

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 11.12.2020

+ **CRL. A. 326/2017, CRL.M. (BAIL) 318/2020**

MANOJ

.....Appellant

Versus

THE STATE (GOVT. OF NCT) OF DELHI Respondent

Advocates who appeared in this case:

For the Appellant : Mr Sumer Kumar Sethi Advocate with
Ms Dolly Sharma, Advocate.

For the Respondent : Mr Ravi Nayak, APP for State.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning a judgment dated 16.11.2016 passed by ASJ-01, North Rohini Courts, New Delhi, whereby the appellant was convicted for committing aggravated penetrative sexual assault on a child victim – an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter the 'POCSO Act').

2. The appellant also seeks to challenge an order on sentence dated 22.11.2016, whereby the appellant was directed to undergo rigorous imprisonment for a period of ten years with a fine of ₹ 5,000/- for committing the offence punishable under Section 6 of the POCSO

Act. It was further directed that in default of payment of the fine, the appellant would undergo simple imprisonment for a further period of thirty days.

3. The appellant was prosecuted pursuant to registration of an FIR bearing no. 364/13, under Section 376(2) of the Indian Penal Code, 1860 (hereinafter 'IPC') at PS Shahbad Dairy. The said FIR was registered on the basis of the statement (Ex PW4/A) made by the mother of the child victim. She alleged that one month prior to lodging the said complaint, the child victim had complained of stomach ache. The complainant (mother of the child victim), thereafter, brought medicines from the medical store. The child victim also complained of pain in her private parts. The complainant noticed red marks near the private parts of the child victim and thereafter, applied medicine. Subsequently, the child victim disclosed that one day when the complainant was quarrelling with her husband (father of the child victim) and she was playing outside, the accused Manoj (the appellant herein) took her to a bathroom outside the house of one Malti. The accused then removed her *pajami* and inserted finger in her private part and also pressed her chest. The accused threatened the child victim not to disclose about the incident to her mother. She stated that she took the child victim to the Health Post, where she narrated about the incident to social workers Maya and Premwati, and they then took the child victim to BSA Hospital.

4. The accused was arrested on 08.07.2013. Thereafter, charges under Section 6 of the POCSO Act were framed against the accused. The accused pleaded not guilty and the matter was set down to trial.

5. The prosecution examined thirteen witnesses. After evaluating the evidence led in the case, the Trial Court found the appellant guilty of committing an offence punishable under Section 6 of the POCSO Act, and accordingly convicted him.

6. The appellant contends that there are many inconsistencies in the testimony and the statements made by the prosecutrix (child victim) and the medical evidence does not substantiate the allegation that the appellant had committed the offence. The appellant also submitted that there was a considerable delay in lodging of the FIR and there was no plausible explanation for such delay.

Evidence

7. Before proceeding further, it is relevant to examine the statements made by the prosecutrix as well as the evidence led by various witnesses.

8. The statement of the child victim was recorded under Section 161 Cr.CP, on 08.07.2013. She stated that when her parents were quarreling, her mother had sent her outside. She stated that Manoj *Bhaiya* – the accused – took her on his lap (“*godh mein lekar*”) to the bathroom of Malti Aunty. She stated that the accused removed her *pajami*, inserted his finger in her private parts and also pressed her

chest. She stated that the accused removed his pant and nothing was worn by him (*“kuch nahi pahena tha bhaiya ne”*). She stated that he had told her not tell her parents about the incident as it is a ‘dirty thing’ (*“gandi baat hoti hai”*). He then made her wear her *pajami* and told her to go back. She stated that she told her mother, one night prior to making this statement.

9. On 09.07.2013, the statement of the prosecutrix was recorded under Section 164 of the Cr.PC. In her statement, she stated that she does not remember the date of the incident. She stated that on that day, there was a quarrel between her parents and her mother had asked her and her sister, M (name concealed), to wait outside the house. She stated that one boy was standing outside and his name was Manoj. He lifted her and took her to the bathroom of their neighbour – Malti Aunty. She stated that when the accused took her away, her sister, M was not present as she had gone inside to sleep. She stated that the accused – Manoj removed her *pajami* (*“pyjama utari”*), started inserting his finger in her private parts (*“peshab ki jagah mein ungli daalne laga”*) and he pressed her chest (*“usne meri chaati bhi dabai”*). She stated that the accused did not remove his clothes. She stated that the accused had kissed her sister in the past (*“meri behen ko khelte huye uthakar pappi li thi”*).

10. The prosecutrix was examined as PW-2. She testified that one evening there was quarrel between her parents and she and her sister (M), were asked by their parents to wait outside the house. She stated that her sister went back inside to sleep but she chose to stay outside

the house. She also stated that the accused, Manoj *Bhaiya*, came and took her to the bathroom of one Malti Aunty. She further stated that Malti Aunty and her family were sleeping on the terrace. She deposed that the accused took out her *pajami*, inserted his finger in her private parts and also pressed her chest. She also deposed that the accused had pressed her mouth and had also threatened her not to tell anyone, otherwise he would beat her up. Her sister then called her and she went back home. She informed her mother that she felt pain in her stomach and was then taken to the hospital. She stated that once, in the past, the accused (Manoj *Bhaiya*) had taken her sister, M, to a nearby vacant plot and had kissed her.

11. In her cross-examination, the prosecutrix deposed that there was no quarrel between the accused and her mother. She deposed that there was no door to the bathroom, where the accused had taken her, but there was a curtain. She stated that there was no other person present when she was being taken to the bathroom by the accused. She stated that Manoj *Bhaiya* was sitting outside the house and was playing with his phone. She stated that she informed her mother one/two days after the incident, when she felt pain in her stomach. Her mother told her that she would get her medically examined in a day or two. She stated that she does not remember how many days ago the accused kissed her sister. She stated that when her sister had called her, she came and sat down on a slab outside the house. She stated that her sister went back inside to sleep, while the quarrel between her parents was ongoing. She is aware of this as she went back inside and saw her sister

sleeping. She also stated that she does not remember for how long the quarrel between her parents lasted.

12. The mother of the prosecutrix was examined as PW-3. She deposed that her daughter (the prosecutrix herein) was complaining of pain in the abdomen since a month. She deposed that the prosecutrix later complained of itching on her private part and she thereafter, applied medication for relief. However, the prosecutrix still complained of pain in her abdomen. She stated that she took her daughter to a doctor for treatment and on inquiry by the doctor, her daughter revealed that one Manoj (the accused herein) who resided in her neighborhood used to insert his finger in her private parts. She stated that the prosecutrix disclosed the same to her, before she took her daughter to the doctor at BSA Hospital. She testified that her daughter had stated that when she playing outside the house, Manoj *Bhaiya* had taken her inside the bathroom of Malti, where he had inserted his finger in her private parts and had also pressed her chest. She stated that she noticed the private parts of her daughter and found that it was red and swollen. The police officials reached the hospital and her statement was recorded (Ex. PW3/A). She also stated that the police officials took her daughter to BSA Hospital for her medical examination but she did not give her consent to conduct a medical internal examination on the prosecutrix and an endorsement was made on the MLC (Ex. PW 3/B). The arrest memo (Ex. PW3/D1), pointing out memo that is pointing out the place of occurrence – the bathroom of the house of Malti (Ex. PW3/D2) and disclosure statement of the

accused (Ex. PW3/D3) were brought in as evidence. She identified her signatures on the same. PW-3 identified Maya (PW-7) as a lady who works in an NGO near her house. She stated that Maya (PW-7), had visited her house in the past for the purpose of vaccination. She also stated that the accused Manoj is not known to her.

13. In her cross-examination, she deposed that Maya Devi (PW-7) and Premvati (PW-8) had accompanied her when she took her daughter for a medical examination to BSA Hospital. She deposed that in the past her daughter had not informed her anything about the accused Manoj. She had done so in the hospital in the presence of the doctor.

14. Dr. Richa Gupta, Senior Resident, BSA Hospital was examined as PW-5. She deposed that the prosecutrix was brought to the hospital for her medical examination on 08.07.2013 at about 2:30 pm by the mother of the prosecutrix and a lady from the NGO – Premwati (PW-8). She deposed that as per the MLC, on a local examination, the patients genetalia was normal, the hymen was intact and there was no visible external injury.

15. Smt Maya Devi was examined as PW-7. She deposed that on 08.07.2013 she was carrying the work of a social worker in Shahbad Dairy with NGO – ‘Saksham’. She deposed that on that day, at about 11:30 am, the complainant (mother of the prosecutrix) came to the MCD, Health Post along with the prosecutrix. The complainant disclosed that the victim (prosecutrix) was sexually assaulted.

Thereafter, she and Premwati (PW-8) took the prosecutrix and her mother to BSA Hospital for the medical examination of the prosecutrix. She deposed that she along with the prosecutrix, mother of the prosecutrix, SI Anju Dahiya and Premwati reached the police station at 2:30 pm. She deposed that the statements of the prosecutrix and her mother were recorded in the police station in her presence. She also deposed that the mother of the prosecutrix had visited her office three-four times after the said incident. PW-7 volunteered that the mother of the prosecutrix reached their office because she was being threatened by the relatives of the accused. She stated that she informed the same to the police, however, no written complaint was made.

16. Smt Premwati was examined as PW-8. She testified that she was working with the NGO – ‘Child Survival India’, as a social worker. She stated that on 08.07.2013, she went to MCD Health Post, B-block, Shahbad Dairy. She stated that on that day, the mother of the prosecutrix and the child victim came to the MCD Health Post where she started weeping and she disclosed that somebody had sexually assaulted her daughter – the child victim. She also stated that she along with Maya Devi (PW-7) took the mother of prosecutrix and the prosecutrix to BSA Hospital for the medical examination of the prosecutrix. Thereafter, the police were informed from the hospital. She stated that the statement of the prosecutrix and her mother was recorded, in her presence, at the police station. She identified her signature on the statement of the mother of the prosecutrix (Ex.

PW3/A). In her cross-examination, she deposed that she never met the prosecutrix and the mother of the prosecutrix after the date of the incident as her husband was unwell at that time.

17. SI Anju Dahiya was examined as PW-10. She testified that on receipt of DD NO. 38A (Ex. PW10/A) on 08.07.2013, she reached BSA Hospital. She deposed that she made necessary inquiries and recorded the statement (Ex. PW3/A) of the mother of the victim in the presence of a lady from Nav Srishti, NGO. She deposed that she prepared the *tehrir* (Ex. PW10/B), and handed it over to Ct. Deepak for registration of the case. She prepared the site plan (Ex. PW10/C) at the instance of the child victim (the prosecutrix). She deposed that the accused was arrested from his house at the instance of the mother of the prosecutrix and she identified her signatures on his arrest memo (Ex. PW3D/1). She also identified her signatures on personal search memo (Ex. PW6/A) and pointing out memo, that is, pointing out the place of occurrence (Ex. PW3/D2). She recorded the disclosure statement of the accused (Ex. PW3/D-3). Thereafter the accused was produced before the concerned court and subsequently was sent to judicial custody. She also applied [vide application (Ex. PW10/D)] for recording the statements of the child victim and her mother under Section 164 of the Cr.PC. She deposed that the child victim was also produced before the CWC vide application (Ex. PW10/E). She obtained the age proof certificate of the victim from her school (Ex. PW10/F) and after completion of investigation, she filed the charge sheet in court.

18. In her cross-examination, she deposed that she reached the spot of the incident at about 6-6:15pm after completion of the MLC at the hospital. She stated that she does not remember whether she visited the house of Malti (PW-12). She also stated that she did not investigate about the antecedents or the addresses of the witnesses. She deposed that the house of Malti (PW-12) is in front of the house of the victim. She also deposed that the place of occurrence i.e., the bathroom was outside the house of Malti (PW-12). She stated that the size of the said bathroom is approximately 2X3 feet. She also stated that there is no door in the said bathroom and the opening of the bathroom was towards the main road and was visible to a passerby.

19. Ms. Malti was examined as PW-12. She deposed that she does not know anything about the case. She stated that she was not acquainted with the accused and was not aware about his identity.

20. In her cross-examination she was confronted with her statement recorded under Section 161 of the Cr.PC. She stated that she had not told the police that the accused – Manoj was residing in the adjoining street or that she often saw him sitting in a vacant plot in front of her house. She volunteered that many boys of the locality sit in the vacant plot, however, she does not recognize any of them. She failed to identify the accused.

21. The statement of the appellant was recorded under Section 313 of the Cr.PC and he denied the allegations made against him.

Reasons and Conclusion

22. The case of the prosecution rests almost entirely on the statement made by the prosecutrix. There is no other corroborative evidence that would establish that the appellant is guilty of committing the offence for which he has been convicted.

23. It is, thus, important to carefully examine the statements made by the prosecutrix and other material witness. Minor inconsistencies in the statements/ testimony of the prosecutrix does not dilute the quality of her evidence. However, it is necessary to ascertain whether there is a threshold level of clarity as to the core allegations and the surrounding circumstances.

24. In the present case, there is no certainty as to when the alleged offence was committed. The mother of the prosecutrix, at whose instance the FIR was registered, had in her initial statement – Ex. PW3/A, recorded on 08.07.2013 – stated that about one month prior to the said date, the prosecutrix had complained about stomach ache and she had got medicine for the same from the medical store. The prosecutrix had also complained about pain in her private parts. The complainant had, therefore, examined the same and found there were red marks on her vagina. On inquiries, the prosecutrix had told her that the red marks were on account of her scratching her private parts, which she had done on account of itching sensation. The complainant stated that she had applied medication. However, the prosecutrix continued to complain about her stomach ache. She stated that in the aforesaid context, she made inquiries from the prosecutrix and she informed that one day while she (the complainant) and her husband

were quarreling, and she was playing outside the house; the accused Manoj had taken her to the bathroom at Malti's house and had committed the said offence.

25. It is relevant to note that neither in her statement recorded on 08.07.2013 (Ex. PW3/A) nor in her testimony recorded subsequently, did the complainant provide any clarity regarding the date when she and her husband had quarreled, which in turn would indicate the date on which the offence was allegedly committed.

26. There is no co-relation between the stomach ache suffered by the prosecutrix or the red marks seen by the complainant on her vaginal area with the alleged offence. As stated by her in her statement, the red marks on the private parts of the prosecutrix were on account of the prosecutrix scratching herself. Thus, the assertion that the prosecutrix was complaining of stomach ache for a period of one month prior to the registration of the FIR does not assist the Court in determining whether the alleged offence was committed one month prior to the registration of the FIR or any time prior to the said period.

27. The Trial Court had held that even though there was some uncertainty regarding the date on which the offence was committed, there was no delay in filing of the FIR since the same was lodged on the very first day after the mother of the prosecutrix became aware of commission of such an offence. The question when the offence was allegedly committed is not only relevant for the purposes of examining

whether there is any delay in lodging the FIR but also in ascertaining whether there is any clarity as to the commission of the offence.

28. In her cross-examination, the prosecutrix stated that she had told her mother about the incident after one/two days after when she felt pain in her stomach. However, the mother of the prosecutrix (PW3) did not state so either in her statement or in her testimony. She did not state that the incident had occurred a few days prior to her becoming aware of the same. On the contrary, she suggested that the stomach ache of the prosecutrix was due to the appellant committing the offence and, that the prosecutrix was complaining of stomach ache for about one month prior to the registration of the FIR.

29. Apart from there being no certainty as to the proximate date on which the incident had occurred, there is also no certainty as to how the mother of the prosecutrix had become aware that the appellant had committed the offence. In her statement (Ex. PW3/A), she had stated that she became aware on the prosecutrix informing her on the night prior to the date on which her statement was recorded. However, in her testimony, she stated that the prosecutrix had disclosed about the offence on inquiries made by the doctor. In her testimony, she affirmed that she had provided medication to the prosecutrix but she did not get any relief from abdomen pain and ultimately, she took her to a doctor for her treatment and *“on enquiry by the doctor my daughter revealed that one Manoj who was residing in her neighbourhood, used to insert his finger into her vagina”*. In her cross examination, she further clarified that the prosecutrix had not

informed about the accused prior to revealing about him before the doctor.

30. There is also lack of clarity as to how the appellant was identified. The prosecutrix had named the appellant as the person, who had committed the offence. She had also stated that he resides in her neighbourhood (in the *gali* on the rear side of the house where the prosecutrix resides). However, the mother of the prosecutrix (PW-3), testified that she was not acquainted with the appellant. She further stated in her cross-examination that she saw him for the first time on the day after her daughter had informed her about the appellant committing the offence. In her statement (Ex.PW3/A), she had stated that the prosecutrix had informed her about the offence the night before. She waited till the morning and thereafter, went to B-Block, MCD Health Post along with her daughter. She met Ms. Premvati at the said health post and informed her about the commission of the offence and she took them to BSA Hospital. She stated that the prosecutrix was examined there. The police officials (SI Anju Dahia) also arrived there and recorded her statement. SI Anju Dahia was examined as PW-10 and she had stated that after she had recorded the statement of the mother of the prosecutrix, she had prepared a *tehrir* and had handed it over to Ct. Deepak for registration of the case. He had gone to the PS and handed over the *tehrir* to the DO. He returned back after registration of the FIR along with the original *tehrir* and handed it over to her. She stated that at the instance of the prosecutrix, she prepared a site plan at the place of the occurrence and then she

arrested the accused at the instance of the mother of the prosecutrix. However, Ct. Deepak had testified that he along with the IO had gone to the house of the accused, he was found and the victim had started crying on seeing the accused and he was apprehended. Thus, it does appear that the victim had accompanied the IO and Ct. Deepak and the appellant was perhaps identified at the instance of the prosecutrix.

31. There are also several inconsistencies between the statements of the prosecutrix recorded under Section 161 of the Cr.PC, her statement under Section 164 of the Cr.PC, and her testimony before the court. The same are briefly noted below:

(i) In her statement under Section 161 of the Cr.PC, the prosecutrix did not mention that her sister had also been turned out of the house while her parents were quarreling on the date of the incident. However, in her statement under Section 164 of the Cr.PC as well as in her examination-in-chief, she stated that she and her sister had been asked to wait outside the house while her parents were quarreling.

(ii) In her statement under Section 161 of the Cr.PC and under Section 164 of the Cr.PC, the prosecutrix stated that her mother had turned her out of the house. However, in her examination in chief, she stated that both her parents had asked her and her sister to wait outside the house.

(iii) In her statement under Section 161 of the Cr.PC, the prosecutrix had not stated anything about her sister going inside the house to

sleep. In fact, she had not mentioned that her sister had been turned out of the house along with her. However, in her statement under Section 164 of the Cr.PC, she stated that her sister had gone back inside the house to sleep. In her examination-in-chief, she reiterated that while she remained outside, her sister had gone inside to sleep. In her cross-examination, she reiterated the same but she also added that she knew that her sister was sleeping because she had gone inside the house and had seen her sleeping.

(iv) In her statement under Section 161 of the Cr.PC, the prosecutrix had stated that she was taken by the appellant who used to come to the lane (*Manoj bhaiya ke sath jo gali me aate hai*). In her statement under Section 164 of the Cr.PC, she stated that when she and her sister were turned out, one boy whose name was Manoj was standing there and he had picked her up and had taken her to the bathroom of an aunty who lives in the neighbourhood. In her examination-in-chief, she stated that *Manoj Bhaiya* who used to visit the house of her neighbours had come and taken her to the bathroom of Malti aunty. In her cross-examination, she further stated that the appellant was sitting on slab near her house and was playing with his mobile. She further stated that *Manoj Bhaiya* lives in the lane on the rear and she had seen his house while playing.

(v) In her examination-in-chief, the prosecutrix stated that Malti aunty and her family were sleeping on the terrace at the material time. This fact was not mentioned by her in any of her earlier statements. In

her cross-examination, she stated that she knew Malti aunty was on the terrace because she had seen her go onto the terrace.

(vi) In her statement under Section 161 of the Cr.PC, she had stated that the accused had put on her *pajami* and asked her to go home. However, in her examination-in-chief, she stated that her sister had called her and then she came back home.

32. These inconsistencies/improvements may not be of much relevance if considered in isolation. But apart from the aforesaid inconsistencies/improvements in the statement of the victim and her testimony before the court, there are inconsistencies in relation to two material aspects that relate to the commission of the offence. First, relates to whether the appellant had also removed his apparel. In her statement recorded under Section 161 of the Cr.PC, the prosecutrix had stated unequivocally that the accused was not wearing anything. However, in her statement under Section 164 of the Cr.PC, she had stated that the appellant had not removed his clothes. In her testimony before the court, she did not mention about the appellant removing his clothes.

33. Second, relates to the manner in which the alleged offence was committed. In her statement under Section 161 of the Cr.PC, the prosecutrix alleged that the appellant had touched her chest and had pressed it and he had put his finger in her vagina. In her statement under Section 164 of the Cr.PC, she improved her statement further by saying that the appellant had continued to touch her body for a long

time and he kept inserting his fingers in her vagina (*Manoj ne mere sharir ko bahut der tak chua or ungli daalta raha*). In her examination before the court, she stated that Manoj had put his finger in her urinating part twice. He had also pressed her chest.

34. It is apparent from the above that there is also no consistency in the manner in which the offence was committed. Whereas in the initial instance, it was stated that he had inserted his finger, the prosecutrix subsequently stated that he had done the same many times and then in her examination-in-chief, she had said that he had done so twice. Whereas in the first instance, she stated that he had also taken off his trousers and he was not wearing anything. In her statement recorded under Section 164 of the Cr.PC, she had stated that he had not taken off his clothes. She also stated that he did not show his urinating part.

35. The Trial Court has overlooked the said inconsistencies in the statements and the examination-in-chief of the prosecutrix. The prosecutrix was a young child of seven years at the material time and it is not expected that her statements would be identical. Some inconsistencies/improvements in her statements are expected due to passage of time. However, inconsistency as to whether the appellant had removed his clothes or not is a material inconsistency and so is the inconsistency in the statements regarding the number of times the appellant had inserted his finger in her vagina. These do raise doubts as to the case set up by the prosecution.

36. The medical evidence also does not support the case of the prosecution. The prosecutrix was examined medically and it was found that there were no injuries on her private part and her *hymen* was intact. The Trial Court has rightly observed that the same does not necessarily mean that the case set up by the prosecution is false as the penetration to any extent could constitute a penetrative sexual assault. It is not necessary that such an assault should result in tearing of the hymen. However, whilst the medical evidence may not demolish the prosecution's case, it certainly does not support it either.

37. In view of the above, this Court is unable to concur with the Trial Court that the testimony of the prosecutrix is consistent in material particulars. Clearly, there are several inconsistencies in the statement made by the prosecutrix and her testimony. If considered in isolation each one of the consistencies/improvements mentioned above may be innocuous but viewed in totality, it is apparent that there is no clarity in the manner in which the offence was committed. This Court is unable to ascertain whether the sister of the prosecutrix was sleeping inside when the appellant had allegedly picked up the prosecutrix or whether she was awake and had called out to the prosecutrix subsequently. This Court is also unable to visualize whether the appellant had picked up the prosecutrix while passing by on the street or whether he was already sitting down at a nearby spot playing with his mobile phone. It is in evidence that the place where the offence was committed (bathroom of a neighbouring house) was 2 feet by 3 feet in dimension. It does not appear that there was any

space where the prosecutrix could be put down. It is also unclear whether the appellant had continued to hold her with one arm, while he committed the offence with the other.

38. In the present case, the Trial Court had also proceeded on the basis that the appellant has been unable to discharge his burden of proof and has been unable to rebut the presumption that he is guilty of the offence charged. Section 29 provides that whenever a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the POCSO Act, be presumed that the offence has been committed unless the accused can prove to the contrary. Section 30 of the POCSO Act deals with the presumption of culpability of the mental state of the accused.

39. However, Section 29 of the POCSO Act has limited applicability and must be interpreted keeping in view the limitations of such reverse onus clauses. Plainly, the import of Section 29 of the POCSO Act is not that the prosecution merely has to charge an accused and on doing so, the onus to establish that he is innocent rests on him. In *Noor Aga v. State of Punjab: (2008) 16 SCC 417*, the Supreme Court while upholding the validity of the provision of Section 35 of the Narcotic Drugs and Psychotropic Substances Act, 1985, held that provisions imposing reverse burden may also be subject to proof of some basic facts as envisaged. The initial burden for establishing an offence will have to be discharged by the prosecution. It is only when the threshold has been established that the legal burden to establish innocence would shift on the accused.

Further, the accused is not required to establish that he is innocent beyond any reasonable doubt. The presumption can be rebutted by him by meeting the standards of preponderance of probability, that he is innocent. Plainly, a conviction could only follow once the court is convinced that the accused is guilty beyond any reasonable doubt.

40. The accused can discharge his burden in several ways. He may do so by eliciting responses in the cross-examination of witnesses, which indicate that the testimony cannot be relied upon. He may also do so by leading positive evidence of his innocence.

41. In *Noor Aga's* case, the Court had also referred to the text of an article captioned "*The Presumption of Innocence and Reverse Burdens: A Balancing Duty*" published in [2007] C.L.J. (March Part) 142 and had reproduced the following paragraph:

"In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice - where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment."

42. The Supreme Court held that the principles enunciated above should be applied in each case having regard to the statutory provisions involved therein.

43. It is, thus, also essential to examine as to the possibility of the accused to be able to discharge his burden of proving his innocence. Surely, the task of discharging such burden cannot be an impossible one. In this case, the prosecution has not even established as to when the alleged offence was committed. All that the prosecutrix had said that the offence had been committed one day, when her parents were quarrelling. The mother of the prosecutrix has not indicated as to when she and her husband were quarrelling. Her husband (the father of the prosecutrix) has not been examined. There is no certainty whether the offence had occurred within the last few days of being reported or any time earlier. There is also some inconsistency whether it had occurred in the evening or at night.

44. Assuming that the appellant is innocent, there is little else that he can do except to state so. There is one aspect, which the accused was required to address and that is to provide a plausible explanation as why the prosecutrix or her mother would implicate him in a false case. To this end, the appellant had put questions in the cross-examination to elicit that the mother of the prosecutrix had received compensation of ₹20,000/- for the alleged offence. According to the suggestions put by the appellant that was possibly the reason why he had been falsely implicated.

45. In a recent case, *Justin @ Renjith v. Union of India: WP (C) No. 15564 of 2017*, the Kerala High Court had upheld the constitutional validity of Section 29 of the POCSO Act. In its decision, the Court referred to the decision of the Supreme Court in *Noor Aga's* case (*supra*) and had observed as under:

“Foundational facts in a POCSO case include the proof that the victim is a child, that alleged incident has taken place, that the accused has committed the offence and whenever physical injury is caused, to establish it with supporting medical evidence. If the foundational facts of the prosecution case is laid by the prosecution by leading legally admissible evidence, the duty of the accused is to rebut it, by establishing from the evidence on record that he has not committed the offence. This can be achieved by eliciting patent absurdities or inherent infirmities in the version of prosecution or in the oral testimony of witnesses or the existence of enmity between the accused and victim or bring out the peculiar features of the particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour, or bring out material contradictions and omissions in the evidence of witnesses, or to establish that the victim and witnesses are unreliable or that there is considerable and unexplained delay in lodging the complaint or that the victim is not a child.”

46. As observed above, in the present case, the prosecution's case rests solely on the statement of the prosecutrix. Given the said testimony, it is seen that it is inconsistent with the earlier statements given in this regard. Some of the inconsistencies are undeniably material. As stated above, the fact whether the appellant was wearing any clothes while committing the offence is a material aspect and if

there is inconsistency in regard to such an aspect, the entire statement of the prosecutrix regarding the manner in which the offence was allegedly committed is brought to question.

47. Apart from the above, as noticed above, there are several inconsistencies in the statement and the testimony of the prosecutrix and if the same are viewed in totality, it does raise a question as to the reliability of her evidence.

48. In addition to the above, there is also a significant inconsistency in the testimony of the mother of the prosecutrix (PW-3) as to how and when she became aware that the said offence had been committed. According to her initial statement, the prosecutrix had disclosed the incident a night before her statement was recorded. She had then taken the prosecutrix to the MCD Health Depot in the morning and had narrated the said incident. Smt. Premvati (PW-8), who was at that time present at the MCD Health Block, had testified that the mother of the prosecutrix had come in the morning and she was weeping that her daughter had been sexually assaulted. However, in her testimony, PW-3 stated that she became aware of her daughter being assaulted when her daughter narrated the same to the doctor. According to her, she did not know about it prior to that time. This does create a doubt as to the case of the prosecution.

49. In view of the above, this Court is unable to concur with the view that it has been established beyond reasonable doubt that the

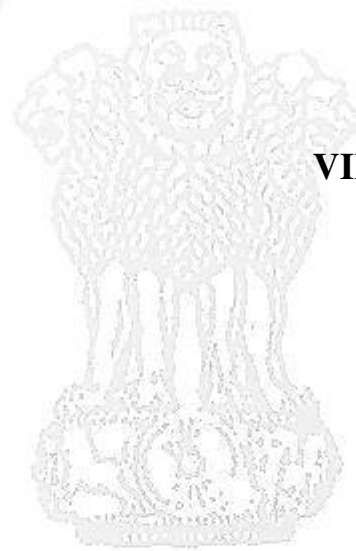
appellant is guilty of committing the offence for which he has been charged and convicted.

50. The appeal is, accordingly, allowed. The appellant is acquitted of the offence for which he has been charged and convicted. The appellant has served more than eight years of his prison sentence. He is directed to be released forthwith, if not wanted in any other case.

51. The pending application is also disposed of.

DECEMBER 11, 2020
RK

VIBHU BAKHRU, J



नित्यमेव जयते