

GAHC010012942020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./64/2020

MANIRUL ISLAM @ MANIRUL ZAMAN
S/O LATE ABDUL AWAL, R/O VILL. KHUDRAKUCHI, P.O. AND P.S.
KALGACHIA, DIST. BARPETA, ASSAM, PIN 781319

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY PP, ASSAM

2:NAZRUL ISLAM
S/O LATE AKASH ALI
R/O VILL. KHUDRAKUCHI
P.O. AND P.S. KALGACHIA
DIST. BARPETA
ASSAM
PIN 78131

For the Appellant : **Mr. N.J. Das, Adv.**

For the Respondent: Mr. M. Phukan, APP, Assam.

BEFORE

THE HON'BLE MR. JUSTICE SUMAN SHYAM
THE HON'BLE MR. JUSTICE MIR ALFAZ ALI

Date of hearing : **22/03/2021.**

Date of judgement : **09/04/2021.**

JUDGEMENT AND ORDER (CAV)

Suman Shyam, J

1. Heard Mr. N.J. Das, learned counsel appearing for the appellant. We have also heard Mr. M. Phukan, learned APP, Assam, appearing for the State. None has appeared for the informant.
2. This appeal is directed against the judgement and order dated 22/11/2019 passed by the learned Special Judge, Barpeta in Special POCSO Case No. 72/2018, finding the appellant guilty of committing penetrative sexual assault under section 3 of the POCSO, Act,2012 [here-in after referred to as "POCSO"] and sentencing him under Section 4 of the POCSO to undergo rigorous imprisonment for a period 12 years and also to pay fine of Rs. 2,000/-, in default, to suffer simple imprisonment for another 3 (three) months.
3. The facts of the case, briefly stated, are that on 26/11/2016, one Nazrul Islam i.e. the uncle of the victim girl, had lodged an ejahar before the In-Charge, Barbhita Police Outpost, in the district of Barpeta, informing that on 10/10/2016, at about 5 p.m., the accused No.1/appellant, acting in a conspiracy with the accused nos. 3, 4, and 5, had forcibly taken away his niece to the house of the accused no. 1 and committed rape on her against her will. In the ejahar, it was mentioned that the delay in lodging the FIR was because of the settlement arrived at in the social meeting. Based on the ejahar dated 26/11/2016, G.D. entry No. 460 dated 26/11/2016 was made in the Barbhita Police Outpost and the ejahar was forwarded to Kalgachia Police Station for registering a case under the appropriate provisions of law. Accordingly, Kalgachia Police Station Case No. 880/2016 was registered under Section 120(B)/34 of the IPC read with Section 4 of the POCSO Act and the Officer-in-Charge of Barbhita Police Outpost took up the matter for investigation.
4. During the course of investigation, the I.O. had recorded the statements of the witnesses, drew sketch map and sent the victim girl for medical examination. The statement of the victim was also recorded under Section 164 Cr.P.C. However, the accused could not be arrested. Upon completion of investigation, the I.O. had laid charge sheet against the accused Manirul Islam under Section 4 of the POCSO showing him as an absconder. However, no material was found against the other accused persons and hence, they were not sent up for trial. It appears that after submission of charge-sheet by the Police, the accused had entered appearance in the Court of the learned Special Judge, Barpeta. Thereafter, charge

under section 4 of the POCSO was framed against the accused and the same was read over and explained to him. However, since the accused had pleaded not guilty and claimed to be tried, the matter went up for trial.

5. During the course of trial, the prosecution side had examined as many as 6 (six) witnesses including the IO and the doctor who had conducted medical examination on the victim. After conclusion of recording of evidence of the prosecution witnesses, the accused was examined under Section 313 of the Cr.P.C., wherein, he had denied his involvement in the matter and had taken the plea of false accusation.

6. Upon conclusion of trial, the learned Special Judge had held that from the Birth Certificate of the victim girl adduced as Ext. A, it was proved that on the date of the occurrence, the victim was aged 15 years 1 month and 15 days. It was also observed that the evidence adduced by the prosecutrix (victim girl) was trustworthy and, therefore, drawing presumption under Section 29 and 30 of the POCSO the learned Special Judge had found the accused guilty under Section 4 of the POCSO. Accordingly, the accused was sentenced as indicated above.

7. By referring to the materials available on record, Mr. N.J. Das, learned counsel appearing for the appellant has argued that there was more than 46 days delay in lodging the ejahar and the victim was also examined nearly 60 days after the alleged occurrence. But there is no plausible explanation for the delay. Urging that delay in lodging of FIR in this case would have fatal consequences on the prosecution case, Mr. Das had relied upon the decision rendered in the case of ***Subash Deb Vs. State of Tripura*** reported in **2009 (4) GLT 84** and ***State of Andhra Pradesh Vs. M. Madhusudhan Rao*** reported in **(2018) 15 SCC 582** to argue that the impugned judgement and order dated 22/11/2019 is unsustainable in the eye of law on such count alone.

8. The learned counsel for the appellant further submits that there are contradictions in the testimony of the prosecutrix which were proved by the I.O. According to the Mr. Das, the doctor had found the age of the victim to be between 18 years and 20 years and there was no evidence available to the contrary. Since the parents of the victim were not examine nor had the prosecution examined the seizure witnesses of Ext. A, hence, the Birth Certificate (Ext- A) would not have any probative value in this case even if the said document is held to be admissible in evidence. In support of his aforesaid submission, Mr. Das has relied upon

two decisions of the Supreme Court, viz. **Ram Prasad Sarma Vs. State of Bihar** reported in **1970 AIR 326** and **State of Bihar Vs. Radha Krishna Singh and others** reported in **1983 AIR 684**.

9. Contending that mere marking of a document as an exhibit does not amount to its proof, Mr. Das has relied upon another decision of the Supreme Court rendered in the case of **LIC of India and another Vs. Ram Pal Singh Bisen** reported in **2010(4) SCC 491** to contend that merely by exhibiting the Birth Certificate as Ext-A, the prosecution cannot absolve itself of the duty to prove the contents of the said document in accordance with law.

10. To sum up his argument, Mr. Das has relied upon a recent decision of this Court in the case of **Mrinal Das Vs. State of Assam** reported in **2017(5)GLT 626** to argue that conviction of the accused cannot be based on the sole testimony of the prosecutrix if the same is not found to be trustworthy.

11. Mr. M. Phukan, learned APP, Assam, appearing for the State, on the other hand, has argued that in this case, the prosecution has succeeded in establishing that the victim was a minor girl aged below 16 years on the date of the occurrence and as per the medical evidence, her hymen was also found to be torn. The testimony of the PW-1 and the victim i.e. PW-2 finds due corroboration from the medical evidence brought on record. By referring to Section 29 and 30 of the POCSO Act, 2012 the learned APP submits that in a case where the accused is prosecuted for offence committed under section 3,5,7 and 9 of the POCSO Act, the court is empowered to draw presumption of guilt of the accused. Therefore, having regard to the facts and circumstances of the case as well as the evidence brought on record, the learned Special Judge has rightly held that the accused was guilty and sentenced him under Section 4 of the POCSO Act, 2012. In such view of the matter, no interference with the impugned judgement and order dated 22/11/2019 by this Court is called for.

12. We have taken note of the submissions advanced by the learned counsel representing for both the parties and have also carefully gone through the materials available on record.

13. The occurrence allegedly took place on 10/10/2016 but the ejahar in this case was admittedly lodged on 26/11/2016 i.e. after a delay of about 46 days. The informant Nazrul Islam (PW-1), who is the uncle of the prosecutrix has deposed that the accused had forcefully taken away his Niece (victim) to his house and committed rape against her will, on the basis

of a conspiracy hatched by the accused along with three other accused persons named in the FIR viz. Nurjahan, Abu Taleb, Noyse Ali. As per the ejahar dated 26/11/2016, the incident took place on 10/10/2016 at about 5 p.m.

14. The PW-1 has also deposed that when he enquired from his niece (victim), she told him that while returning home from the house of her maternal grandmother, she was forcefully pulled up by the accused Manirul from near his house and committed rape on her by wrapping her mouth with a "gamocha". PW-1 has stated that at the time of the incident, the age of the victim was 14 years. This witness had also produced Ext.- A, which was the photocopy of the Birth Certificate of the victim, compared with the original. During his cross-examination, the PW-1 has stated that the accused had also visited the house of his niece earlier, being a neighbour, but he had denied that they were trying to get the victim girl married to the accused by force and that on the date of the incident, his niece had voluntarily gone to the house of the accused, she was sleeping in the bed of the accused but the accused was not present in the house. PW-1 has also denied the suggestion that while his niece was sleeping on the bed of the accused, the mother of the accused had abused her, as a result of which, his niece came back home and said that she was assaulted and threatened by the mother of the accused.

15. The victim was examined as PW-2. The prosecutrix has deposed that the incident occurred on 10/10/2016 at about 10 p.m. while she was returning home from the house of her maternal grandmother. At that time, the accused had pulled her from the road to his residence and committed rape on her by wrapping her mouth with a "gamocha". Then she came home weeping and narrated the incident to her uncle Nazrul Islam (PW-1). Thereafter, her uncle filed the case. Later on, she was produced before the doctor for medical examination and her statement was also recorded by the Magistrate under Section 164 Cr.P.C. PW-2 has proved her statement recorded by the Magistrate under section 164 Cr.P.C. as Ext.- 1.

16. During her cross examination, PW-2 had stated that the house of the accused and her grandmother was adjacent and she used to often go to the house of the accused. When there was a hue and cry, the FIR named accused viz. Nurjahan, Abu Taleb, Noyse Ali etc. had gathered there. The prosecutrix has, however, denied the suggestion made by the defense side that she had voluntarily gone to the house of the accused and was sleeping on his bed;

that the mother of the accused had abused her as a result of which, she had returned home weeping. She had also denied the suggestion of the defense side that her family was agreeable to give her in marriage with the accused, as a result of which, there has been delay in this case.

17. PW-3 Anowar Hussain is a co-villager and he has deposed to the effect that the victim girl had told him that the accused took her to his house and had sexual intercourse with her. Regarding this matter, there was a "village mel" (meeting) in the house of Amzad Ali wherein, he was also present. However, since the victim was a minor, the villagers decided not to marry the girl with the accused. Thereafter, the uncle of the victim had filed the case. During his cross examination, PW-3 had stated that during the village meeting, the accused, on being asked, had denied that he had any physical relation with the girl. Although the uncle of the girl had conveyed his no objection to the marriage proposal between the victim and the accused, yet, considering her minority, the members of the society did not allow the marriage.

18. PW-4 Sri Sona Miah is another neighbour of the informant. In his deposition, this witness had stated that the village meeting was called after one or two days of the incident. Although the meeting discussed about the marriage of the victim with the accused but the accused has denied his involvement and the father of the victim also refused to give his daughter in marriage due to her underage. In his cross examination, PW-4 had stated that the victim girl had visited the house of the accused to charge her mobile phone and was sleeping in the bed of the accused, for which, his mother had abused her.

19. PW-5 is the Doctor who had conducted medical examination on the victim. On examination of the victim, the following observations were made by the doctor :-

“On X-ray examination her age is found above 18 years and below 20 years. There is no recent sign of sexual intercourse. No injury marks on her body. Victim is not suffering from any physical and mental disability and no foreign body found on her cloth as well as private part.

Exhibit 2 is the medical report and exhibit 2(1) is my signature.

Normally the hymen is torn due to sexual assault or fall or injury suffered due to accident.”

20. PW-6 is the I.O. in this case. He has deposed that after receiving the FIR from Nazrul Islam (PW-1) he had made G.D. entry no. 460 dated 26/11/2016 and forwarded the ejahar to the Kalgachia Police Station for registering a case. PW-6 has confirmed that he had carried out investigation in this case and had visited the place of occurrence. The I.O. has stated that he drew a sketch map, recorded the statement of the witnesses including the victim, sent her for medical examination at Barpeta FAAMCH and had also collected the medical report. However, the accused could not be arrested by him. During his cross examination, the IO has stated that he had sent the victim for medical examination after 11 days of receiving the FIR. The IO had also stated that the victim did not state before him that the accused had committed rape on her by wrapping her mouth with a "gamocha" nor did PW-4 state before him that he had heard about the incident from Nazrul.

21. As per the ejahar dated 26/11/2016, the incident occurred on 10/10/2016, at about 5 p.m. pursuant to a conspiracy hatched by the accused with the other three FIR named accused persons. However, the victim (PW-2) had deposed that the incident occurred on 10/10/2016 at about 10 p.m. at night. In the ejahar, it has been mentioned that the accused had conspired with co-accused Nurjahan, Abu Taleb and Noyse Ali forcefully took his neice to his house and committed rape. However, according to the prosecutrix, the co-accused Nurjahan, Abu Taleb and Noyse Ali i.e. the accused nos. 2, 3 and 5 had gathered in the place when there was hue and cry raised after the incident. Although the PW-1 had deposed that the accused had wrapper a "gamocha" around her mouth and committed rape on her, she did not say so to the I.O. or in her statement recorded under section 164 Cr.P.C. In her statement recorded under section 164 Cr.P.C the prosecutrix had stated that the incident took place in the evening but in her deposition, the time of the incident has been mentioned as 10 p.m. From the above, it would become evident that there are a number of material contradictions in the version of the prosecutrix making her testimony un-trust worthy.

22. In her statement recorded under Section 164 Cr.P.C., the victim has stated as follows :-

“About 2 months from today, when I was returning from the house of my maternal uncle, Monirul Islam committed rape upon me. I was forcefully taken to his house and committed rape. The incident took place in the evening.”

23. The expression "rape" is defined in section 375 of the Indian Penal Code which is *pari-mataria* with section 3 of the POCSO. The basic difference between the two sections is that while section 375 IPC applies in case of women, section 3 of the POCSO will be applicable only in case of children. For an offence to come under section 3 of the POCSO, it must be shown that there was penetrative sexual offence on the victim. However, from the statement of the victim recorded under section 164 Cr. P.C it would be apparent that her statement is vague and cryptic. The same does not give proper particulars of the act allegedly committed by the accused nor does it give any details as regard circumstances under which the accused had committed rape on her. Therefore, it is evident that even while recording her statement under section 164 Cr.P.C, the victim was economical with truth thereby, giving an impression that she was reluctant to divulge the whole truth.

24. The PW-4 has deposed that the prosecutrix had visited the house of the accused to charge her mobile and was sleeping on his bed, as a result of which, the mother of the accused had abused her. PW-4 has also mentioned about the 'village Mel' held 1 or 2 days after the incident. The testimony of this witness appears to be reliable. His version also finds corroboration from the evidence of PW-3 who has also stated about the Village Mel held in the house of Amzad Ali and in the meeting, the mother of the accused had told that she had hurled abuses on the girl for sleeping on the bed of her son and charging her mobile. Therefore, if the testimonies of these witnesses are to be believed than it becomes apparent that on the day of the occurrence, the victim girl had voluntarily gone to the house of the accused, sat on his bed and tried to charge her mobile and then she was rebuked by the mother of the accused. Thereafter, she came home and complained about the matter to her uncle. We find no justification not to believe the above version coming out from the evidence adduced by the PWs 3 and 4.

25. From the opinion of the doctor (PW-5), although it is seen that the hymen of the victim was found to be torn, yet, according to the doctor's opinion, the same can be either due to sexual assault or fall or injury suffered due to accident. The doctor also found that there was no sign of any sexual intercourse or other injury on the private parts of the victim. Therefore, medical report of the victim, in our opinion, did not cogently establish sexual penetrative assault on the prosecutrix.

26. As per section 2(d) of the POCSO Act, a "child" means a person below the age of

eighteen years. Therefore, for attracting the provisions of the POCSO , the age of the victim on the date of occurrence must be below eighteen years. In the instant case, the learned counsel for the appellant has argued that the prosecution has failed to establish that the victim was a minor girl below the age of 18 years on the date of occurrence. The learned Trial Court has, however, held to the contrary, by placing reliance on Ext- A.

27. From a close scrutiny of the materials available on record, we find that Ext-A is the photocopy, compared with original, of the Birth Certificate issued by the Department of Health Services, Govt. of Assam, certifying that the accused was born on 25/08/2001. This certificate was apparently seized by the IO in presence of two seizure witnesses, viz. Usman Gani and Habibur Rahman. However, none of the seizure witnesses have been examined by the prosecution during the course of the trial. The Birth Certificate (Ext.-A) was, in fact, exhibited by the informant (PW-1), who is the uncle of the victim. The prosecution had neither examined the parents of the prosecutrix nor called any official from the Health Department so as to prove the contents of Ext-A. There is also no explanation for not doing so.

28. A Birth Certificate issued by the Health Department of the State Government is a part of the public record. Section 35 of the Evidence Act, 1872 deals with relevancy of entry in public record which reads as follows :-

“35. Relevancy of entry in public record [or an electronic record], made in performance of duty.—An entry in any public or other official book, register or record [or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record [or an electronic record] is kept, is itself a relevant fact.”

29. From a plain reading of Section 35, it would be apparent that an entry made in any public or other official book/register or record is required to be proved by a public servant who had made the entry in discharge of his official duty or by any other persons, in performance of his duty, especially enjoined by law. In the instant case, as noted above, no such officer of the department was summoned by the prosecution as a witness to prove Ext-A.

30. It also appears from Ext- A, that the subject (victim) was born on 25/08/2001 but

the Birth Certificate was issued on 12/07/2012 i.e. after a period of almost 11 years. As per Section 13(3) of the Registration of Births and Deaths Act, 1969, any birth or death which had not been registered within one year of its occurrence, can be registered only on an order made by a Magistrate of the First Class or a Presidency Magistrate after verifying the correctness of the birth or death and on payment of prescribed fee.

31. In the case of ***LIC of India and another (supra)*** the Supreme Court has held that admission of documents in evidence does not amount to its proof. Under the law of Evidence, it is necessary to prove the contents of documents either by primary or secondary evidence. At the most, admission of documents may amount to admission of its content but not its truth.

32. In the present case, the prosecution had made an attempt to prove the document Ext-A through PW-1 and it appears that the defense side did not raise any objection when the document was marked as an exhibit. Therefore, in so far the admissibility of Ext-A is concerned, the said question must be answered in favour of the prosecution. That, however, would not automatically absolve the prosecution from the requirement in law to establish the truthfulness of its contents. The PW-1 being the informant in this case, had nothing to do with the birth of the child or the Department of Health Services, Assam. Therefore, in our opinion, he was not competent to prove the contents of Ext.-A. Viewed from that perspective, the PW-1 could not have vouched for the truthfulness of the contents of Ext-A. Therefore, in the light of the doctor's opinion (PW-5), which is to the effect that the age of the victim was between 18 years to 20 years, we are of the view that the prosecution has failed to show that the victim was below 18 (eighteen) years on the date of occurrence.

33. The next issue which has caught the attention of this court is the unusual delay of 46 days in lodging the FIR. According to the witnesses examined by the prosecution the marriage proposal did not go through on account of the fact that the victim girl was still a minor. Thereafter, there was no action in the matter for nearly 46 days. It was only after the lapse of about 46 days from the alleged occurrence, that an ejahar was lodged by the uncle of the victim. The reason for such delay has been cited as the "village meeting". But we find from the evidence on record, more particularly the testimony of PW-4, that the village meeting was called after 1 or 2 days of the occurrence and the marriage proposal of the accused with the victim girl was also turned down in that meeting itself. If that be so, what

then was the reason for the delay of 46 days in lodging the FIR ? There is not even an iota of evidence on record to throw light on that. It is also not the case of the prosecution that the accused had, in any manner, threatened the victim with consequences resulting in delay in lodging the FIR.

34. Law is firmly settled that delay in lodging FIR would not make the prosecution case improbable if the delay is properly explained. However, un-reasonable delay in lodging FIR, without any plausible explanation, would undoubtedly give rise to suspicion as regard the prosecution case, raising a question mark on the trust worthiness of the prosecution version.

35. There is evidence available on record to indicate that the victim and the accused were known to each other and that the victim used to visit the house of the accused quite often. It also appears that talk of marriage of the victim and the accused was going on for quite some time but the marriage proposal had fizzled out in the meeting held in the house of Amzad Ali apparently due to the tender age of the girl. There is no evidence to show that the alleged rape committed by the accused on the victim was the subject matter of discussion in the village meeting. Moreover, it is also not clear that if the accused had in fact raped the victim forcefully, then why would her parents solicit the hands of the accused in a marriage proposal with the victim. In the above circumstances, the un-explained delay in lodging the FIR, viewed in the light of the plea taken by the accused of false accusation, in our opinion would be sufficient to give rise to a reasonable suspicion that the FIR was the fall out of the marriage proposal between the parties turning sour.

36. In the case of ***Raju and others Vs. State of Madhya Pradesh*** reported in ***(2008) 15 SCC 33***, the Supreme Court had made the following observations in para 11:-

“11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.”

37. In another decision of the Apex Court in the case of ***Raja and others Vs, State of Karnataka*** reported in **(2016) 10 SCC 506**, it has been observed that though generally the testimony of a victim of rape or non-consensual physical assault ought to be accepted as true and unblemished but it will still be subjected to judicial scrutiny, lest casual, routine and automatic acceptance thereof, may result in unwarranted conviction of the person charged. Relying on the aforesaid decision of the Supreme Court, a learned Single Judge of this Court in the case of ***Mrinal Das (Supra)*** has observed as follows :-

“26. There is no doubt about the principle of appreciation of evidence that in a case of sexual assault the testimony of the prosecutrix must be given primary consideration and her testimony should not be viewed with suspicion, unless there are compelling circumstances requiring the court to seek corroboration or support from other independent source. But the principle that prosecution needs to prove its case beyond reasonable doubt and that the reliability of a witness depends on its credibility and trustworthiness, equally applies even in case of sexual assault. It cannot be said that whatever is stated by the victim of sexual assault, being the solitary witness, has to be relied by the court, notwithstanding, any infirmities in the testimony of such witness.”

38. Having observed as above, this court is conscious of the fact that the charge framed against the accused in this case is under sections 3/ 4 of the POCSO . Section 29 & 30 of the POCSO permits the Court to draw rebuttable presumption as to the culpability of an accused being prosecuted under the provisions of the Act. In a trial conducted under the Cr.P.C the accused can remain silent and the burden would be upon the prosecution to prove the charge beyond reasonable doubt by leading cogent evidence. However, an exception to this general rule has been introduced in case of prosecution under the POCSO. In view of sections 29 and 30 of the POCSO Act, there would be reverse onus upon the accused to displace any presumption of guilt.

39. Section 29 of the POCSO Act is reproduced herein below for ready reference :-

“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."

40. Section 30 of the POCSO Act reads as follows :-

"30. Presumption of culpable mental state- (1) *In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*

(2) *For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.*

Explanation.-In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."

41. POCSO was enacted by the Parliament on 19-06-2012 with the object to protect children from offences of sexual assault, sexual harassment and pornography. The Act, which came into force with effect from 20-06-2012 on being published in the Gazette of India, provides for setting up Special Courts for trial of offences under the Act. Although section 376 of IPC contains penal provision to award punishment for rape, yet, the Legislative intent behind bringing such a Special Statute appears to be to tackle the growing cases of sexual harassment on children. In order to provide better teeth to the prosecution, sections 29 and 30 have been inserted in the POCSO empowering the court to draw presumption of guilt against the accused. However, insertion of sections 29 & 30 has also raised questions as to the parameters following which, power under the said provisions is to be exercised by the Special Court to draw presumption of guilt.

42. The doctrine of reverse burden is not peculiar to the POCSO. There are a number of other Legislations in India which contains such provisions. Sections 35 and 54 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short NDPS) are an example. While dealing with challenge made to the validity of section 35 and 54 of the NDPS, in so far as it imposes

reverse burden upon the accused, the Apex Court has observed in the case **of Noor Aga Vs State of Punjab** reported in **(2008) 16 SCC 417**, as follows :-

“58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.”

43. While upholding the constitutional validity of sections 35 and 54 of the NDPS Act, the Apex Court has, however, reiterated that more serious the offence, the stricter would be the degree of proof to convict the accused. It was also observed that an initial burden would lie upon the prosecution and only when it stands satisfied, the legal burden would shift upon the accused. What follows from the above decision is that notwithstanding the concept of reverse burden envisaged by section 35 and 54 of the NDPS Act, the burden upon the prosecution to prove the foundational fact would still exist.

44. In a decision rendered by the High Court of Judicature at Calcutta in the case of **Sohid Hossain Biswas Vs. State of West Bengal** [CRA No 736 of 2016] it was held that establishing the foundational facts by leading evidence by the prosecution is an essential pre-requisite before the statutory presumption under Section 29 of the POCSO Act is triggered so as to shift the onus on the accused to prove the contrary.

45. Taking a similar view, the learned Single Judge of the Bombay High Court in the case of **Navin Dhaniram Baraiye Vs. the State of Maharashtra** (Crl. Appeal No. 406/2017) has observed as follows :-

“A perusal of the above quoted provision does show that it is for the accused to prove

the contrary and in case he fails to do so, the presumption would operate against him leading to his conviction under the provisions of the POCSO Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operation. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witnesses would have to be accepted as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under Section 29 of the POCSO act cannot be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law."

46. In the case of ***Dharmender Singh @ Saheb Vs. The State*** (Govt. of NCT, Delhi) (Bail Application 1559/2020), the Delhi High Court was called upon to consider bail application filed by an accused prosecuted under the POCSO. One of the issues which arose for consideration of the Court was as to whether, presumption of guilt of the accused under Section 29 of the POCSO would arise at the pre-trial stage or whether the same would arise only after commencement of trial by framing charges. The learned Single Judge has held that presumption of guilt engrafted in section 29 would get triggered only once trial begins i.e. after charges are framed against the accused but not before that. It would come into operation only when the prosecution is first able to establish the facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. The relevant observations made by the Learned Single Judge in ***Dharmender Singh (Supra)*** are reproduced herein below for ready reference:-

"51. Only when the trial court frames charges, does it form a prima facie opinion that there is a case for the accused to answer and defend. At the stage of framing charges, the trial court may decide not to frame charges against an accused under any of the

sections mentioned in section 29 but under some other provision; or, it may not frame charges against all accused persons under those sections. So, the presumption under section 29 cannot arise before charges are framed.

52. If the presumption of guilt is taken to arise even before charges are framed, say when a court is considering a bail application, then the court will have to afford to the accused an opportunity to prove that he has not committed the offence; which would require the court to conduct a mini-trial, even when it is only considering a bail plea. What then would remain to be done during the trial itself ? In the opinion of this court it is not the purport of section 29 that a mini-trial should be conducted at the stage of deciding a bail application. No such concept is known to law. Requiring production and analysis of evidence to form an opinion on the merits of the allegations; and to BAIL APPL. No. 1559/2020 Page 26 of 45 express a view on such evidence, is certainly not within the remit of a court considering a bail plea.”

47. However, in ***Badri Nath Vs. Union Territory of J & K and others*** (Bail App. No. 139/2020), the learned Single Judge of Jammu and Kashmir High Court has taken a contrary view and has held that the presumption under Section 29 would come into play even at the pre-trial stage, thereby, disagreeing with the views expressed by the Delhi High Court in the case of ***Dharmender Singh*** (*Supra*).

48. In a recent decision in the case of ***Bhupen Kalita Vs. State of Assam*** reported in ***2020 (3) GLT 403*** learned Single Judge of this Court had the occasion to interpret sections 29 and 30 of the POCSO. In the aforesaid decision, the Learned Single Judge has elaborately dealt with various facets of the law on the issue and upon a thread bare analysis of the judicial pronouncements and legal literature available on the subject including the law laid down by the Supreme Court in the case of ***Noor Aga (supra)***, has held that the prosecution would be under an obligation to lay down the foundational facts before presumption can be drawn against the accused under Section 29 and 30 (2) of POCSO. Having held as above, certain broad principles, applicable in a proceeding under the POCSO, for drawing presumption under Section 29 and 30, have been laid down in paragraph 71, which are reproduced herein below for ready reference :-

“71. In the light of the discussions above, the following legal positions emerge in any proceeding under the POCSO Act.

(A) The prosecution has to prove the foundational facts of the offence charged against the accused, not based on proof beyond reasonable doubt, but on the basis of preponderance of probability.

(B) Accordingly, if the prosecution is not able to prove the foundational facts of the offence based on preponderance of probability, the presumption under [Section 29](#) of the Act cannot be invoked against the accused.

(C) If the prosecution is successful in establishing the foundational facts and the presumption is raised against the accused, the accused can rebut the same either by discrediting the prosecution witnesses through cross-examination or by adducing his own evidence to demonstrate that the prosecution case is improbable based on the principle of preponderance of probability. However, if it relates to absence of culpable mental state, the accused has to prove the absence of such culpable mental state beyond reasonable doubt as provided under [Section 30\(2\)](#) of the Act.

(D) However, because of legal presumption against the accused, it may not suffice by merely trying to discredit the evidence of the prosecution through cross-examination, and the defence may be required to adduce evidence to dismantle the legal presumption against him and prove that he is not guilty. The accused would be expected to come forward with more positive evidence to establish his innocence to negate the presumption of guilt.”

49. From a minute examination of the ratio laid down in the aforesaid decisions rendered by the different High Courts, we are of the view that the decisions rendered in case of ***Sohid Hossain Biswas(supra)***; ***Navin Dhaniram Baraiya(supra)*** ; ***Dharmendra Sigh (supra)*** and ***Bhupen Kalita (supra)*** on the issue of applicability of sections 29 and 30 of POCSO, is based on the correct proposition of law. In all these decision, the Courts have expressed the opinion that reverse burden on the accused under sections 29 & 30 of

POCSO would operate during trial and that too, after the prosecution establishes the foundational facts.

50. Section 31 of the POCSO provides that the Code of Criminal Procedure, 1973, [Cr.P.C] shall apply to a proceeding before the Special Court and for the purpose of the said provisions, the Special Court shall be deemed to be the Court of Sessions and the person conducting prosecution before a Special Court shall be deemed to be a Public Prosecutor. As per section 225 of Cr.P.C trial is to be conducted by Public Prosecutor. Section 226 of Cr.P.C provides that the prosecutor is to open the case by describing the charge brought against the accused and by stating what evidence he proposes to prove the guilt of the accused. Therefore, it is axiomatic that even in a case coming under the POCSO, formal charge has to be framed and the prosecution would be required to lead evidence to prove the charge.

51. From the above, it becomes apparent that mere insertion of sections 29 and 30(2) in the POCSO does not altogether relieve the prosecution of the burden of proof contemplated under sections 101 and 102 of the Evidence Act but merely lessen the burden on the prosecution by shifting the onus upon the accused. However, such reverse onus would shift upon the accused only when the prosecution succeeds in *prima facie* establishing the charge by adhering to the standard of proof of preponderance of probability. It is only then, the accused would have to displace the presumption of guilt. What therefore, follows is that conviction in a proceeding initiated under the POCSO cannot be based solely on presumption of guilt of the accused under sections 29 & 30 of the Act. For the above reasons, we find ourselves in agreement with the guiding principles laid down in paragraph 71 of ***Bhupen Kalita (supra)*** formulating the parameters to be satisfied for drawing presumption of guilt by the Court under sections 29 and 30(2) of POCSO.

52. Coming to the facts of this case, we are of the opinion that the prosecution has failed to establish the foundational facts. The testimony of the prosecutrix is also found to be full of contradictions and hence, unreliable. From the impugned judgement and order, we find that the conviction of the accused on the basis of presumption drawn under sections 29 & 30(2) of the POCSO. Therefore, we are of the view that in the absence of cogent evidence brought on record to *prima facie* establish the foundational facts, conviction of the accused cannot be based solely on presumption of guilt, premised on the precincts of the doctrine of reverse burden.

53. In view of the foregoing discussions, we hold that the impugned judgement and order dated 22/11/2019 passed by the learned Special Judge, Barpeta in Special POCSO Case No. 72/2018 is unsustainable in law. The same is accordingly set aside.

54. The appeal stands allowed.

55. The appellant/ accused is hereby acquitted.

56. He shall be forthwith released from jail if not wanted in connection with any other proceeding.

Send back the LCR.

JUDGE

JUDGE

Sukhamay

Comparing Assistant