

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

**THE HON'BLE JUSTICE SOUMEN SEN
&
THE HON'BLE JUSTICE RABINDRANATH SAMANTA**

**CRA 69 of 2019
Raju Roy
-vs.-
*State of West Bengal & Anr.***

For the Appellant	:	Md. Zohaib Rauf Mr. Rameez Alam
For the State of West Bengal	:	Mr. Saibal Bapuli Mr. Bibaswan Bhattacharya
Hearing Concluded on	:	21.09.2021
Judgment on	:	29.09.2021

Rabindranath Samanta, J:-

1. This appeal is against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge-cum-Special Judge under POCSO Act, 2012, First Court, Sealdah in Special Case No. 55 of 2017 whereby the appellant has been convicted for commission of offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (in short POCSO Act) read with Section 376 (2) (i), Indian Penal Code (in short IPC) and sentenced to suffer rigorous imprisonment for life without remission and to pay a fine of Rs. 2,000,00/-, out of which 90 per cent amount is to be paid to the victim as compensation under

Section 357, Code of Criminal Procedure (in short Cr.P.C), in default to undergo rigorous imprisonment for one year more. By that judgment the learned Trial Judge directed that compensation of Rs.10,00,000/- (Ten Lakhs Only) be paid to the victim under Section 357A, Cr.P.C.

2. The prosecution case, in short compass, may be delineated as under:

On 15th December, 2017 in noon the victim girl who is the younger daughter of the informant Guria Sah was playing in front of her house. At about 3.00 p.m. while she was searching for her daughter, then a girl namely Anjali of her neighbourhood informed her that the appellant/accused Raju Roy took her daughter at his lap. While searching, she saw that her daughter was weeping sitting in front of the house of the accused at 27/3A Owda Raja Lane, P.S. – Narkeldanga, Kolkata-700015, and the accused Raju Roy was sleeping on a cot in his room. The informant took her daughter at lap and saw that her pant was drenched with blood and blood was oozing out from her private parts. She, then and then intercepted Raju and while asked him about the condition of her daughter, he confessed that he committed rape on her daughter. Soon thereafter, the accused fled away from his room.

3. Narrating the episode as above the informant lodged an FIR at Narkeldanga Police Station and the FIR was registered as Narkeldanga P.S Case no. 292 dated 15.12.2017 under Section 6 of the POCSO Act.
4. After taking up the investigation, the investigating officer arrested the accused and produced him before the learned Trial Judge. During investigation the investigating officer recorded the statements of available witnesses under Section 161 Cr.P.C and arranged for medical examination of the victim girl. He made prayer before the

learned Trial Judge for recording statement of some witnesses including the informant and the victim girl and their statements were recorded by a learned Magistrate. The investigating officer also made arrangement for medical examination of the accused. After completion of the investigation, the investigating officer submitted charge-sheet under Section 6 of the POCSO Act against the accused Raju Roy.

5. Ultimately, charge under Section 6 of the POCSO Act was framed against the accused. Alternatively, charge under Section 376(2)(i) of IPC was also framed against him. The accused pleaded not guilty of the charge.
6. In course of trial, the prosecution examined as many as 21 witnesses and relied on some documents which have been marked as Exhibits 1 to 21. On the other hand, the accused in order to prove his innocence got himself examined as D.W.1.
7. Upon hearing learned Lawyers appearing for the parties and on consideration of evidence on record the learned Trial Judge found the accused guilty of committing the offence and charges framed against him being proved convicted and sentenced him as above.
8. Feeling aggrieved and dissatisfied with the judgment of conviction and sentence as aforesaid, the accused has preferred the instant appeal. We have heard Mr. Zohaib Rauf, learned Counsel, assisted by Mr. Rameez Alam, learned Advocate for the appellant (hereinafter be referred as the accused person) as well as Mr. Saibal Bapuli, learned Counsel, assisted by Mr. Bibaswan Bhattacharya, learned Advocate. Mr. Zohaib Rauf, learned lawyer appearing for the appellant submits that the evidence of the victim girl is not reliable as her evidence reveals that she deposed tutored by her mother. Learned lawyer by drawing our attention to the evidence of P.W.3 Guria Sah in cross-examination submits that this witness has deposed that she went to the house of the accused person and in that house she heard crying

of her daughter. She entered into the room and took her daughter. But, in the FIR she has stated that her daughter was weeping in front of the house of the accused person. Besides, the medical evidence does not lend any credence to the prosecution case. On the score, learned lawyer argues that the prosecution has failed to establish the foundational facts and the charges levelled against the accused person. In support of his argument learned lawyer has referred to a decision in the case of **Navin Dhaniram Baraiye- Vs- State Of Maharashtra** reported in **2018 Crl.J. 3393 (Bombay)**. Learned lawyer further argues that the evidence of the prosecutrix cannot always be presumed to be gospel truth to record conviction of an accused. In such context, learned lawyer has referred to a decision in the case of **Rajoo & Ors. -Vs- State of Madhya Pradesh** reported in **(2008) 15 SCC 133**.

9. Per contra, Mr. Bibaswan Bhattacharya strongly defends the findings recorded by the learned Trial Judge and submits that the ocular evidence conjointly with the medical evidence clearly establish without any shadow of doubt that the accused person sexually ravished the victim girl. Learned lawyer submits that the vital prosecution witnesses remain unshaken in cross-examination and their testimony before the Court is in consonance with the statements made by them before the learned Magistrate.
10. In the judgment the learned Trial Judge has held that the prosecution has been able to prove the foundational facts of the case and the legal presumption under Section 29 of the POCSO Act was available against the accused person. This implies that the onus was shifted upon the accused person to show why such presumption could not be available against him. But the accused person failed to discharge such onus either from the evidence led by the prosecution or by adducing independent evidence.

11. Since this Court is a Court of First Appeal, we have scrutinized the evidence and the materials on record meticulously to assess sustainability of the findings of guilt recorded by the learned Trial Judge. Amongst the prosecution witnesses PW.1 is the victim girl, PW.2 Anjali Kumari, a child aged about 8 years, PW.3 the informant Guria Sah. As it transpires from the evidence of the victim girl aged about 3 years, she identified the accused Raju Roy in Court and stated that the accused opened her pant and lied down her on the bed. For this she suffered pain on her belly. She was taken to hospital by her mother. As pointed out by learned lawyer for the accused person, it is true that this witness has deposed that her mother tutored her to make the statement before the Court. But, she thereafter, has deposed that her mother told her to depose without fear. We find that her evidence as a whole indicts the accused person of commission of the offence.
12. PW. 2 Anjali Kumari, aged about 8 years initially made statement to the learned Magistrate. She stated to the learned Magistrate that a person took the victim girl with him. In her deposition before the Court PW. 2 testifies that she saw that the victim girl was taken away by one person whom she identified in Court.
13. PW. 3 Guria Sah, the mother of the victim girl in her evidence states that the incident took place in December, 2017 at about 3.00 p.m . Her daughter was playing in front of their house. Her daughter stated to bring food and she went to her room to bring food. But, when she came in front of their house she saw that her daughter was not there. She searched for her daughter. PW. 2 Anjali told her that the accused took her daughter with him. She went to the house of the accused and heard crying of her daughter. She, after entering into the room of the accused took out her daughter. She noticed that her pant was drenched with blood and blood was oozing out from her private

parts. While she asked the accused why he did such thing, then the accused fled away. She was admitted to hospital and medically examined and treated by doctors. As we find, the evidence of PW. 3 remains unshaken in cross-examination.

14. It is in the evidence of PW.4 Soma Das, a neighbour of the informant that the victim girl along with three children were playing in front of their house. Then the accused took the victim girl to his house. After a few minutes she heard a hue and cry and went to the house of the accused. She saw that the accused Raju fled away seeing the mother of the victim girl.
15. PW. 6 Ramesh Roy a neighbour in his evidence states that he heard that the accused Raju committed rape on the victim girl. PW. 9 Binod Shah, the father of the victim girl deposes that after hearing the incident from someone he came to his house and saw that blood was oozing out from the body of his daughter and she was taken to NRS hospital.
16. As we find from the evidence of the aforesaid witnesses namely PW.1, PW.2, PW.3 and PW.4, these facts stand established that while the victim girl was playing with other children the accused took the victim girl to his house and sexually ravished her. It is evident from the evidence of the parents of the victim girl as well as PW. 4 Soma Das that while the victim girl was taken out of the house of the accused her pant was found drenched with blood and blood was oozing out from her private parts.
17. Now, it is to be seen whether the medical evidence corroborates the prosecution case that the accused sexually ravished the victim girl of tender age. It is in the evidence of PW.7 Dr. Rina Dey that on 15.12.2017 while she was posted at NRS Medical College and Hospital as RMO-cum-clinical tutor she examined the victim girl. On examination she noticed that there was Mid line tear in the posterior

vaginal wall and bleeding. In cross-examination she deposes that it is a clear case of sexual assault. PW. 10 Dr. Mohan Chandra Mandal deposes that he anaesthetised the victim girl with his team on 16.12.2017. It is evident from the evidence of PW. 11 Dr. Arnab Kr. Koley that the victim girl was admitted to the hospital on 15.12.2017 and she was discharged on 21.12.2017. Therefore, the victim girl was admitted to hospital for six days. The medical papers show that it was a case of sexual assault on the victim girl. The evidence of the doctors and the medical papers on record conjointly establish that the victim girl was sexually ravished which in legal parlance termed as aggravated penetrative sexual assault under the POCSO Act.

18. As noted above, the concerned prosecution witnesses prove the fact that the victim girl was last seen with the accused Raju Roy and she was taken out of his house with her pant drenched with blood and blood oozing out from her private parts. No iota of evidence has been adduced from the side of the defence to explain as to how the victim girl met her ill fate. From the oral as well as documentary evidence we are of the opinion that the prosecution has been able to establish the foundational facts that the accused person committed the offence of aggravated penetrative sexual assault on the victim girl as discussed in the preceding paragraphs. The evidence of DW.1 the accused Raju Roy does not inspire any confidence to rebut the presumption drawn under Section 29 of the POCSO Act against him. In the aforesaid factual matrix, the decisions cited by learned lawyer of the accused person are not applicable.

19. The victim girl aged about 3 years who expected love and care from the accused person became prey to his lust. This painful and ghastly incident shocks the conscience of the Court. Perusal of the judgment of the learned Trial Judge shows that the learned Trial Judge has dealt with all the issues with sensitivity and his judgment is based on

evidence as discussed above. The judgment does not suffer from any infirmity and accordingly we find no reason to interfere with the judgment.

20. As regards imposing appropriate sentence and awarding compensation we feel that the learned Trial Judge has considered all the relevant factors.
21. In the result, the appeal merits dismissal and accordingly the appeal is dismissed. No order as to costs.
22. The judgment and the order of conviction and sentence as well as award of compensation passed by the learned Trial Judge are confirmed.
23. Send down the L.C.R to the learned Court below along with a copy of this judgment.
24. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties upon compliance with all requisite formalities.

(*Rabindranath Samanta, J.*)

Soumen Sen, J.

1. I have read the judgment of my learned brother Justice Rabindranath Samanta, and I completely agree with the conclusions arrived at by His Lordship. I, however, wish to reflect briefly on the evidentiary value of a child witness and reverse burden of proof in a POCSO trial.
2. Justice Samanta has meticulously summarized the facts and carefully scanned the evidence. I do not wish to elaborately go into the facts and the evidence as it is wholly unnecessary for the present purpose, save

and accept I would say that the offence is established without any reasonable doubt on the basis of the evidence of PW-1, the victim, eight year old Anjali PW-2 and the doctor PW 7, who examined victim.

3. The evidentiary value of a child witness who herself is a victim of the lust of the appellant, is the prime witness and her testimony has to be weighed, scanned and scrutinized by taking into the totality of the circumstances. The learned Counsel for the appellant has tried to wish away, and down play the evidence of the child victim and her friend Anjali by submitting that the possibility of exaggeration or embellishment or false implication cannot be ruled out and in any event the evidence of the mother of the victim and Anjali are in the nature of hearsay evidence and in support of such submission he has relied upon ***Raju and Ors. vs State of Madhya Pradesh***, reported in **2008(15) SCC 133**, paragraph 12 and ***Navin Dhaniram Baraiye v. State of Maharashtra***, reported in **2018 Cri. L.J. 3393**, paragraph 25 to 30.
4. The learned Counsel has also relied upon a decision of this Court in ***Sahid Hossain v. State of West Bengal***, reported in **(2018) Cr. L.J. (NOC) 44 CAL**, in support of his submission that the foundational facts in the instant case have not been established and accordingly the reverse burden of proof would not apply against the accused.
5. The aforesaid submission raises issues with regard to evidence of a child witness and the concept of reverse burden of proof in a criminal trial.

6. Before I refer to the POCSO Act, 2012, it is essential that we evaluate the deposition given by a child witness, since the case stands on the support of one such evidence. A witness is someone who provides astute evidence, which is proof that they have personally heard, seen, smelt, or felt. Competence is sometimes misconstrued with credibility or dependability. Determining competency is not a test of whether or not the witness is giving, or will give, accurate or truthful testimony. Credibility and reliability are factors that the trier of fact considers when deciding how much weight to give the evidence (judge or jury depending upon where the case is being heard). If the child is called as a witness by the prosecution, he or she must have the ability to understand the questions put to him by the defence as well as the prosecution and to provide answers to them which are understandable. (See: ***R v. MacPherson*** reported in **2006 (1) CAR 30**; ***R v. Powell***, reported in **2006(1) CAR 31**; ***R v. M*** reported in **2008 EWCA Crim 2751** and ***R v. Malicki*** reported in **2009 EWCA Crim 365**.)
7. The position of a child witness in the English Jurisprudence has been clarified in ***R v. B*** reported in **2010 EWCA Crim 4**. The case facts included anal rape committed on a three year old baby girl by the appellant who was romantically involved with the child's mother. The crucial piece of testimony in this case was the deposition by the child victim herself. Due to this, the role of a child witness was explored in this case. The judicial authority at the appellate stage was conscious of the

extreme youth of the child and after close examination of the evidence and the deposition, was satisfied that the child's responses and behaviour during the interview which indicated her ability to provide evidence. It appeared obvious that if she was pushing a tale concocted by her elder sisters, a quick cross-examination would have shown that the girl had been educated and what she was "desired to say," as W.G. Dixon had noted in 1864. The Learned Lord Chief Justice of England and Wales, evaluating the role of a child witness, held that;

“The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness.”

8. It should be noted that the reference to “intelligible testimony” is (a) the ability to understand questions put to the witness and (b) give answers to those questions that can be understood. This is probably one of the toughest tasks for an advocate where a child witness of tender years is concerned.

In the English courts there exists the presumption that a child's evidence-in-chief will be given via a recorded interview and any further evidence facilitated by live link unless the court is satisfied that this procedure would not serve to improve the quality of the child witness's evidence. Furthermore, where the court agrees, a child witness may opt-out of giving their evidence by recorded interview and/or live link. In this instance, there is a presumption that the child witness will give his or

her evidence in court but from behind a screen. Once again, if the court agrees, the child witness may opt-out of using a screen in court. (See **Eliciting Best Evidence from a Child Witness: A Comparative Study of the United Kingdom and India, Charanjit Singh, February 28, 2019**)

9. The American Jurisprudence was examined in an article published in the **Michigan Law Review**, April 1905, Volume 3, No. 6. It was stated that, intelligence, ability to comprehend the meaning of an oath, and the moral obligations to speak the truth, and not age, are the tests by which the competency of a child to give testimony is determined. And when it appears that the witness is so qualified, he should be admitted to testify, no matter what his age. (See **Wheeler v. U. S.**, 159 U. S. 523; **White v. State**, 136 Ala. 58; **Minton v. State**, 99 Ga. 254; **State v. King**, 17 Ia. 484; **State v. Wilson**, 109 La. 74; **Trim v. State**, - Miss. -, 33 So. Rep. 718; **State v. Scanlan**, 58 Mo. 204.)
10. It has been observed that Children are easily confused by cross-examination. They are reluctant witnesses and sometimes recant, disclaiming prior testimony to absolve an assailant who is often a relative or family friend. And parents sometimes decline to press charges rather than subject their abused child to the ordeal of extended litigation requiring endless repetition of a painful and best-forgotten episode. (See **"The Testimony of Child Victims in Sex Abuse Prosecutions: Two**

Legislative Innovations," Harvard Law Review 98, no. 4 (February 1985): 806-827).

11. Now we would take the opportunity to explore the Indian Legal Jurisprudence to elaborate the role of child witness in criminal trials.

12. Under Indian law all persons are competent to give evidence.

Section 118 of the Indian Evidence Act 1872 (IEA), Chapter IX, states:

"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them, or from giving rational answer to those questions, by tender years, extreme old age, disease, whether of body and mind, or any other cause of the same kind."

13. In criminal cases, the basic test of competence is whether the person is able to understand questions put to him as a witness, and give answers to them which can be understood. (See **Ratanlal and Dhirajlal, The Law of Evidence, 24th Edition**).

14. The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation and is a question distinct from that of his credibility when he has been sworn or has been affirmed. In determining the question of competency the Court, under this section, has not enter into inquiries as to the witness's religious belief or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational and intelligent account of what he has seen or heard or done on a particular occasion. If a person of tender years or

of very advanced age can satisfy these requirements, his competency as a witness is established. (See ***Queen Empress v Lal Sahai*** reported in ILR (1888) 11 All 183; ***Quasim Ali v. State***, reported in ILR (1952) Raj 435; ***Purna Chandra v. State*** reported in AIR 1959 Cal 306; ***Ghewar Ram v State of Rajasthan*** reported in 2001 CrLJ 4460 (para 16) (Raj); ***Ratansinh Dalsukhbhai Nayak v State of Gujarat***, reported in 2004(1) SCC 64,68 (para 8)).

15. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. (See ***Wheeler v. United States*** reported in 159 US 523, per Brewer J. referred in ***Ratansinh Dalsukhbhai Nayak v State of Gujarat***, reported in 2004(1) SCC 64, 68 (para 8)).

16. Section 4 of the Oaths Act, 1969 says that all witnesses are to take oath or affirmation. But under the proviso, Sections 4 and 5 of the that Act shall not apply to a child witness under the age of 12 years. Therefore, if once the Court is satisfied that a child below 12 years of age is a competent witness then such witness can be examined without oath or affirmation. Where the court is satisfied that the child witness understands the duty of speaking the truth though he does not understand the nature of an oath or affirmation, the provisions of Sections 5 and 6 Oaths Act do not apply and court should proceed to record the evidence. (See **Ratanlal and Dhirajlal, The Law of Evidence, 24th Edition**).

17. The courts of law have stated in catena of decisions that with respect to children, no precise age is fixed by law within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the degree of intelligence and knowledge which will render a child a competent witness. In all questions of this kind much must depend upon the good sense and discretion of the Judge. In practice, it is not unusual to receive the testimony of children of eight or nine years of age when they appear to possess sufficient understanding. (See Taylor, 12th Edn. S. 1377, p. 869; ***Arulan Israel v State***, reported in **ILR (1954) TC 1200**).
18. The competency of the child witness can be ascertained by questioning him/her to find out intelligence to understand the occurrence witnessed and duty to speak the truth before the Court and thereby his/her statement inspiring confidence can be relied upon even without corroboration. (See ***Ram Bilas Singh v. State of Bihar*** reported in **1999 CrLJ 2360** (paras 7 and 9)).
19. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge, who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of obligation on an oath. This decision of trial court may, however, be disturbed by the

higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that, if after careful scrutiny of their evidence the Court comes to the conclusion that there is impression of truth in it, there is no obstacle in the way of acceptance of the evidence of a child witness. (See. **Golla Yelegu Govindu v. State of A.P.**, reported in **AIR 2008 SC 1842**)

20. It has also been observed that where the child immediately after the occurrence gave the details of the incident and those facts were corroborated by the medical evidence, such evidence of the child could not be discarded. (See **Kana Majhi v. State**, reported in **1985 CrLJ 1876 (Ori)**).
21. In **Panchhi and Others, National Commission for Women v State of Uttar Pradesh and Others** reported in **1998 CriLJ 3305**, case concerning the murder of an entire family, the only witness was a child, the son of one of the victims. The Supreme Court observed in paragraph 11 that;

“It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others [told] them and thus a child witness is an easy prey to tutoring. Courts have laid down that evidence of a child witness

must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law.”

22. In **Yogesh Singh v. Mahabeer Singh and Ors.** reported in **(2017) SCC 195** the testimony of a child witness was elaborated upon. The factual matrix of the case revolved around the incident of murder wherein the minor child witnessed the father being murdered and his head being severed from the body by multiple armed men. It was held that:

*“22. It is well settled that the evidence of a child witness must find adequate corroboration before it is relied upon as the rule of corroboration is of practical wisdom than of law. (See **Prakash v. State of M.P.** reported in (1992) 4 SCC 225, **Baby Kandayanathil v. State of Kerala** reported in 1993 Supp (3) SCC 697, **Raja Ram Yadav v. State of Bihar** reported in (1996) 9 SCC 287, **Dattu Ramrao Sakhare v. State of Maharashtra** reported in (1997) 5 SCC 341, **State of U.P. v. Ashok Dixit** reported in (2000) 3 SCC 70, and **Suryanarayana v. State of Karnataka** reported in (2001) 9 SCC 129).*

*23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. (Vide **Panchhi v State of U.P.** reported in (1998) 7 SCC 177).”*

23. In recent years the Supreme Court of India has adopted “Guidelines For Recording Of Evidence Of Vulnerable Witnesses In Criminal Matters” in the case **The State of Maharashtra v Bandu @ Daulat** reported in **2018 (11) SCC 163**. The case concerned the evidence of a 14-year-old “deaf, dumb and mentally retarded” child

witness, the victim of a rape. In this instance the Supreme Court observed that there should be special centres for examination of vulnerable witnesses in criminal cases in the interest of conducive environment in Court so as to encourage a vulnerable victim to make a statement. Such centres were directed to be set up with all necessary safeguards.

24. The Supreme Court had itself issued direction for vulnerable witnesses, the case concerned rape, in ***Sakshi v Union of India and Ors*** reported in **(2004) 5 SCC 518** as follows:

“(1) The provisions of sub-section (2) of Section 327 Cr.PC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

- i. a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;*
- ii. the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;*
- iii. the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.”*

25. *Ei incumbit probatio qui dicit, non qui negat* is the Latin maxim of criminal innocence which means that the burden of proving the alleged crime is on the one who asserts and not him who denies. (See Legal Maxims, Law Times Journal, (Sept. 29, 2019))

26. What lies at the bottom of the various rules shifting the burden of proof is the idea that it is impossible for the prosecution to give wholly

convincing evidence on certain issues from his own hand, and it is therefore for the accused to give evidence on them if he wishes to escape. When the law shifts the evidential burden to the accused, the prosecution need not give any evidence, or need give only slight evidence, on that issue, in the sense that they are not liable on that issue to be met with a submission of "no case to answer," even though they failed to give the evidence usually required. (**The Proof of Guilt, A Study of English Criminal Trial, Third Edition**, 1963, Page 184)

27. In **Swapan Mondal v. State** reported in **2021 SCC OnLine Cal 2007** I have discussed few areas in law which has also been discussed in the instance case. As highlighted in paragraph 57-62 of my judgment in the said case, the matter observed was as follows:

"57. The POCSO Act is a special statute. In view of the fact that the child is in a vulnerable position and is required to be protected from offences of sexual assault, sexual harassment, etc., the Anglo-Saxon jurisprudential presumption of innocence is replaced by a presumption of commission or abatement or attempt to commit an offence under Sections 3, 5, 7 and 9 of the POCSO Act "unless the contrary is proved" by Section 29 of the POCSO Act.

58. Similarly, Section 30 states that the Special Court shall presume that the accused had the requisite "culpable mental state" to commit an offence under the POCSO Act when prosecuted for an offence requiring such a mental state under the said Act. However, Section 30 allows the accused to take a defence by proving the fact that he had no such mental state with respect to the act charged as an offence under the POCSO Act. The explanation to Section 30 states that "culpable mental state" includes intention, motive, knowledge of a fact and the belief in or reason to believe a fact.

59. Sections 29 and 30, for the sake of convenience, are reproduced below:

'29. Presumption as to certain offences.--Where a person is prosecuted for committing or abetting or attempting to commit any

offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

30. Presumption of culpable mental state.—

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.--In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.'

60. A presumption is a legal inference or assumption that a fact or legal outcome exists based on the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production of evidence or persuasion to the opposing party, who can then attempt to overcome the presumption. In other words, it reverses the burden of proof. The strength or weakness of a particular presumption of fact or of law depends on the circumstances and the presence or absence of an alternative explanation.

61. There are a few statutes which create a reverse burden of proof. The relevant section in such statutes clearly presumes the existence of certain facts which the accused has to rebut - it proceeds on the basis that if a particular state of facts exists then it is on the accused to prove the existence of such facts as improbable or not existing at all. To illustrate we may refer to Section 138 of the Negotiable Instrument Act, 1881. The object of the said provision was held as being both punitive as well as compensatory. The offence was discussed as a regulatory offence and the burden of proof was on the accused in view of the presumption under Section

139 and the standard of proof was on a preponderance of probabilities: *M/s. Meters and Instruments Pvt. Ltd. & Anr. v. Kanchan Mehta*, reported in MANU/SC/1256/2017 : A.I.R. 2017 S.C. 4594, at paragraph 18 of the report. The presumption has to be made that every negotiable instrument was made or drawn for consideration and it was executed for discharge of debt or liability, once the execution of the negotiable instrument is either prove or admitted. Unless the contrary is proved, the presumption has to be made that the holder of a negotiable instrument is the holder in due course. (See. *Laxmi Dyechem v. State of Gujarat*, reported in MANU/SC/1030/2012 : 2012 (13) SCC 375, at paragraphs 24-25 of the report).

62. Hence, a 'presumption' is a probable consequence drawn from the facts as to the truth of a fact alleged and a 'presumption of fact' is an inference as to the existence of one fact drawn from other facts (either certain, or proved by direct testimony) as to the truth of the fact alleged: *Ramachandran v. State of Kerala*, reported in MANU/KE/0327/2008 : (2009) 73 AIC 730 (Ker), at pp. 732-733 of the report."

28. ***Woolmington v Director of Public Prosecution*** reported in **[1935] All ER 1: [1935] A.C. 462**, is regarded as a landmark case in the United Kingdom on the presumption of innocence. Lord Sankey famously described the prosecution's duty to prove guilt beyond doubt as the "golden thread" running throughout English criminal law. There were two exceptions, however: insanity defence and statutory exclusions. 'Burdens on the defence should be evidentiary exclusively,' according to the Criminal Law Revision Committee's 11th Report on Evidence, 1972. (See Christopher Allen, *Practical Guide to Evidence*, 153 (2008))
29. Contemporarily in UK reverse onus clauses are allowed and Court has even allowed reverse persuasive burden. Court have justified even persuasive reverse burden with the following line of reasoning –

*“There may be difficulty in proving defendant’s intention or purpose or actual possession especially when the defendant is a terrorist and had been trained in ways of avoiding detection or has an explanation which is a plausible one. The question of reverse burden is one which must be considered in context of the statute which imposes the burden, since in each case the balance between the result of the reverse burden and underlying reason for it may be different. They (reverse burdens) are permitted so long as they are kept within reasonable limits and are not arbitrary or disproportionate taking into account factors such as the opportunity which the defendant had to rebut the presumption, the importance of the interests at stake, and evidential difficulty for prosecution and defence.” (See David Hoffman & John Rowe, *Human Rights In U.K.*, 223 (2013)).*

Whereas the reverse persuasive burden requires the defendant to prove his innocence on the balance of probabilities, the reverse evidential burden only requires the defendant to raise a matter of exculpation as a genuine issue. The prosecution will then carry the persuasive burden of negating the matter. (See **The Presumption of Innocence and Reverse Burdens: A Balancing Act**, David Hamer, 2007).

30. The reverse persuasive burden is a considerable departure from the normal operation of the presumption of innocence. Requiring the defendant to prove his innocence on the balance of probabilities increases the risk of mistaken conviction. But the reverse burden brings a far greater decrease in the risk of erroneous acquittal and a significant improvement in expected accuracy overall. (See **David Hamer** (supra))
31. Statutory provisions employing reverse onus clauses in India are the Food Adulteration Act, 1954, Section 10(7-B); the Essential Commodities Act, 1955, Section 10C; the Customs Act, 1962, Sections

123, 138A and 139; the Foreign Exchange Management Act, 1999, Section 39; the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985, Sections 35, 54 and 66; the Wealth Tax Act, 1957, Section 35-O; and the Prevention of Corruption Act, 1988, Section 20.

32. We are aware that Section 114A of the Evidence Act was introduced by way of an amendment in the year 2013. It lays down a rule of presumption as to absence of consent in certain prosecution case for rape. The POCSO Act 2012 provides for two presumptions, namely, the presumption as to certain offences, (Section 29) and the presumption of culpable mental state (Section 30). In contrast to the normal idea of 'presumption of innocence' (innocent until proven guilty) in criminal law, the POCSO Act, as a special statute, allows for a movement toward 'presumption of guilt.'
33. Considering the same, it has been established that the primary burden is for the prosecution to prove the foundational fact of the case by adducing 'cogent, trustworthy and reliable' standard of evidence. Section 29 has got no direct and automatic application irrespective of the standard of evidence adduced in a particular case. Thus, without proof of foundational evidence in case under POCSO Act, the onus to prove the reverse burden of proof does not come into operation. The statutory presumption cannot be taken to be absolute. (See **Swapan Mondal** (Supra)).

34. In the case **Sitaram Das v. State of W.B.**, reported in **2020 SCC**

OnLine Cal 522, it was held in paragraph 33-35 as follows;

“It is only on proof of foundational evidence being led, the onus gets shifted to accused to prove the contrary in order to discharge the reverse burden of proof, as contemplated in Section 29 of the POCSO Act.... It has got no direct and automatic application irrespective of the standard of evidence adduced in a particular case. The statutory presumption thus cannot be taken to be absolute. “...mere proof of medical evidence, which is nothing more than a corroborative piece of evidence, would not by itself pave the way for application of presumption available under Section 29 of the POCSO Act.”

35. In **Swapan Mondal**, (supra) in a separate concurring judgement delivered by one of us (Soumen Sen J.), the concept of reverse burden of proof was considered and discussed. The factual matrix of the case pertained to the aggravated penetrative assault on a victim girl aged fifteen years. Observing that the main substance of the prosecution's case rests on appreciation of evidence in the context of Section 29 and 30 of the POCSO Act, it was held in paragraph 28-30 that:

“There is hardly any scope for direct application of Section 29 of the POCSO Act, even in a case where there is no foundational evidence being led by the prosecution. ... The issue was addressed by the Division Bench of this court in the case of Subrata Biswas v. The State reported in (2019) 3 CrL (Cal) 331, where the ratio decided was that proof of penetrative sexual assault is sine qua non prior to making application of the presumption available under Section 29 of the POCSO Act. ... Section 29 has got no direct and automatic application irrespective of the standard of evidence adduced in a particular case. Thus, without proof of foundational evidence in a case under the POCSO Act, the onus to prove the reverse burden of proof does not come into operation. The statutory presumption therefore cannot be taken to be absolute.”

Thus, once the foundational facts required for the presumption under Section 29 and 30 of the POCSO Act kick in stand established. The

burden of proof falls squarely on the appellant/accused to rebut the said presumptions on the balance of probabilities.

36. In the aforementioned judgment I had elaborated the basis of presumption and had held in paragraph 71, that,

“71. A presumption is a legal inference or assumption that a fact or legal outcome exists based on the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production of evidence or persuasion to the opposing party, who can then attempt to overcome the presumption. In other words, it reverses the burden of proof. The strength or weakness of a particular presumption of fact or of law depends on the circumstances and the presence or absence of an alternative explanation.

*72. There are a few statutes which create a reverse burden of proof. The relevant section in such statutes clearly presumes the existence of certain facts which the accused has to rebut - it proceeds on the basis that if a particular state of facts exists then it is on the accused to prove the existence of such facts as improbable or not existing at all. To illustrate we may refer to Section 138 of the Negotiable Instrument Act 1881. The object of the said provision was held as being both punitive as well as compensatory. The offence was discussed as a regulatory offence and the burden of proof was on the accused in view of the presumption under Section 139 and the standard of proof was on a preponderance of probabilities, **Meters and Instruments Pvt. Ltd. v. Kanchan Mehta**, reported in **(2018) 1 SCC 560: AIR 2017 SC 4594**, at paragraph 18 of the report. The presumption has to be made that every negotiable instrument was made or drawn for consideration and it was executed for discharge of debt or liability, once the execution of the negotiable instrument is either prove or admitted. Unless the contrary is proved, the presumption has to be made that the holder of a negotiable instrument is the holder in due course. (See. **Laxmi Dychem v. State of Gujarat**, reported in **(2012) 13 SCC 375**, at paragraphs 24-25 of the report).*

73. Hence, a ‘presumption’ is a probable consequence drawn from the facts as to the truth of a fact alleged and a ‘presumption of fact’ is an inference as to the existence of one fact drawn from

other facts (either certain, or proved by direct testimony) as to the truth of the fact alleged: Ramachandran v. State of Kerala reported in (2009) 73 AIC 730 (Ker), at pp. 732-733 of the report.”

Thus, the presumption so raised shall hold and continue “unless contrary is proved.”

37. I have answered the question whether we look to Section 29 as a mandatory presumption of guilt as to an essential element of the offence, and held in paragraph 82 that;

“In other words, irrespective of the nature of the presumption that we may discuss, the prosecution, in order to take advantage of such presumption, has to lay the foundation and the basis of such fact that would automatically raise a presumption of guilt without any further evidence being led to prove the commission of the offence. Without such foundational facts, the edifice is bound to fall and an accused cannot be asked to adduce evidence to prove that he has not committed the offence..... However, in cases where there is a reverse burden of proof the intensity and complexity of the burden of proof the prosecution is required to discharge to prove an offence is largely reduced by reason of a presumption of law in view of the clear language of Section 29 of the POCSO Act. Where an irrefutable presumption of law is applied on proof or admission of a basic fact, another fact will be presumed and the other party is barred from calling any evidence in rebuttal. As shall be discussed, Section 29 makes it clear that proof of a basic fact or foundational fact is necessary for presumption of existence of another fact.”

38. The Indian position on the constitutionality of the presumption of innocence was clearly stated in **P.N. Krishna Lal v. Govt. of Kerala** reported in **AIR 1995 SC 1325**, where it was specifically stated that the presumption of innocence is not a constitutional guarantee and therefore reverse onus clauses cannot be deemed unconstitutional.

39. The Courts have upheld that in such statutes providing for a reverse burden, it is incumbent for the prosecution to first prove the foundational facts beyond any reasonable doubt, which would in itself be

subjected to greater scrutiny, before the presumption can be raised against an accused. (See **Hanif Khan v. Central Bureau of Narcotics**, reported in **2020 (16) SCC 709**.)

40. The reverse burden of proof has also been discussed in the light of Section 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985 which Deals with presumption from possession of illicit articles. In **Noor Aga v State of Punjab & Anr.** reported in **(2008) 16 SCC 417**, Supreme Court upheld the constitutionality of Sections 35 & 54 of the NDPS Act. Supreme Court observed that,

‘Presumption of innocence is a human right as envisaged under Article 14(2) of the International Covenant on Civil and Political Rights. However, it cannot be equated with fundamental right & liberty adumbrated under Article 21 of the constitution of India.’

And further, that,

“An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability” on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.”

The constitutionality of a criminal provision that places the burden of evidence on the accused must be judged against the backdrop of the state's obligation to protect innocent individuals. The prosecution bears a first burden, which must be met before the legal duty is shifted. Even

yet, the burden of proof imposed on the accused to show his innocence is lower than that imposed on the prosecution.

41. In **Raju and Ors.** (supra), the factual matrix was that the prosecutrix while going along with her mother was met with four accused, who called her a prostitute and asked her to go with them to a hotel. When she refused, they put a towel on her face, slapped her several times and made her sit on a Luna Scooter. She was allegedly gangraped when she was taken to the newly constructed quarters by the accused (thirteen in all) present. The accused were charged under S. 366/376 IPC. The Trial Court had acquitted them under S. 366 of IPC but convicted them under S. 376 (2) (g) and sentenced them to rigorous imprisonment for 10 years and a fine of Rs 200 with default stipulation. In appeal, the High Court by impugned judgment acquitted two accused since they were not identified in the TI parade and maintained the with modification in sentence from 10 years' to 8 years' rigorous imprisonment and fine from Rs. 200 to Rs. 5000. On appeal the Apex Court examined the entire evidence and were of the opinion that it would be difficult to conclusively show that the involvement of each of the accused beyond reasonable doubt and since in that instance the truth and falsehood was so inextricably intertwined that the learned judges found it impossible to discern where one ends and the other begins. Thereby the accused were acquitted in the case.

42. The learned counsel made reference to the Paragraph no. 12 wherein it was stated that,

“Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the India Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”

43. The next case discussed by the Learned Counsel, **Navin Dhaniram Baraiye** (supra), was delivered by Bombay High Court. The case involved a prosecution of an accused under S. 377 of the Indian Penal Code read with Section 3 and 4 of the Protection of Children from Sexual Offences Act, 2012. The accused was sentenced to rigorous imprisonment of 7 years and fine of Rs. 5000. The factual matrix of the case pertained to the complainant discovering her son, the victim, and the other victim is the room where the son was lying on the bed with his pant down and his aforesaid friend, the second victim was sitting on him, also with his pants removed. Upon asked who taught him to do such an act, the

second victim narrated that the accused had taken him to his house to play mobile game and that he had committed anal sex with him. The defense counsel in that case had argued about the presence of a dispute between the accused and the victim's family and that the prosecution has failed to provide foundational facts in support of the case. The medical report also did not support the case at hand. The doctor stated in that said case injuries were not visible and no old injury was found on the anus of the victims. Thereafter, upon perusing the forensic report for the first time in Court, it was stated that there were no semen or blood detected as per his opinion but sexual assault could not be ruled out.

44. In rejecting the contention of the appellant, we are of the view that the conviction has been substantiated by the prosecution from the deposition of four persons, that is, the child victim (PW-1), the mother of the victim or the complainant (PW-3), the deposition of the eight year old girl child Anjali (PW-2) and the deposition of the doctor, (PW-7). The evidence was found natural and spontaneous by the Learned Judge. The evidence of the said witnesses are believable, trustworthy and natural as found by the Learned Judge and we are in agreement with the said finding.

45. On reading of the entire materials, this Court is of the view that the prosecution has provided and substantiated foundational evidence and has proved its case beyond all reasonable doubt. The appellant/accused neither examined any independent witness nor

produced any contra evidence to prove his defence. There has been no discrepancy between the place of occurrence, medical witness, report, and oral evidence of the alleged eye witness.

46. Besides, the witnesses deposed in favour of the prosecution had not enmity and no reason for being tutored for falsely implicating the accused. (See ***Indrajit Mallah v. State of U.P.*** reported in **2006 CrLJ (NOC) 53 All**).

47. Mere lapse on the part of prosecution should not lead unmerited acquittal, subject to rider that in such situation evidence on record should be clinching, so that lapses of prosecution can be condoned. In this case, evidence of victim is cogent and consistent.

48. On a combined reading of evidence of P.Ws.1 to 21 and Exs. 1 to 21, this Court is of the considered view that prosecution has proved its case beyond all reasonable doubt and the accused has failed to rebut the presumption under Section 29 and 30 of the POCSO Act Trial Court has rightly appreciated the evidence of prosecution and come to the conclusion that the appellant/accused committed offence punishable under Section 6 of the POCSO Act read with Section 376 (2) (i) of IPC.

49. All of the reports on the appellant show that he is a child abuser. I agree with the learned brother judge that his culpability was significant and the crimes were serious. These atrocities were both inexplicable and terribly horrifying. In finality, this Court comes to the conclusion that

there is no merit in the appeal and there is no sound reason to interfere with the judgment of conviction and sentence.

Accordingly, this criminal appeal is dismissed.

The judgment and order of conviction and sentence under appeal is confirmed.

However, there shall be no order as to costs.

Urgent Xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.

(Soumen Sen, J.)