THE HIGH COURT OF TRIPURA
AGARTALA

CRL A (J) 34 OF 2019

Sri Lalmalsom Kaipeng,
S/o Sri Neldhansek Kaipeng of Palku Colony,
PS Taidu, District-Gomati Tripura.

…. **Appellant**

– Vs –

The State of Tripura,

….Respondent

BEFORE
HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI
HON'BLE MR. JUSTICE ARINDAM LODH

For the appellant : Mr. Sankar Bhattacharjee,
Legal aid counsel.

For the State respondent : Mr. Sumit Debnath,
Additional Public Prosecutor.

Date of hearing : **24.03.2021**

Date of delivery of Judgment & Order : **01.04.2021**

Whether fit for reporting : **NO**

JUDGMENT & ORDER

(Arindam Lodh, J.)

This appeal is directed against the judgment and order of conviction and sentence dated 27.03.2019, passed by the learned Special Judge, Gomati Judicial District, Udaipur in case No. Special 08 (POCSO) of 2018 whereby and whereunder the appellant has been convicted under Section 6 of Protection of Children from Sexual Offences Act (POCSO)

and sentenced him to suffer rigorous imprisonment for 10 (ten) years and to pay fine of ₹25,000/- with default stipulation.

2. The prosecution case, in brief, is that one Sri Ramlian Malsom lodged a written ejahar with the O.C., Taidu Police Station on 31.07.2018, *inter alia* stating that on 29.07.2018, at about 12:00 noon, accused Lalmalsom Kaipeng took his younger sister's daughter, aged 8 years, to the nearby jungle and committed rape on her. This was informed to his sister by his niece and, thereafter, on 31.07.2018 his sister Daisingh Kaipeng told him about the incident. Due to social shame, they did not divulge the incident soon after the incident.

3. On receipt of the ejahar, Taidu PS FIR No.12/2018 under Section 376(2)(i)/506 of IPC and Section 6 of the POCSO Act was registered and the OC himself took up the investigation and on completion of investigation, charge-sheet was submitted under the aforesaid sections.

4. Charge was framed against the accused-appellant under Section 376(2)(i)/506 of IPC and Section 6 of the POCSO Act to which the accused-appellant pleaded not guilty and claimed to be tried.

5. During trial, prosecution examined as many as 17 witnesses and on closure of prosecution evidence, the accused-appellant was examined under Section 313 CrPC to which he denied the veracity of the

prosecution evidences. The accused-appellant declined to adduce any defence witness on his behalf.

6. Having heard the learned counsels appearing for the parties and after consideration of the evidence and materials brought on record, the learned Special Judge convicted and sentenced the accused-appellant as aforestated.

7. Being aggrieved, the appellant has preferred the instant appeal before this Court.

8. Mr. S. Bhattacharjee, learned counsel appearing for the convict-appellant has submitted that the prosecution has miserably failed to establish the charges framed against the appellant. There are substantial improvements and exaggerations in the deposition of prosecution witnesses. Further, according to learned counsel for the appellant, the ocular versions of the prosecution witnesses, particularly, the victim was not supported by the medical evidence. Learned counsel for the appellant has prayed for acquittal of the appellant.

9. Per contra, Mr. S. Debnath, learned Additional Public Prosecutor would contend that there was no room to suspect the prosecution case. The prosecution witnesses had been able to prove the facts and circumstances that the victim was taken to a forest (jungle) by the

appellant where he committed rape. Learned Additional PP has further submitted that the Doctor who examined the victim after the incident deposed that the victim was suffering from acute pain in urinating which findings clearly established the prosecution case that the victim was raped by the appellant and none else.

10. We have given our thoughtful consideration to the rival submissions advanced by the learned counsels appearing for the parties. Keeping in mind the aforesaid submissions, we shall proceed to determine the sustainability of the conviction and sentence as declared by the learned Special Judge against the appellant.

11. PW-1, Smt. Daisingh Kaipang, the mother of the victim deposed that about 3/4 months ago from the date of her deposition, on one Sunday around noon time she went to the ‘jum’ cultivation and when she was returning home, she met one Chinglu Kaipang who told her that the appellant committed rape upon her daughter who was 7 years old in a jungle near a mango tree. Reaching home she found her daughter was crying and being asked the victim narrated the incident of rape by the appellant upon her by opening her panty. Thereafter, PW-1 informed the incident to her brother, Ramlian Malsom who subsequently lodged the complaint to the police. PW-1 further deposed that during investigation

police recorded the statements of the victim under Section 164 of CrPC. The police also arranged for her daughter's (victim) medical examination.

During her cross-examination, her attention was drawn to her statement recorded under Section 161, CrPC where she admitted that she did not state any such statement to the police that the appellant opened the clothes of the victim and committed rape. She further stated, being confronted with cross-examination, that they had a dispute with the appellant on the issue of boundary. She also admitted that for mutual settlement of the dispute, they demanded a pig from the appellant.

12. PW-2, the victim girl deposed that about 3/4 months ago from the date of her deposition, on one Sunday around noon time she was playing with the baby of the appellant. At that time, the appellant caught hold of her hand and took her to the nearby jungle and offered her money with a currency note. Thereafter the appellant opened her clothes and panty and committed rape upon her. She sustained bleeding injury in her private parts and also was having problem in urination. The appellant told her not to tell the incident to anybody. She further deposed that she told her mother about the incident when she came to the house from 'jum' cultivation. Thereafter her mother told the incident to others including the police. The police took her to a Magistrate to give her statement. She was examined by

the Doctor. Being confronted with cross-examination, PW-2, the victim stated that there were other houses near their house. Most striking feature in her cross-examination was that what she stated before the Magistrate, her mother told her to state. When her attention was drawn to her statements recorded under Section 161 of CrPC and 164 of CrPC, the statements she made before the authorities concerned that the appellant took her to the jungle by catching her hand and that she told the incident to her mother and that her mother told to others were not found.

13. PW-3, Sri Ramlian Malsom during his deposition stated that on 31.07.2018 at about 10 am, her younger sister PW-1 informed him that on 29.07.2018 the appellant committed rape upon her daughter i.e. his niece. Thereafter he enquired the matter from the victim herself when she confirmed the fact of rape and the place of such rape. PW-3 further deposed that the victim complained of pain in her private parts. Thereafter, he lodged the FIR at Taidu PS. He identified his signature in the ejahar [Exbt.1].

During cross-examination, PW-3 admitted that there was dispute between the appellant and his sister [PW-1] regarding boundary of their residential houses. He also admitted the fact that for settling the dispute her sister demanded a pig from the appellant. He further stated that

there were many other houses in the locality of her sister. But he admitted that there was no jungle near the house of her sister.

14. PW-4 is the interpreter. PW-5 Smt. Chengru Kumari Malsum is an independent witness who deposed that after 3/4 days of the incident victim told her that the appellant committed sexual intercourse with her by opening her panty. At the time of incident, her mother was not present in the house. She told this to her mother when she came from her 'jum' cultivation.

15. PW-6 Smt. Nagar Bhakti Malsom is a police constable who stated that on 31.07.2018 she was on law and order duty on Lungfung Road along with other staff at about 12 noon. At that time, the mother of the victim told that her daughter was raped by the convict-appellant. She interpreted the versions of the victim and her mother from Kaipeng language to Bengali language and it was written by the police officer.

16. PW-7, Dhan Daulat Kaipeng stated in his deposition that about five months ago from the date of his deposition, one day, mother of the victim told him that accused-appellant had committed rape upon the victim. Thereafter he asked the victim and she also told that the accused-appellant had committed rape on her. In his cross-examination he stated that he was not interrogated by the police.

17. PW-8, Naikhasiam Malsom stated nothing about the incident. PW-9, Kanak Kalai is the scribe of the ejahar. He deposed that he wrote the ejahar as per the version of Ramlian Malsom. In cross-examination, PW-9 denied that the ejahar was a creation of his imagination.

18. PW-10, Ratish Chakraborty and PW-11, Biswajit Sutradhar are the two constables. They are the seizure witnesses in respect of seizure of the school certificate of the victim by the IO.

19. PW-12, Dip Kumar Debbarma is the Teacher-in-charge of Lungfung S/B School. He deposed that on being asked by the IO he issued the school certificate of the victim and it was seized by the IO when he put his signature in the seizure list.

20. PW-13 is the Medical Officer, namely, Dr. Jemi Debbarma. He deposed that on 31.07.2018 he was posted as Medical Officer at Ompi CHC. On that day he examined Lalmalsom Kaipeng on his potency and opined that he was capable of performing sexual intercourse. He prepared his report and on identification, the said report was marked as Exbt.4 and his signature as Exbt.4/1.

21. PW-14, Smt. Dorothy Jamatia is the Judicial Magistrate who recorded the statement of the victim under Section 164(5) of CrPC and she has stated to the same effect.

22. PW-15, S.I. Palash Dutta is the IO of the case. In course of his deposition, the IO stated that he visited the place of occurrence; prepared hand sketch map with separate index; examined the available witnesses and recorded their statements under Section 161 of CrPC; arranged for recording statement of the victim under Section 164(5) of CrPC and medical examination of the victim as well as the accused-appellant; seized the wearing clothes, vaginal swab and blood sample of the victim; also seized the pubic hair, dried blood sample and blood sample of the accused-appellant and after observing all formalities, having prima facie satisfied, he submitted charge-sheet against the accused-appellant.

Nothing materials brought out from his cross-examination.

23. PW-16, Dr. Anjali Jamatia is the Medical Officer who deposed that on 31.07.2018 she examined the victim when she found her hymen was ruptured which was old and there was lower abdominal pain with urinary problem. There was no mark of injury on her person. She further deposed that such complication may be caused due to rape or by pressing finger or by hard substance. She proved her report as Exbt.11 and the signature thereon as Exbt.11/1.

In her cross-examination, the Doctor stated that on examination the vagina of the victim was found normal. Per anal

examination was also normal. Vaginal swab was also negative for sperm. One foreign hair was found, but could not be identified without DNA test. As such she was not sure whether it was of male or female. In the final opinion after the SFSL report, she opined that there was no sign of recent intercourse, but hymen was ruptured and there was abdominal pain and urinary problem. The hymen had old rupture. It may be 15 days or one month old. She denied the suggestion that the abdominal pain might be due to other reasons.

24. PW-17, Smt. Rupali Majumder, a Scientific Officer of the State Forensic Science Laboratory deposed that she examined the exhibits in connection with this case i.e. the external vaginal swab, internal vaginal swab, a small short hair, dry blood sample of victim, long pant of victim, light purple colour shirt of victim, pubic hair (cut) of accused-appellant, pubic hair (combed) of accused-appellant, dry blood sample of accused-appellant. The result of the examination was as follows:-

> "*Seminal stain/spermatozoa/blood stain of human origin could not be detected in Exbts. A, B, E and F. Hair of human origin could be detected in the Exbt.C, but its site of body could not be detected. She identified her report marked as Exbt.12 and her signature as Exbt.12/1.*"

25. Having reproduced the evidences let in by the prosecution witnesses, we have perused the medical examination report of the victim

girl. We find in the said report PW-16, the Doctor passed her final opinion as under:-

> ***"As per clinical examination and SFSL report, there is no sign of recent intercourse, but hymen was ruptured (old) and there was lower abdominal pain."***

From this final opinion, it transpires that the Doctor, PW-16 nowhere has stated that the lower abdominal pain with urinary problem might have caused due to rape or by pressing finger or by hard substance. Resultantly, the Doctor improved her versions in respect of her final opinion as aforestated. We have further noticed that vaginal canal and fornices are found to be normal in the report.

26. Again, noticeably, PW-3 being the maternal uncle of the victim i.e. the informant of the case admitted in his cross-examination that there was no jungle near the house of his sister and there were many other houses in the locality of his sister. It is also admitted position that there was dispute regarding boundary of the houses of the victim (PW-2) and the appellant. More so, the mother of PW-2 demanded a pig for settlement. We find contradictory statements of the victim and her mother (PW-1) regarding the fact that the victim was taken to the nearby jungle where she was raped by the appellant. We have our due attemtion to the sketch map of the scene of crime prepared by the investigating officer. It transpires that

there is no indication of either jungle or forest area or any mango tree in and around the houses of the PW-2 and the appellant.

Another circumstance that strike our mind that PW-1 and PW-2 are very categoric to their statements that after intercourse the victim sustained injuries in her private parts that caused bleeding. It becomes apparent that the victim was examined just after two days of the incident. If the versions of PW-1 (mother) and PW-2 (victim) in regard to the fact of injuries at her private parts, then, at least, some kinds of mark of injuries in the nature of swelling, red mark could be detected by the Doctor. But the medical report clearly reveals that there was no mark of injury not only in any of her private parts as well as nowhere of her person.

27. In view of the statements of the prosecution witnesses, particularly, PW-1 and PW-2 coupled with the medical evidence, we find various inconsistencies which appear to be so irreconcilable, are sufficient to suspect the very genesis of prosecution case. According to us, only on the basis of the fact that the victim at the time of her medical examination was suffering from lower abdominal pain with problem of urination will not be enough to hold that the victim was subjected to rape. The victim hails from a lower strata where cleanliness and hygiene are always a question and in that circumstance the cause of abdominal pain and urination may be for various other factors. Even the prosecution has failed

to establish the foundational facts relating to rape and the doctrine of reverse burden can be garnered from the prosecution witnesses. To rebut the presumption as contemplated under Section 29 of the POCSO Act, the accused-appellant under POCSO Act is not required to adduce evidence on his behalf but it can be garnered from the prosecution witnesses itself.

28. To say more comprehensively, the presumption to be drawn under Sections 29 and 30 of the POCSO Act do not absolve the prosecution of its duty to establish the foundational facts. Prosecution has to establish a *prima facie* case beyond reasonable doubt. Only when the fundamental facts are established by the prosecution, the accused will be under obligation to rebut the presumption that arise, by adducing evidence with standard of proof of pre-ponderance of probability. The insistence on establishment of fundamental facts by prosecution acts as a safety guard against misapplication of statutory presumption. Foundational facts in POCSO Act include:-

(i) the prove that the victim is a child;

(ii) that alleged incident has taken place;

(iii) that the accused has committed the offence; and

(iv) whenever physical injury is caused, to establish it with supporting medical evidence.

29. *If the fundamental facts of the prosecution case are laid by the prosecution by leading legally admissible evidence, the duty of the accused*

is to rebut it, by establishing from the evidence on record that he has not committed the offence. This can be achieved by eliciting patent absurdities or inherent infirmities in the version of prosecution or in the oral testimony of witnesses or the existence of enmity between the accused and victim or bring out material contradictions and omissions in the evidence of witnesses, or to establish that the victim and witnesses are unreliable or that there is considerable and unexplained delay in lodging the complaint or that the victim is not a child. Accused may reach that end by discrediting and demolishing prosecution witnesses by effective cross-examination. Only if he is not fully able to do so, he needs only to rebut the presumption by leading defence evidence. Still, whether to offer himself as a witness is the choice of the accused. Fundamentally, the process of adducing evidence in a POCSO case does not substantially differ from any other criminal trial; except that in a trial under the POCSO Act, the prosecution is additionally armed with the presumptions and the corresponding obligation on the accused to rebut the presumption. It is imperative to mention that in POCSO cases, considering the gravity of sentence and the stringency of the provisions, an onerous duty is cast on the trial court to ensure a more careful scrutiny of evidence, especially, when the evidence let in is the nature of oral testimony of the victim alone and not corroborated by any other evidence—oral, documentary and medical.

(emphasis supplied)

30. Legally, the duty of the accused to rebut the presumption as arises only after the prosecution has established the foundational facts of the offence alleged against the accused. The yardstick for evaluating the rebuttable evidence is limited to the sale of preponderance of probability.

Once the burden to rebut the presumption is discharged by the accused through effective cross-examination or by adducing defence evidence or by the accused himself tendering oral evidence, what remains is the appreciation of the evidence let in. *Though, it may appear that in the light of presumptions, the burden of proof oscillate between the prosecution and the accused, depending on the quality of evidence let in, in practice the process of adducing evidence in a POCSO case does not substantially differ from any other criminal case.* Once the recording of prosecution evidence starts, the cross-examination of the witnesses will have to be undertaken by the accused keeping in mind the duty of the accused to demolish the prosecution case by an effective cross-examination and additionally to elicit facts to rebut the statutory presumption that may arise from the evidence of prosecution witnesses. Practically, the duty of prosecution to establish the foundational facts and the duty of accused to rebut presumption arise, with the commencement of trial, progresses forward along with the trial and establishment of one, extinguishes the other. To that extent, the presumptions and the duty to rebut presumptions are co-extensive. (***emphasis supplied)***

31. If an accused is convicted only on the basis of presumption as contemplated in Sections 29 and 30 of the POCSO Act, then, it would definitely offend Articles 20(3) and 21 of the Constitution of India. In my

opinion, it was not the object of the legislature. Presumption of innocence is a human right and cannot *per se* be equated with the fundamental right under Article 21 of the Constitution of India. The Supreme Court in various decisions has held that, provisions imposing reverse burden must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the Statute. [***See State of Bombay Versus Kathi Kalu Oghad, (1962) 3 SCR 10: AIR 1961 SC 1808: (1961) 2 Cri LJ 856***].

32. It may safely be said that presumptions under Sections 29 and 30 of the POCSO Act do not take away the primary duty of prosecution to establish the fundamental facts. This duty is always on the prosecution and never shifts to the accused. POCSO Act has no different connotations. Parliament is competent to place burden on certain aspects on the accused especially those which are within his exclusive knowledge. It is justified on the ground that, prosecution cannot, in the very nature of things be expected to know the affairs of the accused. This is specifically so in the case of sexual offences, where there may not be any eye witness to the incident. Even the burden on accused is also a partial one and is justifiable on larger public interest. [***State of Bombay Versus Kathi Kalu Oghad, (1962) 3 SCR 10: AIR 1961 SC 1808: (1961) 2 Cri LJ 856; Noor Aga Vrs.***

State of Punjab & Anr.,(2008) 16 SCC 417; Abdul Rashid Ibrahim Vrs. State of Gujarat (2000) 2 SCC 513]

33. In the light of above discussion, in our considered view, with the inbuilt safeguards in the Act, *the limited presumption do not upset the basic features of criminal law. Tendering of the oral evidence by accused is not mandatory or essential. (**emphasis supplied**)*

34. In the backdrop of the above discussion on law and facts, in our considered view, the appellant is entitled to benefit of doubt. Accordingly, the convict-appellant, namely, Sri Lalmalsom Kaipeng is acquitted of the charges levelled against him on the benefit of doubt and set at liberty.

The release warrant shall be issued forthwith.

The appeal, accordingly, stands allowed and disposed.

Send down the L.C.Rs.

(ARINDAM LODH), J **(AKIL KURESHI),CJ.**