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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.218 OF 2025
WITH
INTERIM APPLICATION NO.695 OF 2025
WITH
INTERIM APPLICATION NO.697 OF 2025
IN
CRIMINAL APPEAL NO.218 OF 2025

Shantilal Dashrath Gaikwad
Age 50 years, Occupation Labour
Resident Near Thane Railway station,
Permanent Address :
Vishrantwadi Dhanoli road,
Patri Chawl, Alandi Road,
Survey No.12, Bhimnagar
Slum Road, Pune

... Appellant

V/s.

State of Maharashtra
Through Public Prosecutor
2nd Floor, PWD Building,
High Court, Fort,
Mumbai 400 032

... Respondent

Mr. Amit Gharte, Advocate appointed by Legal Aid for the Appellant.
Mr. Vinod Chate, APP for the Respondent-State.

**CORAM : A. S. GADKARI AND
SHYAM C. CHANDAK, JJ.**

**RESERVED ON : 26th FEBRUARY 2026
PRONOUNCED ON : 25th March 2026**

JUDGMENT: [PER- SHYAM C. CHANDAK, J.]

1) Challenge in this Appeal is to a Judgment and Order dated 9th July 2024 passed by the learned Special Judge (POCSO), at Thane in Special (P) Case No.231 of 2016, thereby, the Appellant/Original Accused

No.3 is convicted under Sections 363, 302 and 201 of the Indian Penal Code (for short 'IPC') and sentenced as under :-

Under Section 363 of IPC, Appellant was sentenced to suffer R.I. for 5 years and to pay fine of Rs.5,000/- and i/d to undergo simple imprisonment for one month. Under Section 302 and 201 of the IPC, he was sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/- and i/d to undergo simple imprisonment for one month. However, the Appellant was acquitted of the remaining charges framed against him.

2) Heard Mr. Gharte, learned Advocate for the Appellant appointed by Legal Aid and learned APP Mr. Chate for the Respondent-State. Perused entire record.

3) The facts of the case in hand are intriguing and therefore stating it in detail is necessary.

4) The informant "P" (PW.1) was wife of "NP" (PW.2). The victim girl 'M' aged about 1 year 10 months was their biological daughter. Their family used to reside at GL Colony, Manpada, Thane. About one year prior to the incident A-1 Shankar Jagdev Singh used to do waterproofing work in the society of PW.1. On 20.08.2013, at about 6:00 p.m., the victim was playing in front of her house where birthday programme of neighbouring child – s/o Shravankumar was organised. At about 7:00 p.m., the victim went missing. A search was made for the victim; however, she could not be

found. Upon enquiry with the neighbour Prakash Mishra, he revealed that A-1 was playing with the victim at the birthday venue. Search was made in the house of A-1 but the victim and A-1 both were not found there. Therefore, PW.1 filed the complaint (Exh.21) which came to be registered with Kasarwadavli police station under Section 363 of IPC against the A-1.

4.1) On 21.08.2013 and 22.08.2013, API Lokare (PW.7) conducted the investigation and recorded the statement of witnesses. It revealed that when the victim went missing, A-2 Jahid-Ur-Rehman Shaikh was present with A-1. On 23.08.2013, A-1 was arrested. During further investigation, it transpired that A-1 had kidnapped the victim from the birthday venue and handed over to A-2 who took her to Thane Railway Station and abandoned at Platform No.10, there.

4.2) The CCTV footage of the Platform No.10 provided by the RPF Thane Railway Station discovered that after the victim was abandoned by A-2 at Platform No.10, an unknown person (Appellant) came there and took her in his custody. At that time, Rakesh Dhudaku Pawar, (PW.3) then Police Naik, was present there. Therefore, PW.3 was shown the CCTV footage and his statement was recorded. PW.3 divulged that on 20.08.2013, at 11:25 p.m., he and his associate police constable/Shirsat had arrived at the Platform No.10 and stayed there as their next patrolling duty was on Thane-CSMT train leaving at 5:31 hours. After some time, PW.3 heard

crying of a child. He went there and found that one small girl aged 1 ½ to 2 years was crying outside the entrance gate towards *Kopari* side. He, therefore, enquired with the people who had slept there. They said that she did not belong to them. At that juncture, said unknown person having red colour shirt on his body came there and claimed that said girl belongs to him. Further, that unknown person talked to the persons present there as, “*Dekhona Baba yah Kya Tumhari Bachi Hai Kyaa, yah Mery Bachchi Hai*”. That unknown person along with said girl then went to the RPF booth near entrance gate No.1 and requested the RPF police to allow him to keep that girl there as he wanted to bring meal. At that time, PW.3 went to that booth; brought that unknown person alongwith that girl at the place where she was found and again enquired with the people present there. But, the persons present there also told him that the girl did not belong to them. At this juncture, that unknown person said to PW.3 that, “*Dekho Saab Kisika Ladki Nahin, Mera hi Ladki Hain Na*”. Therefore, PW.3 got convinced that the girl belongs to that unknown person and he told him to go away. The unknown person then kept that girl on a *Katta* at Platform No.10 and said to PW.3 as “*Baba main Ladki Ke Liye paanch Minit Main Khanaa Lekar Aata Hoon*”. On this, PW3 instructed him as “*Tujhi Mulgi Tujhya Sobat Gheun Ja*” (Take your girl with you). Thus, that unknown person was involved in this offence and since then he was a wanted accused.

4.3) On 29.08.2013, police arrested A-2. Investigation with A-2 revealed that he alongwith the wanted accused had kidnapped the victim to exploit her for the purpose of begging. One Satish Shetty was a suspected accused as he resembled that unknown person in the CCTV footage who had kidnapped the victim from platform No.10, Thane. On 17.09.2013 it was learnt that, the victim was taken to Hyderabad but her search there did not yield any result. On 15.10.2013, the police investigated about Satish Shetty with the people working at Thane railway station, but, he was not found. In the backdrop, on 28.10.2013 charge-sheet was filed against A-1, A-2 and two wanted accused under Section 363A and 34 I.P.C.

5) On 09.01.2014, the wanted accused Satish Shetty came to be arrested. However, further investigation later confirmed that Satish Shetty had no involvement in the crime. This led to filing of a report under Section 169 of Cr.P.C. seeking his release.

6) Since the victim was not found, her parents – PW.1 and PW.2 filed Criminal Writ Petition No.2510 of 2014 seeking writ of habeas corpus. *Vide* this Order dated 18.07.2014, since more than 6 months whereabouts of the victim were not known, hence observing that proper investigation was not done in the case, this Court directed Mr. Ravindra Singhal Additional Commissioner of Police to look into the matter and submit a report on 30.07.2014 regarding the steps taken during investigation.

7) As the prosecution case goes further, the Appellant was native of Vishrantwadi, Pune. He alongwith his friends had committed some crimes of theft. For past 2 ½ years he was staying on the footpath at Thane Railway Station. He used to collect scrap, plastic bottles from the platform area and sell it to earn his livelihood. During investigation, on 26.07.2014 Smt. Bagul, Asst. P.I. and police from the squad took the Appellant in custody and shown him some photographs and the recovered CCTV footage. The Appellant stated that he was seen in said photographs. Further the Appellant disclosed that prior to about one year, at about 11:30 p.m., while he was collecting scrap on Eastern side of Thane Railway Station, there he had noticed one abandoned girl aged 1 ½ years. He, therefore, enquired with the people present nearby and tried to find out whether someone had lost his daughter. Meanwhile, he went to the police help desk situated there and informed the matter to the police. Said police suggested him to go to the police chowky. He then enquired with some passengers present at Platform No.10. However, he did not get the parents/guardian of that girl. At about 12:00 midnight, when he was going towards Thane (West) police chowky, A-4 came from behind and told him not to take that girl to police chowky and that, he will take care of her. Therefore, he handed over that girl to A-4 and asked him his address. A-4 disclosed that he was residing in Panvel Railway Station slum area. The Appellant also

informed that one woman aged about 22 years, with 4 minor children aged between 3 months to 10 years were associated with A-4. Then, A-4 made that girl sleep along with his own children. Appellant further informed that, on the next day, at about 5:30 a.m., he had returned to the same place. By that time, A-4 and his family alongwith that abandoned girl had left for Panvel. Therefore, the police requested him to help searching that girl. He then went to Panvel along with Smt. Bagul, API and searched for A-4. At about 12.30 p.m., they saw one girl from amongst the children who were associated with A-4. Appellant identified that girl. Therefore, search was made for A-4 around the hut of that girl. At about 12.30 p.m., the police were able to find A-4. The Appellant was able to identify A-4. Thereafter, A-4, his wife and their children were brought to the police station along with the abandoned girl.

7.1) On 29.07.2014, Mr. Kadam, Senior PI, Anti Extortion Squad – Crime Branch, Thane and PW.7/Mr. Lokare, API enquired with the Appellant wherein, he had narrated as stated above. Therefore, Appellant and A-4 were arrested on 29.07.2014 and remanded to police custody on 30.07.2014.

7.2) *Vide* Order dated 30.07.2014 passed in the Writ Petition, this Court was informed that pursuant to the Order dated 18.07.2014, in all 11 police teams were formed by the Additional Commissioner of Police and

succeeded in tracing out the victim. Therefore, this Court directed that the identification process of the abandoned girl shall be completed within three days. However, the police shall not wait for DNA test and if the mother and father identifies their daughter, then the custody of that abandoned girl should immediately be handed over to the said Petitioner and his wife (PW.1 & PW.2). The Court also appreciated the prompt steps taken by the police to search the victim.

7.3) On 01.08.2014, PW.1 and PW.2 were called at the police station when they identified the abandoned girl as their missing child 'M' – the victim. Therefore, as per direction of this Court, the abandoned girl was given in the custody of PW.1 and PW.2. Further investigation was marked to PW.8 – Mr. K. V. Karpe, Police Inspector (Admn.). The test of the DNA samples of PW.1, PW.2, the abandoned girl, A-4 and A-4's wife revealed that the abandoned girl was born on 08.03.2010 at Dr. Balabai Nanavati hospital and she was the biological daughter of A-4 and his wife – Ms.Hansa. Hence, *vide* this Court Order dated 26.08.2014 passed in the Writ Petition, the abandoned girl was handed over to A-4 and his wife. The police was directed to carry out further investigation.

7.4) Despite this background, on 21st & 22nd August 2014 the Appellant gave a confessional statement (Exh.190) under Section 164 of Cr.PC. before PW.11 – Mrs. Y. R. Mukkanwar, then Judicial Magistrate First

Class, Thane. This confession was similar to what the Appellant had disclosed on 29.07.2014 before Mr. Kadam., Senior PI, AES – Crime Branch, Thane and Mr. Lokare, API (PW.7). But it is noticeable that the confession (Exh.190) does not bear signature of Appellant.

8) From here, the prosecution case took a dramatic twist. This unexpected shift posed a serious challenge to the integrity of the entire case. On 02.09.2014, Dy. Commissioner of Police Mr. Manere constituted 5 teams of detection squad. On 05.09.2014, the Appellant was shown to be in police custody in C.R.No. 280 of 2013 registered with Kasarwadavli Police Station under Sections 454, 457 and 380 of IPC. On 05.09.2014 itself, during interrogation in that C.R.No. 280 of 2013 by Mr. Shaikh, Senior Police Inspector, AHTC, Crime Branch, Thane, in the presence of panchas, the Appellant voluntarily disclosed that, “when he used to reside at Pune, he and his friends had together committed many crimes of theft. He was convicted in those crimes and was released after serving the sentence. Thereafter, his parents had driven him out of the house. Since many years he used to reside at Platform No.10, Thane Railway Station. He used to collect scrap material and empty water bottles lying on railway tracks and sell it to earn his livelihood. Prior to about one year, at about 11:30 p.m., when he was roaming in the Eastern side of Thane Railway Station, he had found the aforesaid abandoned girl (“the victim”) outside Platform No.10.

He then enquired with the people there and tried to search for her relatives, however, her relative was not found. He, therefore, went to the police help centre there and informed the matter to the police. Said police suggested him to take the victim to the police chowky. While he was going there, the A-4 came from behind and said him, “*Don’t take the girl to police chowky, I will look after her.*” He, therefore, handed over the victim to A-4. However, wife of A-4, who was present there, refused to look after the victim. Therefore, he alongwith the victim slept at the bus stop situated outside the Platform No.10. On the next day, he came to “*Jakoo Mata Math*” (“*Math*”). The victim was crying, therefore, one Yasmin (PW.9), who was present in the *Math*, fed her milk and rice. The Appellant stated that then he and his friend Jayraj Pillai (PW.4) smoked *Ganja*. He then took the victim to one nearby tree and twice he raped on her. The victim was crying. Meanwhile, Jayraj Pillai came there and they smoked *Ganja* together. Thereafter, Jayraj Pillai went away. The victim was still crying. Therefore, the Appellant, assaulted her over head by means of broken hockey stick and killed her. He then again committed rape on her dead body. Further, he concealed her dead body in a plastic bag and threw that bag alongwith the hockey stick into *Indrayani* river. Further, the Appellant voluntarily told that he was ready to show place where he had killed the victim after raping her and where he had thrown her dead body in the river.” Mr. Shaikh, Sr. P.I.

recorded this disclosure statement (Exh.71). Then, the panchas, police officers, police staff and the Appellant went to said *Math* in a police vehicle as lead by the Appellant. There, the Appellant had shown the tree under which he had ravished and murdered the victim and also the river wherein he had thrown the dead body. The police inspected there but the dead body and the hockey stick were not found. Accordingly, the police recorded the Memorandum Panchanama (Exh.72).

8.1) Similar disclosure was made by the Appellant on 06.09.2014 before PW.8. – K. E. Karpe, Investigation Officer, but adding that, earlier, on 29.07.2014 due to fear of police he had falsely stated before the two police officers that he had given the victim in the custody of A-4. On the same day, PW.8 recorded the statement of Jagdish Dattu More (PW.5), Kisan Pardeshi, Yasmin Latif Sayyed (PW.9) and on 11.09.2014 of Jayraj Pillai (PW.4). PW.5 had also seen the Appellant in the *Math*.

8.2) On 21st and 25th September 2014, the Appellant gave another confessional statement (Exh.187) before Pranita Bharsakade-Wagh (PW.10), then Judicial Magistrate First Class, Thane. Therein, the Appellant had stated that in his earlier confession he had stated that he had given the victim in the custody of A-4. However, he had not given the victim in the custody of A-4. He had taken her to the said *Math*. There, he had smoked *Ganja* and consumed a Nitrogen pill purchasing it from Kisan Paddrdeshi. He

being intoxicated took the victim to the said tree. She was crying. Therefore, he assaulted her over head with a piece of a stump and killed her under the influence of the narcotics.

8.3) Meanwhile police exchanged written communications to find out whether at the relevant time an Accidental Death/Crime was registered in Pune region in respect of the victim. The police also obtained details of criminal cases previously registered against the Appellant. On 04.10.2014, the police filed a report under Section 169 of the Cr.P.C. and sought the release of A-4. Finally, police charge-sheeted the Appellant on 31.10.2014.

9) On 01.12.2015, the learned trial Court framed the charge below Exh.13. A-1 and A-2 were charged under Section 363A and 34 of IPC. The Appellant was charged under Sections 363, 376 (2) (i) 302 and 201 of IPC. Additionally, under Sections 4, 5 (1)(m), 6, 9 (1)(m) and 10 of the Protection of Children from Sexual Offences Act, 2012. The accused pleaded not guilty to the charge and claimed to be tried. Their defence was of the total denial and false implication.

9.1) As recorded in impugned Judgment, the A-2 absconded during trial and he was not traced out. Therefore, the trial was proceeded against A-1 and A-3, separating against the A-2 (*vide* Order below Exh.81).

10) To substantiate its case, the prosecution examined 11 witnesses including P.W.5 – Jagdish Dattu More who had seen the Appellant in the

said *Math* and PW.6 – Imtiaz Ahmad Memon, Panch witness to the Disclosure Statement & Memorandum Panchanama.

10.1) All the incriminating circumstances in the evidence were denied by A-1 and A-3 in their statement under Section 313 of Cr.P.C., maintaining the same defence. Both these accused have not examined themselves on oath nor any witness in their defence.

10.2) This being the case of *corpus delicti*, the proof of the charge of murder was depending on ‘last seen together’ circumstance, preceded by the fact of alleged kidnapping from lawful guardianship and supported with the confessional statements made by Appellant. On appreciating the oral and documentary evidence in the light of rival arguments and the settled principle of law, the learned Judge of the trial Court found the evidence sufficient, cogent and reliable but only against the Appellant. The confessional statements of the Appellant were accepted as voluntary, true and worthy of inspiring confidence. As a result, the Appellant was held guilty and convicted for kidnapping and murder of the victim. In the end, he was sentenced as noted in paragraph 1 above.

10.3) The A-1 was acquitted on the charge of Section 363A and 34 of IPC. The A-2 though was absconding, he was also acquitted of the said charge for want of the evidence.

11) In this context, deposition of PW.1 is that, on 20.08.2013, at

about 7.00 p.m., her husband-PW.2 returned home from market and he enquired about the victim. She told him that she was playing in the courtyard of their house. Then, she and PW.2 searched for the victim but she was not found. When they enquired with their neighbour Prakash Mishra, he told her that the victim was playing with A-1, Shankar and he had taken her with him. PW.1 deposed that then they searched for the victim at the room of A-1 but A-1 and the victim were not found. She then filed the complaint (Exh.21). She has deposed that, she had given the photo (Exh.22) of the victim to the police. Police had arrested A-1 and he had disclosed that he had handed over the victim to some third person. PW.1 deposed that the police had shown her the CCTV footage on 01.08.2014 and it revealed that, the victim was given by one to another. There were 3-4 persons at Thane Railway station. PW.1 deposed that on the basis of the description of the victim given by her, custody of one girl was given to her as per the directions of this Court. However, the DNA test did not match and hence, custody of that girl was handed over to her biological mother, *i.e.*, wife of A-4. PW.1 identified the photos of the CCTV footage (Exh.23 to 25). She had also identified A-1, Shankar before the Court.

11.1) In the cross-examination, PW.1 has admitted that the house of Shravankumar was visible from her house. Police had told her that her daughter was at Hyderabad. When she had gone to Hyderabad, some

children were playing outside the house where they had visited for the victim. Said children had told that her daughter was inside that house. At that time the police did not help her. She had seen A-1 at the police station for the first time. The person seen in the CCTV footage was not A-1. She has denied that she had deposed at the instance of police that A-1 was present before the Court. She has denied that she has deposed false against A-1.

12) PW.2, father of the victim has testified that at the time of the incident the victim was playing near his room. A-1 had taken her alongwith him and abandoned her at Thane Railway station. The said fact was recorded in the CCTV footage installed there. The police had shown him the CCTV footage. He deposed that another person had picked up the victim. The said person had disclosed that he had sold the victim for Rs.1,000/-. Hence, PW.1 filed the complaint. He deposed that police had apprehended eight persons. One of the accused disclosed that he had sold the victim at Hyderabad and was ready to show the victim. PW.1 went to Hyderabad alongwith the police. Pursuant to the Order of this Court passed in his Writ Petition, one girl was handed over to him.

12.1) In the cross-examination of PW.2 it has come that the persons who were apprehended by the police were not produced before the Court. Only A-1 was involved in this case and the other two accused were not involved. He has denied in the CCTV footage, the face of the person was not

clear who had kidnapped the victim. After verifying the identification mark of his missing daughter, he had accepted the custody of the said girl child. He has denied that the person seen in the CCTV footage was present before the Court. He has denied that, he has deposed false on the say of police that the Appellant was the same person who was seen in the CCTV footage.

13) The pivotal evidence in the given case was the testimony of Rakesh Pawar-PW.3, the then Police Naik attached to Dadar Railway police station and who was relied as the first person who had seen the victim and the Appellant together. PW.3 has deposed that on 20.08.2013, at 11:35 p.m., he and his associate police P.C.No.3243/Shirsat came at Thane Railway Station by train as his next duty was to start at 5:30 hours of the next day. They kept their service rifles at the Platform No.10. He then went towards *Kopari* side and while he was returning, he heard crying of a child. People there told him that one child was crying. He went there. One girl child aged 16 to 18 months was crying there. She was inside the compound. He removed her from the compound and shouted "*Kiska ladaki hai, kiska ladaki hai*". One person wearing red shirt came there and told that said girl was his daughter; he had gone to take meal. PW.3 deposed that he had asked other people there as to whether they were parents of the said girl. They all replied in negative. Thereafter, that unknown person lifted the said girl and she stopped crying. Further, the unknown person

made that girl sit on RPF's table. PW.3 deposed that he had told him not to leave that girl alone. Thereafter, that unknown person went away alongwith that girl. PW.3 deposed that on 28.08.2013 he was called at Kasarwadavali Police Station and was shown the CCTV footage. He, said unknown person and the said girl were seen in the CCTV footage. Lastly, he has identified the Appellant as the same person seen in the said footage.

13.1) In the cross-examination, PW.3 has admitted that the police had not called him for identification parade of the Appellant. He has denied that he had not seen the Appellant on the railway station; that, there was no conversation between him and the Appellant; that, he was not present on the platform at the relevant time; that, he has deposed false at the instance of his higher authorities.

14) Jayaram Pillai-PW.4 has testified that the Appellant had become his friend when he was in jail. In the year 2013, he was standing at the shop of Kisan Pardeshi, near the said *Math*, at *Kamshet* Railway station. There, Kishan Pardeshi was dealing in *Ganja*. PW.4 deposed that he had seen the Appellant at 4:30 to 5:30 p.m. at the said *Math*. At that time, he had asked the Appellant as "what brought you here" (*Tu ithe kasa aala*). The Appellant replied that he had come there to get *Ganja*. PW.4 deposed that he, one girl aged about 5 to 6 years was with the Appellant. Then he, his friend and the Appellant consumed *Ganja* and the Appellant went near

the river. At 9.00 p.m. he went to home and the Appellant remained there along with the said girl. He deposed that Smt. Bagul, API had visited at his residence and showed him photograph of the victim and the Appellant. He had told her that he knew the Appellant as he was with him in the jail. On seeing the photo, he had identified the victim and the Appellant as the victim was with the Appellant when he had visited the *Math*. He deposed that the man and the girl seen in the photographs (Exhs.23, 24 & 25) were the victim and the Appellant. He has identified the photograph (Exh.57) of the subject tree shown by the Appellant.

14.1) In cross-examination, PW.4 has admitted that the photographs (Exhs. 23 to 25) of the Appellant and victim were not clear. He has denied that he had identified the photographs at the instance of police.

15) Jagdish Dattu More-PW.5 has deposed that in the year 2014, he was working as a driver with Primary Health Center and his duty timings were from 8.:00 a.m. till midnight. He was a member of MNS political party and Kishan Pardeshi was city President of the MNS. The office of Kishan Pardeshi was situated near the said *Math*. PW.5 deposed that he used to go to that *Math*. Yasmin Sayyed (PW.9) was working in the office and *Math*. PW.5 deposed that on the occasion of Raksha Bandhan of the year 2013, in the evening, he, Kishan Pardeshi, PW.4 and PW.9 were present in the *Math* for dinner. One unknown person along with a small girl aged about 1 to 1½

years came there. Said girl was crying. PW.5 deposed that he told PW.9 to provide rice and milk to that girl. Thereafter, the Appellant took that girl towards a big tree and returned alone. He had tried to call the Appellant but he neglected and went away. The Appellant was not in a condition to listen. PW.5 deposed that, after some days, the police had visited him and showed photographs of that person and the said girl. He deposed that the name of the said person was Shantaram Gaikwad. On enquiry, he had stated to the police that the Appellant had brought that girl to the *Math*. Police had brought the Appellant in the *Math* to know the spot of the incident. He has identified the photographs (Exhs.23, 24, 25 & 57) and the victim, Appellant and the tree seen in said photos. He deposed that same photos were shown to him by the police. He has identified the Appellant.

15.1) In the cross-examination, PW.5 deposed that being a social worker, he was in contact with police. He has denied that the said girl was not crying, she was happy and she ate with them; that, he had talked with the person who was alongwith the girl; that, said unknown person had visited the *Math* for *Darshan*; that, he cannot identify the visitors to the *Math*; that, he does not know the Appellant; that he had not seen the victim; and that, he has deposed false at the instance of the police.

16) Yasmeen Sayyed-PW.9 deposed that her brother-in-law Mr.Kisan Pardeshi had constructed the said *Math*. She used to cook for the

devotees and labour who used to visit the *Math*. Her duty timings were 7.00 a.m. to 7.00 p.m. She knew the Appellant. She has deposed that in the year 2013, on the following day of *Raksha Bandhan*, at about 4:00 p.m., the Appellant had visited the *Math* along with a girl child aged about 1 ½ and 2 years. The child was crying. She had provided milk and rice for the child and meal to the Appellant. The Appellant fed the child. At that time, she was standing near the child. Thereafter, the Appellant left the *Math* along with the child. But, she does not know the time when the Appellant had left. Kasarwadavali police had brought the Appellant at the *Math*. She had told the police that the Appellant used to visit the *Math*. The police had showed her the photograph (Exh.24) of the victim. The girl seen in that photograph was the victim. The Judicial Magistrate had recorded her statement (Exh.108). Only suggestions of denial have been put to PW.9 in her cross-examination.

17) Imtiaz Memon-PW.6 deposed that on 05.09.2014, the Appellant was in police custody. At that time the Appellant voluntarily stated that, he would show the place where the dead body of the victim was thrown in the *Indrayani* river. The police recorded that Disclosure Statement (Exh.71). Thereafter, he alongwith police, panchas and the Appellant went to Pune by police Van. The Appellant took them near one temple and stated that the dead body was kept there. The police recorded the Memorandum

Panchanama (Exh.72). It bears his signature. Its contents are true.

17.1) In the cross-examination PW.6 admitted that the Appellant was handcuffed when he was brought inside the police station. Daily, he used to come to the Court. However, he has denied that he used to come to the Court to give evidence; that, he was working as regular panch; that, he was acquainted with police and therefore, the police had called him to act as a panch; that, the Appellant had not made the voluntary statement and shown the said spot; and that, he has deposed false on the say of the police.

18) Vikas Lokare-PW.7, API, has testified that during investigation he had recorded the spot panchnama (Exh.88). On 23.08.2013, he had arrested the A-1. On 23.08.2013, a letter was issued to PI., RPF to provide the CCTV footage, which was received in a pen-drive on 24.08.2013. On 26.08.2013, further investigation was handed over to Mr. Thorat, Police Inspector. On 28.08.2013, Mr. Thorat had arrested the A-2. Since sufficient evidence was found against A1 and A2, therefore, he filed the charge-sheet. He deposed that on 29.07.2014, PI. (Crime) had found two suspected accused. He arrested A-3 and A-4 under arrest panchnama (Exh.94) and (Exh.95). Since the victim was not found, therefore, further investigation was continued through PI. Mr. Karpe/PW.8.

18.1) In the cross-examination, PW.7 admitted that CCTV footage were checked, to trace out as to where the victim had gone from Platform

No.10. He had given the CCTV footage to Mr. Thorat, PI. The said CCTV footage was filed along with the charge-sheet by Mr. Thorat. He denied that he had not given the CCTV footage to Mr. Thorat in which the victim was seen with the Appellant at Platform No.10. He has admitted that CCTV footage other than of Platform No.10 was not annexed with charge-sheet. He cannot show the said CCTV footage as it was not available with him. He has admitted that he had sent PW.1 to Hyderabad along with the police as they had got the information that victim was alive. He has denied that at Hyderabad, money was demanded from PW.1 but she could not pay the money, therefore, she had returned back with police. He has denied that to suit their purpose he and Mr. Thorat, PI had recorded the statement of witnesses. He has denied that as this matter was taken up by this Court, they falsely arrested the Appellant and charge-sheeted him.

19) Sr. PI K. V. Karpe (PW.8) has deposed that, during investigation he had checked all the CCTV footage of the relevant time of the Railway Station. From the CCTV footage, it was noticed that the victim was taken away by one person from Platform No.10. He had recorded the statement of the witnesses as noted above. He had obtained the statement of Kishan Pardeshi, Jagdish More (PW.5) and Yasmin Sayyed (PW.9) recorded under Section 164 of Cr.P.C. (Exh.106 to Exh.108). Further, he has deposed about the other steps taken for the investigation. The cross-examination of PW.8 is

full of the suggestions of denial. PW.8 has not caved into those suggestions.

20) Now coming to the confessions made by the Appellant before PW.11- Yogita Mukkanwar and PW.10- Pranita Bharsakade-Wagh, who were then serving as the Civil Judge, Junior Division and J.M.F.C., Thane. In the beginning, both PW.11 and PW.10 had testified about the legal procedure that they were required to follow and which they had actually followed for recording the Part-I and Part – II of the confessions. There is no dispute about that from the Appellant's end.

20.1) About the significant part of the 1st confession, PW.11 has deposed that the appellant has stated that, prior to one year, a day before Raksha Bandhan, he was collecting scrap. At about 11:00 to 11:30 p.m., he had noticed a small girl crying outside Thane Railway Station. He took the said girl to the Railway Police Station, however, the police drove him away. Then he alongwith that girl wandered for some time here and there. Then he again went to the Railway Police Station. However, the police assaulted him with a log. Thereafter, while he was taking that girl to the Railway Police Station, one person by name Sheru Salat (A-4) approached him from behind and stated that he would take care of the child. He then handed over the said child to Sheru Salat. He enquired about his residence, to which said person replied that he was residing in Panvel. Thereafter, Sheru Salat and the girl child left at about 5:30 a.m. by a Panvel local train. After

about 15 days, when he went to Panvel, he had seen Sheru Salat while playing with the said girl child. Thereafter, on 29.07.2014 police arrested him and made enquiry. He was shown the CCTV footage, wherein he was seen handing over the said girl to Sheru Salat for taking her care.

20.2) As deposed by PW.10, in the 2nd confession (Exh.187) recorded by her, the Appellant had stated that, earlier, he had given the confession (Exh.190) before the Magistrate (PW.11) that he had handed over the small child to Sheru Salat. But, he had not given her to him. He alongwith her went to Pune, in a *Math at Kamshet*. There, he took *Ganja* and Nitrogen tablet from Kisan Pardeshi and consumed it. In that intoxicated state, he carried that girl child through a tunnel of a tree. Being intoxicated, he then assaulted her over head with a piece of stump. As a result, she died instantly. Therefore, he concealed her dead body in a scrap bag and threw it into the river.

20.3) In the cross-examination, PW.11 has admitted that she had not obtained the signature of the Appellant on the confession (Exh.190). Both PW.10 and PW.11 have denied that the Appellant had given the confessions due to pressure of police.

21) **Submissions by Mr. Gharte, the learned Appointed Advocate :-**

i) Admittedly, the Appellant was not connected with A-1 and A-2. Nor were said two accused proved to be kidnappers.

- ii) Appellant was searched on the basis of some CCTV footage allegedly provided by the RPF. But, that CCTV footage was not produced in the evidence.
- iii) It was not proved that the photographs (Exhs.23, 24 & 25) were of the said CCTV footage. Those photographs were not proved in accordance with law nor admissible in the absence of Certificate under Section 65-B of the Evidence Act.
- iv) The face of the kidnappers and the alleged victim seen in the said photographs were not clear. Therefore, initially, Satish Shetty was suspected to be the kidnapper, as he resembled the alleged kidnapper in the said photographs.
- v) It was impossible to recognise PW.3 on the basis of the photos. No record was produced to prove that, indeed, PW.3 was present on the duty at Platform number 10, Thane, when the Appellant had allegedly kidnapped the victim from there.
- vi) This was a case of mistaken identity of the kidnapper. Therefore, appellant was wrongly arrested and wrong girl, i.e., daughter of A-4 was shown as the victim. However, when this mistake or illegality come to light, the Appellant was falsely implicated in this case by the police to save their own skin.
- vii) Only this inference was permissible because after A-4's release under

Section 169 of Cr.P.C., he could have been examined by the prosecution to prove the fact that the Appellant had falsely stated that he had given the abandoned girl in the custody of A-4's and it was only then A-4's daughter was taken into custody by the police at the instance of Appellant. That apart, even no police has been examined who had gone to the residence of the A-4 and witnessed the said fact. No contemporaneous police record was proved showing that the police had visited the residence of A-4 to recover the victim at lead by the Appellant.

viii) In the facts, the confessions were not true and voluntary. That apart, the other evidence was wholly unreliable. In the absence of corroborative evidence, the confessions cannot be a basis for the conviction and sentence.

ix) In *Sharad Birdhichand Sarda vs. State of Maharashtra*, reported in *AIR 1984 SC 1622*, the Hon'ble Supreme Court has introduced the Panchsheel Test for the relevance and evaluation of circumstantial evidence in cases where direct evidence is not available. Mr. Gharte submitted that, in the present case, the prosecution has not passed the said test to accept its case based on circumstantial evidence.

21.1) To support these submissions, Mr. Gharte relied upon following reported decisions :-

(i) *Ramreddy Rajesh Khanna Reddy vs. State of A.P* , reported in (2006)

10 SCC 172. Therein, it is enunciated that to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well-settled that suspicion, however, grave may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence.

(ii) *Navaneetha Krishnan vs. State*, reported in (2018) 16 SCC 161, which enunciated that, it is a settled legal position that the law presumes that it is the person, who was last seen with the deceased, would have killed the deceased and the burden to rebut the same lies on the accused. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. However, this evidence alone can't discharge the burden of establishing the guilt of accused beyond reasonable doubt and requires corroboration.

(iii) *Sarwan Singh Ratan Singh vs. State of Punjab* reported in AIR 1957 SC 637. Therein it is held that "usually Courts require some corroboration to the confessional statement before convicting an accused person on such a

statement. What amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of the circumstances of each case”.

(iv) *Rama Nand and Ors. vs. State of Himachal Pradesh* reported in (1981) 1 SCC 511. In this case the corpus delicti, i.e., the dead-body of the victim was not found. However, it is held that even on that assumption, the question remains whether the other circumstances established on record were sufficient to lead to the conclusion that within all human probability, the deceased had been murdered by the appellant/accused? Because, one of the essential ingredients of the offence of culpable homicide required to be proved by the prosecution is that the accused “caused the death” of the person alleged to have been killed.

22) **Submissions by the learned APP Mr. Chate :-**

- i) The Appellant has not disputed that the victim was kidnapped. PW.3 has deposed that the Appellant had taken the victim away from Platform No.10. PW.3 has identified the Appellant. Said evidence is not rebutted.
- ii) PW.4, PW.5 and PW.9 have proved that after kidnapping the victim from Thane, the Appellant had taken her to the said *Math*.
- iii) The photographs (Exhs.23, 24 and 25) have been proved by the prosecution with the help of PW.1, the mother of the victim. Seeing those photos the PW.1, PW.4, PW.5 and PW.9 had identified the Appellant and the

victim during the investigation as well as in the trial Court. Thus, said evidence has proved the identity of both of them.

iv) Lastly, the Appellant had taken the victim down the *Math* premises, near the *Indrayani* river. The Appellant has not explained the whereabouts of the victim after he had taken her there.

v) The confessions of the Appellant were voluntary and true. The same were duly proved by the Judicial Officers PW.10 and PW.11 who had recorded the same. Both these witnesses had no reason to depose false that the Appellant had made those confessions before them. The Appellant could not successfully retract the confessions. Therefore, the same are safe to rely upon. The confessions have proved that the Appellant has committed the murder of the victim in the state of intoxication. Therefore, the conviction and sentence imposed on the Appellant is lawful and need not be upset.

22.1) To buttress these submissions, Mr. Chate, has cited following decisions in :-

(i) *Ram Gulam Chaudhary and Ors. vs. State of Bihar*, reported in (2001) 8 SCC 311. Therein it is held that, even if corpus delicti is not found, the accused can be convicted if there is direct or circumstantial evidence conclusively showing that the victim had died and that accused had committed his/her murder.

(ii) *Manoharan vs. State, Coimbatore* reported in (2019) 7 SCC 716,

therein the confession made by the Appellant was retracted by him but belatedly and in part only. However, finding that the confession was duly recorded and properly proved, the Hon'ble Supreme Court declined to disbelieve same.

23) We have considered these submissions in the light of the evidence on record and the cited reported cases. In our opinion, the case proposed by the learned Appointed Advocate Mr. Gharte is well-founded.

24) In this context, at the first place, it must be noted that the prosecution could not prove that A-1 and A-2 had kidnapped the victim, as alleged. As noted in the Order dated 30.07.2014 passed in the Writ Petition, the CCTV footage which was retrieved from the Railway Station indicated that the two accused had left the victim girl at the Railway Station and then she went missing. However, this very CCTV footage was not produced to prove that either A-1 or A-2 or they both were seen in that footage alongwith the victim. Considering this fact, it was incumbent for the prosecution to prove as to by whom, when and how the victim was brought at Thane Railway Station from the birthday venue and abandoned at Platform No.10. Because the Railway Station was far from the birthday venue and in view of the age of the victim, it was unlikely that she could have walked up to that railway station on her own.

Undoubtedly, the offence was serious in nature. After arrest of

A-1 and A-2, the police could have searched for more CCTV footage right from the place of kidnapping up to Platform No.10. Despite the investigation having been conducted by senior and experienced police officers from the outset, none of the said officers deemed it necessary to collect such footage or to take any steps in that direction. Therefore, it was not proved that after the victim was kidnapped from the birthday venue, she was abandoned outside the Platform No.10 and nowhere-else.

25) To salvage that situation, the prosecution has heavily relied upon the testimony of PW.3 who has tried to impress upon the Court that on 20.08.2013, at 11:35 p.m., he had come at Thane Railway Station as his next duty was about to start at 5:31 hours of the next day. However, no record is produced to prove that on 20th or 21st August 2013, PW.3 was deputed for the patrolling duty on a train leaving Thane at 05:31 hours.

26) Record indicates that two letters were given to the RPF Thane to provide the CCTV footage. One was dated 22.08.2013 and another dated 23.08.2013. Only the subsequent letter (Exh.91) has been referred to and proved by PW.7. The alleged CCTV footage was provided on 24.08.2013. Out of the 3 photographs, only one shows the image of a police. But said image was highly unclear. It was difficult to identify that police only on the basis of that image and without any further evidence in that regard. However, there is no evidence as to how and when PW.3 was identified and

ascertained as the same police who, at the relevant time, was present at Platform No.10 and with whom the Appellant had allegedly interacted when he had taken the victim in his custody and went away. PW.3 was specifically suggested that he was not present on the platform at the relevant time. Therefore, bare words of PW.3 are not sufficient to accept that he was present at Platform No.10 when Appellant had allegedly kidnapped the victim there.

27) According to PW.8, the photographs (Exhs.23, 24 & 25) were the screenshots of the said CCTV footage. Said photographs were proved by showing it to PW.1. But, neither the relevant CCTV footage was produced nor the person who had copied and provided that CCTV footage to the police was examined by the prosecution. Even the necessary Certificate to be issued under Section 65-B of the Indian Evidence Act was not produced to support the prosecution's claim that said photographs were produced by the cameras and the computers installed at Platform No.10 by the RPF. Said photos were inadmissible without such a Certificate and could not have been proved through PW.1.

28) In this context it is apt to refer the decision in case of *Sundar @ Sundarrajan vs. State by Inspector of police*, reported in *2023 SCC OnLine SC 310*. Therein, the Apex Court considered the admissibility of CDR; and how evidence of CDR is to be considered, *i.e.*, the law as it then

stood, at the time of trial. The relevant paragraphs are paragraphs 31 and 32 of the said Judgment, which read thus:-

*“31. One of the earliest decisions on the provision was of a two-Judge bench of this Court in **State (NCT of Delhi) vs. Navjot Sandhu-(2005) 11 SCC 600**, where the Court held that Section 65-B was only one of the provisions through which secondary evidence by way of electronic record could be admitted and that there was no bar on admitting evidence through other provisions. The Court noted that:*

*“150. According to Section 63, “secondary evidence” means and includes, among other things, ‘copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies’. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. **Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing***

secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.”

(emphasis supplied)

32. *The principle which was enunciated in **Navjot Sandhu** was overruled by a three judge bench of this Court in **Anvar P.V.** where it was held that:*

*22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the Court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. **Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section***

65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.” (emphasis supplied)

28.1) The Apex Court in *Sonu @ amar vs. State of Haryana*, reported in (2017) 8 SCC 570, was called upon to consider whether the judgment in *Anvar PV. vs. PK. Basheer*, reported in (2014) 10 SCC 473, should be retrospectively applied or whether it should find a prospective application. Accordingly, in para 40, the Apex Court held as under:

“40. This Court did not apply the principle of prospective overruling in Anvar case [Anvar PV. v. PK. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108]. The dilemma is whether we should. This Court in K. Madhava Reddy v. State of A.P. [K. Madhava Reddy v. State of A.P., (2014) 6 SCC 537 : (2014) 2 SCC (L&S) 305] held that an earlier judgment would be prospective taking note of the ramifications of its retrospective operation. If the judgment in Anvar’s case is applied retrospectively, it would result in unscrambling past transactions and adversely affecting the administration of justice. As Anvar case was decided by a three-Judge Bench, propriety demands that we refrain from declaring that the judgment would be prospective in operation. We leave it open to be decided in an appropriate case by a three-Judge Bench. In any event, this question is not germane for adjudication

of the present dispute in view of the adjudication of the other issues against the accused.”

(emphasis supplied)

28.2) In case of *Nitin Gorakhnath Sartape & Ors. vs. The State of Maharashtra*, reported in *2024 SCC OnLine Bom 1047*, in para 303, this Court noted that, since the question was left open in *Sonu @ amar* (supra), the aforementioned legal labyrinth of Section 65-B certificate was finally navigated in *Sundar @ Sundarrajan* (supra), where the Apex Court held in para 44 as under:

“44. Therefore, we are inclined to agree with the ratio in Sonu by not allowing the objection which is raised at a belated stage that the CDRs are inadmissible in the absence of a Section 65B certificate, especially in cases, where the trial has been completed before 18 September 2014, i.e., before the pronouncement of the decision in Anvar PV.”

28.3) In para 304, this Court observed that, “... it was canvassed in *Sonu @ amar* (supra), that there are two categories of objections which can be raised regarding the admissibility of documents, the first category is, where the document is *per se* inadmissible *i.e.*, inherently inadmissible; and, the second category is, where the objection is regarding the mode of proof, which is procedural. In the latter case, if the objection is raised at any stage subsequent to the marking of the document as an exhibit, the said

objection regarding the mode of proof cannot be allowed. It was held, that the crucial test, is whether the parties tendering the evidence would have had the opportunity to cure the defect by resorting to such mode of proof as would be regular, if such an objection was raised at the time of marking such documents as exhibits”.

28.4) In case of *Sonu @ amar* (supra), in paragraph 32 of the said judgment it is observed and held as under:

“32. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the trial court without a certificate as required by Section 65-B (4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are *per se* inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is

procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 CrPC, 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65-B(4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof.”

(emphasis supplied)

28.5) Lastly in para 306, this Court concluded that, “It is thus evident from the aforesaid judgments and in particular, the judgment of the Apex Court in the case of *Sundar @ Sundarrajan* (supra), that an objection that the CDRs are inadmissible in the absence of a 65-B Certificate, if raised at a belated stage, will not be allowed in cases where the trial has been completed before 18th September, 2014. ...”.

28.6) There is no difference between a CCTV footage (CCTV video recording) and its hard copy in the form of prints, as both are computer output and thus, an electronic record. In the case in hand, when the photographs (Exhs.23, 24 & 25) were referred to PW.1 to prove the same,

that mode of proof was not objected by the defence. However, the evidence of PW.1 was commenced on 26.07.2018 and the evidence of last witness – PW.11 was completed on 03.01.2024. The judgment was delivered on 09.07.2024. Therefore, as held in *Sundar @ Sundarrajan* (supra), without producing the relevant original CCTV footage, without examining the person who had copied and provided it and in absence of the supporting Certificate under Section 65-B of the Indian Evidence Act, the said photographs were inadmissible in evidence. Hence, we are of the view that the prosecution cannot be allowed to take an advantage of an inadmissible photographs as well as an illegal mode of proving those photographs though PW.1 more particularly when the charge was of a serious offence. Otherwise, this cannot be a fair trial.

28.7) As provided in Section 167 of the Indian Evidence Act, the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. However, the present case is not capable to provide such a situation because even if we ignore the said photographs, we do not find the other evidence of a sterling quality, inspiring confidence and

sufficient to safely rely upon it for reasons recorded in the forgoing paragraphs and herein under.

29) Be that as it may. Admittedly, during investigation itself PW.3 had identified the Appellant on the basis of the said CCTV footage. As noted above, said CCTV footage was not available in the trial to show it to PW.3. However, it is not clear from the testimony of PW.3 as to on what basis he has claimed that the victim was the same girl who was kidnapped by the Appellant and the Appellant was the same person who had kidnapped her from Platform No.10. The photographs (Exhs.23, 24 & 25) were not clear. Therefore, it was very difficult to identify the Appellant and the victim on the basis of said photographs. This fact is also admitted by PW.4. The victim's parents, PW.1 and PW.2 both had made mistake in identifying her. Therefore, even if it is accepted that at the relevant time PW.3 was present at Platform No.10, we find it risky to accept his claim that he had seen the victim and the Appellant together just before kidnapping.

29.1) In these circumstances, it was necessary to hold a TIP of the Appellant. Yet, PW.7, PW.8 or any other officer did not think it proper to hold the TIP. No explanation is given by the prosecution for not holding such a TIP although in the said Writ Petition this Court had observed that proper investigation was not done and therefore directed Mr. Singhal Additional Commissioner of Police to promptly look into. As against this, a

short cut method was chosen by the said police, *i.e.*, showing the said photos to the Appellant and relying upon his admission that he was seen in those photos. Same practice was followed in respect of PW.3 to whom the CCTV footage was shown to confirm the Appellant's identity for the purpose of investigation. This is not permissible in law. For these reason we decline to hold that the identity of the victim and the Appellant was established by PW.3 during the investigation and in the trial. Consequently, it is doubtful that the Appellant had kidnapped the victim from Platform No.10.

30) The prosecution has heavily relied upon the confessions (Exhs.190 & 187) recorded by PW.11 and PW.10 respectively. Both PW.10 and PW.11 have deposed that they had recorded the confessions as narrated by the Appellant. They have with confidence claimed that the confessions were voluntary, true and correct. However, we are not prepared to accept this claim of the Magistrates for various reasons.

30.1) Firstly; we have noticed that as soon as the parents of the victim filed the said Writ Petition, within 15 days, the Investigation Officers searched and arrested the Appellant, but only on the basis of the weak and inadmissible pieces of evidence in the form of photographs (Exhs.23 to 25) and the CCTV footage which was never produced in the trial. In the remand application dated 30.07.2014, seeking police custody of the Appellant and A-4, Investigation Officer (PW.7) had stated that in the CCTV footage it was

seen that after the Appellant lifted the victim from Platform No.10, he gave her custody to A-4. However, this important evidence was withheld from the trial Court. Then the prosecution claimed before this Court in the Writ Petition that the Appellant had kidnapped the victim and the girl child recovered from A-4 was the victim. This was followed by the Appellant's confession (Exh.190) which was based on the subject photographs. But, this confession got falsified by the DNA report. No police was examined who was led by the Appellant to the hut of A-4 and who had taken the A-4's daughter into his custody. From the aforesaid, it appears that somehow PW.7, PW.8 and their higher police wanted to show that this crime was detected as expected by this Court in the Writ Petition. Therefore, we find it not reliable that the Appellant had falsely stated to the police and in the 1st confession that he had given the victim's custody to A-4.

30.2) Secondly, the 1st confession does not bear the signature of the Appellant. PW.11 has not deposed as to why the Appellant did not sign that confession. Nor its reason is discernible from the other evidence on record. It is settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all. In *Dhanajaya Reddy vs. State of Karnataka*, reported in (2001) 4 SCC 9, in paragraph 20, the Hon'ble Supreme Court observed that, the function of the Magistrate in recording confession under Section 164 of Cr.PC. is a very

solemn act which the Magistrate is obliged to perform by taking due care to ensure that all the requirements of 164 of Cr.PC. are fully satisfied. The Magistrate recording such a statement should not adopt a casual approach. The Magistrate must record the confession in the manner laid down by the section. Omission to comply the mandatory provisions, one of such being as incorporated in sub-section (4) of Section 164 is likely to render the confessional statement inadmissible. The words “shall be signed by the person making the confession”, are mandatory in nature and the Magistrate recording the confession has no option. Mere failure to get the signature of the person making the confession may not be very material if the making of such statement is not disputed by the accused but in cases where the making of the statement itself is in controversy, the omission to get the signature is fatal.

In this regard, in paragraph 21, reference was made to the earlier decision in *Kehar Singh vs. State (Delhi Admn.)*, reported in (1988) 3 SCC 609 and it was observed and held that compliance with sub-section (4) of Section 164 of the Code is mandatory and its non-compliance renders the confession not admissible or reliable. Such a defect cannot be cured under Section 463 Cr.PC. It is a settled position of law that if a part of confession is excluded under any provision of law, the entire confessional statement in all its parts, including the admission of minor incriminating

facts must be excluded unless proof of it is permitted by some other section, such as Section 27 of the Evidence Act. The decision of a Division Bench of this Court in *Abdul Razak Shaikh vs. State of Maharashtra*, reported in *1988 Cri LJ 382* is also relevant. Therein, in paragraph 7 it is held :

“7. It is to be considered whether non-obtaining of signature of the accused on the confessional statement recorded by the Magistrate under Section 164 CrPC is an irregularity which can be cured by invoking the provisions of Section 463 CrPC reproduced above. The language used in sub-clause (4) of Section 164 and sub-section (5) of Section 281 CrPC reproduced above indicates that it is mandatory on the part of the Magistrate recording confession to obtain signature of the person whose confession he has recorded. The omission in that behalf cannot be cured by examining the Magistrate under Section 463 CrPC. The Magistrate when examined touching the confession he has recorded, can only say that he has recorded the confession, but by such examination the omission to obtain his signature cannot be supplied. It appears to us that the provision that the Magistrate after recording confession should obtain the signature of the accused thereon is a salutary provision and has been specially provided for, for safeguarding the interest of the accused and, therefore, it is mandatory.”

30.3) Thirdly, as soon as the DNA report surfaced the defect in the investigation and lead to restoring the A-4's daughter in the custody of her mother (A-4's wife), the Kasarwadavli police arrested the Appellant in their

C.R.No. 280 of 2013 registered under Sections 454, 457 and 380 of I.P.C. On 05.09.2014, the Appellant was in police custody in that C.R.No. 280 of 2013. However, there is no evidence as to who had filed the FIR of that C.R.No. 280 of 2013 and on what basis the police concerned had concluded that Appellant was involved in that crime. The prosecution has not explained as to why, at that time, the Appellant was not arrested in C.R. No.280 of 2013 and the present crime of kidnapping, if indeed he was wanted in the former crime. It is not evident as to why the Appellant was interrogated by Mr. Shaikh, Sr. PI. about this crime instead of C.R.No.280 of 2013 in which Appellant was in police custody on 05.09.2014. In the backdrop it is safe to infer that taking advantage of the fact that C.R.No.280 of 2013 and present crime were registered in 2013, purposely, Appellant was shown arrested in that C.R.No. 280 of 2013 to develop the case of kidnapping as desired by PW.7, PW.8 and their superiors and to obtain his 2nd confession. Otherwise, that move was impossible as it was impermissible in law to again get the police custody of Appellant in this crime of kidnapping and lay a foundation for the 2nd confession.

30.4) Fourthly, there is no evidence as to when, why and before whom the Appellant had expressed his desire to make those confessions prior to the same were actually recorded. Here, it cannot be ignored that, as alleged, confession similar to Exh.187 was made by Appellant in his

Disclosure Statement dated 05.09.2014 and before PW.8 on 06.09.2014. However, immediately after that disclosure, the Appellant was not produced before learned Magistrates for recording his confession (Exh.187). Thus, there was considerable delay in recording this 2nd confession after the arrest of the Appellant in said C.R.No.280 of 2013. Significantly, on both the occasions, only Kasarwadvali police had produced the Appellant before the Magistrates for recording his alleged confessions. This, according to us, cannot be a normal circumstance nor a co-incident.

30.5) Considering the evidence as a whole, it appears that both the confessions were the result of the pressure exerted upon the Appellant by the police as the police machinery could not stand on its own legs. In view of the above discussion, both the confession must be ignored and we have neglected it, accordingly.

31) Now, coming to the testimony of PW.4, PW.5, PW.6 and PW.9. As noted above, PW.6 has supported the prosecution case on the point of the Disclosure Statement made by the Appellant leading to showing of the spot of the incident. The testimonies of PW.4, PW.5 and PW.9 were consistent that they had last seen the victim together with the Appellant. Their said testimonies were supported with the testimonies of PW.7 and PW.8. However in view of our discussion and the reasons in the forgoing paragraphs, we hold that none of these witnesses are reliable witness,

because, their evidence was surfaced only after the first round of the investigation was a complete failure.

32) Additionally, the conjoint reading of the testimonies of these witnesses and the confessions indicate that when the Appellant had found the victim, he wanted to feed her. Meanwhile, twice he had contacted the police at Platform No.10 as he wanted to report about the victim to Thane Railway Police Station. However, the said police to whom the Appellant had contacted, did not take him seriously. Thereafter, throughout the day the victim was in the company of the Appellant. Since, the victim was away from her parents and in the company of an unknown, therefore it is safe to presume that she must have repeatedly cried during the transit, if not constantly. However, the Appellant did no wrong with her. As deposed by PW.9, in the *Math*, the Appellant had fed the victim with milk and rice. These fact indicate that, till then the Appellant had taken good care of the victim and did not develop any desire to commit the present crime. The prosecution has not examined Kisan Pardeshi to prove that the Appellant had purchased *Ganja* from him and he then consumed it. We are unable to understand as to how Kisan Pardeshi was selling *Ganja* so easily, that too near a sacred place. It is not proved that the Appellant and PW.4 were in jail at the same time. Therefore, the claim of PW.4 was not reliable that he and the Appellant had become friends in the jail, PW.4 knew the Appellant and

that, they had smoked *Ganja* together. PW.9 has not specifically deposed that she knew the Appellant prior to the incident. As per the prosecution case for last 2 ½ years the Appellant was staying on the footpath at Thane Railway Station. However, PW.9 has not deposed when she had seen the Appellant last before he had started staying at Thane Station. Therefore, the identification of the Appellant by PW.5 and PW.9 was based on the photographs (Exhs.23 to 25). But, as held above, said photographs were not proved as required in law; nor the same were enough clear to identify the alleged offender and the victim seen therein. Despite needed, no TIP was held in respect of PW.3 and PW.5 as the Appellant was unknown to them. Therefore, the prosecution case does not appear probable that only because the victim was crying, the Appellant had committed her murder and caused disappearance of the evidence.

33) The upshot of the above discussion is that, on re-appreciation of the prosecution evidence this Court finds that, the prosecution has failed to prove its case beyond a reasonable doubt. In the facts and circumstances of the case, it appears that, since the matter was taken to this Court in the Writ Petition, stage was managed by the police pressuring the Appellant to give the confessions and taking help of PW.4, PW.5, PW.6 and PW.9 to show that the case was resolved. The chain of circumstances is not established by the prosecution and in fact it is incomplete. However, the learned Judge of

the trial Court failed to appreciate the prosecution evidence in its correct perspective and in accordance with law. Said infirmity led to imposing of the conviction and sentence on the Appellant for the offence of Sections 363, 302 and 201 of IPC. Therefore, the impugned Judgment and Order warrants interference by this Court to quash and set aside the same and acquit the Appellant of said charge.

34) The Appeal succeeds, accordingly.

34.1) Hence, following Order:-

(i) The impugned Judgment and Order dated 9th July 2024 passed by the learned Special Judge (POCSO), at Thane in Special (P) Case No.231 of 2016 is hereby quashed and set aside.

(ii) The Appellant Shantilal Dashrath Gaikwad (Original Accused No.3) is acquitted of the charge of the offence of Sections 363, 302 and 201 of the Indian Penal Code, 1860.

(iii) The Appellant is in jail. He shall be forthwith released from the jail if not required to be detained in any other crime.

(iv) The fine amount, if paid by the Appellant, shall be returned.

(v) Appeal is accordingly allowed.

35) The Interim Applications filed therein do not survive and are also disposed off.

36) Before parting with the Judgment, we place on record our appreciation for the valuable assistance rendered in the case by Mr. Amit Gharte who was found thoroughly prepared, which helped us reach our final conclusion in the case.

(SHYAM C. CHANDAK, J.)

(A.S. GADKARI, J.)