

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.658 of 2023

Arising Out of PS. Case No.-432 Year-2019 Thana- BARACHATTI District- Gaya

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X C/o Ashraf Ansari Resident of Village- Pratapi, PS- Barachatti, District- Gaya

... .. Appellant

Versus

1. The State of Bihar
2. Mukesh Kumar Paswa Son of Ganesh Paswan Resident of Village- Pratapi, PS- Barachatti, District- Gaya
3. Satendra Paswan Son of Late Rameshwar Paswan Resident of Village- Pratapi, PS- Barachatti, District- Gaya
4. Dilip Paswan Son of Munsu Paswan Resident of Village- Pratapi, PS- Barachatti, District- Gaya
5. Shravan Paswan Son of Lakhan Paswan Resident of Village- Pratapi, PS- Barachatti, District- Gaya

... .. Respondents

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Appearance :

For the Appellant/s	:	Mr. Rajesh Kumar, Advocate Mr. Sunil Kumar Yadav, Advocate
For the Respondent/s	:	Mr. Abhimanyu Sharma, APP

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and

HONOURABLE MR. JUSTICE ASHOK KUMAR PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 11-11-2024

Heard learned counsel for the appellant and learned Additional Public Prosecutor for the State. The trial court records have been received and we have perused the same.

2. This appeal against acquittal has been preferred by the informant-appellant for setting aside the judgment dated 08.05.2023 passed by the learned Exclusive Special Judge



POCSO-cum-Additional Sessions Judge-VII, Gaya (hereinafter referred to as the 'learned trial court') in POCSO Case No. 101 of 2019 arising out of Barachatti P.S. Case No. 432 of 2019 (hereinafter referred to as the 'impugned judgment'). By the impugned judgment, the learned trial court has been pleased to acquit respondent nos. 2 to 6 of the charges under Sections 4, 6 and 17 of the Protection of Children from Sexual Offences (in short 'POCSO') Act and Sections 376, 323/34, 504/34 and 506/34 of the Indian Penal Code (in short 'IPC').

3. The prosecution case is based on the statement of the victim (X) recorded by S.I. Ravi Ranjan Kumar, SHO of Mahila Police Station, Gaya on 15.09.2019 at 20:15 hours. It appears on perusal of the statement of the victim (X) that it has been shown recorded under Section 161 of the Code of Criminal Procedure (in short 'CrPC') and the same has been marked as Exhibit '1'. In the left hand margin of the statement of the victim there is an endorsement of the SHO, Barachatti showing that a police case being Barachatti P.S. Case No. 432 of 2019 dated 16.09.2019 was registered under Sections 376/379/323/504/506/34 IPC and Sections 4/6 of the POCSO Act. The endorsement of the police officer has been marked as Exhibit '1/2'.



4. As per the prosecution story, on 06.09.2019 at 10:00 PM the victim had gone outside her house to attend the call of nature. In the meantime, Mukesh Paswan had entered into the house secretly and was hiding beneath a *chowki*. At about 10:15 PM, the victim girl locked the main door and slept there. It is alleged that Mukesh Paswan tied her mouth by *dupatta* due to which the victim awoke and tried to free herself but could not succeed and Mukesh Paswan committed rape upon her. It is further alleged that when Mukesh Paswan untied her mouth, the victim girl raised alarm and then her family members assembled there and asked Mukesh Paswan upon which he confessed his guilt and called his family members. It is alleged that Lakhan Paswan, Satender Paswan, Dilip Pawan, Santosh Paswan, Loha Paswan, Shravan Paswan and Sikander Paswan all variously armed with *lathi-gandasa* entered into the house, committed loot and took away Rs. 10,000/- cash and a box containing clothes and ornaments. On the next day, the accused persons threatened the informant's family of dire consequences and prevented them from going to the police station. Thereafter a *panchayati* was held but the accused persons refused to obey the decision of the *panchayati* and assaulted them in the *panchayati*.



5. As stated above, on the basis of the statement of the victim girl formal FIR was registered on 16.09.2019 at 10:45 hours. After investigation of the case, police submitted a charge-sheet being Charge-sheet No.256 of 2019 by which one of the accused Mukesh Paswan was charge-sheeted while keeping the investigation pending against other accused persons. By filing another charge-sheet being Charge-sheet No. 949 of 2020 dated 17.12.2020 accused Satendra Paswan, Dilip Paswan, Santosh Paswan and Shravan Paswan were charge-sheeted. After filing of the charge-sheet, the learned Special Judge, POCSO Act, took cognizance of the offences *vide* order dated 23.01.2020. The accused persons were explained the charges which they denied and claimed to be tried. Accordingly, the charges under Sections 4 and 6 of the POCSO Act as also under Section 376 IPC were framed against accused Mukesh Paswan on 27.03.2020. So far as the other accused persons are concerned, they were facing the charges under Section 17 of the POCSO Act and Sections 323/34, 504/34 and 506/34 IPC.

6. On behalf of the prosecution, as many as eight witnesses were examined and several documents were marked Exhibits. The list of witnesses and the description of the exhibits are being provided hereunder:-



List of Prosecution Witness

PW-1	Abdul Hakil @ Abdul Hakim
PW-2	Mother of the victim
PW-3	Md. Ashraf Ansari
PW-4	Sister of the victim
PW-5	(X) Victim (informant)
PW-6	Dr. Sushma Verma
PW-7	Kumar Saurav (First I.O.)
PW-8	Sachidanand Singh (Second I.O.)

List of defence witness

DW-1	Umesh Prasad Singh
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List of Exhibits

Ext -1	Signature of mother of the victim on written report
Ext -1/1	Signature of the victim on written report
Ext -1/2	Statement of the victim
Ext 1/3	Registration of FIR

Findings of the learned Trial Court

7. The learned trial court having analyzed the evidences available on the record, held that the prosecution case is highly unbelievable and from the testimonies of the prosecution witnesses it transpires that some occurrence took place in between father of the victim and the accused persons near the public well which is in the western boundary of the house of the victim. The learned trial court held that the prosecution had not come forward with the true



version of the occurrence. In the opinion of the learned trial court, the prosecution failed to prove the charges against the accused persons beyond all reasonable doubts and the accused persons were entitled to be acquitted. Accordingly, all the accused have been acquitted. Since the prosecution failed to prove the occurrence, the learned trial court observed that there was no question of determination of compensation to the victim girl.

Submissions on behalf of the appellant

8. Learned counsel for the appellant has assailed the impugned judgment. It is his submission that all the prosecution witnesses in this case are consistent as to the manner, place and time of occurrence. The victim has fully supported the prosecution case in her statement under Section 164 CrPC and there is nothing in her testimony to doubt her credibility.

9. Learned counsel submits that on behalf of the victim a date of birth certificate has been brought on record and the same has been proved as Exhibit '5'. It is submitted that the learned trial court could not appreciate Exhibit '5' which is the date of birth certificate of the victim showing her date of birth as 01.01.2004. According to him, the date of occurrence being 06.09.2019, it was proved that the victim was minor on the date of occurrence.



10. It is lastly submitted that that the learned trial court could not appreciate the presumption in force under Sections 29 and 30 of the POCSO Act and as the accused persons could not bring any evidence to rebut the said presumption, the judgment of the learned trial court acquitting them of the charges under the POCSO Act is bad and the same is liable to be interfered with.

Submissions on behalf of the State

11. Learned Additional Public Prosecutor for the State has contested the appeal. It is submitted that the judgment of the learned trial court is a well considered judgment and no fault may be found with the same. It is submitted that this Court while hearing an appeal against acquittal has to keep in view the judgment of the Hon'ble Supreme Court in case of **H.D. Sundara and Others Vs. State of Karnataka** reported in **(2023) 9 SCC 581** wherein the Hon'ble Supreme Court has laid down the guiding principles on which only an appeal against acquittal may succeed.

12. Learned counsel submits that the victim in this case did not bring any date of birth certificate/document as provided under Section 94 of the Juvenile Justice Act, 2015 (hereinafter referred to as the 'Act of 2015'). According to the Investigating Officer, though the victim was studying in a school but no age certificate could be produced in court rather a birth certificate



prepared in the year 2020 after the date of occurrence on the basis of an affidavit has been brought in evidence by way of Exhibit '5'. Exhibit '5' is thus not an admissible piece of evidence in accordance with law, therefore the learned trial court has rejected the same. The medical opinion has been proved by Dr. Sushma Verma (PW-6) as Exhibit '3'. According to the medical examination report, the victim was aged between 18-19 years.

13. Learned counsel submits that in this case the alleged occurrence is said to have taken place on 06.09.2019. From the formal FIR it would appear that the First Information Report was lodged on 16.09.2019 on the basis of the statement under Section 161 CrPC of the victim (X). This statement of the victim under Section 161 CrPC has been obtained under her signature and the same has been made basis for lodging of the FIR which is unheard of and such statement would not only be hit by Section 162 CrPC but would also lead to take a view that the true prosecution version has been suppressed.

14. It is submitted that so far as the presumption under Sections 29 and 30 of the POCSO Act is concerned, such presumption would arise only after the basic foundation under the case of POCSO Act is laid down by the prosecution. The presumption does not absolve the prosecution from proving the



guilt of the accused beyond all reasonable doubts. Reliance in this regard has been placed upon the judgment of the Hon'ble Kerala High Court in the case of **Joy V.S. vs. State of Kerala** reported in **2019 SCC OnLine Ker 783** and the Hon'ble Bombay High Court in the case of **Navin Dhaniram Baraiye vs. State of Maharashtra** reported in **2018 SCC OnLine Bom 1281**.

15. It is lastly submitted that the victim in this case cannot be put in the category of a sterling witness and in the kind of evidences available on the record, even the evidence of the victim would not inspire confidence of this Court. It is thus submitted that the judgment of the learned trial court needs no interference.

Consideration

16. Having heard learned counsel for the appellant and learned Additional Public Prosecutor for the State as also on perusal of the records, we find that in this case, the prosecution has examined altogether eight witnesses and the defence has examined one witness namely, Umesh Prasad Singh, who happen to be the Panchayat Sachiv of the Barachatti Block.

17. We have once again appreciated the prosecution evidence while hearing the appeal. In this case Abdul Hakil @ Abdul Hakim (PW-1) has stated in his examination-in-chief that



the occurrence is of 06.09.2019. He was in his house when he heard shouts and came out of his house to see that crowd had assembled there. This witness claims to have asked the victim girl as to what had happened whereupon she informed him that Mukesh Paswan had committed rape on her. Family members from both the sides had assembled then he intervened and said that there is no benefit of entering into a quarrel and there would be a *panchayati* on the next day. According to this witness, when *panchayati* was taking place one boy was recording video of the victim which was opposed and thereafter the *panchayati* failed. In his cross-examination this witness has stated that his statement was recorded by police after one month of the occurrence. At the time of occurrence he was sleeping in his house. He has categorically stated that the occurrence took place after he went to a sleep. He has further stated that his statement about coming to know about the occurrence from the victim was not disclosed by him to anyone. From the deposition of PW-1 it appears that at the time of occurrence he was sleeping in his house, therefore, his statement in the examination-in-chief that he had gone to the house of Ashraf where crowd had assembled is not believable. Apart from that, this witness had stated that nobody had seen commission of rape and he had not seen the blood stained clothes.



18. Mother of the victim (PW-2) has stated in her examination-in-chief that on 06.09.2019 at about 10:15 hours in night she was at the roof of her house. The victim had gone to bathroom, the door of the house was open and the accused Mukesh Paswan had entered inside her house and concealed himself beneath the *chowki*. According to this witness, the victim came from bathroom, bolted the gate and went into a deep slumber whereafter the appellant gagged her by her mouth and committed rape on her. She has stated that blood was oozing out. The victim had shouted for help whereafter this witness came running and found that her daughter was weeping and the accused Mukesh Paswan was there in naked condition. She claims to have caught hold of Mukesh whereupon he begged for pardon and disclosed his identity as *nati* of Lakhan Paswan. This witness has stated that thereafter Mukesh Paswan called his family members whereupon Lakhan Paswan, Santosh Paswan, Loha Paswan, Sikandar Paswan, Satyendra Paswan, Dilip Paswan and Ganesh Paswan all came with *lathi* and *gandasa*. After opening of the gate, Mukesh Paswan fled away from the house of PW-2 and the other accused persons fled away with a box containing Rs.10,000/- and some ornaments. The other accused persons assaulted her husband, PW-2 and the victim girl. She has stated that in the morning when she



opened her door to go to police station, the accused persons stopped them in the name of *panchayati*. *Panchayati* was fixed after ten days. Thereafter, she has stated that when the *panchayati* was taking place, videography was being done and for that reason, the *panchayati* failed. She went to the police station on 15th and lodged the case. In her cross-examination, she has stated that her daughter was wearing a suit on her body, she had not found any blood on the cloth. She had not found anything on the bedsheet. She has stated that the quarrel had taken place with Mukesh Paswan and his relatives outside her door nearby the well. She has stated that at the time of occurrence the younger sister of the victim, aged about twelve years was also sleeping. Her statement was recorded by police after nine days and there is no witness from her neighbours. She was suggested that there was a dispute between two communities near the well and only one month thereafter a false case was registered.

19. Md. Ashraf Ansari (PW-3) has also deposed on the line of PW-2. In his cross-examination, he has stated that after 8:00 PM in the night he and his wife had gone to a sleep on the roof and they were in deep slumber. His wife had heard the voice of the victim girl and she had come down. This witness has stated that after many people were raising *hulla* then he came down from



the roof. According to this witness, his wife had asked about the occurrence from his daughter and she had told her about the occurrence. This witness has stated that his daughter was wearing a *salwar* (jumper) which was soaked with blood and the body was also soaked with blood but at the same time this witness has stated that he had not shown to the I.O. the clothes of the victim and the bedsheets. He has also stated that he had not given the clothes to Darogaji. He could not say the name of the *panches* and neither *Mukhiya* nor *Sarpanch* had come to his house prior to lodging of the case.

20. Younger sister of the victim has been examined as PW-4 in this case. He has also deposed on the line of her mother and father. In her cross-examination, she has stated that her statement was recorded before Darogaji on 10.11.2019. She has stated that on the date of occurrence she was sleeping with the victim girl on the *chowki* at the main door and she had stated about it to Daroga. In her cross-examination, she has stated that she was sleeping and she could not know that what had happened. She has stated that she had seen quarrel taking place between her father and several other people who had assembled at the gate. She has stated that she is not aware as to whether the blood soaked clothes and bed were shown to the police. She had not seen Mukesh



Paswan and had no concern with him. Her attention was also drawn towards her previous statement made before police. From the deposition of PW-2, PW-3 and PW-4, who are the parents and sister of the victim girl, it appears that they are making highly inconsistent and to a great extent, contradictory statements. While PW-2 has stated that she had not seen anything either on the cloth or the bed, PW-3 and PW-4 have stated otherwise. PW-4 claims that she was sleeping on the same *chowki* with the victim but at the same time, she states that she could not know as to what had happened. The evidence of PW-2, PW-3 and PW-4 would not inspire confidence.

21. The victim girl has been examined as PW-5. She has stated in her examination-in-chief that Mukesh had forcibly committed rape on her but in her cross-examination, this witness was suggested that she had fled away with one Saru Mistri of Sharma Bazar from where she had been brought to falsely depose in this case. In her cross-examination, she has stated that after the occurrence was over, her mother was sleeping on the roof. She has stated initially that after the occurrence, she had told about the occurrence to the people but she could not disclose their names, later on, she has stated that she had not disclosed the occurrence to



anyone. In paragraph '17', she has stated that 12 years prior to the occurrence, she had started menstruating.

22. Dr. Sushma Verma (PW-6) was posted at Prabhavati Hospital, Gaya on 18th September, 2019. She had examined the victim girl. She had not found any mark of violence. Pubic hair was present but there was no mating of hair. Hymen was ruptured and admitted two fingers loose. No live or dead spermatozoa was seen in the provided sample. The Doctor opined the age of the victim between 18-19 years and observed that though, there was no recent sign of sexual intercourse, rape cannot be ruled out. In her cross-examination, the Doctor has opined that the victim was above 18 years and hymen can be ruptured due to various reasons.

23. Kumar Saurav (PW-7) was the S.H.O. of the Barachatti Police Station on 06.09.2019. The I.O. has stated that he had sent the victim for recording of her statement under Section 164 CrPC on 19.09.2019. In course of investigation, he had not asked for the clothes of the victim which she was wearing at the time of occurrence. In between 06.09.2019 and 15.09.2019, neither Chaukidar, Dafadar, Mukhiya or any responsible person of the village had given information regarding the occurrence. He has also stated that the father and mother of the victim are not eyewitnesses to the occurrence. In paragraph '18' of his



deposition, the I.O. has stated that Abdul Hakim and Shakila Khatoon of Village-Pratapi had said that the quarrel was taking place between the accused Mukesh Paswan and father of the victim over the public well and for that reason, a *panchayati* had taken place. The I.O. has also stated that he had not seen any certificate of age of the victim saying that she was below 18 years of age. He had seen the medical report in which the age of the victim was written as 18-19 years. The I.O. had not found any sign of injury on the person of the parents of the victim girl. He has also stated that the sister of the victim had not stated before him that when she was sleeping, the victim girl had gone outside after opening the door. She had also not stated that Mukesh Paswan had entered inside the house and concealed himself beneath the *chowki*. The I.O. has also stated that the sister of the victim had not made any statement that Mukesh Paswan had gagged the victim and committed rape on her.

24. Sachidanand Singh (PW-8) is another I.O. of this case who had submitted the charge-sheet. He has stated in paragraphs '7' and '8' of his deposition that he had asked for an attested date of birth certificate of the school from the father of the victim but he had not provided him any certificate. He has also



stated that he had not found any date of birth certificate from the school in Paraiya village where the victim was said to be studying.

25. From the deposition of the prosecution witnesses as discussed hereinabove, this Court finds that in this case, the prosecution miserably failed to prove that the victim was a child within the meaning of the POCSO Act. The only reliable piece of evidence with regard to the age of the victim is the medical report (Exhibit '3' proved by PW-6) and according to this, the victim was in between 18-19 years at the time of occurrence. The information with regard to the occurrence was not received in the police station from any source for about ten days and the present FIR has been lodged after ten days of the occurrence. The delay in lodging of the FIR has though been sought to be explained by the prosecution saying that a *panchayati* was to be held in this regard but no proof has been brought on record to show that there was any talk of *panchayati* and *panchayati* had taken place with regard to the alleged occurrence.

26. In the opinion of this Court, the basic foundation which is required to be led by the prosecution to raise the presumption under Sections 29 and 30 of the POCSO Act has not been proved by the prosecution. In the case of **Joy versus State of Kerala represented by Public Prosecutor** reported in **2019 SCC**



Online Ker 783, the Hon'ble Kerala High Court has while dealing with the presumption under Sections 29 and 30 of the POCSO Act held as under:-

“11. However, the statutory presumption under Section 29 of the Act does not mean that the prosecution version has to be accepted as gospel truth in every case. The presumption does not mean that the court cannot take into consideration the special features of a particular case. Patent absurdities or inherent infirmities or improbabilities in the prosecution version may lead to an irresistible inference of falsehood in the prosecution case. The presumption would come into play only when the prosecution is able to bring on record facts that would form the foundation for the presumption. Otherwise, all that the prosecution would be required to do is to raise some allegations against the accused and to claim that the case projected by it is true. The courts must be on guard to see that the application of the presumption, without advertent to essential facts, shall not lead to any injustice. The presumption under Section 29 of the Act is not absolute. The statutory presumption would get activated or triggered only if the prosecution proves the essential basic facts. If the accused is able to create serious doubt on the veracity of the prosecution case or the accused brings on record materials which would render the prosecution version highly improbable, the presumption would get weakened. As held by the Apex Court in *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694 : AIR 2011 SC 312, frivolity in prosecution should always be considered and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of anticipatory bail. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. It should necessarily depend on facts and circumstances of each case in consonance with the legislative intention.”

27. Similar view has been taken by the Hon'ble Bombay High Court in the case of **Navin Dhaniram Baraiye Vs. State of**



Maharashtra reported in **2018 SCC Online Bom 1281**. The relevant paragraphs are being reproduced hereunder for a ready reference:-

“In this backdrop, it is first necessary to examine the effect of presumption under [Section 29](#) of the POCSO Act and the manner in which the accused could rebut such presumption. Section 29 of the POCSO Act reads as follows:-

“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.”

18. A perusal of the above quoted provision does show that it is for the accused to prove the contrary and in case he fails to do so, the presumption would operate against him leading to his conviction under the provisions of the POCSO Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witnesses would have to be accepted as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under Section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law.”



28. We are also of the considered opinion that the principles governing an appeal against acquittal as laid down by the Hon'ble Supreme Court in the case of **H.D. Sundara** (*supra*) are to be kept in mind. Paragraph '8' of the said judgment are being reproduced hereunder for a ready reference:-

“**8.** In this appeal, we are called upon to consider the legality and validity of the impugned judgment¹ rendered by the High Court while deciding an appeal against acquittal under Section 378 of the Code of Criminal Procedure, 1973 (for short “CrPC”). The principles which govern the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378CrPC can be summarised as follows:

“**8.1.** The acquittal of the accused further strengthens the presumption of innocence;

8.2. The appellate court, while hearing an appeal against acquittal, is entitled to reappraise the oral and documentary evidence;

8.3. The appellate court, while deciding an appeal against acquittal, after reappraising the evidence, is required to consider whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record;

8.4. If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible; and

8.5. The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that



the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible.”

29. In the kind of the evidences on the record, we are of the opinion that the learned trial court has not committed any error in appreciation of the evidences on the record. No interference is called out.

30. This appeal has no merit. It is dismissed.

(Rajeev Ranjan Prasad, J)

(Ashok Kumar Pandey, J)

Rishi/Durgesh-

AFR/NAFR	
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