

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.731 of 2022

Arising Out of PS. Case No.-150 Year-2018 Thana- INDUSTRIAL District- Bhagalpur

Arvind Kumar @ Arvind Son of Rajendra Mandal, Resident of at Rani Talab,
P.S.- Industrial Area, District - Bhagalpur

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Rajive Ranjan Singh, Advocate.
	:	Mr. Amit Ranjan, Advocate.
For the Respondent/s	:	Mr. Sujit Kumar Singh, APP.

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and

HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA)

Date : 07-03-2024

Heard learned counsel for the appellant and learned
Additional Public Prosecutor for the State.

2. The present criminal appeal has been filed under
Section 374(2) of the Code of Criminal Procedure, 1973
(hereinafter referred to as “Cr.P.C.”) against the judgment of
conviction dated 23.08.2022 and order of sentence dated
30.08.2022 passed by learned Additional Sessions Judge VIth-
cum-Special Judge, Protection of Children from Sexual
Offences (POCSO) Act, Bhagalpur (hereinafter referred to as
‘the Trial Court’) in POCSO G.R. Case No.6375 of 2018
(arising out of Industrial Area P.S. Case No.150 of 2018)



whereby and whereunder the appellant, namely, Arvind Kumar, has been convicted under Section 4 of POCSO Act and Section 363 of the Indian Penal Code and sentenced accordingly as under:-

Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
1.Arvind Kumar	4 POCSO	RI for 20 years	50,000/-	S.I. for 1 year
	363 IPC	RI for 5 years	20,000/-	S.I. for 6 months
Both the sentences shall run concurrently.				

3. The victim’s name has been concealed in the present judgment and she has been referred as the ‘victim’ for maintaining privacy of her identity to protect her dignity.

4. The brief facts leading to filing of the present appeal are as under:-

4.1. On the basis of written report dated 26.11.2018 of informant (P.W.4) at 08.10 a.m. the formal F.I.R. was registered against the accused/ appellant under Section 366 (A) of Indian Penal Code. In the written report of informant it is stated that on 22.11.2018 at 09.00 a.m., his maternal grand-daughter (victim, P.W.1) left home and went to Girl High School, Sabour but did not returned till the evening, then all the



family members together searched her everywhere but she was not found. He came to know that accused has kidnapped the victim. There were six witnesses mentioned in the written report.

4.2. The Investigating Officer proceeded with the investigation and on the same day the victim was recovered with accused in his house and the accused was arrested. The victim was sent to concerned hospital for medical examination and was examined on 27.11.2018 by P.W.-5 at 11.20 a.m. The statement of victim came to be recorded under Section 161 of Cr.P.C. by the In-charge Mahila Police Station on 28.11.2018 and under Section 164 of Cr.P.C. by concerned Magistrate. The Investigating Officer has also recorded the statement of witnesses and thereafter filed the chargesheet against the present appellant under Section 363/376 of Indian Penal Code and under Section 4 of POCSO Act. The cognizance was taken by Special Judge, POCSO Act, Bhagalpur of the said offence on 03.06.2019. The charges were framed on 04.02.2020 against the accused-appellant who denied the allegation levelled against him and claimed to be tried.

4.3. Before the Trial Court in order to substantiate the charge, the prosecution had examined in all six witnesses.



P.W.1 is victim, P.W.2 and P.W.3 are maternal uncle of victim. P.W.4 is informant, who is maternal grandfather of the victim. P.W.5 is Dr. Priyanka Rani, who had examined the victim and P.W.6 is Subhash Prasad, who was the Investigating Officer of the case.

4.4. The prosecution also adduced following documentary evidences. Exhibit 1 is signature of victim on her statement under Section 164 of the Cr.P.C. Ext.2 is signature of victim on her statement under Section 161 of the Cr.P.C. Ext.3 is application of victim praying to go with her maternal uncle. Ext.4 is medical report of victim. Ext.5 is arrest memo. Ext.6 is formal F.I.R. and Ext.7 is signature of Ranjan Kumar, S.H.O., Police Station on F.I.R.

4.5. After completion of investigation on behalf of prosecution, the statement of accused under Section 313 Cr.P.C. was recorded and he claimed to be innocent. The defence also examined two witnesses. D.W.1 is Chano Devi and D.W.2 is Sanjeet Kumar. The learned Trial Court passed the impugned judgment convicting the appellant and sentence him accordingly as aforesaid.

4.6. Being aggrieved by the judgment of conviction and order of sentence, the present appeal has been filed by the



accused/appellant.

5. Learned counsel for the appellant submits that the present appellant is innocent and has falsely been implicated in this case and the learned Trial Court has not appreciated the evidence properly. No occurrence as alleged has occurred and the Trial Court failed to consider that the First Information Report is belated and there is material contradiction in the statement of witnesses. Learned counsel for the appellant would submit that the prosecution has failed to prove the age of the victim by producing any documentary evidence though the victim was studying in 10th Standard in the school. It is further stated that even as per the deposition of P.W.5, the doctor, who had examined the witness, that her age is stated to be between 14 to 16 years on the basis of the x-ray report and she has admitted that there may be two years margin in the age of victim determined. Learned counsel also placed reliance upon the decision rendered by Hon'ble Supreme Court in the case of **Jay Mala vs. Home Secretary, Government of Jammu & Kashmir and Others** reported in (1982) 2 SCC 538.

6. Learned counsel for the appellant further submits that from the medical evidence of doctor (P.W.5) it reveals that the allegation of the victim of rape for four days by the appellant



is not correct as no physical or chemical injury was found on the body including the private part of the victim and no any sign of rape was found on victim. Learned counsel, therefore, urged that medical evidence does not support the version given by the victim, despite which the Trial Court has recorded the order of conviction and, therefore, the same is required to be quashed and set aside.

7. On the other hand, learned A.P.P. appearing for the State has opposed the present appeal and submits that the deposition given by the victim is corroborated by the prosecution witnesses and medical evidence. The victim was a minor girl aged about 14 to 16 years as her age was assessed on the basis of x-ray report. He further submits that the Trial Court has on the basis of the evidence led before it, convicted the appellant and no error is committed by the Trial Court as prosecution has proved the guilt of the accused/appellant beyond reasonable doubt. There is no merit in the appeal and the appellant has been rightly convicted. Learned A.P.P. would, therefore, urge that the appeal be dismissed.

8. We have considered the submissions advanced by the learned counsels for the parties. We have also carefully perused the Trial Court records.



9. The Appellate Court is empowered to re-appreciate the entire evidence on record for the purpose of ascertaining as to whether the accused had committed any offence or not and if the impugned judgment and order is ultimately found to be clearly unreasonable and perverse then such judgment and order can be set aside by the appellate Court.

10. To examine the correctness of findings, we will first assess the testimony of witnesses adduced by the parties.

11. P.W.1 is victim, who has deposed that the accused used to chase her when she went to school and out of fear she did not go to school for one month. Thereafter, the accused said that he would take poison and the accused/appellant by enticing her taken her to godown, given water to her due to which she became unconscious and after sometime when she became conscious then she found that her mouth was tied with clothes and both hands and legs were also tied. Thereafter, the accused committed rape with her. Accused kept her four days in godown. She was examined by doctor and she identified her signature (Ext.1) on the statement under Section 164 Cr.P.C. and women police officer had recorded her statement and identified her signature (Ext.2) on the same.

12. In her cross-examination, P.W.1 has admitted



that she had not raised any alarm where she was taken on motorcycle from Bajrangbali Sthan, Main Road which is a busy place and she had also not raised any alarm where she was taken. The police recovered her after four days and she had got no injury during four days where she was kept by accused. She had given certificate to police with respect to her date of birth written in Middle School, Fatehpur. Her Aadhar Card was taken by accused. She further admitted that her marriage was solemnized with Rohit Yadav in 2019. She had done her daily routine in godown and the godown had two doors and many windows.

13. P.W.4 (informant) is maternal grandfather of victim, has deposed that minor victim had gone to school and she did not return from school till evening and they searched her. He further stated that on the next date, he went to police station and lodged the report, there after the police recovered the victim and they went to police station and met the victim who told that the accused had kidnapped her and committed rape also. In his cross-examination, P.W.4 admitted that the road from home to school is busy road. The victim told the name of accused to him and no one else. After registering case, the police had not taken his statement. He cannot say what was the



age of the victim at the time of occurrence. The victim used to go school. No boys chased the victim. When the victim was recovered, there was no injury on her body. He further stated that in written report, he got recorded that when police recovered the victim then on information he met her at police station who had stated that accused had taken her and kept her in godown and tied her mouth.

14. P.W.2 Suraj Kumar deposed that on the date of occurrence the victim went to school but not returned till evening and she was searched 1-2 days but she was not found then informant lodged the case and the police recovered the victim. He further stated that on asking police, they went with police at the place of occurrence where in a godown the accused had kept her and he saw the accused with victim and the police brought both at police station.

15. P.W.3 deposed that accused had kidnapped the victim, kept the victim in a room by locking her and he raped her. In his cross-examination, he has admitted that the victim had never told him about any boy before occurrence. He further admitted that he had not stated before the police that the victim was kept in lock in a room and the accused had raped her. He had admitted that police had not taken his statement and his



statement has been recorded first time in the Court.

16. P.W.5 Dr. Priyanka Rani who examined the victim on 27.11.2018 at 11:20 A.M. found no physical or chemical injury on whole body including her private part. According to pathology report, spermatozoa was not found. Age on radiological ground appears between 14 to 16 years. In the opinion of P.W.5, no evidence of recent sexual intercourse was found and the age of victim assessed between 14 to 16 years. In her cross-examination, she has stated that she had not found any foreign element on the body or private part of victim. She further admitted that spermatozoa was not found due to that rape was not confirmed, x-ray report, radiological report and plate were not before P.W.5. She in para 13 admitted that if rape is committed by force then injury mark will remain on body but the same was not found on the body of victim. In para 14, she admitted that there may be two years margin in age of victim determined.

17. P.W.6 is Investigating Officer of this case. He has deposed that he recorded the re-statement of informant, he reached the place of occurrence which is house of informant and recorded the statements of P.Ws.2 and 3. He further stated that he arrested the accused and recovered the victim; the



accused was medically examined; the victim was sent to Sadar Hospital, Bhagalpur for medical examination; women officer recorded the statement of victim under Section 161 Cr.P.C. and her statement before Court was recorded under Section 164 Cr.P.C. He received the medical report of victim from hospital. He was cross-examined on behalf of accused. He has admitted that informant or victim had not given any document with respect to her date of birth. He had not seen the register of school (with respect to date of birth of victim) in which the victim was studying. He further admitted that no witness had stated about the date of birth of victim. The informant in his written report or re-statement has not stated about the date of birth of victim. He admits that P.W.2 had not stated in his statement that police had recovered the victim after 2 to 3 days, the victim was kept in a godown near Rani Talab and on asking by police when P.W.2 went with police then he had seen the accused with victim in the godown. P.W.6 also admitted that P.W.3 had not stated in his statement that victim was kept in a room by putting lock and accused raped her.

18. Two witnesses have been examined on behalf of the defence. D.W.1 is Chano Devi and D.W.2 is Sanjeet Kumar who have stated that accused has been falsely implicated



due to land dispute and no occurrence took place with the victim.

19. It is pertinent to note that the witnesses on the written report have not been examined without any explanation.

20. It is also pertinent to mention here that the foundational fact in a POCSO case includes that the victim is a child, that the alleged incident has taken place, that the accused has committed the offence and whether any physical injury is caused to establish it with medical evidence.

21. In view of the aforesaid discussed evidence adduced on behalf of the parties, it appears that the first issue which is to be decided in this case as to whether the victim is a child or not within the meaning of Section 2(1)(d) of the POCSO Act. When the date of birth of the victim is in dispute, it is well settled that it is bounded duty of prosecution to establish the age of child victim during the course of trial within the meaning of Section 2(1)(d) of the POCSO Court.

22. To determine the age of prosecutrix, the Co-ordinate Bench of this Court in **Abhinandan Sah @ Abhinandan Kumar Sah Vs. State of Bihar** reported in (2024) 1 BLJ 512 in paragraph nos.34 to 38 observed as under:-

34. In a case pertaining to the POCSO Act, it needs no reiteration that it is imperative to establish the



age of the victim and thereby her minority. The age of the prosecutrix has an extremely crucial bearing in the case. The age of victim has to be determined on the basis of settled statutory criteria. Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 provides for determination of age of the child in conflict with law and child in need of care and protection. The law is well settled that the method to determine the age of a juvenile is also applicable to determine the age of the victim. The Hon'ble Supreme Court in **P. Yuvaprakash Vs. State** (Criminal Appeal No.1898 of 2023) vide judgment dated 18.07.2023 observed that in view of Section 34 (1) of the POCSO Act and Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, whenever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the Courts have to take recourse to the steps indicated in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Section 94 (2)(iii) of the Juvenile Justice (Care and Protection of Children) Act, 2015 clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred.

35. The Hon'ble Supreme Court in case of **Jarnail Singh Vs. State of Haryana (2013) 7 SCC 263** has held that "though Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007 have been framed under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 is applicable to determine the age of child in conflict with law, the aforesaid provision should be the basis for determination of age of a child who is victim of crime. The Court remarked that there was hardly any difference between a child in conflict



with law, and a child who is a victim of crime. Identical provision is thereunder Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 which came into effect from 15.01.2016.

*36. In case of **Rajak Mohammad Vs. State of H.P. (2018) 9 SCC 248**, the Hon'ble Supreme Court has noted that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed. In State of **Madhya Pradesh Vs. Munna @ Shambhoo Nath (2016) 1 SCC 699**, the Hon'ble Supreme Court held that the evidence of approximate age of the victim would not be sufficient to any conclusion about the exact age of victim. If there is doubt with regard to correct age of prosecutrix, the benefit, naturally, must go in favour of the accused.*

*37. In case of **Rishipal Singh Solanki Vs. State of Uttar Pradesh and Others**, reported in **Manu/SC/1081/2021** the Hon'ble Supreme Court discussed the law on this point and culled out the principles with regard to the determination of age. It is observed therein that when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i), (ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or Sub-section (2) of Section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised. It is further observed therein that when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Indian Evidence Act, inasmuch as any*



public or official document maintained in the discharge of official duty would have greater credibility than private documents.

*38. The Hon'ble Supreme Court through the three-Judge bench in **Abuzar Hossain @ Gulam Hossain Vs. State of West Bengal (2012) 9 SCR 224** held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. It is now well settled that the burden is always upon prosecution to establish what is alleges.*

23. The Hon'ble Supreme Court in **Mukarrab & Ors. vs. State of U.P. (2017) 2 SCC 210** observed that medical examination leaves a margin of two years on either side even if ossification test of multiple joints is conducted. It has further been observed that the Courts have always held that the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person but the evidence is not conclusive and incontrovertible nature and it is subject to a margin of error. It is difficult to determine the exact age of the person concerned on the basis of radiological/ossification test or other tests.

24. The margin of error in age has been judicially recognized by Hon'ble Supreme Court in the case of **Jay Mala vs. Home Secretary, Government of Jammu & Kashmir and Others (1982) 2 SCC 538** wherein the Hon'ble Supreme Court



observed that one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.

25. The age of prosecutrix has an extremely crucial bearing in the case and it is imperative to establish the age of victim and thereby her minority. The law is now well settled that the method to determine the age of a juvenile is also applicable to determine the age of victim. As stated above, the Hon'ble Supreme Court in **P. Yuvaprakash Vs. State represented by Inspector of Police** reported in **2023 SCC OnLine SC 846** observed that whenever the dispute with respect to the age of a person arises in the context of her/him being a victim under the POCSO Act, the Courts have to take recourse to the steps indicated in Section 94 of the J.J. Act.

26. Dealing with the issue of victim's age, the evidence of P.W.4 (informant) is that he cannot say about the date of birth of the victim at the time of occurrence. The victim stated that she had given the document with respect to her date of birth to the I.O. but the I.O. of the case denied the said fact and stated that the victim or the informant had not given any document with respect to the age of victim. The I.O. has not enquired about the age from the school in which the victim was



studying. Even the victim stated that her Aadhar Card was prepared but the prosecution failed to examine or to produce the same. The prosecution withheld the said document which also creates doubt in the prosecution case that the victim was minor at the time of occurrence. P.W.5 (Doctor) who had examined the victim on the basis of radiological report assessed the age of victim between 14 to 16 years which may not be treated to be accurate for applying the provision of POCSO Act. The doctor herself stated that 2 years margin is possible in the estimated age on the basis of radiological report. As a matter of fact no effort was made by the prosecution to establish the age of victim in accordance with the statutory provisions.

27. The documentary evidence to establish the victim's age was imperative for proof of her age as admittedly she was studying in the school in 10th standard. The prosecution has failed to conduct necessary investigation and the learned Trial Court has been remiss in failing to take into consideration the provisions of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

28. The date of birth is question of fact which must be cogently proved by leading evidence. The allegation of sexual assault coupled with the proof of minority of the victim



drags an accused to the rigorous of POCSO Act, 2012 which mandates a reverse burden of proof. The aim of the Court of facts is to come to a firm conclusion about the minority of the victim. Like all other facts in issue, the determination of age of victim must necessarily be proved by cogent evidence needed in a criminal trial. The POCSO Act, 2012 does not diminish or dilute the Indian Evidence Act.

29. The second issue is whether the victim (P.W.1) can be treated as sterling witness so that on her sole testimony conviction can be recorded. It is now well settled that if evidence of prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. The evidence of a prosecutrix in a case of rape is of same value as that of an injured witness. The Hon'ble Supreme Court in case of **Rai Sandeep Vs. State (NCT of Delhi)**, reported in **(2012) 8 SCC 21** observed in paragraph no.22 as under :-

“22. In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a



witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”



30. In the present case there are several contradictions/inconsistencies in the versions of witnesses regarding manner of occurrence committed, place of occurrence and the age of victim. The medical evidence also does not support the case of prosecution. The manner in which the occurrence is stated to have occurred is not believable.

31. From the evidence of aforesaid witnesses examined on behalf of the prosecution it is clear that except victim, there is no eye witness of the occurrence of rape with the victim by the appellant. The conduct of victim is not natural and creates doubt in her version of occurrence.

31.1. The victim admitted that in godown there were two doors and there were many windows. She also admitted that she had got no injury. She further admitted that she had not raised any alarm when the accused had taken her on motorcycle despite the fact that the road was very busy.

31.2. It is not alleged that any force was used against her for taking her on motorcycle by the appellant or committing rape on her for 4 days and despite opportunity she has not raised any alarm.

31.3. The alleged recovery of the victim from godown is also doubtful. The I.O. has not deposed that from



where the victim was recovered. The I.O. has not made any sketch map of the place of occurrence where the alleged rape on victim was committed by the appellant. The I.O. described the place of occurrence as house of the informant which is contrary to the version of victim. In his deposition I.O. has not disclosed from where the victim had been recovered. The place of occurrence from where she was recovered and raped has not been properly proved by the prosecution. P.W.2 had deposed that Police had taken victim and accused both to Police Station. The narration of victim that she was kept in godown creates doubt in view of the fact that P.W.3 in his deposition stated that victim and the accused were recovered from the godown but the I.O. has deposed that the accused was arrested from his house and the said fact is also revealed from the arrest memo which shows that accused was arrested from his house on 26.11.2018 at 02.00 p.m. The I.O. had not seized any material from the place of occurrence where the alleged offence of rape on victim was committed. Even the cloth of the victim was not seized for forensic analysis which also creates doubt in the prosecution case.

31.4. The victim deposed that the accused used to chase her daily when she went to school, due to fear she had not



gone school for one month, however, P.W.4 (informant) had admitted that the victim or anyone had not told the name of accused and no boy had involved in chasing the victim. No one had seen that the victim was taken away by the accused. The contradictions on the point that the accused was chasing the victim also creates doubt in the testimony of the victim.

31.5. As per the victim, the accused had taken her and kept her in a godown for 4 days and there he used to rape her but the I.O. in his deposition stated that the place of occurrence is house of informant which contradict the claim of victim that she was kept in the godown from where she was recovered by the Police.

31.6. The victim accepted in her cross-examination when photograph was shown that in photograph she was wearing spectacle and smiling with the accused which is also not natural conduct of victim in view of her allegation that she was not known to the appellant.

31.7. The victim and the informant in their depositions have stated that no injury was found on the body of the victim after her recovery. The doctor also found no injury on the body of the victim. No foreign element was found on her body in pathological examination also. No spermatozoa was



found and thus the rape has not been proved on the victim. The doctor has deposed that in case of rape there is a chance of injury on the body of the victim. This circumstance show that the victim has not given the true fact with respect to the commission of rape on her.

32. In the facts and circumstances of the case, as discussed above we find that the solitary version of the prosecutrix (victim) cannot be taken as a gospel truth of face value and in absence of any other supporting evidence, the victim cannot be termed as sterling witness.

33. It appears from the impugned judgment of the Trial Court that learned Trial Court held that defence has totally failed to rebut the presumption under Section 29 of POCSO Act that the Court has to presume that the accused had committed the offence for which he is charged under the POCSO Act unless contrary is proved.

34. Under Section 29 of POCSO Act it cannot be said that presumption is absolute, it would come into operation only when the prosecution is first able to establish facts that would form foundation for the presumption under Section 29 of the POCSO Act to operate. If the basic and foundational facts of prosecution case is proved by adducing legally admissible



evidence then burden get shifted to the accused to rebut it by establishing from the evidence on record that he has not committed the offence or that no such incident was occurred or that victim is not child.

35. The statutory presumption stands activated only if prosecution proves the foundational facts. In the present case, the prosecution failed to prove that the victim was minor as on the date of occurrence.

36. A proper analysis of the prosecution witnesses and the medical evidence brought on record by the prosecution shows that the foundational facts, necessary in the present to raise presumption under Section 29 of the POCSO Act, have not been established beyond reasonable doubt by the prosecution. The defence has been able to demonstrate that the prosecution story cannot be believed and that, therefore, the presumption would not operate and thus, it would be unsafe to hold that the prosecution had proved its case against the appellant under the provision of POCSO Act or under Section 376 of I.P.C.

37. Thus, it is to be held that the prosecution has failed to prove the charges levelled against the accused/appellant beyond all reasonable doubts thereby entitling the accused/appellant for acquittal



38. In the result, the instant appeal deserves to be allowed and is allowed with the following orders:

I. The appeal is allowed.

II. The impugned judgment of conviction dated 23.08.2022 and order of sentence dated 30.08.2022 passed by learned Additional Sessions Judge VIth-cum-Special Judge, Protection of Children from Sexual Offences Act (POCSO), Bhagalpur in connection with POCSO G.R. Case No.6375 of 2018 (arising out of Industrial Area P.S. Case No.150 of 2018) thereby convicting the appellant/convicted accused and sentencing him, accordingly, is set aside.

III. The appellant is acquitted of the charges levelled against him and held to be proved against him by the learned Trial Court.

IV. The appellant, who is in jail custody, be set at liberty forthwith, if not required in any other case.

39. The aforesaid appeal, accordingly, stands disposed of.

40. Let a copy of this judgment be dispatched to the Superintendent of concerned jail forthwith for compliance and record.

41. The Trial Court records of the instant appeal be



returned to the Trial Court forthwith.

42. Interlocutory application(s), if any, also stand(s)
disposed off, accordingly.

(Vipul M. Pancholi, J)

(Sunil Dutta Mishra, J)

Ritik/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	18.03.2024
Transmission Date	18.03.2024

