

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.103 of 2019**

Arising Out of PS. Case No.-94 Year-2013 Thana- MUSRIGHRARI District- Samastipur

Heera Das, son of Late Chulhai Das, Resident of village- Gangapur, P.S.-
Musrigharari, District - Samastipur

... .. Appellant

Versus

- 1. The State of Bihar
- 2. Ms. X

... .. Respondents

Appearance :

For the Appellant/s : Mr.Vishal Agrawal, Advocate
Mr. Deepak Kumar Singh, Advocate
For the Respondent/s : Mr.Dilip Kumar Sinha, APP

**CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)**

Date : 19-06-2024

The present appeal arises out of the judgment of conviction dated 05.07.2017 and the order of sentence dated 11.07.2017 (hereinafter referred to as ‘the impugned judgment and order’ respectively) passed by learned Special Judge, POCSO Act, Samastipur (in short ‘the learned trial court’) in Sessions Trial No. 528 of 2013 arising out of Mushri Gharari P.S. Case No. 94 of 2013 registered under Section 376 of the Indian Penal Code (in short ‘IPC’) and Section 4 of the Protection of Children from Sexual Offences Act 2012 (hereinafter referred to as the ‘POCSO Act, 2012’).

2. By the impugned judgment and order, the learned trial court has been pleased to convict the appellant for the offences punishable under Section 376 IPC and Section 6 of the POCSO Act, 2012 and awarded a sentence of rigorous life imprisonment with a fine of Rs. 50,000/- for the offences punishable under Section 376 IPC and a rigorous life imprisonment with a fine of Rs. 50,000/- for the offence under Section 6 of the POCSO Act, 2012. In case of non-payment of fine, under both the Sections, the appellant has been ordered to undergo rigorous imprisonment for 6 months each. Both the sentences are to run concurrently.

Prosecution Case

3. The prosecution case is based on a written report dated 24.07.2013 submitted by the mother of the victim (hereinafter the victim would be called as 'Ms. X' and the informant who is the mother of the victim would be called as 'Ms. Y'). The written report submitted by Ms. 'Y' addressed to the Superintendent of Police, Samastipur alleged that while she had come to her *maika* in village Gangapur on the occasion of the marriage of her brother, her minor daughter (Ms. 'X') aged about '5' years was allured by this appellant who gave her a biscuit and took her to his house where he committed rape on her. According to the written report, the rape was committed on 14.06.2013 at

11:00 am by the appellant in his own house. It is further alleged that because of the rape committed upon the victim, her private part was torn and it was bleeding. It is alleged that on the screaming of the victim child, the co-villagers caught this appellant and they talked of a *Panchayati* in the village but the *Panchayati* was not held, the Sarpanch had taken her thumb impression, but in collusion with the appellant the Panch and the Sarpanch after taking money scolded the informant to go away. The informant claimed that the injury wound on the private part of the daughter is still present. She further alleged that Ramesh Das and Ganesh Das who are the two sons of the appellant were threatening her that in case she would lodge a case then her whole family would be killed and thrown. The written report dated 24.07.2013 resulted in lodging of the First Information Report giving rise to Mushri Gharari P.S. Case No. 94 of 2013 dated 25.07.2013 against the sole accused who is appellant before this Court.

4. After investigation, police submitted a charge-sheet under Section 376/511 IPC and Section 8 of the POCSO Act, 2012. Accordingly, after taking cognizance, the records were submitted to the court of learned Special Judge, POCSO Act where charges were framed on 01.10.2013. The appellant was charged for the

offence under Section 376/511 IPC and Section 8 of the POCSO Act, 2012.

5. In course of trial, the prosecution examined as many as '9' witnesses. It, however, appears from the records that after examinations of '8' prosecution witnesses, an application was filed on behalf of the prosecution for alteration of charges. The prosecution submitted that in view of the evidence of the prosecution witnesses, charges be framed under Section 376 IPC and Section 6 of the POCSO Act, 2012. This application of the prosecution was opposed by the defence but vide order dated 09.08.2016, the learned trial Judge allowed the application and directed for alteration of charges. Accordingly, the charges were altered under Section 376 IPC and Section 6 of the POCSO Act, 2012. On the same day, the learned Trial Judge recorded in it's order that the defence has been given opportunity to cross-examine the prosecution witnesses who had already been examined and cross-examined earlier but the defence did not make any request to allow him to cross-examine the prosecution witnesses again. With this note in the order dated 09.08.2016, the learned trial court proceeded to issue summon to Investigating Officer (I.O.). The I.O. was examined as last witness being PW-9. Thereafter, the prosecution evidence was closed.

6. On behalf of the prosecution, the injury report of the victim has been proved by Dr. Sudha Verma (PW-5) which has been marked as Exhibit '1' and the formal FIR has been proved by the I.O. (PW-9) which has been marked as Exhibit '2'.

7. After closure of the prosecution evidence, the statement of the accused was recorded under Section 313 Cr.P.C. The accused-appellant pleaded innocence. The defence did not examine any witness. No documentary evidence has been otherwise proved by the defence.

Findings of the Learned Trial Court

8. Learned trial court having analyzed the prosecution evidences, both oral as well as documentary, held that the prosecution has been able to prove the guilt of the accused beyond all reasonable doubts. In course of discussions, the learned trial court has taken a view that the victim (PW-8) was aged about 5-6 years at the time of occurrence and she has clearly stated that the appellant had committed rape on her as a result whereof she was bleeding from her private part. The statement of the victim in this regard has been corroborated by PW-4, PW-6 and PW-7 in their respective evidences. The learned trial court has, though, taken note of the evidence of the doctor (PW-5) and the medical report (Exhibit '1') in which no sign of rape has been found, concluded

that he would not agree with the medical evidence. The learned trial court further held that Section 29 of the POCSO Act, 2012 raises a presumption of guilt against the accused. In this case, according to the learned trial court, the accused was not able to bring in any material to create a doubt upon the prosecution evidence, therefore, the prosecution has been found established beyond all reasonable doubts.

Submissions on behalf of the Appellant

9. While assailing the judgment of the learned trial court, Mr. Vishal Agrawal, learned counsel would submit that the learned trial court has committed grave error in appreciation of the materials available on the record. It is further submitted that the learned trial court could not appreciate that the presumption under Sections 29 and 30 of the POCSO Act, 2012 cannot be interpreted in a manner so as to take a view that the prosecution has no role to play in establishing and/or probablising the preliminary facts constituting the offence. It is submitted that in the present case, the prosecution has failed to establish even the foundational facts which are required to be proved in order to shift the burden upon the accused persons.

10. It is submitted that the prosecution is unable to explain the inordinate delay of one month ten days in lodging of the First Information Report.

11. Learned counsel has relied upon the judgments of the Hon'ble Supreme Court in the case of **Thulia Kali Vs. State of Tamil Nadu** reported in **(1972) 3 SCC 393** and **Nandlal and Others versus State of Chattisgarh** reported in **(2023) 10 SCC 470** to submit that the delay of one month ten days in lodging of the First Information Report would tend to show that it is a fabricated case and it would prove fatal to the prosecution case.

12. Learned counsel has further submitted that when the medical evidence is at variance with the ocular evidence and it completely rules out the ocular evidence, the conviction of the appellant on the basis of sole testimony of a child witness which is highly doubtful and does not inspire confidence would result in travesty of justice.

13. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of **Pradeep vs. State of Haryana** reported in **AIR 2023 SC 2345** and **P. Ramesh Vs. State represented by Inspector of Police** reported in **(2019) 20 SCC 593** to submit that in the present case, it would not be safe to

base the conviction only on the testimony of the child witness which does not inspire confidence.

14. In this case, the court has not examined the competence of the child witness to understand the question, give a rational answer and her ability to speak the truth. Her statement was not recorded earlier under Section 164 Cr.P.C and she had visited her maternal uncle's place for the first time at the age of '5' years. She did not recall the name of the neighbours who were residing there but surprisingly took the name of the appellant in course of her evidence which was recorded two years after the alleged occurrence.

15. As regards the presumption under Sections 29 and 30 of the POCSO Act, 2012, learned counsel has relied upon the judgment of the Hon'ble Delhi High Court in the case of **Veerpal @ Titu versus State (CRL.A.223/2023 dated 15th April, 2024)** and the judgment of the Hon'ble Calcutta High Court in the case of **Subrata Biswas and Another versus State** reported in **2019 SCC Online Cal 1815**. It is submitted that the learned trial court committed grave error by altering the charges without recording any reason and then in one stroke of pen saying that the defence has not made any request to cross-examine the prosecution witnesses who had already been discharged. It is submitted that the

learned trial court proceeded to conduct the trial in violation of the established procedure of law which resulted in passing of the impugned judgment.

Submissions on behalf of the State

16. Mr. Dilip Kumar Sinha, learned APP for the State has defended the impugned judgment. Learned APP would submit that no doubt the medical evidence completely rules out the prosecution case but there is no reason as to why the victim's evidence as a child witness and the corroboration made to some extent by PW-4 and PW-6 be not taken as reliable piece of evidence.

17. Learned APP submits that so far as delay of one month and ten days is concerned, the same has been explained in the written report itself where it is stated that there was a talk of *panchayati* but the said *panchayati* did not take place because the Sarpanch had gone in collusion with the appellant.

18. Learned APP submits that PW-4, PW-6 and PW-7 all have stated that they had seen the victim (PW-8) in the house of the appellant after she was raped and as a result of which she was bleeding from her private part. Learned APP submits that the delay in lodging of the FIR would not always prove fatal to the prosecution case and in the given facts and circumstances where this Court would find that the prosecution evidences are reliable

and trustworthy, the prosecution case need not be thrown out on the ground on mere delay.

19. As regards the presumption envisaged under Sections 29 and 30 of the POCSO Act, 2012, learned APP submits that the learned trial court has rightly recorded about the said presumption. The prosecution has been able to establish the preliminary facts showing that there was commission of rape by the appellant but in course of evidence, the appellant is not able to demolish the prosecution evidence so as to belie the presumption under the aforesaid provisions of the POCSO Act, 2012.

Consideration

20. We have heard learned counsel for the appellant and learned APP for the State as also perused the records. From the first information report (Exhibit '1'), it would appear that the alleged occurrence took place on 14.06.2013 at 11:00 am. The informant claims that the victim was bleeding from her private part and the villagers had caught hold of the appellant. At the first instance, it is important to take note that this written report submitted by the informant (PW-7) is a duly typed application addressed to the Superintendent of Police, Samastipur, PW-7 is an illiterate lady who had put her thumb impression. She got the written report typed after getting it prepared by someone whose name has not been disclosed. Even her thumb impression has not been identified by any person.

In the written report, it is stated that the wound on the private part of the victim girl is still present but that is not corroborated by medical report proved by PW-5.

21. In the background of an inordinate and unexplained delay of one month ten days in lodging of the first information report when the evidence of PW-7 is looked into, it is found that the appellant is said to have taken away the victim girl at about 11:00 am from a place known as Kali Asthan where she was playing. On this point of taking away the victim girl from the Kali Asthan, there is no witness at all. PW-7 has stated in her examination-in-chief that she went to the house of the appellant after hearing *hulla* of her daughter. In this regard, it is found from the evidence of the I.O. (PW-9) that the house of the informant (PW-7) is situated at a distance of 800 yards from the house of the appellant, therefore, it looks highly improbable that the voice of the victim girl who had been allegedly taken inside the house by the appellant would be heard by the informant at a distance of 800 yards. PW-7 has stated that her daughter was in a very serious condition and she was bleeding from her private part. She has further stated that her daughter had become unconscious and she was taken to Sarpanch Mukesh Singh and she had taken her daughter to Patna for her treatment but contrary to that the I.O. (PW-9) has stated in his evidence that neither the informant nor the prosecution witnesses,

namely, PW-4 and PW-6 had ever informed him that the victim was bleeding from her private part or that the victim had become unconscious. PW-9 has further stated that the informant had not told him that she had taken the victim girl to Sarpanch Mukesh Singh.

22. This Court further finds that in paragraph '3' of her examination-in-chief, PW-7 has stated that when she reached the place of occurrence, she found that the appellant was fleeing away towards the field whereas in her written report (Exhibit '2'), she has stated that the appellant had been caught hold of by the co-villagers. She has stated that in the evening the victim girl told her that this appellant had committed wrong act with her and she had got written a complaint letter to Superintendent of Police, Samastipur. In paragraph '8' of her cross-examination, she has stated that she had kept the blood stained cloth of her daughter and had shown it to Darogaji who had not taken it but contrary to that the I.O. (PW-9) has stated in his cross-examination (paragraph '10') that the mother of the victim had neither produced any document of treatment of the victim nor had produced any cloth of the victim to him. From the evidence of PW-7, this Court finds that she is totally inconsistent on material aspects of the matter and has been contradicted by the I.O. (PW-9) on almost all aspects of the matter.

23. To this Court, it, thus, appears that PW-7 is neither able to explain the delay of one month ten days in submission of her written report to the Superintendent of Police, Samastipur nor has she been able to demonstrate from her evidence that the victim girl was shown being taking away by the appellant to his house which is the basic fact which should have been proved by the prosecution. This Court has noticed that in this case, the persons residing in the surrounding houses have not been examined, no independent witness has come to support the prosecution case and the evidence of PW-7 does not inspire confidence.

24. In the case of **Thulia Kali** (supra), the Hon'ble Supreme Court has held that the delay in lodging of the first information report can often result in embellishment which is a creature of afterthought. In the case of **Nand Lal and Others** (supra), the Hon'ble Supreme Court has observed that a delay of around 4 to 5 hours in lodging of the FIR, in the facts of the said case was not explained and that proved fatal to the prosecution case.

25. We have further found that in this case, the victim who was a child witness was produced for the first time in course of trial before the learned trial court who assessed her age as about seven years at the time of her deposition. On reading of the testimony of PW-8, this Court finds that the learned trial court has

not put her any question so as to assess her competence to understand the importance of speaking truth. The learned trial court seems to have proceeded to record her evidence after simply asking her name, her parents' name and address of her house. As regards the evidence of child witness, in the case of **Pradeep** (Supra), the Hon'ble Supreme Court has observed that it would not be safe to base the conviction only on the testimony of the child witness which does not inspire confidence. In the case of **P. Ramesh** (Supra), the Hon'ble Supreme Court has held that before recording evidence of a child, it is the duty of the judicial officer to ask preliminary questions to him/her with a view to ascertain whether the child can understand the questions put to him/her and is in a position to give rational answers. Both the judgments of the Hon'ble Supreme Court have been recently discussed by the Hon'ble Division Bench of this Court in the case of **Rudal Chaupal versus the State of Bihar** reported in **2024 (2) BLJ 231 (HC)**.

26. We find from the evidence of the child witness (PW-8) that she had come to her maternal uncle's place for the first time. In her cross-examination, she was asked as to whether she can take name of four persons who are residing nearby to her maternal uncle's place, on this, the witness said that she does not know the name of any person. In the circumstances, this Court finds it

peculiar that the victim who was aged about five years and had gone to her maternal uncle's place for the first time would know the name of the appellant. She was not brought before the learned Magistrate for recording her statement under Section 164 Cr.P.C. immediately after the occurrence, her blood stained clothes were not produced before the I.O. (PW-9).

27. We have also gone through the medical report (Exhibit '1') which are being extracted hereunder for a ready reference:-

“A medical board had been constituted to examine Ms. 'X' under the chairmanship of Dr. A.V. Sahay, I/c D.S. Sadar Hospital with member Dr. Anuranjan Kumar and Dr. Sudha Verma, I/c D.T.O. on 25.07.13 at 4 PM and found the following:

M-9 – Birth mark brown coloured on abdominal wall.

Ht. - 3'3" wt. -16 kg, Teeth – 5+5/5+5 = Twenty.

G/E – No mark of injury on her body and face. No any type of stain. Sec. Sex. Character- Auxiliary and pubic hair and breast are not appeared.

P/A- NAD

P/V- Hymen intact, no tears, no bleeding. No any stain. No injury on her private parts. Vaginal swab had been taken for microscopic examination.

Investigation, suggested and findings-

(1) X-ray both wrist joint AP view – Shows Lunate bone had appeared but Navicular bone (scaphoid bone) of wrist bone had not appeared.

(2) Vaginal swab report shows spermatozoa not found.

Opinion:

(1) Regarding age- On the basis of above physical and radiological finding in our opinion the age of victim Ms. X is in between 5-6 yrs. (five to six years)

(2) Opinion Regarding Rape- On the basis of above physical finding and investigation report in our opinion there is no sign of rape.”

28. The Doctor (PW-5) who examined the victim has categorically deposed that there was no mark of injury on her body and hymen was intact, there was no tears, no bleeding and no staining on body or injury on her private part. The medical report (Exhibit ‘1’), in fact, falsifies the claim of the informant (PW-7) that the wound on the private part is still present. In the case of **Krishan Kumar Malik versus State of Haryana** reported in **(2011) 7 SCC 130**, the Hon’ble Supreme Court while dealing with a case of rape in which medical evidence showed that her Labia Majora and Labia Minora were healthy and had no mark of injury. Hymen had old healed tear and the same was not red hot or tender and did not bleed on touching. Taking note of the medical evidence, the Hon’ble Supreme Court observed in paragraph ‘24’ as under:-

“**24.** Needless to say the solitary evidence of the prosecutrix to bring home the charge of abduction and commission of rape by the Appellant does not inspire confidence and is not of sterling quality. In our opinion, it is neither prudent nor safe to hold the Appellant guilty of commission of the said offence. We hold so, on account of many other circumstances, which are against the prosecution, narrated hereinbelow.”

29. We are of the view that in the present case, the medical evidence completely rules out a case of rape, hence, it would not be safe to convict the appellant on the basis of sole testimony of the child witness, PW-8.

30. This Court has found that the independent witnesses, namely, Pankaj Singh (PW-1), Naresh Das (PW-2) and Bulkan Rai (PW-3) have not supported the prosecution case and for that reason, they have been declared hostile. Though, they have been cross-examined by the prosecution, but no material to support the prosecution could be extracted from him.

31. The I.O. (PW-9) has stated that he had not recorded the statement of the persons residing in the boundary of the place of occurrence. In paragraph '10' of his cross-examination, he has stated that the mother of the victim had not produced any document of treatment and blood-stained clothes of the victim. PW-9 had not recorded the statement of Panch, Sarpanch and Mukhiya. In paragraphs '13', '14' and '15', of his cross-examination, he has completely contradicted the statements of the prosecution witnesses saying that the witnesses Vijay Das (PW-4), Dukhni Devi (PW-6) and the informant (PW-7) had not stated to have seen the victim bleeding from her private part and they had not said that they had seen it from their own eyes.

32. From the materials available on the record, this Court finds that in the present case, the prosecution has not been able to lay down even the foundational fact so as to attract presumption under Section 29 of the POCSO Act. Sections 29 and 30 both are being quoted hereunder for a ready reference:-

“Section 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.”

Section 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.”

33. In the case of **Veerpal @ Titu (supra)**, the Hon’ble Delhi High Court has discussed the kind of presumption provided under Section 29 of the POCSO Act. Paragraph ‘20’ of the judgment in the case of **Veerpal @ Titu (supra)** is quoted hereunder for a ready reference:-

“20. Section 29 of POCSO Act provides that Court shall presume that the accused has committed the

offence for which he is charged with, until contrary is proved. However, the presumption would operate only when the prosecution proves the foundational facts in the context of allegation against the accused beyond reasonable doubt. After the prosecution establishes the foundational facts, the presumption raised against the accused can be rebutted by discrediting the prosecution witnesses through cross-examination and demonstrating the gaps in prosecution version or improbability of the incident or lead defence evidence in order to rebut the presumption by way of preponderance of probability. Keeping the same in perspective, the prosecution in the first instance is required to establish the foundational fact that the incident, as alleged, was conveyed by the victim to her dadi (grandmother) on 16.09.2016 (i.e. the day of lodging of FIR). However, the evidence and statements during investigation, as discussed above, reflect different dates of alleged communication of the incident, which throws a doubt on the prosecution version. In view of above, in absence of foundational fact not being proved beyond reasonable doubt, the reliance placed upon presumption under Section 29 & 30 of POCSO Act by learned Trial Court to base conviction, appears to be misplaced. Taking in the alternative, even if the foundational facts are considered to be proved, to make the presumption under Section 29 of POCSO Act, the same stands discredited by way of discrepancies brought in cross-examination of the victim, PW3 and witnesses examined in defence. The presumption of guilt under Section 29 & 30 of POCSO Act taken by the learned Trial Court could not be an edifice to convict the appellant since testimony of victim is unreliable and there are serious flaws and gaps in the prosecution case. As a wrongful acquittal shakes the confidence of people, a wrongful conviction is far worse. A child abuser in the eventuality of false implication even continues to suffer a blot of social stigma which is much more painful than the rigours of a trial and imprisonment. Prosecution case is marred by inadequacies and contradictions which strike to the root of prosecution case and, as such, prosecution has failed to bring

home the charge against the accused beyond reasonable doubt.

For the foregoing reasons, appeal is allowed and the judgment and order on sentence passed by the learned Trial Court is set aside. Appellant is acquitted and be released forthwith, if not required in any other case.

Pending applications, if any, also stand disposed of.

A copy of this judgment be forwarded to the Jail Superintendent and the learned Trial Court for information and compliance. A copy be also provided to the appellant, free of cost.”

34. Similarly, in the case of **Subrata Biswas (supra)**, the Hon’ble Division Bench of Calcutta High Court has discussed the scope of statutory presumption under Section 29 of the POCSO Act, 2012. Paragraphs ‘22’ and ‘23’ of the judgment in the case of **Subrata Biswas (supra)** are quoted hereunder for a ready reference:-

“**22.** The statutory presumption applies when a person is prosecuted for committing offence under Sections 5 and 9 of the Act and a reverse burden is imposed on 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 the prosecution laying the firm contours thereof by leading reliable and admissible evidence. Such an interpretation not only leads to absurdity but renders the aforesaid provision constitutionally suspect. A proper interpretation of the said provision is that in a case where the person is prosecuted under Section 5 and 9 of the Act (as in the present case) 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 a preponderance of probability. Upon laying the foundation of its case by leading cogent and reliable evidence (which does not fall foul of patent absurdities or inherent probabilities) the onus shifts upon the accused to prove the contrary. Judging the evidence in the present case from that perspective, I am constrained to hold that the version of the victim (PW-1) and her mother (PW-2) with regard to twin incidents of 24th March, 2016 and 18th April, 2016 if taken as whole, do not inspire confidence and runs contrary to normal human conduct in the backdrop of the broad probabilities of the present case.

23. Hence, I am of the opinion that the evidence led by the prosecution to establish the primary facts suffer from inherent contradictions and patent improbabilities particularly the inexplicable conduct of the victim herself. One part of the prosecution case improbabilises the other part to such an extent that no man of reasonable prudence would accept the version as coming from the witnesses. Hence, I am of the opinion that the factual matrix of the case does not call for invocation of the aforesaid statutory presumption so as to convict the appellant on the charges levelled against him.”

35. The same views have been expressed by the Hon’ble Kerala High Court in the case of **Joy versus State of Kerala** reported in **(2019) 1 KLT 935**. It has been held that the duty to rebut the presumption arises only after the prosecution has established the foundational facts of the offence alleged against the accused and the court must be on guard to see that the application of presumption, without advertent to essential facts shall not lead to injustice. In the present case, the foundational facts such as that the victim was taken away by the appellant at 11:00 am by alluring her after giving a biscuit and then the rape was committed inside

the house has not been established. The prosecution story as discussed in the written report giving rise to the present FIR and then the evidence of PW-7 are materially inconsistent and this Court has discussed hereinabove why the evidence of PW-7 would not inspire confidence.

36. For the aforesaid reasons, we are of the view that the learned trial court has committed grave error in convicting the appellant. We set aside the judgment of conviction and order of sentence and acquit the appellant of the charges giving him benefit of doubt.

37. The appellant is in custody, he shall be released forthwith, if he not wanted in any other case.

38. This appeal is allowed.

39. The trial court record be sent back.

(Rajeev Ranjan Prasad, J)

(Shailendra Singh, J)

SUSHMA2/-

AFR/NAFR	
CAV DATE	
Uploading Date	28.06.2024
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