evidence. When facts are peculiarly within the knowledge of the accused, the burden is on him to present evidence of such facts, whether the proposition is an affirmative or negative one. He is not required to do so even though a *prima facie* case has been established, for the court must still find that he is guilty beyond a reasonable doubt before it can convict. However, the accused's failure to present evidence on his behalf may be regarded by the court as confirming the conclusion indicated by the evidence presented by the prosecution or as confirming presumptions which might have been rebutted. Although not legally required to produce evidence on his own behalf, the accused may therefore as a practical matter find it essential to go forward with proof. This does not alter the burden of proof resting upon the prosecution. (Wharton's Criminal Evidence, 12th Edn. 1955, Vol. 1, Ch.2 p 37 and foil) Leland Vs. State of Oregon reported in 1952 SCC online US SC82: 96 L Ed 1302: 343 US 790 (1952) Raffel Vs. United States reported in 1926 SCC Online US SC 156: 70 L Ed 1054: 271 US 494 (1926)."

31. In *Anees Vs. State Government of NCT* (supra) the Supreme Court, after analyzing the law laid down in the various previous decisions of the Court, has made the following observations in paragraph Nos. 43, 44 and 55 which are reproduced hereinbelow :

> "43. Thus, from the aforesaid decisions of this Court, it is evident that the court should apply Section 106 of the Evidence Act in criminal cases with care and caution. It cannot be said that it has no application to criminal cases. The ordinary rule which applies to criminal trials in this country that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in Section 106 of the Evidence Act.
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> 44. Section 106 of the Evidence Act cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden on the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So, until a *prima facie* case is established by such evidence, the onus does not shift to the accused.
>
> 55. If an offence takes place inside the four walls of a house and in such circumstances where the accused has all the opportunity to plan and commit the offence at a time and in the circumstances of his choice, it will be extremely difficult for the prosecution to lead direct evidence to establish the guilt of the accused. It is to resolve such a situation that Section 106 of the Evidence Act exists in the statute book. In the case of *Trimukh Maroti Kirkan* (supra), this Court observed that a Judge does not preside over a criminal trial merely to see that no

> innocent man is punished. The court proceeded to observe that a Judge also presides to see that a guilty man does not escape. Both are public duties. The law does not enjoin a duty on the prosecution to lead evidence of such character, which is almost impossible to be led, or at any rate, extremely difficult to be led. The duty on the prosecution is to lead such evidence, which it is capable of leading, having regard to the facts and circumstances of the case."

32. From a careful analysis of the ratio laid down in the aforesaid judgments of the Hon'ble Supreme Court, what is crystal clear is that in a criminal case, persuasive burden under Section 101 of the Act to establish the charge beyond reasonable doubt would always lie on the prosecution and the said burden will never shift upon the Accused. However, in cases where the offences are committed in secrecy or under circumstances where save and except the Accused persons, there is no possibility for any other person of coming to know, as to what has transpired, in those cases, the Accused would have a burden under Section 106 of the Act to disclose the circumstances which are especially within his knowledge. In doing so, it will also be incumbent upon the Accused to explain the circumstances under which the victim had suffered injury. Failure to offer any plausible explanation by the accused can be viewed as an additional link in the chain of circumstances, thus raising a presumption of guilt in respect of the Accused. However, such presumption, would arise only when the prosecution succeeds in establishing each link in the chain of circumstances to establish the charge against the Accused.

33. In a recent decision of the Hon'ble Supreme Court in *Rahil and anr. Vs. State (Government of N.C.T. of Delhi)* (supra) the aforesaid principle of law has been reinstated whereby, it has been observed that whether it is a case of direct or circumstantial evidence, the burden of proof always rest on the prosecution. Only when the prosecution discharges the initial onus i.e. proves the incriminating attending circumstances to establish the fact that the cause of death was within the 'special knowledge' of the Accused, the onus shifts and an adverse inference against the Accused may be drawn, if he fails to discharge such onus.

34. Coming to the case in hand, as has already been observed, save and except the fact that the Accused/Appellant had taken the victim girl from the custody of her mother on 3rd October, 2013 for buying garments, there is no other evidence connecting the Appellant with the alleged offence of sexual assault on the victim. There is not even an iota of evidence available on record so as to indicate as to what transpired between 3rd October, 2013 and the time when the victim girl was recovered from Mumbra railway station. The prosecution has also failed to adduce any forensic evidence to connect the Appellant with the commission of the offence of sexual assault on the victim. The conduct of the Accused/Appellant in forcefully taking the victim girl from the custody of her mother and thereafter not returning back home and his failure to offer as any plausible explanation as to what had transpired in between, would not doubt, raise a strong suspicion as regards his wrong doings, as alleged. However, law is well settled

that suspicion, howsoever strong, cannot take the place proof. Unless there is evidence available on record to connect the Accused/Appellant with the commission of offence punishable under Sections 376(2)(f) and 377 of the IPC, his conviction under those sections would not be sustainable in the eyes of law.

35. Having observed as above, we now revert back to the objection raised by the learned counsel for the Appellant on the ground of failure on the part of the prosecution to examine the victim as a witness. As has been noted herein above, there is credible material on record to indicate that it was the victim girl who had narrated the incident to her mother as to in what manner, she was sexually assaulted. She had allegedly implicated the Accused for committing sexual assault on her. Her statement was also admittedly recorded by the Investigating Officer Mr. Ghodke. If that be so, it is apparent that the victim girl was in a position to narrate the incident. Not only that, since she could communicate with her mother in "varadi" language, hence, there was nothing preventing the Court from recording the statement of the victim girl with the assistance of the mother of the victim, as an interpreter. However, as has been indicated hereinabove, the same has been done in this case. The prosecution has also failed to offer any explanation for not doing so.

36. We are in agreement with the submission of the learned Legal-aid counsel appearing for the Appellant that in the facts of the case, testimony the victim girl would have been the best

evidence. Therefore, failure on the part of the prosecution to put her in the witness box without any reasonable explanation would afford a reasonable ground for this Court to draw adverse presumption against the prosecution on the basis that had the victim been examined as a witness, she would not have supported the prosecution case. It appears that the learned trial Court has also not made any attempt to unearth the whole truth by obtaining the version of the prosecutrix, although the court below was duty bound to do so.

37. The need to hold a fair trial by protecting the rights and interest of the Accused as well as the victim and thereby, the society as a whole has been emphasized by the Hon'ble Supreme Court, time and again, in a number of judicial pronouncements. In the case of ***Zahira Habibulla H. Sheikh and anr. Vs. State of Gujarat and ors.***[2], it was observed that the concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and the prosecuting agencies. The Courts have overriding duty to maintain public confidence in the administration of justice-often referred to as a duty to vindicate and often to uphold the "Majesty of the law". If a Criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by a participant in the trial evincing intelligent, active interest and elicit all relevant materials necessary for reaching the correct conclusion, so as to find out the truth and

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2 (2004) 4 SCC 158

administer justice with fairness and impartiality both to the parties and to the community it serves.

38. In another decision of the Supreme Court rendered in the case of *Vinubhai Haribhai Malaviya and ors Vs. State of Gujarat and anr.* (supra), it has been observed that the right of fair trial is inbuilt in the Article 21 of the Constitution of India. The observations made in paragraph Nos.17 and 18 are reproduced for ready reference:-

> "17. Article 21 of the Constitution of India makes it clear that the procedure in criminal trials must, after the seminal decision in *Maneka Gandhi Vs. Union of India reported in (1978) 1 SCC 248*, be "right, just and fair and not arbitrary, fanciful or oppressive". Equally, in *Commr. Of Police Vs. Delhi High reported in Court (1996) 6 SCC 323* it was stated that Article 21 enshrines and guarantees the precious right of life and personal liberty to a person which can only be deprived on following the procedure established by law in a fair trial which assures the safety of the accused. The assurance of a fair trial is stated to be the first imperative of the dispensation of justice.
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> 18. It is clear that a fair trial must kick off only after an investigation is itself fair and just. The ultimate aim of all investigation and inquiry, whether by the police or by the Magistrate, is to ensure that those who have actually committed a crime are correctly booked, and those who have not are not arraigned to stand trial. That this is the minimal procedural requirement that is the fundamental requirement of Article 21 of the Constitution of India cannot be doubted. It is the hovering omnipresence of Article 21 over Cr.P.C. that must needs inform the interpretation of all the provisions of Cr.P.C., so as to ensure that Article 21 is followed both in letter and in spirit."

39. In the case of *J. Jayalalitha and others Vs. State of Karnataka and ors.*[3] it was further observed as follows:-

> "28. Fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society. Thus fair trial must be accorded to every accused in the spirit of the right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge impugned in a criminal case. Any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general. In all circumstances, the courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the "majesty of the law" and the courts cannot turn a blind eye to vexatious or oppressive conduct that occurs in relation to criminal proceedings.
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> 29. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution. "No trial can be allowed to prolong indefinitely due to the lethargy of the prosecuting agency or the State

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3 (2014)2 SCC 401

> machinery and that is the raison d'etre in prescribing the time frame" for conclusion of the trial."

40. From a careful examination of the ratio laid down in the aforesaid decisions, we are left with no manner of doubt that unless the Accused is granted a fair opportunity to defend his interest in a fair trial, an order of conviction would stand vitiated merely on such count.

41. In the above context, it would be pertinent to note herein that the prosecution has placed heavy reliance on the version of the victim as brought on record through her mother (PW 1) so as to bring home the charge brought against the Accused/Appellant under Sections 376(2)(f) and 377 of the IPC. Notwithstanding the same, as has been noted above, the victim/prosecutrix has not been examined as a witness. Sections 25 and 26 of the POCSO Act, 2012 lays down specific provisions for recording the statement of a child. As per Section 26(2) the Magistrate/ police can even take the assistance of a Translator or an Interpreter while recording the statement of the child. Notwithstanding the same, neither the child has been examined as a witness nor has the PSI Ghodke, who had recorded the victim's statement called as a witness by the prosecution. The failure on the part of the prosecution to examine the victim or the PSI, without any just explanation, in our considered opinion would amount to denial of an opportunity to the accused to prove his innocence and therefore, in the facts of the case, would constitute denial of fair trial to the accused.

42. From the discussions made above, we find that the evidence brought on record by the prosecution is insufficient to establish the charge under Sections 376(2)(f) and 377 of the IPC brought against the Accused. There is serious doubt as to whether, it is the Accused/Appellant who had committed penetrative sexual assault on the victim. However, the same cannot be said in respect of the charge framed against the accused under Section 363 of the IPC. Having regard to the evidence of PW 1 and PW 8, we are left with no manner of doubt that the said charge has been duly proved.

43. For the reasons stated hereinabove, we are of the opinion that the conviction of the Appellant under Sections 377(2)(f) and 377 of the IPC is liable to be set aside, by giving him the benefit of doubt. We accordingly interfere with the conviction of the Appellant under Sections 376(2)(f) and 377 of IPC and set aside the sentences imposed upon him by the learned Trial Court for committing the offences under the aforesaid provisions. We, however, affirm the conviction of the Accused/ Appellant under Section 363 of the IPC and the sentences imposed on him for the said offence.

44. Since the Appellant has already spent more than 10 years in jail, which is the maximum jail sentence that can be awarded for offence committed under Section 363 of the IPC, hence, we direct the Appellant be set at liberty unless his custodial detention is deemed necessary in connection with any other case.

45. The appeal stands allowed to the extent indicated above.

46. Send back the record.

(SHYAM C. CHANDAK, J.) (SUMAN SHYAM, J.)