

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NOS. 59 AND 64 OF 2001.

CRIMINAL APPEAL NO. 59 OF 2001.

1. Uday Hulaswar,
at Central Jail,
Aguada.
 2. Mahesh Veer,
r/o Gaonkarvaddo,
Dhargal, Pernem.
 3. Shantaram Salkar alias
Parwar, r/o Khutvalvaddo,
Pernem.
- ... Appellants.

Versus

State. ... Respondent.

Mr. Arun Bras de Sa, Advocate for the Appellants.

Mr. S.N. Sardessai, Public Prosecutor for the
Respondent/State.

CRIMINAL APPEAL NO. 64 OF 2001.

Sanjay Kerkar,
r/o H. No. 194,
Boavistavaddo,
Bastora. ... Appellant.

Versus

State. ... Respondent.

Mr. S.S. Kantak with Mrs. Leena Dharwadkar, Advocates
for the Appellant.

Mr. S.N. Sardessai, Public Prosecutor for the
Respondent/State.

Coram : P.V. HARDAS, J.

Date : 29th August 2003.

ORAL JUDGMENT.

Criminal Appeal No. 59 of 2001 is filed by
original accused 1 to 3 and Criminal Appeal No. 64 of
2001 is filed by original accused no. 4. Original

accused no. 1 stands convicted for offences punishable under Sections 363, 365 and 376 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for 2 years and to pay fine of Rs. 1,000/-, in default simple imprisonment for one month and rigorous imprisonment for 7 years and to pay fine of Rs. 500/-, in default simple imprisonment for 3 months. Accused 2, 3 and 4 are convicted for an offence punishable under Section 109 read with Sections 363 and 365 of the Indian Penal Code and are sentenced to undergo rigorous imprisonment for two years and also to pay fine of Rs. 1,000/- each, in default simple imprisonment for one month. The substantive sentences of accused no. 1 are directed to run concurrently. The appellants, being aggrieved by the conviction and sentence passed by the IInd Additional Sessions Judge, Panaji, by Judgment, dated 13th November 2001, in Sessions Case No. 18 of 1998, have filed these appeals challenging the conviction and sentence.

2. The facts in brief as are necessary for the decision of these appeals are stated hereunder:-

P.W.27 L.P.S.I. Sunita Sawant was attached to Mapusa Police Station. On 9th March 1998, P.W.6 Cristalina Fernandes complained that her minor daughter Jennamicka had been kidnapped while she was returning

from school by accused no. 1 Uday and others in a Sumo vehicle. On the basis of the complaint, at Exhibit 41, an offence, vide Crime No. 16/98, under Sections 363 and 365 of the Indian Penal Code, was registered. After registration of the Crime, a wireless message was issued to all police stations regarding the offence and the staff of the police station were deputed to Margao, where some relatives of accused no. 1 were working. On the same day, P.W.27 L.P.S.I. Sunita recorded the statement of P.W.4 Sharada Kittar. Meanwhile P.W.27 L.P.S.I. Sunita received information that a white colour Sumo bearing registration no. GA-01-M-9976 had left Mapusa stand alongwith some customers and was probably heading in Londa-Belgaum direction. P.W.27 L.P.S.I. Sunita issued wireless message for keeping a check on the said vehicle and its occupants. On 10th March 1998, a look out notice was circulated to all the police stations. P.W.27 L.P.S.I. Sunita recorded the statement of P.W.11 Remedios Colaco and, on the same day, on perusal of the records of the Regional Transport Office, gathered information regarding the name of the owner. It transpired that the said Tata Sumo vehicle was registered in the name of Mrs Bhanumati Harishchandra Kerkar. Police personnel were deputed at the residence of the said Mrs. Bhanumati Harishchandra Kerkar and P.W.27 L.P.S.I. Sunita was informed that the said vehicle was driven by one Sanjay Kerkar, who had

left on 9th March 1998 and had not returned. On 11th March 1998, the Tata Sumo was found at Verla and the presence of accused no. 4 Sanjay was secured and he was interrogated. The said Tata Sumo vehicle was attached under a panchanama, at Exhibit 28, in the presence of P.W.2 Anil Kerkar and one Raymond Menezes. Accused no. 4 Sanjay came to be arrested. Accused no. 5 came to be arrested and later on accused no. 2 Gajanan and accused no. 3 Mahesh came to be arrested. On 12th March 1998, P.W.6 Cristalina approached the police station and informed P.W.27 L.P.S.I. Sunita that her daughter, who had been kidnapped, had telephonically informed P.W.6 Cristalina that she was calling from the house of one Babasahel Patil, situated near the bus stand, Kolhapur. P.W.27 L.P.S.I. Sunita after recording the supplementary statement of P.W.6 Cristalina, proceeded to Kolhapur alongwith the police party and apprehended accused no. 1 Uday and original accused no. 6 Anil Mohite, in whose house the minor girl was staying. The statement of the minor girl P.W.19 Jennamicka came to be recorded and it transpired that an offence under Section 376 had been committed by accused no. 1 Uday and, accordingly, Section 376 was added. P.W.19 Jennamicka and accused no. 1 Uday were sent for medical examination and were examined by P.W.8 Dr. E.J. Rodrigues. In respect of P.W.19 Jennamicka, P.W.8 Dr. Rodrigues found that her general development was good.

He found a reddish bruise of 1.5 cms. x 3 mm. around 5 to 7 o'clock position of hymen. The margins were edimatus and tender to touch. There was an old healed hymenal tear at 5 and 7 o'clock position of hymen. Hymenal opening admits two fingers easily. He, accordingly, opined that there was evidence of recent sexual intercourse. Vaginal swabs and slides were prepared for being sent for chemical examination. The report of P.W.19 Jennamicka is at Exhibit 47. He had also examined accused no. 1 Uday and found no injuries on his body. On his physical genital examination he opined that no positive opinion could be given in respect of recent forcible sexual intercourse. The examination report of accused no. 1 Uday is at Exhibit 48. The vaginal swabs, slides of P.W.19 Jennamicka and the underwear of accused no. 1 Uday were sent for chemical examination vide Exhibit 49 Colly. On 14th March 1998, blood samples of accused no. 1 Uday and P.W.19 Jennamicka were drawn for blood test at Goa Medical College. The clothes of P.W.19 Jennamicka were attached vide Exhibit 45.

3. On 17th March 1998, a letter was sent to P.W.17 Special Judicial Magistrate Vinayak Alornekar for holding the test identification parade. The letter is at Exhibit 104. P.W.17 Alornekar arranged for test identification parade on 22nd March 1998, in the

premises of Civil and Criminal Court at Mapusa. Twelve dummies were secured and initially two accused were put up with these dummies for the test identification parade. P.W.19 Jennamicka identified accused no. 3 Shantaram and accused no. 2 Mahesh. She had also identified accused no. 1 Uday. P.W.5 Clara D'Silva also identified accused nos. 2 and 3. P.W.4 Sharada had also identified the accused. The memorandum of the test identification parade is at Exhibit 69.

4. On 19th March 1998, A.S.I. Vatangi had attached the hotel register of Hotel Sanman. The specimen handwriting of accused no. 1 Uday came to be attached, vide panchanama at Exhibit 54. The muddemal property was forwarded to the Central Forensic Science Laboratory, Hyderabad, vide covering letter at Exhibit 105. The specimen handwriting of accused no. 1 Uday alongwith forwarding letter was forwarded to the Officer for examination of records vide Exhibit 106 Colly. The handwriting expert P.W.25 Nilu Raut Dessai, by his opinion at Exhibit 101, opined that the person who had written the specimen writings marked S1 to S6 had written the question writings marked Q1 and Q2. The reasons of the expert P.W.25 Nilu is at Exhibit 102. The report of the Central Forensic Science Laboratory is at Exhibit 97. The muddemal property had been examined by P.W.24 Dr. N.R.K. Rao, a Junior Scientific Officer,

working in the Central Forensic Science Laboratory, Hyderabad. He detected human spermatozoa in the two urethral swabs and two urethral smear slides. Similarly human spermatozoa were detected in the two vaginal swabs and two vaginal smear slides.

5. After completion of the investigation P.W.23 A.S.I. Manjunath Naik filed the charge-sheet against the accused. On committal of the case to the Court of Sessions, the learned Assistant Sessions Judge, Panaji, vide Exhibit 15, framed a charge against the appellants/accused. The appellants/accused denied their guilt and claimed to be tried. The prosecution in support of its case examined 27 witnesses. The accused no. 1 Uday in his defence examined himself as D.W.1. The learned trial Court on consideration of the evidence convicted and sentenced the appellants/accused as aforestated.

6. Mr. De Sa, the learned counsel appearing for appellants/accused 1 to 3 in Criminal Appeal No. 59 of 2001, has urged before me that the evidence of P.W.19 Jennamicka together with the evidence of P.W. 4 Sharada and P.W. 5 Clara suffer from inter se contradiction and, as such, the evidence cannot be implicitly relied upon for sustaining the conviction. In respect of accused 2 and 3, the learned counsel has urged that

their conviction with the aid of Section 109 is wholly unsustainable. It is also urged before me by the learned counsel for accused no. 1 that the accused no. 1 has been in custody since 13th March 1998 and has virtually undergone five years and five and half months of imprisonment. It is also stated that, while in custody, accused no. 1 Uday had undergone a bypass surgery and has been diagnosed as suffering from heart ailment. The medical papers have been produced and the same are taken on record and marked 'X' for the purpose of identification. It is, thus, submitted, by the learned counsel for the accused no. 1 Uday, that, in the alternative, the accused no. 1 be ordered to be released on the period of imprisonment already undergone by him.

7. Mr. Kantak, the learned counsel appearing on behalf of the appellant/accused no. 4 Sanjay in Criminal Appeal No. 64 of 2001, has submitted that the appellant/original accused no. 4 was a driver of the Tata Sumo vehicle. There is no evidence to suggest that he was acquainted with original accused no. 1 and there is no evidence to suggest that he had given intentional aid and, therefore, abetted the commission of the offence. According to the learned counsel for appellant/accused no. 4 Sanjay, the evidence suggests that he was paid charges for hiring

the vehicle and in such circumstances, his conviction with the aid of Section 109 of the Indian Penal Code is wholly unwarranted.

8. Mr. Sardessai, the learned Public Prosecutor, has submitted that assuming that there are inter se contradictions in the evidence of the prosecutrix P.W.19 Jennamicka and P.W. 4 Sharada and P.W. 5 Clara, the evidence of the prosecutrix P.W.19 Jennamicka clearly establishes the offence against all the appellants. He has further submitted that the medical evidence corroborates the version of P.W.19 Jennamicka and, therefore, the conviction is justified.

9. P.W.1 Manuel Pereira states that he had taken the bakery of one Emilia Cristalina Fernandes on contract basis for which he was paying Rs. 1,500/- per month. Accused No. 1 Uday and one Remy were employed by him in the bakery. Accused no. 1 Uday and the other person Remy used to reside in a portion of the bakery. He further states that the said Emilia @ Cristalina (P.W.6) had two daughters and three sons and P.W.19 Jennamicka is her second daughter. He further states that P.W.6 Cristalina, mother of P.W.19 Jennamicka, had informed him that there was a love affair between the accused no. 1 Uday and P.W.19 Jennamicka and that he should keep a watch. He further states that he had

observed that accused no. 1 Uday used to talk to P.W.19 Jennamicka from the window to the wall separating the two premises. He, accordingly, requested accused no. 1 Uday to leave the job and that he would provide him with a job elsewhere. He has further stated that he had asked accused no. 1 Uday to leave the job just prior to the incident. In the cross-examination he has admitted that P.W.19 Jennamicka used to visit the bakery and he was told by P.W.6 Emilia @ Cristalina to discharge accused no. 1 Uday from services, since there was a love affair between the prosecutrix P.W.19 Jennamicka and accused no. 1 Uday. He has also admitted that accused no. 1 Uday used to write love letters to P.W.19 prosecutrix Jennamicka. He has also admitted that prosecutrix P.W.19 Jennamicka used to write love letters to accused no. 1 Uday.

10. P.W.6 Cristalina, mother of prosecutrix P.W.19 Jennamicka, states that about two months prior to the incident, since accused no. 1 was teasing the prosecutrix P.W.19 Jennamicka, she told P.W.1 Manuel to remove him from service. On 9th March 1998, at about 7.30 a.m., prosecutrix P.W.19 Jennamicka left the house for attending the school at Tivim. She was wearing her school uniform and was carrying her school books in the school bag. In the afternoon, at about 2.00 p.m., P.W.4 Sharada and P.W.5 Clara came and informed her that

P.W.19 Jennamicka had been forcibly taken in a Tata Sumo vehicle by accused no. 1 Uday. She, accordingly, went to the police station and lodged the complaint at Exhibit 41. On 11th March 1998, she received a phone call from her daughter and, on her asking her whereabouts, her daughter revealed that she was somewhere in Karwar. She told her daughter that she would come and collect her but her daughter informed her not to do so. Her daughter had asked her if she had lodged a complaint but P.W.6 Cristalina falsely informed her daughter that she had not done so. On 12th March 1998, P.W.6 Cristalina received another phone call from her daughter and said that accused no. 6 Anil, who is the brother-in-law of accused no. 1 Uday, wanted to talk with her. Accused no. 6 Anil is alleged to have told P.W.6 Cristalina to get the prosecutrix P.W.19 Jennamicka married to accused no. 1 Uday or else they would not send her home. On the same day, she had received another message from her daughter P.W.19 Jennamicka informing her about the contact number at Kolhapur. She then informed the police and the police went and brought prosecutrix P.W.19 Jennamicka back to Goa. In the cross-examination she has admitted that her daughter P.W.19 Jennamicka used to go to the bakery of P.W.1 Manuel some times. She has produced the Baptism Certificate Exhibit 40. She has stated that she was not informed by her daughter P.W.19 Jennamicka of any love

affair with accused no. 1 Uday. She has denied to have stated in her complaint at portion marked A - A1 that her daughter P.W.19 Jennamicka and accused no. 1 were friendly. She has disclaimed any knowledge whether accused no. 1 Uday and her daughter P.W.19 Jennamicka used to exchange any love letters. An omission was brought out that she had not stated in her statement that accused no. 1 Uday had forcibly taken P.W.19 Jennamicka in a Sumo vehicle.

11. P.W.4 Sharada and P.W.5 Clara were studying in Standard VIII, in the same school in which P.W.19 Jennamicka was studying in Standard VII. P.W.4 Sharada states that on 9th March 1998 she attended the school as usual, which got over at 12.30 p.m.. She alongwith P.W.19 Jennamicka, P.W.5 Clara and one Joyce were walking home from school. She saw a white colour Sumo with dark glasses coming from Mapusa side. The said Sumo stopped near them and one person got down from the Sumo and came towards them. The person, who got down from the Sumo, was the accused no. 1 Uday. Uday caught the hand of P.W.19 Jennamicka and pulled her towards the Sumo. P.W.19 Jennamicka shouted 'Uday what are you doing'. Accused no. 1 Uday then pushed P.W.19 Jennamicka into the Tata Sumo. She states that she does not know who was driving the Tata Sumo and has failed to identify accused no. 4 as the person, who was driving

the Tata Sumo. She states that the vehicle then sped away and she went and informed P.W.6 Cristalina, mother of P.W.19 Jennamicka. She states that 9th March 1998 was a Saturday. Her statement was recorded by the police on the same day in the evening. She has further stated that they were shouting when P.W.19 Jennamicka was being taken by accused no. 1 Uday. She has also stated that there was no talk between them and accused no. 1 Uday. She has also stated that she was not informed by P.W.19 Jennamicka regarding her relationship with accused no. 1 Uday.

12. P.W.5 Clara states that on 9th March 1998 at about 12.00 to 12.30 p.m. she along with P.W.19 Jennamicka, P.W.4 Sharada and one Joyce were walking home from school. She saw one Tata Sumo with dark glasses coming from the opposite direction. The Tata Sumo went ahead took a U-turn and came and stopped on the other side of the road. Accused no. 1 Uday got down from the vehicle and after coming to their side, pulled P.W.19 Jennamicka by her hand, upon which, P.W.19 Jennamicka said 'Uday what are you doing'. Accused no. 1 Uday then pushed P.W.19 Jennamicka into the jeep and she saw accused no. 3 sitting inside the jeep. Accused no. 2 was sitting by the side of the driver and the driver was accused no. 4. The vehicle then sped away. They went and informed the mother of P.W.19 Jennamicka. She has stated that

she has identified accused nos. 1 to 4 in the identification parade. In the cross-examination she has stated that she saw the vehicle for the first time when it was at a distance of 10 to 15 metres from them. She has described the clothes worn by accused no. 1 Uday. She has stated that since the window on the driver side was rolled down, she could see inside the vehicle. An omission was brought out in respect of her not stating in her statement that after P.W.19 Jennamicka was forcibly taken by accused no. 1 Uday, P.W.5 Clara and others started screaming. She has stated that she was not aware regarding any love affair between accused no. 1 Uday and P.W.19 Jennamicka. She has also stated that she had seen accused no. 4 Sanjay for the first time on the day of the incident and does not recall if he had a beard. She has further stated that she had gone to the police station on 22nd March 1998. She denied the suggestion that the accused were present in the police station at that time. She has denied the suggestion that she had not identified the accused in the identification parade.

13. P.W.19 Jennamicka states that she knows accused no. 1 Uday and that she knows all the accused. She has given her date of birth as 7th July 1983 and was studying in VII standard at the time of the incident. On the death of her father, the bakery was handed over

to P.W.1 Manuel, who was running it on contract basis. Accused no. 1 Uday and one Remy were employed by P.W.1 Manuel in the bakery. P.W.1 Manuel, accused no. 1 Uday and Remy were residing in the bakery itself. There was friendship between accused no. 1 Uday and her. Some time during the New Year of 1998, accused no. 1 Uday had proposed to her for getting "friendly with him". She had stated that she would ask her mother and, accordingly, she asked her mother, who told her that she was young and studying in school and that she should not be friendly with accused no. 1 Uday. She states that, thereafter, accused no. 1 Uday started harassing her and she informed him that she was not interested in him. P.W.19 Jennamicka further states that she, accordingly, informed her mother about it and her mother asked P.W.1 Manuel to remove accused no. 1 Uday from the employment. She has further stated that, on 6th March 1998, during the night time, accused no. 1 Uday asked her to go along with him and she told accused no. 1 Uday that she would require time to think. On the next day, that is, on 7th March 1998, she told her mother that she was having loose motions and did not go to school. On 8th March 1998, accused no. 1 Uday came and told her that he had made fun and not to take him seriously.

14. On Monday, the 9th of March 1998, she went to

school as usual wearing her school uniform and carrying her school bag. While returning home in the company of P.W.4 Sharada, P.W.5 Clara and one Joyce, she saw a Tata Sumo vehicle with dark glasses parked at a spot. She observed that the Tata Sumo vehicle went ahead towards the main road and after taking a turn came towards their side. The vehicle slowed down near them and accused no. 1 Uday got down from the rear side and caught hold of her hand. She asked accused no. 1 Uday as to what he was doing but accused no. 1 Uday took her to the vehicle and pushed her inside. According to her, accused no. 2 Gajanan pulled her by her hair and made her to sit in the Sumo. She was made to sit between accused no. 2 Gajanan and accused no. 1 Uday. Accused no. 4 Sanjay was driving the said vehicle while accused no. 3 Mahesh was sitting beside him. The driver increased the speed of the vehicle and when they had reached near Limberament Hall, she saw one of her neighbour P.W.3 Diago Pereira. As she was about to call out to P.W.3 Diago, accused no. 2 Gajanan put his right palm over her face and put a "shamaldar" and kept her head on his lap. The vehicle proceeded towards Assanora. After some time the vehicle stopped and accused no. 1 Uday and accused no. 2 Gajanan asked her the size of her footwear. Accused no. 2 Gajanan and accused no. 3 Mahesh got down from the vehicle, went to the market and came back with a pair of shoes,

hair-pins, a packet of rubber bands and rolled gold earrings and gave them to her. After some time the vehicle was stopped and accused no. 2 Gajanan and accused no. 3 Mahesh got down and accused no. 2 Gajanan came back to the vehicle with a yellow colour churidhar while accused no. 3 Mahesh gave a gutka packet to accused no. 1 Uday, who, in turn, gave it to her. The vehicle was again stopped after some time and she was asked by accused no. 1 Uday and others to change her clothes. All the accused alighted from the vehicle and she closed all the windows and changed her dress from uniform to churidhar. Since the churidhar pant was not having a string, she removed her ribbons and tied them together and used as a string for the churidhar pant. On the way the accused had offered her a cold drink and a banana, which she declined. After reaching Belgaum, the accused nos. 1 to 3 got down for booking a hotel. She was alone in the vehicle with accused no. 4 Sanjay. Since no accommodation was available in that hotel, the vehicle was taken to Hotel Sanman. Accused no. 1 Uday alone got down and went to the hotel. Accused no. 1 Uday came to the vehicle and asked her to get down and follow him and, accordingly, she got down and walked behind him. According to her, accused no. 1 Uday had booked one room in the name of Rajesh Naik and paid Rs. 300/-. Accused no. 1 Uday then told accused no. 2 Gajanan and accused no. 3

Mahesh to return to Goa and paid Rs. 1,000/- to accused no. 4 Sanjay, who was the driver. The vehicle alongwith accused 2, 3 and 4 (driver) went away.

15. She has identified the entry at Serial No. 2573, dated 9th March 1998, made by accused no. 1 Uday in the name of Rajesh Naik in the register M.O.15. She went to the room carrying her school bag and uniform. She states that she asked accused no. 1 Uday to reach her home, whereupon accused no. 1 Uday replied that he had spent a lot of money to bring her to Belgaum and that he wanted to own her. Further accused no. 1 Uday had put a knuckle duster and said that he would kill himself and the blame would come on her. Thereafter, accused no. 1 Uday placed an order for two masala dosas and lassi. She further states that while going to the toilet she had removed the churidhar pant. After coming out of the toilet she saw that accused no. 1 Uday was wearing an underwear and had a towel wrapped around him. Accused no. 1 pulled her on the bed and forcibly pulled out her underwear and committed rape on her. She states that accused no. 1 Uday had committed rape on her despite her protests. She had again asked accused no. 1 Uday to reach her home, to which accused no. 1 Uday replied that he would reach her the next day. There was a knock on the door and while accused no. 1 Uday went to open the door, she rearranged her clothes. A waiter

had produced a bill for the masala dosas and lassi. According to her, accused no. 1 Uday had eaten one masala dosa and had consumed the lassi but she did not touch the food. She went to sleep on the bed as there was no separate bed in the room. On the next day, that is, on 10th March 1998, accused no. 1 Uday took his tea but she refused to take tea and requested him to reach her home. Accused no. 1 Uday asked her to wait in the room saying that he would get a rickshaw. Accused no. 1 Uday returned after five minutes and they sat in the rickshaw, which proceeded to the bus stand. They boarded the bus for Kholapur. She asked accused no. 1 Uday as to where he was taking her. Accused no. 1 Uday replied that he was taking her to Kholapur to his sister's house and then to Goa. She states that she cried in the bus. Accused no. 1 Uday promised to take her home after going to his sister's house. According to her, they reached Kholapur at about 2.00 p.m.. Since the house of his sister was locked, he went to the house of accused no. 6 Anil and took the key and opened the house of his sister. The room of accused no. 6 Anil is in a chawl owned by Babasahel Patil. Accused no. 6 Anil and accused no. 1 Uday had asked her to prepare tea. She served tea to both of them. According to her, accused no. 1 Uday asked accused no. 6 Anil to help him in getting married to her. After taking their dinner, they went to sleep and she was awakened by the

overtures of accused no. 1 Uday. According to her, accused no. 1 had sexual intercourse with her that night. Next day morning accused no. 1 asked her to prepare tea and she served tea to accused no. 1 Uday and accused no. 6 Anil. She, thereafter, prepared fish curry for both of them. She was in the room while both the accused went shopping. She assisted accused no. 6 Anil in preparing chicken.

16. She further states that, on 11th March 1998, accused no. 1 Uday and accused no. 6 Anil had taken her to a telephone booth to enable her to telephone her mother. She says that she spoke to her mother and her brother. She further states that accused no. 1 spoke to her mother and told her that P.W.19 Jennamicka would be coming home soon. Accused no. 1 had taken her to the market for purchasing some personal items. In the evening she had cooked food for accused no. 1 Uday and accused no. 6 Anil.

17. On 12th March 1998, she had prepared tea for both the accused. She told accused no. 1 Uday that if he was not going to reach her to her home, he should give her money. Accordingly, accused no. 1 Uday gave her all the money that he had. She took Rs. 100/- and went to the telephone booth and sent a message to her mother giving the whereabouts of the place where she was

staying. Her brother spoke to her informing her not to be afraid as they would be coming with the police. In the afternoon she prepared food for both the accused. Accused no. 1 Uday did not have food as he was annoyed with P.W.19 Jennamicka. Thereafter, again she had gone to telephone her mother while both the accused remained inside the room. Later in the evening the police arrived from Goa and she was taken to Goa.

18. In the cross-examination she denied that she was 18 to 20 years of age. She has denied that there was any love affair between her and accused no. 1 Uday. She was shown the letters at Exhibit 75 Colly, which she has admitted to have written to accused no. 1 Uday. In the said letters she has professed her love for Uday. In another letter she has also asked Uday to take her away as she wants to enjoy her whole life with him and she cannot live without him. She has denied to have stated in her statement that, on 7th March 1998, she had stated a falsehood to her mother that she was getting loose motions and, therefore, did not want to attend school. A contradiction to this effect has been proved. She denied that both of them had promised each other to go away from Goa and get married. Omission was brought out in respect of accused no. 2 Gajanan pulling her by her hair and making her sit in the Sumo. Similarly an omission was brought out about accused no. 1 Uday

putting on a knuckle duster and threatening to assault her if she shouted. She also admitted not to have raised cries for help when accused no. 2 Gajanan and accused no. 3 Mahesh had gone to bring some articles for her. She denied as false that accused no. 1 Uday had not given his name as Rajesh Naik and that she was not taken to Belgaum. She has admitted that she did not inform the person at the counter of the hotel that she had been forcibly brought to Belgaum. She has also admitted that she did not raise any alarm at Hotel Sanman. She has also admitted that there were several people at the bus stop when they boarded the bus for Kholapur. She has admitted that she did not raise any cries for help. She has also admitted that her neighbour Diago had neither heard her nor seen her when she had cried for help on the way. She has denied that accused no. 1 Uday did not have any forcible sexual intercourse with her. Similarly she has admitted that there were several persons in the bus and she did not inform any of them that she was forcibly brought. In the cross-examination she has produced the Birth certificate, at Exhibit 76, and as per the said certificate, the date of birth is 7th July 1983.

19. P.W.3 Diago Pereira states that, on 9th March 1998, while he was returning home, he saw a Tata Sumo vehicle of white colour and with tinted glasses pass by

in a fast speed. He has stated that he saw accused no. 4 driving the vehicle and, accordingly, he has identified accused no. 4. He had noted the number of the Tata Sumo. In the cross-examination he has stated that he had gone to buy vegetables and while returning, he saw the vehicle, at 1.15 p.m.. He has further stated that his statement was recorded by the police on 13th March 1998. He has also admitted that there was no special reason for him for noting the number of the vehicle except that it had gone in a fast speed. The evidence of this witness is highly artificial. The police was also aware that his statement was recorded on 13th March 1998 regarding the registration of the vehicle. His reason for noting down the registration number of the vehicle merely because it sped fast by him, is also highly artificial. Anyway nothing turns on the evidence of this witness.

20. P.W.8 Dr. E.J. Rodrigues has admitted that the finding that the vaginal opening admits two fingers easily is an indication that the prosecutrix was used to intercourse. He has also admitted that there was no physical injuries on the prosecutrix and the accused no. 1 Uday.

21. P.W.17 Vinayak Alornekar, who had conducted the test identification parade, has admitted in the

cross-examination that he was not aware if the identifying witness had been shown to the accused before the parade and at the police station. Curiously he has denied the statement that it is not true "that where the suspect is having a beard, then persons in the parade have to be kept with a beard". The identification parade suffers from a major lapse as on each occasion two accused had been put up with twelve dummies. The same dummies were repeated throughout the identification parade. The identification parade suffers from a basic infirmity and no reliance can be placed on the test identification parade.

22. From the evidence of P.W.19 Jennamicka, it is clear that she was in love with accused no. 1 Uday. They were exchanging love letters to each other. In one of the letters she had asked the accused no. 1 Uday to take her away from her house. According to her, two days before the incident, the accused no. 1 Uday had proposed to her that they should elope and to which she had stated that she would require time to think it over. From the evidence it, therefore, appears that both, the accused no. 1 Uday and the prosecutrix, had decided to elope and, accordingly, 9th March 1998 was the day fixed for elopement as the accused no. 1 Uday was soon to be dismissed from his employment by P.W.1 Manuel. The love affair between the prosecutrix and accused no. 1 Uday

was also known to her mother P.W.6 Cristalina. In the face of this evidence, according to me, the statement of the prosecutrix that accused no. 1 Uday had forcibly taken her when she was returning home and she had asked the accused no. 1 Uday as to what he was doing, does not appear to be plausible. If the evidence of P.W.6 Cristalina is perused, there is an omission in what P.W.4 Sharada and P.W.5 Clara had told her regarding the forcible taking of the prosecutrix and she asking accused no. 1 Uday as to what he was doing. Whether the accused no. 1 Uday has forcibly taken the prosecutrix or she had willingly gone with him pales into insignificance. She was a minor when the accused no. 1 Uday had taken her alongwith him. The accused no. 1 Uday in his evidence has stated that the prosecutrix had told him that she was a major and they had decided to elope and get married. That part of the evidence of the accused no. 1 appears to be believable. Even if the prosecutrix had stated a falsehood, the fact remains that accused no. 1 has committed offences punishable under Sections 363 and 365 of the Indian Penal Code. The evidence of the prosecutrix coupled with the corroborative medical evidence and the report of the Chemical Analyser would show that the accused no. 1 Uday did have sexual intercourse with her. The conduct of the prosecutrix would certainly suggest that she did not resist to the advances of the accused no. 1

Uday and had willingly gone alongwith him and had willingly submitted herself for sexual intercourse. P.W.6 Cristalina has stated that in one of the telephone conversations with the prosecutrix, the prosecutrix had told her not to come to collect her. Again the consent of the prosecutrix P.W.19 Jennamicka for the sexual intercourse is wholly immaterial as the prosecution has been able to prove that, on the day of the incident, she was below 16 years. In the face of this evidence, the conviction of the appellant no. 1/accused no. 1 for the offences punishable under Sections 363, 365 and 376 of the Indian Penal Code is sustainable. Accused 2, 3 and 4 have been convicted with the aid of Section 109 of the Indian Penal Code. It is alleged against accused no. 2 that he had pulled the prosecutrix by her hair into the Sumo vehicle and later on when she tried to shout to P.W.3 Diago, he had placed his hand on her mouth. In respect of accused no. 3, it is stated that he was present in the jeep and had gone to purchase certain articles for her. In respect of accused no. 4, it is stated that he was driving the said vehicle. An omission has been brought out vis-a-vis her statement that the prosecutrix had not stated in her statement that accused no. 2 had pulled her by her hair into the jeep. All that is alleged is that accused no. 2 had gagged her mouth when she had attempted to shout in the name of P.W.3 Diago. In her cross-examination she has

admitted that neither P.W.3 Diago had seen her nor had he heard her. This would indicate that she had shouted in the name of P.W.3 Diago. That apart, if the evidence indicates that she had willingly accompanied accused no. 1 and the evidence in respect of her offering resistance in going along with accused no. 1 in the said vehicle is found to be false on the touchstone of her conduct subsequently, that part of the evidence that accused no. 2 had prevented her from shouting appears to me to be not a truthful version. It appears that she had agreed with accused no. 1 Uday for eloping on 9th March 1998. This is evident from the fact that she has in the letters, at Exhibit 75 Colly, expressed her love for accused no. 1 Uday and had requested him to take her away from her house. The evidence also suggests that two days before the date of the incident, the accused no. 1 Uday had suggested to her that they should elope. Though she has stated that she told the accused no. 1 Uday that she wanted to think it over, it appears that she had readily agreed for eloping with the accused no. 1 Uday. In such circumstances, accused nos. 2 and 3, who are stated to be friends of accused no. 1 Uday, had merely accompanied him in the vehicle for going to Belgaum. The readiness with which the prosecutrix has accepted the articles brought by the accused for her and the alacrity with which she changed her uniform and wore the churidhar would also go a long way in suggesting

that she had willingly accompanied accused no. 1 Uday in the vehicle, pursuant to a pre-set arrangement between them. In such circumstances where no positive role is attributable to accused nos. 2 and 3, particularly when P.W.19 Jennamicka was not shown to be unwilling to go, the conviction of accused nos. 2 and 3 with the aid of Section 109 of the Indian Penal Code is not justified at all. Turning to the case of accused no. 4. Accused no. 4 is stated to be the driver of the vehicle, whose services were engaged on payment of hire charges. He was, accordingly, paid Rs. 1,000/- on reaching Belgaum. Accused no. 4 cannot be said to have intentionally aided the commission of offence by accused no. 1. All the accused cannot be attributed with the knowledge that prosecutrix P.W.19 Jennamicka was a minor and, particularly so, according to me, when the evidence does suggest that she had willingly accompanied accused no. 1 Uday in the vehicle. The conviction of accused no. 4 for the aforesaid reason also cannot be sustained. The learned counsel for the accused 2, 3 and 4 has urged before me that the identification parade is replete with infirmities and cannot be relied upon. Even if the identification parade is discarded, the evidence of the prosecutrix in respect of the identification of the accused in Court can be believed. She was in the company of the accused/appellants in the jeep till she reached Belgaum. The incident had

occurred in the afternoon and it is not alleged that any of the accused had covered their faces. In such circumstances, despite the infirmities in the identification parade, the presence of the accused 2, 3 and 4 in the jeep can safely be accepted. However, according to me, there is no evidence to justify their conviction for the alleged offence with the aid of Section 109 of the Indian Penal Code.

23. Mr. De Sa, the learned counsel appearing on behalf of the accused no. 1 Uday, has placed the medical papers relating to accused no. 1 Uday on record and they are marked Exhibit 'X' for the purpose of identification. It appears from the papers that accused no. 1 Uday was admitted in the Department of Cardio Thoracic and Vascular Surgery of KLES Hospital and Medical Research Centre, Belgaum, on 9th August 2001. He was operated on 18th August 2001 and was discharged on 24th August 2001. He had suffered an attack three days prior to his admission. The post operative result was Mitral valve prosthesis in situ. On the fourth page of Exhibit 'X' are the findings and the bypass done to Aortic and Venous. The accused no. 1 Uday had undergone a bypass surgery while he was in custody. The accused no. 1 Uday is stated to be in custody since 13th March 1998 till today. He has undergone five years and five and half months of the imprisonment of seven

years, as awarded by the trial Court. Evidence on record clearly suggests that the prosecutrix had willingly accompanied him and had consented for sexual intercourse. However, since the prosecutrix was below the age of 16 years, the conviction of the accused no. 1 Uday is sustained. According to me, the ends of justice would be met by releasing the accused no. 1 Uday on the terms of imprisonment of five years and five and half months, which he has undergone. Accused 2, 3 and 4, as indicated above, are entitled to be acquitted.

24. In the result Criminal Appeal No. 59 of 2001 is partly allowed. The conviction of appellant no. 1/original accused no. 1 for offences punishable under Sections 363, 365 and 376 of the Indian Penal Code is maintained. The sentence of rigorous imprisonment for 2 and 7 years respectively is modified and the appellant no. 1/original accused no. 1 is sentenced for the aforesaid offences for the period of imprisonment which he has already undergone. The sentence of fine, however, is maintained. The appellant no. 1/original accused no. 1 be released forthwith, if not wanted in any other case.

25. The appeal of appellant no. 2/original accused no. 2 and appellant no. 3/original accused no. 3 is allowed and the sentence passed against them is,

hereby, quashed and set aside and they are acquitted of the offences with which they were charged and their bail bonds stand cancelled. Fine, if paid, be refunded to appellant nos. 2 and 3.

26. Criminal Appeal No. 64 of 2001 is allowed. The conviction and sentence of the appellant/original accused no. 4 is, hereby, quashed and set aside and the appellant/original accused no. 4 is acquitted for the offence with which he was charged. His bail bond stands cancelled. Fine, if paid be refunded to the appellant/original accused no. 4.

(P.V. HARDAS)
JUDGE.

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