

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRA-D-202-2021 (O&M)
Date of Decision: 21.12.2022
Reserved on: 24.11.2022**

Rakesh ... Appellant

Versus

State of Haryana ... Respondent

**CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA**

Present: Ms. Monika Thakur, Legal Aid Counsel,
for the appellant.

Mr. Pawan Girdhar, Addl. AG, Haryana.

MANISHA BATRA, J.

The present appeal has been directed against the judgment of conviction dated 05.02.2020 and order of quantum of sentence dated 06.02.2020 passed by the learned Additional Sessions Judge (Fast Track Court), Gurugram in Sessions case No.198 of 2018 titled *State v. Rakesh* whereby the appellant-accused had been held guilty for commission of offence punishable under Section 6 of The Protection of Children from Sexual Offence Act, 2012 (for short "POCSO Act") and had been sentenced to undergo rigorous imprisonment for a period of 20 years and to pay fine of Rs.50,000/- and in default of payment of fine, he was further sentenced to undergo rigorous imprisonment for a period of one year. Simultaneously, the victim was directed to be paid compensation of Rs.5 lacs by DLSA, Gurugram.

2. Brief matrix of the case is that on 21.10.2016, on receipt of an information regarding an incident of rape having taken place with a

three years' old girl in the area of Basai Enclave, Gurugram and she being referred to General Hospital, Gurugram, a police party headed by PW-2 ASI Amandeep Kaur reached there and recorded statement of mother of the victim "R" (name withheld) who alleged that the victim "S" (name withheld) who was her three years old daughter was playing outside her jhuggi at about 7.30 PM on the same evening while she was cooking meals. Her daughter had suddenly disappeared. She started making search for her and found her while crying in front of Green Field Public School. She brought the victim back to her jhuggi and on reaching there, the victim complained of pain on her private parts. The complainant noticed blood oozing out of her private parts. In the meanwhile, her husband "A" (name withheld) also reached there and they took the victim to a private doctor who advised them to take her to some Government hospital. The victim was medico legally examined. She was also examined by a gynecologist and was referred to Safdarjang Hospital, Delhi as her condition was critical. After her discharge from the hospital, she was taken by the police to the place of occurrence on 25.10.2016 which was identified by her. The accused Rakesh was also arrested on the same night on the basis of some secret information. He was interrogated and suffered disclosure statement admitting his involvement in the crime and demarcated the place of occurrence. He also got recovered capri/underwear of the victim from the bushes existing near the spot of occurrence. The statement of the mother of the victim under Section 164 Cr.P.C. was recorded on 26.10.2016. The medico legal examination of accused was also conducted and his blood samples were taken for DNA profiling.

3. After completion of necessary investigation and usual

formalities, challan under Section 173 Cr.P.C. was presented for trial of the accused. The case was committed to the Courts of Sessions. On finding a prima facie case for commission of offence punishable under Section 6 of POCSO Act, the accused had been charge-sheeted accordingly. He pleaded not guilty and claimed trial.

4. To substantiate its case, the prosecution produced 12 witnesses in all. The victim was summoned as PW-5 by the learned trial Court. However, she was declared to be an incompetent witness. The father of the victim was examined as PW-6 and mother as PW-7. The prosecution also examined PW-2 ASI Amandeep Kaur who deposed about conducting investigation from the stage of receipt of information about the incident till culmination of the entire investigation proceedings and proved the steps taken by her during the course of investigation leading to collection of entire incriminating evidence and justifying the prosecution of the accused for committing rape upon the victim. The learned Public Prosecutor tendered in evidence Ex.PX FSL report, Ex.P-20 medical examination report of victim, Ex. P-20/A opinion of gynecologist and Ex.P-21 medico legal report of the victim as prepared by doctor of Safdarjang Hospital, Delhi. Reliance was placed on other documentary evidence also.

5. The statement of accused under Section 313 of Cr.P.C. was recorded wherein he pleaded false implication and claimed himself to be innocent. He was given opportunity to produce evidence in defence but failed to produce any.

6. On appreciation of evidence produced on record and consideration of the contentions raised by both the sides, the learned trial Court held the accused guilty for commission of offence punishable under

Section 6 of POCSO Act and sentenced him in the manner as mentioned above.

7. Feeling aggrieved, the instant appeal had been preferred by the appellant-accused who shall be continued to be referred as accused hereinafter for the sake of convenience.

8. Learned counsel for the accused submitted that the impugned judgment and order on quantum of sentence were liable to be reversed as the same were not sustainable in the eyes of law. The learned trial Court failed to appreciate the evidence produced on record in proper prospective. The fact that no direct evidence of the occurrence had come on the spot and the case rested on the hearsay evidence of PW-6 & PW-7, had not been taken into consideration. Both PW-6 & PW-7 were proved to have materially improved their initial version. Their statements did not fall within the exception of rule of *res gestae* and hence could not be considered to be admissible in evidence. The accused was neither named in the FIR nor proved to be identified either by the victim or her parents at any point of time during the course of investigation. The prosecution version as to suffering of disclosure statement by the accused and consequent recovery of capri/underwear of the victim was highly improbable and untrustworthy. The said capri/underwear had neither been produced in evidence nor identified by the victim or her parents. The prosecution failed to produce any scientific evidence to connect the accused with the crime. Even the doctors who had conducted medical examination of the victim were not produced and their reports were simply tendered in evidence which made the same inadmissible but learned trial Court while ignoring these facts, committed a grave error. The place of occurrence was already known to the

police. The accused had successfully rebutted the presumption under Section 29 of the POCSO Act. Hence, it was urged that the appeal deserves to be accepted.

9. Per contra, learned State counsel argued that the findings as given by learned trial Court did not warrant any interference. The victim was a child of tender age and hence was unable to record her statement in the Court. The statements of parents of the victim were, however, very much relevant and trustworthy and were fully covered under the rule of *res gestae*. There could not be any effective denial on the part of the accused to the evidence led by them. The medico legal reports of the victim were tendered in evidence on account of no objection given by counsel for the accused and hence the same were very much admissible in evidence and proved that the victim had been subjected to sexual abuse. There was overwhelming evidence on record to prove that the accused had suffered disclosure statement and had got recovered capri/underwear of the victim and this fact also connected him with the subject offence.

10. Learned State counsel further submitted that the presumption under Section 29 of POCSO Act was absolute and the Court had to presume that the accused committed the offence for which he was charged with unless the contrary was proved. He argued that it was for the accused to prove the contrary and burden was entirely upon him to prove his innocence, which he had failed to discharge. With these broad submissions, it was stressed that the appeal being devoid of any merit was liable to be dismissed.

11. On a careful scrutiny of the evidence produced on record and after giving due deliberations to the contentions as raised by both the sides,

in our opinion, the followings points are required to be considered:-

- i) Whether the victim was proved to have been subjected to rape?**
- ii) Whether the prosecution succeeded in proving that it was the accused who had ravished the victim?**

12. In the light of the contentions raised by learned State counsel, it is firstly necessary to examine the effect of presumption under Section 29 of the POCSO Act and the manner in which the accused can rebut such presumption. As per this section, when 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, then the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, unless the contrary is proved. In our opinion, the submission that statutory presumption under Sections 3, 5, 7 & 9 of the POCSO Act is absolute, cannot be accepted as the well settled proposition of law is that the statutory presumption would stand activated only if the prosecution proves the foundational facts and even when the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond a reasonable doubt. If the accused is in position to create a serious doubt about the veracity of the prosecution case, or the accused brings on record material to render the prosecution version highly improbable, the same is sufficient. Reference in this regard can be made to **Subrata Biswas v. State**, 2019 SCC OnLine Cal 1815, wherein it was held that the statutory presumption under Section 29 applies when a person is prosecuted for committing offences under Sections 5 & 9 of the POCSO Act and reverse burden is imposed upon the accused to prove the contrary. The word “is prosecuted”

in the aforesaid provision does not mean that the prosecution has no role to play in establishing and/or probablising primary facts constituting the offence. If that were so then the prosecution would be absolved of the responsibility of leading any evidence whatsoever and the Court would be required to call upon the accused to disprove a case without prosecution laying the firm contours thereof by leading reliable and admissible evidence. It was held that such an interpretation not only led to absurdity but rendered the aforesaid provision constitutionally suspect. It was further observed that a proper interpretation of Section 29 was that when a person is prosecuted under Sections 5 & 9 of the POCSO Act, the prosecution is absolved of the responsibility of proving its case beyond reasonable doubt. On the contrary, it is only required to lead evidence to establish the ingredients of the offence on preponderance of probabilities. Upon laying the foundation of its case by leading cogent and reliable evidence, the onus shifts upon the accused to prove the contrary.

13. Similar proposition of law was laid down in **Sachin son of Baliram Kakde v. The State of Maharashtra**, 2016 ALL MR (Criminal) 4049 wherein Bombay High Court held that the presumption under Section 29 of the POCSO Act could not be said to be irrebuttable. Infact no presumption was irrebuttable in law, as it could not be equated with conclusive proof. The provision of Section 29 mandated the Court to draw the presumption unless contrary was proved. One had to keep in mind, as expressed by an eminent jurist that presumptions are bats in law, they fly in a twilight but vanish in the light of facts. Reliance can also be placed upon judgment dated 23.04.2018 (Nagpur Bench) passed in **Amol s/o Dudhram Barsagade v. State of Maharashtra**, Crl. Appeal No.600 of 2017 wherein

it was observed that the statutory presumption under Section 29 of the POSCO Act would stand activated only if prosecution proves the foundational facts and then, even if statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond reasonable doubt. Suffice it if the accused is in a position to create a serious doubt about the veracity of the prosecution case or brings on record material to render the prosecution version highly improbable.

14. In view of the above settled proposition of law, the evidence placed on record by the prosecution is to be examined to come to the conclusion that the foundational facts of the prosecution case have been established or not? Hence, let us proceed further and deliberate upon the question as to whether the victim who was a child of tender age being only 3 years old was proved to have been sexually abused as on the evening of 21.10.2016 as per the version as set up by the prosecution? The prosecution did not examine the doctors of General Hospital, Gurugram and Safdarjang Hospital, Delhi who had medico legally examined the victim and had rested its case on this point upon the reports Ex.P-20 & Ex.P-21 as well as gynecologist report Ex.P-20/A which were fully relied upon by learned trial Court. Though learned counsel for the accused had strenuously argued that these reports could not be considered to be admissible in evidence as they were not proved in accordance with law, however, on perusal of trial Court record, we are not inclined to hold so. The trial Court record reveals that the doctors who had prepared the above reports were given up while their reports were tendered in evidence by learned PP on 12.11.2018. At the same time, it has also been revealed that the learned trial Court issued summons to these doctors time and again but their presence could not be secured

probably due to the reason that they had left their previous places of posting. Moreso, at the time when these reports were tendered in evidence, it was specifically recorded by the learned trial Court as well by learned PP that no objection had been given by counsel for the accused for proving these reports in evidence. As such, the accused cannot raise any argument as to authenticity of these reports at this stage and they are to be taken into consideration as pieces of admissible evidence. On a perusal of all these reports, it is clear that on conducting medico legal examination of the victim on 21.10.2016 and while preparing reports Ex.P-20 and Ex.P-20/A, it was found that there were stains of blood on external genitalia of the victim though there was no active blood. A two degree perineal tear (mid line) and tears fourchette and introitus were seen. Report Ex.P-21 corroborated this fact and as per that report, swelling was found on right side of labia majora of the victim. As per Ex.P-20, the possibility that the victim was subjected to sexual intercourse/sexual abuse could not be ruled out. The observations as made in these reports coupled with the fact that both parents of victim had seen blood on the private parts of the victim and could not be controverted by the accused on that point, prove that in fact the victim was subjected to rape on the evening of 21.10.2016.

15. Now coming to the question as to whether it was the accused, who had ravished the victim? It was not the prosecution case that the rape was witnessed by any one. No direct evidence regarding the same was adduced before the Court. Though the victim was summoned as a witness but after putting certain general questions, the learned trial Court had noticed no response from the victim probably because of the fact that she could not understand any other language except Bengali language and also

on account of her tender age and she was declared an incompetent witness. The prosecution, therefore, relied upon statements of PW-6 & PW-7 which were obviously very crucial. Learned counsel for the accused argued that the learned trial Court had wrongly treated the evidence of PW-6 & PW-7 as relevant and admissible in evidence though the same could not be relied upon being hearsay in nature and also because both of them had made material improvements in their statements. PW-7 "R" mother of the prosecutrix in her statement Ex.P-2 initially recorded before the police at 11.55 PM on 21.10.2016, had alleged that some unknown person had committed rape upon her daughter. It was only in her statement recorded under Section 164 of Cr.P.C. (Ex.P15) as on **26.10.2016** that she had disclosed before the concerned Magistrate that it was the accused who had taken away her daughter and had committed rape upon her. Similarly, PW-6 "A" in his statement Ex.D-1 recorded under Section 161 of Cr.P.C. on 21.10.2016 had not disclosed the name or identity of the rapist. It was only for the first time while recording his sworn deposition in the Court that he stated that on the night of occurrence itself, he had made inquiry from his daughters and some other persons then it was revealed to him that the accused had enticed away his daughter on the pretext of giving toffees and had committed rape upon her in their absence from their house, in the day time by taking her near school area. On perusal of statements made by them during cross-examination, it is, nonetheless, crystal clear that actually they had no idea about the identity of the rapist till the night of 25.10.2016 when the accused was arrested. Both of them are shown to have made statements inconsistent to each other as well as self contradictory statements and are also proved to have improved their initial version. PW-6 admitted during

cross-examination that neither his wife nor himself had disclosed the name of the accused to the police on 21.10.2016 and stated that his daughter had disclosed his name to them as well as to the police at about 10/11 PM. However, his testimony to this effect was not corroborated either by PW-7 or by PW-2. It was simultaneously stated by him that his daughter did not understand Hindi and understood Bengali language only. As such, how his daughter could inform the police about the identity of the accused, had not at all been explained by him. He was also unable to disclose the names and particulars of such persons who had allegedly given information about identity of rapist to him and also did not explain as to why he had not exchanged that information with police till 25.10.2016 or even thereafter. Then, even PW-7 admitted during her cross-examination that none had revealed anything about the accused to her. She also stated that none of her neighbours could reveal that they had seen the crime of rape being committed upon her daughter. She stated that since her daughter was found bleeding from her private parts, therefore, it was suspected by her that rape was committed upon her. Though she stated that she had disclosed about the identity of the accused to the police in her statement Ex.P-2 but she was confronted with the contents of the same wherein it was not so recorded. She stated that her daughter had identified the accused from the photograph shown to her by the police but exactly when and by whom such photograph had been shown was not explained by her. This goes a long way to show that both these witnesses had made material improvements from their initial version thereby rendering the same highly unreliable.

16. Further, on testing the statements of PW-6 & PW-7 on the anvil of the principles of Section 6 of Indian Evidence Act (for short “Act”) we

find that they are only hearsay in evidence and cannot form part of *res gestae* at all. Section 6 of the Act is an exception to the general rule under which the hearsay evidence becomes admissible. For bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that, it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statement sought to be admitted, therefore, as forming part of *res gestae* must have been made contemporaneous with the acts or immediately thereafter. Reference in this regard can be made to **Bhaskaran v. State of Kerala**, 1985 CriLJ 1711, wherein it was observed that Section 6 of the Act read with illustration (a) thereto says that spontaneous statements made in the course of the transaction are admissible as being *res gestae*. The statement is relevant only if it is that of a person who has seen the actual occurrence and who uttered it simultaneously with the incident or so soon thereafter, as to make it reasonably certain that the speaker is still under the strains of the excitement caused by it having seen the incident. The statement uttered or the act done, must be spontaneous reaction of the person witnessing the crime and forming part of the transaction. Remarks made by persons other than eye-witnesses are only hearsay. In order to make the statement of a witness admissible, it must have been made, as contemplated by Section 6 of the Act illustration (a) to it, at the time, the transaction was taking place, or so shortly before or after it as to form part of the transaction. If the transaction has terminated and then the statement is made, the statement is irrelevant. The admissibility is dependent on continuity.

17. The well settled proposition of law is that the application of

res gestae depends upon the proximity of time of conveyance of the information. It should be so proximate that the information conveyed, in fact, forms part of the same transaction. The real test is proximity of time. It is the principle behind *res gestae* evidence that the information is conveyed before there is any lapse of time so as to develop or to cook up a story. The logic behind the principle is that the act continuing *res gestae* is so close and proximate i.e. treated to form part of the same transaction. It is, however, apparent from record that there is no spontaneity and immediate proximity as also continuity between the occurrence and the statement allegedly made by the victim to her parents as to the identity of the accused and the statements made by her parents to police. Hence, the same cannot be stated to be admissible as *res gestae* with regard to identity of the accused as rapist due to the reason that the same were not recorded simultaneously with the incident or soon thereafter with regard to the identity of the accused. Nor it was initial version of PW-6 & PW-7 that the victim had divulged the identity of the accused to them shortly after the incident. Rather, the accused is not proved to have been shown to the victim child at all. PW-7 stated that her daughter had identified the accused from his photograph which was shown by the police but strangely PW-2 investigating officer did not utter even a single word to the effect that she had shown photograph of the accused to the victim to establish his identity. If name and identity of the accused were actually disclosed by the victim to PW-6 & PW-7 or to the police then what stopped them from informing the police and why police did not immediately apprehend him, had not been explained. The conduct of PW-7 of mentioning name of the accused as the culprit on 26.10.2016 before Magistrate, could by no stretch of imagination

be stated to be spontaneous reaction of a person witnessing the crime and forming part of the same transaction or a statement recorded soon after the incident as to make reasonably certain that the victim had actually disclosed about the identity of the accused to this witness. As such, we have no hesitation to hold that though statements of PW-6 & PW-7 could be acted and relied upon to hold that the victim had been subjected to sexual abuse but the same cannot be held admissible in evidence under Section 6 of the Act with regard to identity of the accused. The learned trial Court did not take these points into consideration and, therefore, the findings given by learned trial Court on the point as to involvement of the accused while relying upon their statements cannot be stated to be sustainable in the eyes of law and are liable to be reversed.

18. Another lacuna in the prosecution case as pointed out by learned counsel for the accused was that the test identification parade of the accused had not been conducted. In the instant case, PW-7 had firstly taken the name of the accused on 26.10.2016 while recording her statement under Section 164 of Cr.P.C. It is not revealed from the record that the accused had been seen by her even by that time and identified as such. The prosecution case is that the accused was residing in the neighbourhood of the victim. PW-6 & PW-7 might be knowing the accused prior to the incident. However, the fact that the accused had ravished their daughter was obviously not known to them till the arrest of the accused who as per the testimony of the investigating officer had been arrested only on the basis of secret information. It was not the version of PW-2 that the victim or her parents had given any clue about the identity of the accused to her. Both PW-6 & PW-7 actually identified the accused for the first time in Court.

The victim herself is not proved to have identified the accused at all. As already mentioned though PW-7 stated that her daughter had identified the accused from his photograph as shown by police but her statement on that point was not corroborated by any other evidence including that of investigating officer. The learned trial Court had observed that there was no requirement of conducting test identification parade of the accused as PW-6 & PW-7 already knew him. In our opinion, the learned trial Court did not consider the peculiar circumstances of the case while arriving at this conclusion. The well settled proposition of law is that the test identification parade is not necessary if the accused is already known or sufficiently described in the complaint and when he is arrested on the spot but otherwise, it is obligatory to hold the test identification parade. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances, the complainant or the witnesses came to pick out the accused and the details of the part which such person played in the crime in question. Then identification is considered as a safe rule of prudence for corroboration. Though holding of identification proceedings may not be substantive evidence yet such proceedings are used for corroboration purpose. Reliance in this regard can be placed upon **Rajesh Govind Jagesha vs. State of Maharashtra**, 1999 (4) RCR (CrI.) 754 and **State (Delhi Administration) vs. V.C. Shukla and another**, AIR 1980 Supreme Court 1382. In view of the fact that the complicity of the accused in the subject crime had not been shown till 25.10.2016 either by the investigating officer or by PW-6 & PW-7, it is abundantly clear that the evidence of PW-6 & PW-7 of identifying the accused during trial for the first time was inherently of weak character. As such it clearly appears that a

false story had been cooked by PW-6 & PW-7 in this regard which cannot be believed. Even the stand taken by the investigating officer is that she had arrested the accused on the basis of secret information.

19. The next circumstance as relied upon by the prosecution to connect the accused with the crime was suffering of disclosure statement dated 25.10.2016 vide memo Ex.P-8 and consequent demarcation of place of occurrence vide memo Ex.P-9 and recovery of capri/underwear allegedly belonging to the victim vide memo Ex.P-10. The case of prosecution on this point rested upon the statements of PW-2 ASI Amandeep Kaur and PW-10 Vinod Kumar. Before discussing the question of admissibility of evidence of these witnesses as to demarcation and recovery at the instance of the accused, it will be proper to refer to certain provisions of law. Section 25 of the Act mandates that no confession made to a Police Officer shall be proved as against a person accused of an offence. Similarly, Section 26 of the Act provides that confession made by the accused while in custody of the Police cannot be proved against him. However, to the aforesaid rules of Sections 25 and 26 of the Act, there is an exception carved out by Section 26 of the Act, based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly, it was safely allowed to be given in evidence. The scope and ambit of Section 27 of the Act were illuminatingly stated in **Pulukuri Kottayya and others vs. Emperor AIR 1947 PC 67** which has become *locus classicus* wherein, it was held that Section 27 which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition

necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. It was also observed in this case that it can seldom happen that information leading to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law. It, therefore, follows that unless it is shown by other evidence that the articles discovered were in some way connected with the offence charged and the accused, the recovery thereof, loses any relevancy. To make discovery of a fact in pursuance of an information given by the accused to be relevant and admissible in evidence, it must be further shown by other evidence that the articles discovered were connected with the offence charged of the guilt of the accused. In other words, it may be emphasized that the articles recovered will be relevant only if they are proved by other evidence to have been used in the commission of the offence.

20. The recovery evidence produced in the instant case has to be examined in the light of the above discussed well settled principle. Though, both PW-2 and PW-10 deposed that the accused in pursuance of disclosure statement as suffered by him, had demarcated the place of occurrence vide Memo Ex.P9 on 25.10.2016. However, it is also revealed from their statements that the prosecutrix had already demarcated the place of occurrence on the same night prior to the arrest of accused and rough site plan Ex.P7 had been prepared by PW-2. Meaning thereby, that place of occurrence was already known to the Investigating Officer at the time when

it was allegedly identified by the accused. As such, no new or distinct fact can be stated to have been discovered in pursuance of the disclosure statement stated to have been suffered by the accused leading to demarcation of place of occurrence and hence the evidence produced on record by the prosecution to that effect cannot be stated to be relevant for the purpose. So far as, the recovery of the capri/underwear allegedly worn by the victim at the time of occurrence at the instance of accused vide Memo Ex.P10 is concerned, though the Investigating Officer stated that the recovered capri/underwear had been identified by PW-7 as that of the victim, however, no memo of identification of the said capri/underwear as shown to be signed by mother of the victim had been produced on record nor PW-7 uttered even a single word to the effect that any such capri/underwear had been shown to her or was identified by her as belonging to her daughter. The recovered capri/underwear had not even been produced in the Court and shown to PW-7. In such circumstances, the statements of PW-2 and PW-10 that the accused got recovered any capri/underwear from the bushes situated near the place of occurrence, even if believed to be true, cannot be considered to be relevant in view of the fact that no evidence could be produced by the prosecution to prove that the capri/underwear discovered was in some way connected with the offence charged and therefore, in our considered opinion, the recovery thereof, has lost any relevancy and the said recovery cannot be stated incriminating evidence against the accused. In the peculiar circumstances of the case as the prosecution failed to prove evidence to establish that the capri/underwear allegedly got recovered at the instance of accused was worn by the victim at the relevant time. It also needs to be mentioned that

the well settled proposition of law is that the discovery evidence by itself is a subsidiary evidence and cannot sustain a conviction though, it is a valuable piece of corroborative evidence, but it must be shown by other evidence that the articles discovered were connected with the offence. Accordingly, it emerges that the prosecution failed to link the accused with the rape of the victim on the basis of evidence as to recovery of capri/underwear.

21. Proceeding further and referring to the scientific evidence produced on record in the form of FSL reports Ex.PX & PY as per which the blood found on the cotton wool vaginal swab and frock worn by the victim at the time of occurrence was compared with the blood samples taken from DNA profiling of the accused and the same did not match. No semen was found on the frock, vaginal swab or capri/underwear of the victim. Therefore, from these FSL reports, no inference as to the involvement of the accused in the crime of rape of the victim could obviously be drawn. However, the said point had not been taken into consideration by the learned trial Court. As such, it emerges that on having regard to the totality of the facts and circumstances of the case and the evidence produced on record, it is difficult to hold that the prosecution proved the guilt of the accused by adducing cogent and clinching evidence. As demonstrated above, the evidence with regard to identification of the accused, discovery of incriminating articles, identification of place of occurrence and the scientific evidence in the form of FSL reports showing that DNA profiling of the accused did not match with the blood stains found on the clothing of the victim, has not been proved by the prosecution by leading cogent, clinching and convincing evidence of such a nature which unerringly

pointed towards the guilt of the accused and this demonstrates that on preponderance of probabilities, the accused has been able to rebut the presumption under Section 29 of the POCSO Act. As observed earlier, for the requisite presumption to operate, it was necessary for the prosecution to establish the foundational facts, which do not appear to have been shown by it. The learned trial Court while holding the accused guilty did not take all these aspects into consideration. The findings as given by the learned trial Court are, therefore, not sustainable.

22. Resultantly, we are left with no alternative but to acquit the accused though he is involved in a heinous crime. Having said that and for the reasons stated above, the judgment and order passed by learned trial Court is set aside and the appellant-accused is acquitted from the charge levelled against him by giving him benefit of doubt and is directed to be released forthwith if he is not required in any other case. Appeal stands allowed accordingly

23. It is, however, needless to say that in view of the provisions of Section 357A of Cr.P.C the victim would be entitled to compensation as directed by the learned trial Court to be paid by DLSA Gurugram, if not awarded so far by it.

24. Pending applications, if any stand disposed of.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

21.12.2022
manju

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No