

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1388 of 2018**

Arising Out of PS. Case No.-34 Year-2017 Thana- MAHILA P.S. District- Kaimur (Bhabua)

Manjit Ram @ Manjit Kumar Son of Shiv Narayan Ram, Resident of Village-
Deoradh Kala, P.S.- Kudara, District Kaimur at Bhabhua.

... .. Appellant/s

Versus

1. The State of Bihar
2. X NA

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate. Ms. Vaishnavi Singh, Advocate. Mr. Ritwik Kumar, Advocate.
For the Respondent No. 1:		Mr. Abhimanyu Sharma, APP
For Respondent No. 2	:	Mr. Saroj Kumar Sharma, Advocate Ms. Kiran Kumari Sharma, Advocate.

**CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE JITENDRA KUMAR)**

Date : 23-07-2024

The present appeal has been preferred against the impugned judgment of conviction and order of sentence dated 22.09.2018 and 24.09.2018, respectively passed by Ld. Additional District and Sessions Judge-Ist-cum-Special Judge (POCSO), Kaimur at Bhabhua in POCSO Trial Registration No. 21 of 2017, arising out of Bhabhua Mahila P.S. Case No. 34 of 2017, whereby the sole appellant has been found guilty of offence punishable under Sections 376(2)(i) of the Indian Penal Code and Section 4 of the Protection of Children from Sexual



Offences (POCSO) Act and sentenced to undergo R.I. for 15 years and to pay a fine of Rs. 50,000/- under Section 376(2)(i) of the I.P.C. In case of default to pay the fine, he has been ordered to undergo additional R.I. for six months. But no sentence was passed under Section 4 of the POCSO Act.

2. On the basis of the written report, Bhabhua Mahila P.S Case No. 34 of 2017 was registered on 15.05.2017 against the sole appellant for the offence punishable under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act, 2012.

3. The prosecution case as emerging from the written report of the informant/Mithlesh Ram addressed to Officer-in-Charge, Mahila Police Station Bhabhua, Kaimur, is that his 11 year old daughter was sleeping in her courtyard along with her mother and brother. All of a sudden, his son felt the urge to defecate. Hence his wife took his son outside. In the meantime, his co-villager Amarjeet Ram, entered his house and gagged his daughter and took her to his own house and committed rape on her. When his wife came back, she could not find her daughter in the courtyard. She heard the cries of her daughter coming from the house of Amarjeet. She tried to enter his house, but, Amarjeet stood at his door with a country made pistol (katta) in



his hand. He warned her that if she entered the house, she would be killed. He then pushed her out from his house. There were blood stains on her thighs and she was crying in pain.

4. After registration of the F.I.R., the investigation commenced and charge-sheet bearing no. 29 of 2017 dated 30.06.2017 was filed against the sole appellant Manjit Ram under Section 376 of the Indian Penal Code and under Section 4 of the POCSO Act, 2012 and FIR named Accused/Amarjeet Ram was exonerated by the Police. Subsequently, cognizance was taken and charges were framed against the sole accused facing the Trial.

5. During trial, the following six witnesses were examined on behalf of the prosecution:

- (1) **P.W.-1** – Taraman Devi
- (2) **P.W.-2** – Mithlesh Ram (Informant)
- (3) **P.W.-3** – Victim
- (4) **P.W.-4** – Dr. Jitendranth Singh (Doctor)
- (5) **P.W.-5** – Dr. Meena Pathak (Doctor)
- (6) **P.W.-6** – Kumari Anchala (I.O.)

6. The prosecution brought on record the following documentary evidences also:

- (i) **Ext. 1**- Signature on the seizure list
- (ii) **Ext. 2** – Signature on the fardebayan
- (iii) **Ext. 3** – Report of the medial board
- (iv) **Ext. 4** – Medical report
- (v) **Ext. 5** – Pathological report
- (vi) **Ext.6** – Formal F.I.R.
- (vii) **Ext. 7** – Endorsement on fardebayan



(viii) **Ext. 8-** Statement under Section 164 Cr.PC

7. After closure of the prosecution evidence, accused was examined under Section 313 Cr.PC confronting him with incriminating circumstances which came in the prosecution evidence, so as to afford him opportunity to explain those circumstances. During this examination he stated that he had heard the evidence of the prosecution, but he did not explain any circumstances. However, he denied the charges and claimed to be innocent.

8. The accused/appellant, however, has not examined any witness, nor has brought any documents on record in his defence.

9. Learned Trial Court, after appreciating the evidence on record and considering the submissions of the parties, passed the impugned judgment of conviction and order of sentence, finding that the victim was below sixteen year of age on the date of occurrence. He also found that the Prosecution has proved its case against the appellant under Section 376(ii) of the Indian Penal Code and Section 4 of the POCSO Act.

10. We have heard the learned counsel for the appellant and learned Counsel for the Respondents.

11. The learned counsel for the appellant has



submitted that the impugned judgment of conviction and the order of sentence passed by learned Trial Court are not sustainable in the eye of law or on facts. Learned Court below has not applied its judicial mind. It has failed to properly appreciate the evidence on record. He has also submitted that the prosecution has failed to prove the age of the victim as per the procedure provided in the law. He has further submitted that the prosecution has badly failed to prove its case against the appellant beyond reasonable doubts. To substantiate his claim, he has submitted that the appellant is not named in the FIR. It was Amarjeet Ram who was named in the FIR as an accused on the basis of written report of the informant/father of the victim. This fact alone is sufficient to disbelieve the case of the prosecution against the appellant. He has also submitted that all the private witnesses are family members and thus interested witnesses and their testimony cannot be relied upon to convict the appellant. There are various discrepancies and contradictions in the statements of the prosecution witnesses. The allegation of rape is also not supported by the medical evidence.

12. *Per contra*, learned Additional Public Prosecutor and the learned counsel for the informant defended the judgment and argued that the victim was way below 18 years of



age at the time of occurrence and the prosecution has amply proved its case against the appellant. There is no illegality or infirmity in the impugned judgment and order of sentence.

13. As the appellant has been found guilty under the POCSO Act, 2012 also, it is required to take note of Sections 29 and 30 of the Act which provide for mandatory presumptions against the accused. Such presumptions are exceptions to the general rule of the presumption of the innocence of the accused in any criminal trial. Sections 29 and 30 of the POCSO Act read 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.

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."

14. From the reading of these Sections, it clearly transpires that Section 29 provides for reverse burden on the



accused, facing prosecution under Sections 3, 5, 7 and 9 of the Act to prove his innocence. Section 30 stipulates that if *mens rea* on the part of the accused is required for his prosecution under the Act, the Court is required to presume such *mens rea*. The accused has been, however, given right to rebut the presumptions raised against him.

15. Now the question is as to what would be the effect of such presumptions in the criminal trial. Do these provisions absolve the prosecution to prove its case against the accused beyond all reasonable doubts? Can the accused be fastened with burden to prove that he/she is innocent ?

16. Such issues are no longer *res integra*.

17. The Supreme Court in **Babu Vs. State of Kerala, (2010) 9 SCC 189**, has held that presumption of innocence is a human right, though the exception may be created by statutory provisions. But even such statutory presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution.

18. In **Navin Dhaniram Baraiye Vs. State of Maharashtra, 2018 SCC Online Bom 1281, Bombay High Court** has held that the presumption under Section 29 of the



POCSO Act, 2012 operates against the accused only when the prosecution proves the foundational facts against him in the context of the allegation under the Act and the accused has a right to rebut the presumption, either by discrediting prosecution witnesses through cross-examination or by leading evidence to prove his defence. Rebuttal of the presumption would be on the touchstone of preponderance of probability.

19. Hence, it clearly emerges that despite Sections 29 and 30 of the POCSO Act, 2012 the prosecution is not absolved of its burden to prove that the victim is a child i.e. below 18 years of age and he/she has been subjected to sexual assault by the accused and such foundational facts have to be proved by the prosecution beyond reasonable doubts and once the presumption is raised against the accused, the accused can rebut such presumption either by cross-examination of the prosecution witnesses or by leading evidence in his/her defence, on the touchstone of preponderance of probability. The presumptions are bats in law. They fly in a twilight, but vanish in the light of facts.

20. Now question is **what is proof beyond reasonable doubts.** This issue is also well discussed by the Hon'ble Supreme Court on several occasions. The proof beyond



reasonable doubts is not necessarily a perfect proof to mathematical precision. All that is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of the facts in issue. The accused are entitled to get benefit not of all doubts, but only of reasonable doubts. Every hesitancy, hunch and doubt are not reasonable doubts. [Refer to Kali Ram Vs State of HP; (1973) 2 SCC 808, Dharm Das Wadhvani Vs. State of U.P. (1974) 4 SCC 267, Collector of Customs Vs. D. Bhoormal, (1972) 2 SCC 544, Narender Kumar Vs. State (NCT of Delhi), (2012) 7 SCC 171, Shivaji Sahabrao Bobade Vs. State of Maharashtra, (1973) 2 SCC 793 and Dilavar Hussain Vs. State of Gujarat, (1991) 1 SCC 253.]

21. Now, coming to the evidence on record, we find that the **victim** has been examined as **PW-3**. In her **examination-in-chief** she has deposed that occurrence had taken place a year ago while she was sleeping in her courtyard. The appellant came inside the courtyard and gagged her. He took her to his house and raped her. On her cries, her mother came and Manjeet fled away. Thereafter, her mother took her to her house. Next morning, her mother took her to Police Station and got her treated. Thereafter, she was taken to Court, where her statement



(Ext-2) under Section 164 Cr. P.C. was recorded. In her **cross-examination**, she has deposed that there were three to four rooms in the house of the appellant. When she gave her statement before the Magistrate, her mother had instructed her as what statement was to be made. Her family and the family of the appellant are not on good terms. To the court question, she stated that she had bled when the appellant had committed rape. Her pajama were stained, when it was shown to the Police and the Doctor.

22. The **mother of the victim** has been examined as **P.W.-1**. In her **examination-in-chief**, she has supported the prosecution case. She deposed that in the night of occurrence, her husband was not at home. He had gone to see dance in the village. When he came back home at 12 O'clock in the night, he was informed about the occurrence. He went to the house of the appellant and made protest. Many villagers had gathered there. At that time no one was inside the house of the appellant. She also visited the Mukhiya, who thereafter came to her house and saw blood on her daughter's person. After the occurrence, when she went to the house of the appellant, his door was not closed. She entered his house and accosted him. He did not reply and went away from the house. She had handed over the blood



stained undergarments, to the police. She had lifted her daughter back home. Her saree also had blood stains. After coming to her house, the victim became unconscious. She was taken to one Dr. Vijendra.

23. The father of the victim has been examined as **P.W.-2**. He is a hearsay witness regarding the occurrence. He identified the accused/appellant standing in the dock. In his **cross-examination**, he has deposed that in the night at 8:00 P.M. he had gone to see the dance performance in a marriage party. After getting information on mobile about the occurrence, he came back home at 11:15 P.M. His daughter was then in senses. She was crying. There was a doctor in the village. His daughter was not taken to the doctor. He had not gone to Mukhiya and Sarpanch. He denied the suggestion that earlier he had named Amarjeet. He claimed that it was the appellant who had raped his daughter.

24. P.W.-4 Dr. Jitendranath Singh, a member of the Medical Board which had examined the victim on 15.05.2017 to determine the age of the victim on the basis of Radiological test, has opined that the age of the victim was between 11 and 14 years.

25. P.W.-5 is Dr. Meena Pathak who had examined



the victim on 15.05.2017 at Sadar Hospital, Bhabhua. Her findings are as follows:-

“(i) Examination regarding sexual intercourse-

(a) Examination of clothes – no tear, no patches found on external clothes (which were changed after the incidents as per her mother version) undergarments having single whitish patch, sealed and handed over to accompany her.

(b) Marking of violence – no marking of violence found over her body.

(c) External examination of genital area – no bleeding, tear or any other sign of injuries found over or around genital area.

(d) Internal examination of genital area – Vaginal swab and annul swab taken and sent for pathological examination, report shows no spermatozoa found (dead or alive) only epithelial cells and pus cells present. No sign of internal injuries or bleeding found. USG of whole abdomen advised. Report found to be normal.

(ii) opinion – On the basis of above findings and investigations, evidence of recent rape can not be ascertain.”

26. In her **cross-examination**, she has deposed that undergarments of the victim was produced before her, but she did not find any sign of blood on those clothes.

27. As per the **FSL report** bearing No. 2123 of 2017 dated 22.09.2017 received from office of the Director, F.S.L. Patna, no blood or semen was detected on the undergarments of the victim.

28. P.W.-6, Kumari Anchala, is **I.O.** of the case. She had taken the victim to the Sadar Hospital for examination. She has further deposed that in her re-statement the victim had told her that the third son of Shiv Narayan Ram, namely,



Manjeet Kumar (Appellant) had committed rape upon her. Even her father had told her that Manjeet Ram and not Amarjeet Ram had committed rape upon her. The seized clothes was sent to FSL, Patna with the permission of the Court. She has further deposed that after finding the case true against the appellant Manjeet Ram, charge-sheet was submitted against him. The case was dropped against Amarjeet Ram, finding the allegation against him to be untrue. In her **cross-examination**, she has deposed that she had not investigated whether the victim was a student of school or not.

29. Now the **first and foremost question** is whether the prosecution has proved that the victim was a child i.e. below 18 years of age on the date of occurrence in terms of Section 2(1)(d) of the POCSO Act. It is one of the foundational facts to be proved by the prosecution, as it is a prerequisite for application of the Act against the Appellant.

30. In the POCSO Act, 2012 there is no procedure for determination of age. Section 34 (2) of the Act only provides that if any question arises whether a person is a child or not, such question is required to be determined by the Special Court after satisfying itself about the age of such person and to record in writing the reason for such determination.



31. However in the landmark judgment of **Jarnail Singh Vs. State of Haryana, (2013) 7 SCC 263**, which still holds the field and is being followed by all Courts, the Supreme Court has held that the procedure provided for determination of age of a juvenile in conflict with law should be adopted for determination of the age of the victim of a crime also, because there is hardly any difference, in so far as issue of minority is concerned, between the child in conflict with law and the child who is the victim of a crime.

32. Similar view has been taken by the Supreme Court in the recent case of **P. Yuvaprakash Vs. State, 2023 SCC onLine SC 846** referring to Section 34 of the POCSO Act and Section 94 of the J.J. Act, 2015. Section 94 of the J.J. Act, 2015 which deals with presumption and determination of age reads as follows:

“94. Presumption and determination of age.-

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—



(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”

33. Hon’ble Apex Court in P. Yuvaprakash Case

(supra), has held as follows:

“13. It is evident from conjoint reading of the above provisions that wherever 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 JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

“(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board”.

(Emphasis supplied)

34. Coming to the case in hand, in regard to the age of



the victim, it is found that she was student of Class-VI, as she had stated before the Judicial Magistrate during the recording of her statement under Section 164 Cr.PC. However, the I.O. did not make any investigation regarding her age from her school, nor has she obtained any certificate from the school where she had been studying. There is no documentary proof like birth certificate by municipal authority or panchayat, on record. Hence, in the absence of such a certificate, the Court was required to ascertain the age of the victim as per ossification test. A Medical Board was constituted to assess the age of the victim and as per ossification test, her age has been assessed to be between 11 and 14 years.

35. It is a settled position of law that medical opinion regarding age of a person is no conclusive evidence, because exact assessment of the age cannot be made on the basis of medical test. There is always a possibility of errors on both-higher and lower sides. However, medical opinions can be very useful guiding factors to be considered in the absence of the documents as mentioned in Section 94 of Juvenile Justice Act, 2015. Reliance is placed on the following authorities:

- (i) Rishipal Singh Solanki Vs. State of U.P., (2022) 8 SCC 602
- (ii) Mukarrab Vs. State of U.P., (2017) 2 SCC 210
- (iii) State of M.P. Vs. Anoop Singh, (2015) 7 SCC 773



(iv) Abuzar Hossain Vs. State of W.B., (2012) 10 SCC 489

36. Despite the victim studying in a school, the prosecution has not brought on record any school certificate to prove the age of the victim, giving rise to an adverse inference against the prosecution with regard to the age of the victim. Hence, benefit of possibility of error in determination of age by ossification test would be given to the accused. Hence, giving benefit of two years, the age of the victim is assessed to be 16 years. Even then, the victim was a minor at the time of occurrence attracting the application of the POCSO Act, 2012.

37. However, the prosecution was still required to prove the foundational facts regarding the allegation of sexual assault against the appellant beyond reasonable doubts.

38. On perusal of the prosecution evidence, it is found that the accusation was firstly made against Amarjeet Ram. However later, the appellant was charged for the offence. This itself shakes the foundation of the prosecution case, making it highly doubtful. We have further found that even the allegation of sexual assault has not been proved beyond reasonable doubts. The oral testimony of the victim and her parents are not corroborated by scientific and medical evidence. The oral testimony of blood stains on the undergarments of the victim has not been supported by P.W.-5, who had deposed that no



sign of blood was found on the undergarments of the victim which was shown to her by mother of the victim. The medical evidence of rape is totally non-existent. Dr. Meena Pathak (PW-5), who had examined the victim only the next day did not find any bleeding, tear or any other injury on or around private parts of the victim. There were no signs of internal injury. No spermatozoa was found in the vaginal and anal swab.

39. We are conscious of the law that evidence of the victim of rape is not required to be corroborated because she is not an accomplice. But the victim is required to be trustworthy, inspiring the confidence of the Court. She must be a sterling witness to base conviction on her sole testimony. The prosecutrix does not appear to be a sterling witness. Even the parents of the victim are not trustworthy witnesses. There are so many material contradictions in their deposition. Initially, Amarjeet Ram was blamed but later, the appellant was alleged to be the culprit. Even regarding the post occurrence events, there are so many material contradictions in the evidence of the prosecution. The mother of the victim has stated that after the sexual assault, there was tear in the private parts of the victim and she was taken to village doctor for treatment. However, the father of the victim has deposed that she was not taken to any



doctor in the village for treatment. We further find that as per the mother, she had met with local Mukhiya regarding the occurrence, but father of the victim had denied such visit to the Mukhiya.

40. It also transpires from the evidence on record that the appellant and the informant are next-door neighbours and they are not on talking terms for long. Perhaps, some dispute regarding defecation by the minor son of the informant (brother of the victim), had occurred which led to protest from the appellant. The case appears to be a reprisal against such protest. This has been suggested to the witnesses also.

41. On the basis of such evidence, allegation of sexual assault cannot be held to have been proved beyond reasonable doubts. Hence, there is no question of raising presumption under Sections 29 and 30 of the POCSO Act, 2012 against the appellant.

42. The appellant deserves to be acquitted giving benefit of doubt.

43. Accordingly, the impugned judgment of conviction and order of sentence against the appellant being not sustainable in the eyes of law, are set aside **allowing the Appeal.**

44. The appellant stands acquitted of the charges



levelled against him.

45. Since the appellant/Manjit Ram @ Manjit Kumar is in jail, he is directed to be released forthwith, if he is not detained or wanted in any other case

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

47. The records of the case be returned to the Trial Court forthwith.

48. Interlocutory application/s, if any, also stand disposed off accordingly.

(Jitendra Kumar, J.)

I agree.

(Ashutosh Kumar, J.)

Ravishankar/
chandan-

AFR/NAFR	NAFR
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