

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.293 of 2023

Arising Out of PS. Case No.-7 Year-2021 Thana- DHANARUA District- Patna

Santu Kumar @ Forty, Son of Brijnandan Ram, Resident of Village- Kosut,
P.S.- Dhanarua, Distt- Patna Appellant

Versus

1. The State of Bihar

2. [REDACTED] Resident of Village- Kosut , P.S- Dhanarua,
Distt- Patna

... .. Respondents

Appearance :

For the Appellants	:	Mr. Ajay Kumar Thakur, Advocate Mr. Ritwik Thakur, Advocate Mrs. Kiran Thakur, Advocate Mrs. Vaishanvi Singh, Advocate Mr. Md. Imteyaz Ahmad, Advocate
For the State	:	Mr. Abhimanyu Sharma, Addl. P.P.
For the Informant	:	Mr. Gaurav Sharma, Advocte Mr. Alok Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE ASHOK KUMAR PANDEY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHOK KUMAR PANDEY)

Date : 24-06-2025

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

2. This appeal has been preferred for setting aside the
judgment of conviction dated 20.01.2023 (hereinafter referred to
as the ‘impugned judgment’) and the order of sentence dated
23.01.2023 (hereinafter referred to as the ‘impugned order’)
passed by the learned A.D.J.-VII-cum-Special Judge POCSO,
Patna (hereinafter referred to as the ‘learned trial court’) in
Special POCSO Case No.07 of 2021 arising out of Dhanarua



P.S. Case No. 07 of 2021. The appellant has been ordered to undergo rigorous imprisonment for twenty years and fine of Rs. 50,000/- under Section 4(2) of POCSO Act and in default of payment of fine, he shall further undergo a sentence of two months.

Prosecution Case

3. The case of the prosecution based on written report of informant 'in brief' is that on 08.01.2021 at about 10.30 P.M. the accused/appellant Santu Kumar @ Forty has climbed over roof of the informant. When the informant went on the roof on hearing the noise, the accused managed to escape. It is further alleged that the minor daughter of the informant 'x' the victim started weeping and disclosed to the informant that on 05.01.2021 at about 10:00 P.M. in the night when she was busy in studying at her house, the appellant called her on mobile and told her that he has got certain articles for her, if she comes out of the house he will hand it over to her. When the victim 'x' went out of her house the appellant/accused Santu Kumar @ Forty enticed her to a lonely place behind the Raktu Mahto Market and there he forcibly raped her and threatened her of dire consequences if she disclosed the occurrence to her family. Out of fear, the victim did not disclose the occurrence to



anyone. It is also the case of the prosecution that the victim used to go to appellant/accused Santu Kumar @ Forty for coaching and she is scared since the date of occurrence.

4. On the basis of the above written statement, Dhanarua P.S. Case No. 7 of 2021 was registered under Section 376 of the IPC and Sections 4 and 6 of the POCSO Act.

5. After investigation, police submitted chargesheet in above Sections. After that, the learned Exclusive Special POCSO Court took cognizance of the offence.

6. The charges were explained to the accused-appellant which he denied and claimed to be tried whereafter charges were framed against the appellant for the offence under Section 376 of 'IPC' and also under Sections 4 and 8 of the POCSO Act.

7. After the evidence of prosecution, statement of appellant under Section 313 Cr.P.C. was recorded wherein he denied the evidence of prosecution and claimed to be innocent.

8. In order to substantiate this case, the prosecution has examined altogether six witnesses and has also adduced certain documentary evidences which are given hereunder in tabular form for ready reference:-

List of Prosecution Witnesses

P.W.-1	Dr. Anuradha
P.W.-2	Mother of the victim



P.W.-3	Victim
P.W.-4	Father of the victim (Informant)
P.W.-5	Geeta Devi (Investigating Officer)
P.W.-6	Kishore Kumar (Incharge Headmaster of Utkramit Madyamik Vidyalaya, Kosut Block, Dhanarua, District-Patna

9. Defence has not examined any witnesses.

List of Exhibits

Exhibit ‘P-1’	Medical report of the victim
Exhibit ‘P-1/1’	Medical report of the victim
Exhibit ‘P-2’	Statement of victim recorded under Section 164 Cr.P.C.
Exhibit ‘P-3’	Written report of the informant
Exhibit ‘P-4’	Endorsement made by the then SHO over the written report of the informant
Exhibit ‘P-5’	Formal F.I.R.
Exhibit ‘P-6’	Admission Register of the School
Exhibit ‘P-7’	Attendance Register of the victim

Findings of the Learned Trial Court

10. Learned trial court has held that “From the analysis and appreciation of the aforesaid facts, circumstances and evidence available on the record and the discussions made



above, in its considered opinion the prosecution has well proved the date and time of occurrence, place of occurrence and the manner in which it was committed. The victim was a minor girl aged below 16 years on the date and time of occurrence. These witnesses have well proved that on 05.01.2021 at about 10 PM when the victim was studying at her house, the accused had called her on mobile and asked her to come out of her house as he wanted to give some articles to her. When she went out of her house then the accused carried her towards the back of Raktu Mahto Market in the field of brinjal and tomato crop where he pressed her mouth and forcibly committed rape upon her. Thus the prosecution has well proved its case and has been successful in bringing home the guilt of the accused beyond the shadow of all reasonable doubts.”

Submissions on behalf of the appellant

11. The learned counsel for the appellant has submitted that in this case, there is unexplained delay of four days in lodging the F.I.R. The explanation provided for the disclosure of the information on 08.01.2021 and not on 05.01.2021 is unreliable as there was no change of circumstance giving the victim courage to speak up on 08.01.2021 which was absent on 05.01.2021. There is allegation of forceful rape and



some minor injuries still the doctor has not found any internal or external injury on the person of the victim suggesting physical violence or rape. The victim and accused knew each other. The victim being a student of a coaching where the accused tutored is completely fictitious nor her parents or the I.O. disclosed or collected a single material to show the existence of the coaching institute.

12. It has also been submitted by the learned counsel for the appellant that in this case, three place of occurrence has been disclosed by the victim. In F.I.R., the place of occurrence is a secluded place behind Raktu Mahto Market whereas in statement of the victim under Section 164 of the Cr.P.C., the victim has stated that the offence was committed behind the flower tree and in her evidence, she has stated that the offence was committed in '*brinjal tomato field*'.

13. The learned counsel for the appellant has further submitted that it is unbelievable that a girl would leave her house at 10.30 P.M. in the cold night without any shawl or sweater and come back after half an hour after being raped and neither the parent nor would she inform the occurrence to any of the family member.

14. It has further been submitted by the learned



counsel for the appellant that making phone call by the accused on 05.01.2021 on the home number of the informant is equally fictitious as I.O. has not collected either the C.D.R. or seized the phone on which the call was made. It has further been submitted that the story of accused calling on 05.01.2021, the girl reading in non-existent coaching, absence of any evidence of rape in medical report would show that the entire story is false and fabricated.

Submissions on behalf of the State

15. As against this, the learned Additional Public Prosecutor for the State Mr. Abhimanyu Sharma has submitted that it is a case where a minor girl has been raped by his tutor on a secluded place.

16. It has also been submitted that the evidences adduced by the prosecution have been able to prove the case of prosecution beyond all reasonable doubts.

17. It has also been submitted by the learned counsel for the prosecution that in a case of POCSO, the prosecution has only to prove the fundamental facts of the case and after that there is presumption of culpable mental state under Section 29 of the POCSO Act and after that the onus of proving innocence has not been discharged by the appellant.



Consideration

18. In this case, prosecution case revolves around the deposition of the victim who is PW-3. This witness has stated that the occurrence is of 05.01.2021 at about 10 PM at that time, she was studying in her house and at the same time, accused/appellant Santu Kumar @ Forty made a call on mobile no. 8002066673, he told that he is her tutor and he has got something to offer her. On this, the victim came out of her house then the accused/appellant took her behind the Raktu Mahto Market. She has further stated that there in the fields of brinjal and tomato, he forcibly raped her and threatened her of dire consequences.

19. This witness has further stated that on 08.01.2021, the appellant/accused climbed on the roof of the house of the victim, when his footsteps were heard by her family members, the mother of the victim and others went on the roof and they found the appellant/accused was there. Thereafter, he fled away seeing the family members of the victim. After that, the victim started weeping and disclosed the occurrence of 05.01.2021 to her parents. After that, she went to police station with her father and filed this case. This witness has further stated that she was a



student of class seven and she used to go to the coaching and she identifies the accused from the day when she started going to the coaching. This witness has further stated that she has given her statement before Magistrate under Section 164 Cr.P.C. wherein she identifies her signature on her statement under Section 164 Cr.P.C. which has been marked as Ext-P-2. This witness has identified the appellant/accused in the dock.

20. In course of cross-examination, this witness has stated that the appellant was a tutor in the coaching where she was a student. She has further stated that there were other teachers as well but she does not know their names. The appellant was a Math teacher. The appellant himself has disclosed his name in the class and other teachers have not disclosed their name. The victim even does not know as to who runs the coaching, she also does not know as to how much fee was being paid. She has only stated that 5-6 girls were there in the coaching class. She does not know about the boys who were attending the coaching class. This witness has also stated that the appellant has made only one call on the mobile number hereinabove mentioned that too on 05.01.2021 at about 10 PM. This witness has also stated that this date was disclosed today to her by her father who was present in the Court at the time of



examination-in-chief and cross-examination of the witness. She has further stated that she had no conversation with the appellant prior to 05.01.2021 and she did not come to know till now as to what article the appellant has to give to her.

21. This witness has further stated that prior to the date of occurrence she had never gone out of her house in the night. This witness has reiterated that the appellant took her to tomato and brinjal fields behind the Raktu Mahto Market but she did not raise any alarm while she was being taken to the place of occurrence. She followed the appellant as he was her tutor. This witness has further stated that the appellant had gagged her mouth and had committed rape with her that is why she could not make alarm.

22. She has further explained that her mouth was gagged with left hand, she also tried to rescue herself and she also received nail bite near her ear. She has further stated that at the time of occurrence, she had worn a frock. She did not care as to what the appellant has worn. She has further stated that the act continued till 15-20 minutes, she did not raise alarm even after the departure of the appellant as the appellant had threatened her of dire consequences. In her cross-examination, this witness has also stated that at the time of her medical



examination, the doctor had not received her cloth nor the same was seized. This witness has been suggested by the defence that the parents of the witness owe some debt payable to the appellant that is why he has been framed in a false case.

23. PW-1 is the Doctor who has conducted medical examination on the person of the victim. We reproduce the evidence of the Doctor hereunder for ready reference:-

1. On 10-01-2021 I was posted at Gardanibagh Hospital as Medical Officer. On the such day victim was brought by A.S.I. Pappu Kumar and lady constable 3053 Sunita Kumari of P.S. Dhanarua. In the view of registration no. ER/117 dated 10-01-2021 I examined the victim D/o- [REDACTED] R/o- Village- Kosut, P.S.-Dhanarua, District- Patna.

M.I. (i) Til mark over left side of lower lip
(ii) Til mark over upper chest on right side of midline.

LMP-08-01-2021

2-Physical Examination- No mark of violence could be found over any part of her body.

Height: 4'8", Weight:-36 Kg., Teeth:- upper- 14, Lower- 14

Secondary sex Charactor developed

Pelvic examination- No mark of violence could be seen over her private parts. Vaginal swab taken and send to dept. of pathology PMCH, Patna in a sealed envelope.

For age determination she was sent to dept. of radiology PMCH, with Police.

3-Pathological report no 04 dated 11-01-2021

Spermatozoa not found in vaginal swab.

Radiological report no. 34 dated 12-01-2021

X-ray both elobwo (A/P view):- There is complete fusion of the epiphysis of the



medial epicondyle of humerus and radial head epiphysis on both sides. In females both of these fuse at the age of 14 years.

X-ray both Wrist (A/P view):- There is non fusion of the distal ulnar and distal radial epiphysis on both sides. In females distal ulnar epiphysis fuses at the age of 17 years. In females distal radial epiphysis fuses at the age of 16.5 years.

X-ray Pelvis(A/Pview):- There is non fusion of the epiphysis of the iliac crest on both sides. In females iliac crest epiphysis fuses at the age of 17-19 years.

Opinion:- According to above report age of the victim is between 14-16 years.

Above both the reports are prepared by me in my pen and signature and same were marked as Ext.-P-1 and P-1/1 (PW-1).

Cross examination on behalf of the accused person.

4-No any mark of the violence was found on the either External or Internal part of body of the victim. No finding of forceful sexual intercourse to the victim could be found at the time of examination of the victim. I have not mentioned in my report regarding even the suspicion of the forceful sexual intercourse. Generally we do not mentioned in the report but its should be mentioned in the report.

5-When victim was brought before me for her medical examination she was in the menstrual period. It is mentioned the report and same was to prepared by me. Opinion regarding age of the victim is based upon the radiological report. In first report opinion regarding age of the victim was reserved for awaiting the radiological report.

6- On the basis of physical examination, Pelvic examination there is no any my opinion regarding the age of the victim.

24. PW-2 is the mother of the victim, she has reiterated

the FIR in her examination-in-chief. In her cross-examination,



she has stated that the appellant had called on their mobile only for one time. The victim had told this fact to the witness. This witness has also stated in her cross-examination that the victim was knowing the appellant for 1-2 years. This witness never had any talk with the appellant/accused. She has further stated that there is no poster of the coaching, she does not know as to from how many years, the appellant is teaching in the coaching. She has admitted that the appellant is having a hardware shop in the Raktu Mahto Market. The appellant also lives in village Kosut. She has also stated that her house is single-storeyed. She has denied that the hardware was purchased from the shop of the appellant but she has admitted that except the shop of the appellant, there is no other shop dealing in hardware. This witness has been suggested by the defence that appellant is a shopkeeper of a hardware and that at the time of the construction of the house, hardware were purchased from his shop and above purchases were made on credit and this case has been filed with a view to avoid the credit.

25. PW-4 is the father/informant and in his in examination-in-chief, he has reiterated the facts which has been enumerated in the FIR/written application. In cross-examination, this witness has stated that he is having a grocery



shop but the same shop is unlicensed. Regarding his house, this witness has stated that there are four rooms in his house all rooms are separate and there is also a courtyard. Raktu Market is 50 yards away from his house. There are 3-4 shops in the Raktu Market, there is also a flattened rice mill near the Raktu Mahto Market. It has also been stated by this witness that in season, these mills work whole night. Cold is the weather when these mills are operational. These mills start working from January and the occurrence is of January itself. This witness has stated that at the time of occurrence, he was sleeping and he did not see as to with whom, his daughter had proceeded. She was told by the victim regarding the occurrence and he had not seen the occurrence with his eyes. This witness has stated that he is not literate, he can only put his signature and he can count cash. Somebody else has written the application which was given to police, he does not know as to who has written the application, it was written on his dictation. The writer of the application was present in the police station but he has not been examined in this case. This witness has denied the suggestion by the defence that he owes some debt to the appellant and for avoiding the debt, the appellant has been framed in this case.

26. PW-5 is the I.O. and this witness has stated that the



place of occurrence of this case is behind Raktu Mahto Market the fields of Ram Pravesh Mahto and at that time, Brinjal and Tomato crops were sown. In cross-examination, this witness has stated that she had not recorded the statement of Arjun Mahto and has also not recorded the statement of the persons who are in boundary of the place of occurrence. She has also stated that the tomato and brinjal crops were not found crushed. She has also stated that she had neither seized the undergarments of the victim nor of the appellant. She has also not recorded the statement of the neighbours of the victim. She did not collect any birth certificate of the victim. Nobody told her that the appellant is a boy of bad character. The appellant is also not having any criminal antecedent. This witness has further stated that she had gone to the coaching but had not recorded the same in the diary. She did not take the statement of any of the teachers or students. She has not recorded in her diary that the appellant was a teacher in that coaching institute. She did not find any document to establish that the appellant was a teacher in that coaching, she did not find any kind of friendship between the victim and the appellant during whole investigation. She has also not seized the mobile on which, the call of the appellant was received by the victim. This witness has also stated that the



house of the victim is double-storeyed and she does not know whether there is street light or not.

27. PW-6 is the headmaster Utkramit Madhyamik Vidyalaya, Kosut Block, Dhanarua, Patna and he has brought the admission register and he has deposed that the victim was a student of above school and her date of birth is 24.05.2007.

28. We have heard the submissions at bar and have also perused the trial court records.

29. When we start scrutinizing the statement of the victim, we find that in FIR/written application, the victim has stated that the appellant is a teacher in coaching and that he made a call in the night on the mobile of her father who was sleeping at that time, on his call, she came out and went with him to Raktu Mahto Market where she was raped by the appellant. After FIR, during investigation, the victim has given her statement under section 164 Cr.P.C. wherein she has stated that she went to the market with the appellant who is a teacher, behind market there was a flower tree and at that place the offence was committed. The place was secluded. She has also stated that she was being threatened of dire consequences by the appellant. In course of trial, during her deposition, she has stated that the place of occurrence is tomato and brinjal fields and she



has also developed the story and the manner of occurrence, she has stated that the appellant had gagged her mouth with left hand and has committed rape for 15-20 minutes. The place of occurrence as described by the victim in her statement under section 164 Cr.P.C. and her deposition before court vary. In FIR/written application, it is simply stated that forcefully rape was committed, the same is reiterated in her statement under Section 164 Cr.P.C. but in deposition before court while narrating the manner of the occurrence, the victim has stated that the appellant had gagged her mouth and committed rape. From the perusal of the record, it is clear that the victim is aged about 15 years and from evidence of the victim, it is clear that she had not raised any alarm all along the occurrence and not even at the time when she was enticed to Raktu Mahto Market. Medical examination of the victim was conducted and the Doctor has not found any mark of violence on any part of the person of the victim while during her deposition, the victim has stated that she tried to rescue herself, she received nail bite below her ear but the doctor has not found any mark of injury. The occurrence is of 05.01.2021 but the same was reported on 09.01.2021 with the help of a story that the appellant had climbed on the roof. It has come in evidence that the house is a



double storeyed house. During course of cross-examination, the victim has stated in para '10' of her cross-examination that at the time of occurrence, she was wearing a frock. This appears completely unnatural conduct of the victim. Admittedly, it was month of January and the month of January during night at 10 P.M. is the coldest weather in this hemisphere.

30. The I.O. has stated in his cross-examination that the house of the victim is double-storeyed and the mother of the victim has stated that her house is single-storeyed, all these go to show that the evidence of the victim has contradictions. The recurring shifts in the place of occurrence, manner of occurrence and even the way, she has behaved in entire occurrence and the cloth which she was wearing in the month of January casts doubt on her statement. It could not have been possible for the appellant to gag the prosecutrix by one of his hands and to continue with penetrative sexual act for 20 minutes. All these are sufficient to hold that the victim is not a sterling witness.

31. We are conscious of the position of the law that in a case of rape, solitary evidence of prosecutrix is sufficient for conviction or in other words, even only solitary evidence of prosecutrix, conviction can be upheld. In case of **Krishan Kumar Malik v. State of Haryana** reported in (2011) 7 SCC



130, the Hon'ble Apex Court has held that no doubt it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. Hon'ble Supreme Court in the case of Rai Sandeep @ Deepu versus State (NCT of Delhi) reported in (2012) 8 SCC 21, has considered as to who may be called "sterling witness". Paragraph '22' of the judgment in the case of Rai Sandeep (supra) is 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.”

32. Hon’ble Supreme Court has also relied upon above judgment in the case of **Nirmal Premkumar and Another v. State Rep. by Inspector of Police** reported in **2024 SCC OnLine SC 260** and has further held in para ‘18’ which is being reproduced hereunder for ready reference:-

“**18.** However, an alleged offence of sexual harassment in a public place, as opposed to one committed within the confines of a room or a house, or even in a public place but away from the view of the public, stands on



somewhat different premise. If any doubt arises in the Court's mind regarding the veracity of the victim's version, the Court may, at its discretion, seek corroboration from other witnesses who directly observed the incident or from other attending circumstances to unearth the truth."

33. As we have discussed above that the victim is not a sterling witness, in that circumstance, corroboration of her statement is necessary. First of all, when we go through the evidence of the Doctor (PW-1) it is clear that the doctor has categorically stated "physical examination- no mark of violence could be found over any part of her body" and has further stated "pelvic examination- no mark of violence could be seen over her private part". We agree with the submissions of learned counsel for the appellant that the evidence of the victim is not of sterling nature and that her statements are not corroborated with the medical evidence. The evidence adduced by the other witnesses, namely, father (PW-4) and mother have also material contradictions. It is the definite case of prosecution that a call was received on the mobile but the I.O. has not collected the Call Detail Report (C.D.R.) and the oral version of the prosecution that on 05.01.2021 the appellant/accused had made a phone call on the said number of her father is not proved. The prosecution further failed to prove as to in which coaching the appellant was a tutor. I.O. could not collect any document to



support this version of the prosecution that the appellant was a tutor where the victim used to attend classes.

34. At this stage, we take note of the presumption under Sections 29 and 30 of the POCSO Act and the onus on the part of the defence to rebutt the presumption. Section 29 and 30 of the POCSO Act read as under:-

“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.”

35. In the case of **Veerpal @ Titu versus State (CRL.A.223/2023 dated 15th April, 2024)**, the Hon’ble Delhi High Court has discussed the kind of presumption provided under Section 29 of the POCSO Act. The views expressed by the Hon’ble Calcutta High Court in the case of **Subrata Biswas**



and Another versus State reported in **2019 SCC Online Cal 1815** and the views expressed by Hon'ble Kerala High Court in the case of **Joy versus State of Kerala reported in (2019) 1 KLT 935** have been relied upon by this Court in the case of **Heera Das Vs. State of Bihar & Anr.** reported in **2025 (2) BLJ 517**. Paragraph '33', '34' and '35' of the judgment in the case of **Heera Das** (supra) are being reproduced hereunder:-

“**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 advert 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. As regards the onus of proof lying upon the accused and the presumption of innocence in a criminal case, the Hon’ble Supreme Court in the case of **Ramanand vs.**



State of U.P. reported in **AIR 2022 (SC) 5273** has held in paragraph '99' and '101' as under:-

“99. It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. In American Jurisprudence, 2nd Edn., Vol. 30, the expression “preponderance of evidence” has been defined in Article 1164. In America the term means “the weight, credit and value of the aggregate evidence on either side, and is usually considered to be synonymous with the term greater weight of the evidence”, or “greater weight of the credible evidence”. It is a phrase which, in the last analysis, means probability of the truth. To be satisfied, certain, or convinced is a much higher test than the test of “preponderance of evidence”. The phrase “preponderance of probability” appears to have been taken from Charles R. Cooper v. F.W. Slade Charles R. Cooper v. F.W. Slade, (1857-59) 6 HLC 746. The observations made therein make it clear that what “preponderance of probability” means “more probable and rational view of the case”, not necessarily as certain as the pleading should be.

101. The inalienable interface of presumption of innocence and the burden of proof in a criminal case on the prosecution has been succinctly expounded in the following passage from the treatise The Law of Evidence, 5th Edn. by Ian Dennis at p. 445:

“The presumption of innocence states that a person is presumed to be innocent until proven guilty. In one sense this simply restates in different language the rule that the burden of proof in a criminal case is on the prosecution to prove the defendant’s guilt. As explained above, the burden of proof rule has a number of functions, one of which is to provide a rule of decision for the fact-finder in a situation of uncertainty. Another function is to allocate the risk of mis-decision in criminal trials. Because the outcome of wrongful conviction is regarded as a significantly worse harm than wrongful acquittal the rule is constructed so as to minimise the risk of the former. The burden of overcoming a presumption that the defendant is innocent therefore requires the State to prove the defendant's guilt.”

37. Considering the arguments of the learned counsel



for the appellant and materials which we have discussed hereinabove, we are of the opinion that the impugned judgment and order of learned trial court are not sustainable. This Court, therefore, sets aside the impugned judgment and order and acquit the appellant of the charges giving him benefit of doubt. The appellant shall be released forthwith, if not wanted in any other case.

38. The appeal is allowed.

39. Let a copy of this judgment along with the trial court’s records be sent back to the learned trial court.

(Rajeev Ranjan Prasad, J)

(Ashok Kumar Pandey, J)

Lata/-
Shubham/-

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CAV DATE	
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