

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRA 376 of 2019

Susmita Dey

Vs.

The State of West Bengal & anr.

For the Appellant	:	Mr. Sabir Ahmed Mr. T. Ahmed Mr. Dhiman Banerjee Mr. Ezaz Ahmed
For the State	:	Mr. Suman De Ms. Trina Mitra
For the Respondent No.1	:	Mr. Sandipan Ganguli Mr. Arkadeb Bhattacharya
Heard on	:	12.06.2025
Judgment on	:	09.09.2025

Dr. Ajoy Kumar Mukherjee, J.

1. This appeal filed by the appellant is directed against the judgment and order dated 13th March, 2019, passed by the learned Additional District and Sessions Judge, Sealdah in Special Case no. 32 of 2017, arising out of Ultodanga Women P.S. Case no. 9 dated 18.07.2017, whereby, the learned Court below was pleased to acquit the Respondent herein from the charge

under section 10 of The Protection of Children from Sexual Offences Act (in short POCSO Act).

2. Prosecution case in brief is that the informant is the student of class VIII and on 17th July, 2017, she had gone to attend the private tuition class of the Respondent at his residence when the Respondent/accused committed sexual assault upon the said victim girl /informant who is aged about 14 years. The relevant portion of the first information report may be reproduced below:-

"Yesterday that is on 17.7.2017 I had gone to Sir to tuition at about 7:10/7:15 with my mother. On that day seven of us were there. All our guardians take us to the tuition. Some guardians wait the terrace or the staircase. Last night at about 9.10 at night all of us were released. In the place of study that is in the Dining apart from me and Sir no one else was there. Sir's wife was in the kitchen. Sir called me near him to give home task. Thereafter I was wearing a T-shirt on which it was written 'Beautiful'. The word 'Be-you-tiful' was written and it was written on my breast. While given me lessons he started rubbing firmly on the words Be-you-tiful with his index finger. I was feeling very uneasy. He started giving home task. While giving Home task he again started rubbing the words written on my breast and said that I was looking very pretty. I was feeling very helpless and was having an uneasy(sic) feeling. Thereafter Sir firmly pressed my left breast.

Yester when was studying in the chair table Sir was rubbing his feet on my feet when I removed my feet he stretched his leg and started rubbing. Thereafter he became busy in giving tuitions to others. Prior to this also earlier Sir had grabbed my hands. Although he releases about 9, he releases me at 9:25.

Yesterday (17.7.2017) after releasing all other student the way he misbehaved with me for that I am very ashamed, feeling very insulted and have started hating myself. After the tuition I could not say this even to my mother. At night unable to bear the pain I told everyone about the incident.

3. The charge was framed against the Respondent herein under section 10 of POCSO Act, on 22.09.2017, when the Respondent pleaded not guilty. During the trial prosecution examined ten witnesses, while defence adduced none. Out of the ten witnesses PW-1 was the victim and PW-2 is the mother of the victim girl and PW-3 to 8 are the independent witnesses and PW-9 and 10 are the first and second Investigating officer.

4. After conclusion of trial, Court below acquitted the Respondent herein on the ground that prosecution has failed to prove their case beyond shadow of doubt and the Respondent is entitled to get benefit of doubt. While acquitting the Respondent/accused he observed that delay in lodging FIR has not been explained. Victim immediate after incident did not inform the incident to her parents and it has not been explained as to why he remained silent. He also observed that it is mandatory as per provisions of the POCSO Act to conduct medical examination but victim's mother did not allow the victim for such examination. He further observed that investigation discloses that the investigating officer did not examine the other students, who had gone to the house of the Respondent to get tuition. She went to the principal and associated persons of the school authority and cited them as witness to the incident but they turned hostile. Infact PW-3 to 8 did not support prosecution case. Moreover, the role of second IO appears to be dubious as she went to find out the rival group of the accused, which raises doubt in the mind of the Court.

5. Being aggrieved by the impugned judgment Appellant has preferred the instant appeal on the ground that the learned Judge in a very cryptic manner has come to an erroneous conclusion that respondent is liable to be acquitted for not giving consent for medical examination of the victim by the mother of the victim girl. Secondly Court below has failed to appreciate the provision of section 27 of the POCSO Act and came to an erroneous finding that it is mandatory for conclusion regarding the guilt of an accused. He did not consider that section 27 of the Act merely speaks about the procedural aspect during the cross examination and he unnecessarily had given much

credence to section 27 of the Act and thereby reached an erroneous finding regarding the innocence of the accused. Thirdly Ld. Judge has failed to appreciate the special provision of POCSO Act, particularly section 29 of the Act which categorically states that the Special Court is to presume that the accused has committed offence. The court below misdirected himself in applying the presumption as enumerated under section 29 of the POCSO Act. Fourthly the court below failed to appreciate that the victim girl namely PW-1 has categorically specified the act of Sexual assault attributed to her by the accused and corroborated her statement made in the FIR, followed by statement recorded under section 164 of the Cr.P.C. and also at the time of examination on dock and thereby she has proved the prosecution case beyond all reasonable doubt which has been fully corroborated by PW2 also and the court below had no reason to disbelieve such evidence of PW1 and 2 Fifthly Court below failed to consider that accused could not rebut the presumption of offence and did not consider the provision laid down in section 4 of the Evidence Act and thereby came to an erroneous finding. He unnecessarily came to a finding that the witnesses are inimical but he had not given credence to the deposition of the PW-1, 2, 3 and 4. Sixthly, he did not consider that infact there was no delay in lodging FIR, specially in the context that the tender aged girl has disclosed the fact on the next day and immediately thereafter she lodged a complaint to the local police station and sufficient explanation has been given in the complaint which did not attract the judicial mind of the Court below, who mechanically passed the order of acquittal. His finding that the prosecution has failed to prove the case beyond shadow of doubt is contrary to the evidence adduced on behalf of the

prosecution and also in the context of presumption of committing offence by the Respondent. Seventhly Court below completely misdirected himself by not appreciating that the burden of proof contrary to the charges is on the accused and in the instant case on a perusal of the statement of the victim girl, it is crystal clear that the offence has been proved and the accused failed to prove the contrary to the prosecution case and has miserably failed to rebut the presumption.

6. Mr. Sabir Ahmed learned Counsel appearing on behalf of the Appellant contended in support of aforesaid grounds of appeal that section 29 of the POCSO act states that when a person has been made accused of an offence under the said Act, he is presumed to have committed the offence provided the foundational facts of the offence are established and the burden of proof lies on the accused to prove his innocence and in this context he relied upon the judgment of ***Shambhubhai Raisangbhai Padhiyar Vs. The State of Gujarat***, reported in ***2024 SCC Online SC 3769***

7. He further contended that in the instant case, the foundational principles are well established from the prosecution case in order attract presumption of guilt under section 29 of the Act. The foundational fact of the instant case includes the statement made by the victim before learned Magistrate under section 164 of Cr.P.C, which was followed by the testimony of the victim and it was all along consistent and there was absolutely no discrepancy and not only that mother of the victim namely PW-2 completely corroborated the evidence of PW-1/victim. Such fact also corroborated with the circumstantial evidence but the court below failed to consider that the

special statute like POCSO Act provides reverse burden of proof and the presumption of guilt operates, once foundational fact of the case has been established and the onus shifted upon the accused to prove his innocence.

8. Mr. Ahmed further argued that the accused in his examination under section 313 of the Cr.P.C. has tried to make out a story of his false implication in the instant case for long standing dispute between him and the principal of his college but except such oral statement accused has failed to prove such contention with cogent and reliable evidence though, under the rigour of section 29, the accused is to prove his case and as such the order of acquittal is bad in law. Moreover, the accused has taken a plea that he rebuked the victim for not completing his homework, which had arisen for the first time during the cross-examination of mother of victim namely P.W-2 but in the absence of any corroboration, the same is not helpful in proving the case of the accused.

9. Relying upon the judgment of ***State of Punjab Vs. Gurmit Singh*** reported in **(1996) 2 SCC 384**, Mr. Ahmed contended that even mere existence of past enmity or issues does not automatically discredit a witness's testimony. It has been established that animosity can be a double edged sword, it might motivate a witness to provide truthful testimony against the accused or conversely lead to exaggeration or false implication. In the instant case the accused apart from stating of his case of enmity during examination under section 313 Cr.P.C. had not provided any evidence in support of such contention.

10. Mr. Ahmed in this context also relied upon the judgment of ***Attorney General for India Vs. Satish*** reported in **(2022) 5 SCC 545** and contended

that while discussing the legislative intention of section 7 of the POCSO Act, it was held that sexual intent would be a question of fact and the special court when it believes the existence of a fact beyond reasonable doubt can raise a presumption under section 30 as regards the existence of “culpable mental state” on the part of the accused. Referring the case of **Nallabothu Venkaiah Vs. State of A.P., 2002 INSC 343** he further contended that the witnesses are inimically deposed would be no ground to throw away prosecution case, which is otherwise based on reliable, natural and creditworthy statement and in fact on the basis of the deposition of PW-1 and 2, no man of ordinary prudence can say that the offence has not taken place beyond reasonable doubt.

11. Mr. Ahmed further referred the case of **Nirmal Premkumar Vs. State 2024 SCC Online SC 260** and argued that while medical examination are undoubtedly important but the Courts do not place overriding emphasis on their presence or absence, when adjudicating cases of sexual offences under the POCSO Act. In fact, a victim’s sole testimony, if found reliable, trustworthy and of sterling quality can stand on its own, without corroboration. In this context reliance has also been placed upon the case of **Ganesan Vs. State, (2020) 10 SCC 573**.

12. He further contended that in **State of Maharashtra Vs. Chandra Prakash Kewalchand Jain**, reported in **(1990) 1 SCC 550** it was held that a women who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person’s lust and therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. He also referred the judgment of **State of Himachal Pradesh**

of Raghbir Singh reported in **(1993) 2 SCC 622** and contended that conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. In this context he also placed reliance upon the judgment of **Wahid Khan Vs. State of M.P.** reported in **(2010) 2 SCC 9** and **AIR 1952 SC 54** and also judgment of **Phool Sing Vs. State of M.P.** reported in **(2022) 2 SCC 74**. Accordingly he prayed for setting aside the judgment of acquittal and prayed for convicting the accused under the provision of the said act.

13. Mr. Sandipan Ganguly, learned senior counsel appearing on behalf of the Respondent/Accused submits that it is a cardinal principle of criminal jurisprudence that while dealing with the judgment of acquittal, if other view is possible then also the appellate court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial court are perverse.

14. Mr. Ganguly further contended that in the instant case a bare perusal of the order of acquittal passed by the Court below reflects that he has acquitted the Respondent after meticulously dissecting the evidence, examining, appreciating the submissions, material exhibit, document and oral evidence placed by both the parties during the course of trial. He further submits that from the evidence, it will reflect that none of the ingredients enumerated in section 9 of the Act is applicable in the instant case against the Respondent. In this context he also referred section 386 of the Cr.P.C regarding the provision as to how the appellate court can dispose of an appeal arising from an order of acquittal.

15. Mr. Ganguly further argued that presumption under section 29 of the Act arises only when the prosecution has succeeded in proving the foundational fact and prove the ingredients of offence and court cannot invoke presumption under section 29 of the Act to convict accused in the event of failure of prosecution to prove the ingredients of offence. He therefore argued that it is the bounden duty of the prosecution to prove the ingredients of offence by leading cogent and reliable evidence and upon laying the foundation of its case, the onus shifts upon the accused to rebut the presumption by raising probable defence or to create a reasonable doubt about the veracity of the prosecution case but the standard of proof for rebutting the presumption is that of preponderance of probabilities. It is open for the accused to rely on evidence submitted by him or the accused can also rely on the materials adduced by the prosecution in order to raise a probable defence.

16. Mr. Ganguly further argued that from the prosecution case itself, it would be clear that prosecution evidence consistently speaks in favour of the accused. Relying upon the judgment of ***State of U.P. Vs. Ramesh Prasad Mishra*** reported in **(1996) 10 SCC 360**, he contended that evidence of a hostile witness would not be totally rejected, if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence, can be relied upon. He further contended that there are discrepancies with regard to place of occurrence. If one looks into the narration made in the FIR and that of the evidence adduced by PW-1 with that of the statement of victim recorded under section 164 of Cr.P.C. He

further contended that victim/PW-1 in her evidence has not stated the alleged case of rubbing off leg by the Respondent on the leg of the victim. Moreover the prosecution withheld the six other students to be witness in the instant case, which goes to show that the alleged incident of rubbing off leg by the respondent on the leg of the informant never occurred.

17. He further contended that it is quite unnatural that victim did not raise alarm even by making a simple sound to draw the attention of the wife of the Respondent, who admittedly was cooking at the kitchen, which is 3 ft. away from the place of occurrence. These inexplicable and patent improbabilities in the prosecution case when appreciated on the anvil of reasonableness and/or broad probabilities of the normal course of human conduct, it cannot be said that prosecution succeeded in proving the case beyond reasonable doubt. Moreover the victim refused to undergo medical examination prescribed under section 164-A of the Cr.P.C, which itself leads to non-compliance with mandatory provision of section 27 of POCSO Act and it also raises a plausible reason arises to draw an adverse inference against the prosecution case. He also contended that delay in lodging FIR has not been explained and such delay goes to show that FIR was lodged after much deliberation and same is a product of concoction and afterthought.

18. Mr. Ganguly further pointed out that from the evidence of PW-9, it appears that she has recorded the statement of father of victim girl on 17.07.2017, which is much prior to the time, the FIR was lodged. Therefore even before FIR was lodged or the victim girl was orally examined or medically examined or even PW-9 was deputed to investigate into the case,

said PW-9 without any lawful authority commenced the investigation of the case by recording the statement of father of victim girl though he has not been cited as a witness. This is also evident from his own evidence that officer in charge of concerned police station had entrusted him to investigate the case only on 18/07/2017.

19. Mr. Ganguly accordingly contended that it can be easily comprehended that since the father of victim girl is a powerful police officer, the investigation of the case was instructed to be headed in a specific manner, without adhering to the basic principles of criminal jurisprudence. He also contended that it is no doubt trite law that testimony of the prosecutrix can be held to be sufficient to sustain the conviction of an individual/accused for committing of sexual assault but the condition is such testimony should be unflinching, consistent and infallible and it must inspire the confidence of the court to believe the version of the prosecutrix. But in the instant case, the testimony of victim and her mother suffers from inherent improbability and absurdity. The evidence of the victim is unquestionably hazy, full of grave incongruities and shaky and also suffers from inherent improbability and absurdity and even attending circumstances like refusal to undergo medical examination does not support the prosecution case and as such he submits that the order of acquittal passed by the court below does not call for interference.

Decision

20. Whether the finding of the learned Trial Court suffered from erroneous appreciation of the evidence and the law is the question that falls for

determination and to answer the question it is essential to carefully examine the evidence on record.

21. The offence allegedly took place on 17th July 2017 at about 9:25 Pm when the victim was allegedly 14 years old. Victim her-self lodged the FIR where in the relevant portion she has stated :-

“I wearing a T-shirt on which it was written beautiful” The word ‘Be-you-tiful’ was written and it was written on by breast. While given me lessons he started rubbing firmly on the words Be-you-tiful with his Index finger. I was feeling very uneasy. He started giving home task. While giving Home task he again started rubbing the words written on by breast and said that I was looking very pretty. I was feeling very helpless and was having an uneasy feeling. Thereafter Sir firmly pressed my left breast.”

22. The said FIR was lodged on 18th July, 2017 and the victim made statement before the Magistrate under section 164 Cr.P.C on 19.07.2017 where she has categorially stated that on 17.07.2017 she had gone to the house of the Appellant at 7:10 P.M, who used to teach her English. She has further stated that the words be-you-tiful was printed on her T-shirt and the appellant started rubbing the words written on her T-shirt and thereafter he had pressed her breast. She further stated that at the time of occurrence, his wife was at the kitchen and at the place where the incident occurred there were none except herself and the appellant. It further appears that the investigating officer had brought the victim to the medical officer in the R.G. Kar Medical College and Hospital on 18.07.2017 at about 11:00 PM when the victim had made statement before the doctor that she had gone to the residence of Appellant at Ultodanga in between 19:10 hrs - 21:25 hrs on 17.07.2017 and the appellant herein being the private tutor of the victim molested her by touching her breast and the said medical examination

report is marked as Exhibit-6 without objection in the present case. It is true that the mother of the victim did not give consent for breast examination of the victim on that day. Thereafter the victim faced the dock and before the court as PW-1 she made the following statement

“On 17.07.2017 the incident took place at about 9:25 p.m at the house of the teacher Debraj Dutta. Debraj Dutta is present in court (identified). Debraj Dutta is my private tutor. He discharged all the students after coaching excepting me. He called me. He provided me home work for the next date. In my T-shirt beyoutiful is written on my breast. He touched spelling of beyoutiful and he pressed my breast. He discharged me with a request to come on the next date. I went to my house and immediately I did not tell to my parents. I informed the fact at night. On the next date at evening time myself and my parents had been to Ultadanga PS and lodged complaint.”

23. Needless to say that while section 9 deals with the definition of “aggravated sexual assault”, section 7 deals with the definition with “sexual assault” and section 8 deals with punishment for sexual assault which may be reproduced below for the brevity of discussion

“7 Sexual assault- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

8. Punishment for sexual assault-Whoever, commits sexual assault, shall be punished with imprisonment of either description for a terms which shall not be less than three years but which may extend to five years and shall also be liable to fine.”

24. Section 29 of the POCSO Act creates a presumption as to certain offences. Section 29 reads as follows:-

“Presumption as to certain offences:- where a persons 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.”

25. In the case of **Shambu Bhai Raisan Bhai Padiar Vs. State of Gujarat, 2024 SCC Online SC 3769** the Hon’ble Supreme Court noted that

the presumption of guilt under section 29 of the Act will operate once the foundational fact of the cases are established. In the instant case the victim herself has lodged the FIR, where she stated in details about the offence. Thereafter she had also made the same statement on the next date of lodging FIR before the medical officer as well as before the judicial Magistrate. She has also made the same statement before the Court regarding the commission of offence by the appellant herein, while she faced the dock. As quoted above the victims statement was consistent throughout the case and there was absolutely no discrepancy on the material point. Furthermore the mother of the victim namely PW-2 has also corroborated the statement of the victim, the circumstantial evidence which includes that the appellant asked the victim to remain seated after releasing all students to give the victim homework. The T-shirt which was worn by the victim printed with the words be-you-tiful was seized by police and such material facts corroborated throughout the evidence.

26. However, in the presence of such foundational facts, the accused did not adduce any evidence to rebut the presumption and while he was examined under section 313 of the Code he tried to make out a case of his false implication in the instant case for long standing dispute between him and the principal of his college but he even did not bother to substantiate the same by adducing any cogent evidence, though under section 29, he was duty bound to prove his case. He also did not make any attempt to prove the Case that on that day in presence of other students he rebuked the victim for not completing his homework. The defence story of dispute between the principal and the accused person had only arisen during the examination of

accused under section 313 Cr.P.C. but the same has not be confronted to any of the prosecution witnesses and as such the same in no manner can be said to be helpful in proving the innocence of the accused. It is undoubtedly true that to rebut the presumption under section 29, it is not mandatory for the accused to adduce evidence on his behalf and for that he can also rely upon the evidence of the prosecution to rebut the same. But here from the cross examination of the prosecution witnesses as done by the appellant before Trial Court it is manifested that the appellant did not make any attempt to confront the foundational fact.

27. It is true that while in the evidence or in the FIR the victim had not stated that the appellant called her to sit on the floor, which she had stated in the statement recorded under section 164 Cr.P.C. but such minor contradiction or insignificant discrepancy does not establish that the place of occurrence has got shifted.

28. In state of ***Punjab Vs. Gurmeet Singh***, reported in **(1996) 2 SCC 384** the Apex Court held that in cases involving sexual harassment molestation etc. the court is duty bound to deal with such cases with utmost sensitivity and minor contradiction or insignificant discrepancies in the statement of a prosecutrix should not be ground for throwing out an otherwise reliable prosecution case where the victim was only present along with the appellant at the place of occurrence and she was consistent all along in making statement regarding the alleged offence. Evidence of victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. It was also held that the delay in filing FIR for sexual offences even if may not be properly

explained but if found natural, the accused cannot be given any benefit thereof. In the instant case the victim stated in the FIR as well as in her evidence that she immediately could not tell the incident to her parents but she informed the fact to them at night after returning home and on the next evening she and her father had gone to Ultodanga P.S. and lodged the complaint.

29. Having carefully examined the statements and testimonies of the victim and her parents it appears that the disclosure of the incident by the child to her mother after returning home reflects a natural and spontaneous response to the trauma of sexual assault. The child's conduct was instinctive and consistent with the behaviour expected of a victim of such tender age. Her narration of incident to her mother is corroborated by the later statement recorded under section 164 Cr.P.C and before medical officer as well as her testimony before the court. Though Mr. Ganguly on behalf of the appellant argued that unnatural conduct of the victim to raise alarm and not lodging the complaint on the very date of incident or even in the next morning goes to show that FIR was lodged after much deliberation but I do not find any substance in such submission in view of the fact that on careful examination of the testimony of the victim and her mother recorded by the Court below it appears that it finds no material discrepancy. It is entirely natural for a 14 years old child to feel scared and shakened when subjected to such an incident in the night. Cross examination of the victim and her mother did not yield anything to discredit the prosecution version. A division Bench of this High Court in the case of ***Md. Israil Vs. State of***

W.B. (CRA 37 of 2017 dated 22.12.2021) while dealt with a similar situation held as follows:-

9.5. Lastly, it has been fervently argued that the case of the prosecution is shrouded with suspicion as there is immense delay in lodging of the FIR. It is a fact that there is delay in lodging FIR. I am not oblivious to the fact that the victim is of tender age. In her evidence before the court as well as in the written complaint (Exhibit 1) and in her statement under section 164 CrPC (Exhibit 3) she has consistently stated of continuous threatening by the appellant. The victim girl belonging to a traditional non-permissive Indian society would be extremely reluctant to admit occurrence of any incident that would reflect upon her chastity, leading to being looked down upon and ostracized by the society. Therefore her not informing to anyone under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to anyone, overpowered by feeling of shame and her natural inclination would be avoid talking about it to anyone, lest the family name and honour is brought into controversy. The courts cannot overlook the fact that in sexual offences delay in lodging FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving cool thought that a complaint of sexual offence is generally lodged.[See State of Punjab versus Gurmit Singh and Others (supra)].....”

30. The statement of the child victim, stands fully corroborated by her mother’s testimony with respect to the sequence of events and if taken together the testimonies are co-herent, consistent and inspire confidence of the Court. The Apex Court in the case of **Attorney General of India Vs. Satish, (2022) 5 SCC 545**, while discussing the legislative intention of section 7 of the POCSO Act has been pleased to held in para 39 as follows:-

***39.** It may also be pertinent to note that having regard to the seriousness of the offences under the POCSO Act, the legislature has incorporated certain statutory presumptions. Section 29 permits the Special Court to presume, when a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of the Act, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. Similarly, Section 30 thereof permits the Special Court to presume for any offence under the Act which requires a culpable mental state on the part of the accused, the existence of such mental state. Of course, the accused can take a defence and prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. It may further be noted that though as per sub-section (2) of Section 30, for the purposes of the said 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, the Explanation to Section 30 clarifies that “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact. Thus, on the conjoint reading of Sections 7, 11, 29 and 30, there remains no shadow of doubt that though as per the Explanation to Section 11, “sexual intent” would be a question of fact, the Special Court, when it believes the existence of a fact beyond reasonable doubt, can raise a presumption under Section 30 as regards the existence of “culpable mental state” on the part of the accused.

31. In the present case the statement of the victim in the FIR and before the magistrate and the court was consistent which clearly lays down the fundamental facts which attracts the offence under section 7 of the POCSO Act and the appellant/accused throughout the trial has failed to adduce any cogent evidence to prove his innocence. It is quite natural in the instant case that when the offence was committed by the appellant, the victim was alone and as such the other alleged independent witnesses have only to say that they have heard about the incident, since there is no independent eye witness of the occurrence. In the case of ***Nalabothu Venkaiya Vs. State of A.P.*** reported in **2002 INSC 343** the Apex Court held that the witnesses are inimically deposed to the accused alone would be no ground to throw away their evidence otherwise reliable natural and creditworthy statement. The test in such circumstances is that if the witnesses are interested the same must be scrutinised with due care and caution. The victim as well as her mother had categorically stated that the accused/appellant on the fateful date had touched and pressed the breast of the victim. The defence has failed to make out any case to show that such incident had never happened nor could able to cast a reasonable doubt in the mind of the Court though he was duty bound as mandated by the statute. The defence case as can be taken from the deposition of the prosecution witnesses failed to prove any

case of his innocence and from the deposition adduced on behalf of the prosecution no man of ordinary prudence can say that the offence had not taken place.

32. It is well settled that once the foundational facts of the case are established by the prosecution, the onus shifted upon the accused to lead evidence to rebut the presumption. In the instant case the age of the victim stands proven that the same is below 18 years and the victim was child as defined under the provision of POCSO Act. Further the testimony of the material witness namely the victim and her mother fully corroborates and established that the alleged incident had taken place and the present appellant had inappropriately touched/pressed the breast of the victim child. The appellant was thus required to rebut the statutory presumption under the POCSO Act by leading cogent and credible evidence. But here the defences taken by the accused during examination under section 313 and during cross examination are inconsistent uncorroborated and riddled with contradictions. Appellant failed to present any evidence to support his version or to discredit the consistent and reliable testimony of the prosecution witnesses specially the testimony of the victim. In ***Ramji Lal Bairwa Vs. State of Rajasthan, (2025) 5 SCC 117*** the Supreme Court held that even rubbing the breast of a child would constitute the offence of sexual assault under the POCSO Act. In this context reference can also be made in the case of ***Ganesan Vs. State*** reported in **(2020) 10 SCC 573** and in the case of ***State of Maharashtra Vs. Chandra Prakash Jain***, reported in **(1990) 1 SCC 550** where it was held that a woman who is the victim of the sexual assault is not an accomplice of the crime but is a victim of

another person's lust and therefore her evidence need not be tested with the same amount of suspicion as that of an accomplice. Para 16 of the said judgment runs as follows:-

16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness."

33. In ***State of Himachal Pradesh Vs. Raghubir Singh*** reported in **(1993) 2 SCC 622** the Court held that conviction can be recorded on the sole testimony of the prosecutrix if her evidence inspires confidence and there is absence of circumstances which militated against her veracity. A similar view has also been reiterated in ***Wahid Khan Vs. State of M.P.***, reported in **(2010) 2 SCC 9**, placing reliance on an earlier judgment in ***Rameshwar Vs. State of Rajasthan*** reported in **AIR 1952 SC 54**. On a similar note the Apex Court further in the case of ***Phool Singh Vs. State of M.P.*** reported in **(2022) 2 SCC 74** was pleased to observe that if there is no reason to doubt the credibility and/or trustworthiness of the prosecutrix she

is found to be reliable and trustworthy, the conviction of the accused relying upon the sole testimony of the prosecutrix can be sustained.

34. Though Mr. Ganguly in his argument tried to cast doubt upon credibility of the prosecution case by saying further that there is refusal to undergo medical examination of the victim as mother of the victim girl did not give consent for breast examination. A Division Bench of Madras High Court in ***Rajendran Vs. The Superintendent of Police*** dated 14.03.2024 brought on record the report of director of Forensic Science laboratory that the medical examination of the child is required only in cases involving penetrative sexual assault or aggrieved penetrative sexual assault falling under section 3 and 5 of the POCSO Act and for the offences falling under section 7,9 and 11 of the POCSO Act, no useful purpose will be served by subjecting the child for a medical examination, since nothing will come out with the medical examination, considering the nature of sexual assault that is contemplated under this provisions. The court taking the view of the Director came to a finding in para 14 and 15 as follows:-

14. Section 27 of the POCSO Act, provides for medical examination of a child in respect of whom any offence has been committed under the POCSO Act, shall be conducted in accordance with Section 164 A of Cr.P.C. This provision has to be read along with Section 164A of Cr.P.C. on carefully going through the provision, it can be seen that such medical examination is contemplated only for the victim of rape which means that it involves penetrative sexual assault. Section 164A of Cr.P.C. specifically deals with the offence of committing rape or attempt to commit rape. This is more akin to the acts that have been prescribed under sections 3 and 5 of the POCSO Act.

15. the above directions are subject to one caveat. Even for those cases which do not fall within the scope of Sections 3 and 5 of the POCSO Act, there may be cases where the child sustains injury and those cases may fall within the scope of sections 7 and 9 of the POCSO Act. In those cases, it goes without saying that the medical examination has to be conducted as it required to explain the nature of injury sustained. We further make it clear that considering the complaint made by the victim child and/or guardian, the doctor who examines the victim child shall take a decision as to the nature and extent of medical examination that has to be conducted with the child for the purpose of preparing a report.

35. In the present case there is no allegation that the victim sustained any injury due to alleged sexual assault and as such the medical examination of the victim whether consented or not is immaterial and does not have any bearing upon the merit of the case. The case law relied by Mr. Ganguly in this context passed by this High Court in ***Deepankar Roy Vs. State of West Bengal*** dated 18.12.2021 has got no application in the present context as the said case is factually distinguishable. In the said case the victim girl was aged about 17 years and she attained the age of discretion and as such the purpose of ascertaining the case of the prosecution as to whether it was her voluntary act or not, the medical examination of the victim was held to be compulsory.

36. Similarly, another argument advanced by Mr. Ganguly that the prosecution have withheld the examination of vital witness namely six other students who were also attended in the coaching class at the house of the appellant along with the victim on the fateful date raises an adverse presumption to be drawn against the prosecution case in terms of section 114 (g) of the Evidence Act. Such argument might have a bearing upon the allegation as alleged in the FIR regarding rubbing off leg by the respondent on the leg of the victim but since neither the PW1 nor the PW2 have stated anything before the court in respect of allegation in the FIR about rubbing off leg by the respondent on the leg of the appellant, which allegedly took place during coaching class in presence of other students, have not been substantiated. However, the allegation of touching the breast of the victim as well as the allegation of pressing breast of the victim by the appellant had allegedly taken place while the victim and the appellant were only present

and as such the question of withdrawing material witnesses does not arise in the present context, nor there can be said to have any scope of drawing adverse presumption under section 114 (g) of the Evidence Act.

37. Mr. Ganguly also strenuously argued that it is quite unnatural that the victim did not raise any alarm to draw the attention of the wife of the respondent who was within the kitchen at a distance of 3 feet away from the place of occurrence. He further pointed out that the victim admitted in evidence that from the door of the room dining table and the door of kitchen are visible and if one stands near dining table door of the bed room is visible. During cross examination victim also stated that at the time of incident wife of sir was engaging in kitchen for cooking. Even if it is taken to be true that the kitchen is only 3 feet away from the dining space where the incident occurred, even then fact remains that victim has categorically stated firstly that the wife of the Respondent was engaged in kitchen for cooking and secondly though the kitchen is open but there is a curtain. There is no denial during cross examination that there is no curtain in between the two places nor there is any denial that the wife of the respondent was not engaged in cooking. It is not very unnatural or unusual for a students of 14 years not to raise alarm, when her teacher taking advantage of fiduciary relationship has committed the offence of sexual assault.

38. Therefore, in the present case the evidence of the victim remain firm regarding sexual assault committed by the respondent which corroborated by her mother and upon reading the evidence of prosecution as a whole it can be said that the foundational fact to constitute offence of sexual assault

as required under section 29 of the Act has been proved. Since section 29 has been triggered in the instant case, the burden is to disprove the case shifted upon the respondent who has miserably failed to discharge such burden during trial and as such the order of acquittal is liable to be set aside. However, I am agreeable with Mr. Ganguly that the foundational fact to constitute offence of aggravated sexual assault has not been established in the case since the child is admittedly over 12 years of age and the allegation of committing sexual assault on the child more than once or repeatedly has not been established, since during trial the prosecution did not adduce evidence regarding the allegation of rubbing off legs to the leg of the victim or about any other sexual assault.

39. However, in the present case charge was framed under section 10 of the POCSO Act but since as stated above the materials does not disclose offence under section 9 of the Act, the trial court was not justified in framing charge against the respondent under section 10 of the Act alone. Learned Trial court in a very cryptic manner acquitted the accused and the reasons of acquittal given by him does not support the innocence of the Respondent. The trial court narrated the incident and the submissions of the parties with a lot of pages but reached his finding in the last paragraph which resulted the acquittal on the ground that this is case of delayed FIR and the victim has refused to undergo medical examination, the independent witnesses turned hostile and that the prosecution withhold to examine other students of the coaching class during investigation and as such the accused is entitled to get benefit of doubt, which according to me does not have any basis at all and clearly a perverse finding.

40. In view of discussion as stated above. Now the question is since the trial was conducted by framing charge under section 10 of the POCSO Act whether the Court can convict the accused/respondent under section 8 of the Act, when the facts and circumstances including evidence clearly establishes guilt under section 7 of the Act against the Respondent.

41. Needless to say that while section 8 deals with sexual assault, section 10 relates to aggravated sexual assault. Mr. Ganguly in this context strenuously argued that it is settled law that in cases where the accused is found to be not guilty in respect of the offence under which charge has been framed against him i.e. section 10 of the Act herein, the Appellate Court while deciding an appeal against the order of acquittal, cannot convict the accused in respect of different offence, in respect of which charge has not been framed against him as it is the fundamental principle of criminal law that the accused should be informed with certainty and accuracy the exact nature of charge brought against him otherwise he may be seriously prejudiced in his defence.

42. I am not agreeable with the submission made by Mr. Ganguly because the relevant provision which deals with such situation is section 222 of the Cr.P.C. which provides that when a person is charged with an offence, and facts are proved which reduced it to a minor offence, he may be convicted of the minor offence although he is not charged with it.

For better understanding let me reproduce section 222 of Cr.P.C which runs as follows :-

" 222. When offence proved included in offence charged.

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it

(2) When a person is charged with an offence and facts are proved which reduce it to minor offence, he may be convicted of the minor offence, although he is not charged with it.

(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied.

Illustrations

(a) A is charged under Section 407 of the Indian Penal Code (45 of 1860), with criminal breach of trust in respect of property entrusted to him as a carrier. It appears, that he did commit criminal breach of trust under Section 406 of that Code in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under the said Section 406.

(b) A is charged, under Section 325 of the Indian Penal Code (45 of 1860), with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under Section 335 of that Code."

43. For the purpose of section 222 "minor offence" is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section makes the point clear and it can be safely said that only if the two offences are cognate offences wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-a vis the other offence. A cognate offence is a lesser offence that is closely related to a more serious or greater offence and shares several of its essential elements. Therefore, section 222 allows a Court to convict an accused person for a cognate offence i.e. lesser offence if the more serious charge cannot be proved, provided the lesser offence is from the same 'family' of the crimes and the accused is not prejudiced. Here it is needless to reiterate that section 7 defines what constitutes "sexual assault" and section 8 prescribes punishment for sexual assault, whereas

section 9 deals with same sexual assault in aggravated form in respect of which the punishment prescribes in section 10. Therefore, the offence under section 7 is definitely a cognate offence of section 9 as the main ingredients are common and only a lesser sentence has been prescribed and both belongs to same “family of crime” and therefore, even if the charge was not framed under section 8 of the Act, the accused has no cause to prejudice for awarding conviction under section 8 of the Act, since the offence under section 7 has been established in the facts and circumstances of the present case. Therefore, the court has power to find guilty for the offence even the charge were framed for major offences. But conversely when the charges were framed for lesser offence, the court cannot convict and sentence for the major offence punishable with the imprisonment more than the offence which were charged, without altering the charges as per section 216 of Cr.P.C. In this context reliance has been placed upon the decision of Karnataka High Court in ***Sri Subramani Vs. State of Karnataka*** reported in **2023 Live Law (Kar) 235**.

44. While saying all these I am not unmindful about the limited scope of High Court to deal with an order of acquittal and as has been relied by Mr. Ganguly in the case to ***Tota Singh & Another Vs. State of Punjab***, reported in **(1987) 2 SCC 529** which states that the jurisdiction of the appellate court in dealing with an appeal against the order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the Trial Court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by court below is such which could not

have been possibly arrived at by any court acting reasonably and judiciously and can be characterized as perverse. I have already stated above the reasons for which the decisions arrived at by court below is not only cryptic and not based on evidence but also a perverse finding.

45. In *Sadhu Saran Singh Vs. State of U.P.* and others, (2016) 4 SCC

357 the supreme Court opined as follows:-

*‘20..... In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. This Court, while enunciating the principles with regard to the scope of powers of the appellate court in an appeal against acquittal, in *Sambasivan v. State of Kerala* [*Sambasivan v. State of Kerala*, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320] has held : (SCC p. 415, para 7)*

“7. The principles with regard to the scope of the powers of the appellate court in an appeal against acquittal, are well settled. The powers of the appellate court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellate court cannot substitute its view in the place of that of the trial court. It is only when the approach of the trial court in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate court can interfere with the order of acquittal.”

21. This Court, in several cases, has taken the consistent view that the appellate court, while dealing with an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded. If the appellate court, on scrutiny, finds that the decision of the court below is based on erroneous views and against settled position of law, then the interference of the appellate court with such an order is imperative.(emphasis added)

46. In *Harizan Bhala Teza Vs. State of Gujarat*, reported in (2016) 12

SCC 665 the Supreme Court held in para 12 as follows:-

12. No doubt, where, on appreciation of evidence on record, two views are possible, and the trial court has taken a view of acquittal, the appellate court should not interfere with the same. However, this does not mean that in all the cases where the trial court has recorded acquittal, the same should not be interfered with, even if the view is perverse. Where the view taken by the trial court is against the weight of evidence on record, or perverse, it is always open for the appellate court to express the right conclusion after

reappreciating the evidence if the charge is proved beyond reasonable doubt on record, and convict the accused.....”

47. Since from the aforesaid facts and circumstances of the case I am of the clear view that the foundational fact of sexual assault under section 7 has been clearly established against the respondent and as the respondent miserably failed to rebut presumption, this High Court is required to interfere with the order of acquittal since there is perversity in the finding of the trial court which warrant to do substantial justice and also to avoid miscarriage of justice, which unfortunately has arisen due to acquitting the accused, being guilty of offence punishable under section 8 of the Act.

48. In such view of the matter **CRA 376 of 2019** is allowed. The respondents Debraj Dutta is convicted for committing offence punishable under section 8 of the POCSO Act and he is sentenced to suffer simple imprisonment of three years and also to pay fine of Rs. 10,000/- in default to suffer simple imprisonment of another three months. The convict Debraj Dutta is directed to surrender before the court below within 30 days from the date of judgment to serve out the sentence failing which the trial court will be at liberty to take appropriate steps including issuance of warrant of arrest to secure his attendance before the court. Any period spent in custody during investigation or trial shall be set off in accordance with the provision of Cr.P.C.

49. Let a copy of this judgement along with trial court record be returned to the court below forthwith.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(DR. AJOY KUMAR MUKHERJEE, J.)