IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE
JUSTICE SUJOY PAUL
&
JUSTICE AMAR NATH (KESHARWANI)

CRIMINAL APPEAL No.728 OF 2019

BETWEEN :-

DINESH YADAV S/O BALAKRAM @ KALLU YADAV, AGED ABOUT 24 YEARS, R/O VILLAGE SINGHODI, P.S. BANDOL, DISTRICT SEONI (MADHYA PRADESH)

....APPELLANT

(BY SHRI VISHAL R. DANIEL - ADVOCATE)

AND

1. **STATE OF MADHYA PRADESH, THROUGH POLICE STATION HOUSE BANDOL, SEONI (MADHYA PRADESH)**

2. **'A' DETAILS OF THE PROSECUTRIX HAVE BEEN ENCLOSED IN A SEALED ENVELOPE APPENDED ALONGWITH THIS APPEAL**

.....RESPONDENT

(BY SHRI AJAY SHUKLA - GOVERNMENT ADVOCATE)

Reserved on : 05 /04/2023

Pronounced on : 12/ 04 / 2023

This Criminal Appeal has been heard and reserved for judgment, coming on for pronouncement this day, ***Justice Sujoy Paul*** *pronounced the following :*

J U D G M E N T

This Criminal Appeal is filed under Section 374 of Criminal Procedure Code (Cr.P.C.) questioning the judgment dated 12/01/2019 passed in SCATR No.07/2013 by learned Special Judge under the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989, whereby the appellant was convicted and sentenced as under :-

Convicted under Sections	Sentenced to undergo
452 of IPC	R.I. for 5 years with fine of Rs.1000/- and in default R.I. for three months.
342 of IPC	R.I. for 1 year.
376(1) of IPC	R.I. for Life with fine of Rs.2000/- and in default R.I. for six months.
3(2)(v) of SC/ST Act	R.I. for Life with fine of Rs.2000/- and in default R.I. for six months.
3(1)(xii) of SC/ST Act	R.I. for 5 years with fine of Rs.1000/- and in default R.I. for three months.
3(a) r/w 4 of POCSO Act	R.I. for 7 years with fine of Rs.1000/- and in default R.I. for three months.
All sentences to run concurrently	

2. As per the prosecution case, the prosecutrix lodged a written report on 27/12/2012 in Police Station Bandol District Seoni that she is resident of village Singhodi and a student of Class-VI. The father of victim is an agricultural worker in the farm of Sanat Mishra. Sanat Mishra and his family resides at Seoni. Sanat Mishra visits Singhodi to

look after his agricultural activities on Sunday and some times on other days. The mother of complainant is engaged in the house of Sanat Mishra to clean cow dung. The complainant also used to clean cow dung at Sanat Mishra's house as and when required.

3. On 26/12/2012 at around 11:00 A.M., the parents of complainant went elsewhere to perform their work and complainant in the meantime reached the house of Sanat Mishra in order to clean the cow dung. She entered the room called as *Kotha* which is used to keep cows/bulls. While she was cleaning the *Kotha* and clearing the cow dung, the appellant entered the *Kotha* and locked the *Kotha* from inside. He forcibly thrown the complainant to the floor and raped her. After committing rape, the appellant opened the door and fled away. The complainant reached her house weeping and crying. Her brother (PW-5) came there and she informed about the incident to him with sufficient detail. The said narration was in the presence of brother-in-law Kamal, Chhutaniya and Suresh Master who resides just in front of the *Kotha*. In turn, brother (PW-5) apprised the parents about the said incident.

4. The complaint of victim was registered as Crime No.243/2012 for committing offence under Sections 376, 450 and 342 of the Indian Penal Code. During investigation, the victim was medically examined on 27/12/2012. The seizure memos Ex.P/6 and Ex.P/26 were prepared. Investigating Officer Shri Siddharth Bahuguna (PW-16) reached the place of incident and prepared the site map (Ex.P/7).

5. During the investigation, the appellant was arrested on 28/12/2012 (Ex.P/24) and he was medically examined through Ex.P/25. The Constable 186 Ashish Shukla obtained the sealed packet containing slide and undergarment of appellant and in turn, the said material was sent to Forensic Science Laboratory (FSL). During the course of investigation, other relevant materials including school register of victim and her caste certificate were also seized.

6. The FSL report (Ex.P/27) was obtained and after completion of investigation, *challan* was filed. In turn, matter came for trial before the Special Court. The appellant abjured the guilt and prayed for a complete trial.

7. The Court below framed six questions for its determination, recorded evidence and after hearing the parties passed the impugned judgment convicting and sentencing the appellant as mentioned above.

Contention of appellant :-

8. Learned counsel for the appellant at the outset submits that he is beginning his argument in an unusual manner. Before taking this Court to the evidence and factual aspects of the matter, it is strenuously contended that in the impugned judgment, on more than one occasion, the Court below used the phrase *'in these type of matters'*. By placing reliance on **2021 SCC OnLine SC 1233 (Mohan alias Shrinivas alias Seena alias Tailor Seena vs. State of Karnataka)** and **2008 (15) SCC 133 (Raju and others vs. State of Madhya Pradesh),** it is urged that despite sensitivity of a matter, the legal requirement and the requirement of evidence as per law cannot be diluted. False

implications in criminal matters are not unknown to legal fraternity. Thus, over emphasis on '*in these type of matters'* by Court below cannot be appreciated.

9. Shri Vishal Daniel, learned counsel for the appellant at the outset further urged that appellant is assailing the impugned judgment on the ground that appellant has been falsely arraigned and no such offence has been committed by him. Thus, he is not addressing on the aspect of determination of age/juvenility of the victim.

10. The statement of victim (PW-3) was referred to show that incident had taken place in broad daylight at 11:00 A.M. on 26/12/2012. As per her complaint/deposition, the door of *Kotha* was locked by appellant from inside. After the incident, victim narrated the incident to parents and neighbours immediately. The report in the Police Station could not be lodged on the same day on the pretext that complainant/family members did not have any conveyance. The report was admittedly lodged after one day i.e. on 27/12/2012.

11. Inconsistency in the statements of prosecution witnesses were highlighted by taking this Court to the testimony of mother of victim (PW-4). She deposed that the bulls used to go for grazing early in the morning and work of clearing the cow dung in *Kotha* takes place at around 7-8 A.M. By 10-11 A.M. the bulls used to come back in the *Kotha* and before they come back to *Kotha,* it is necessary to clean the *Kotha.*

12. Mother of victim (PW-4) further deposed that her son Jitendra at around 12 O'clock on the date of incident informed her about the incident at an agricultural field. On the same day, she with her husband

and victim went to the house of Sanat Mishra at Seoni. They informed about the incident to Sanat Mishra and on the same night, they went to village Kamta to inform about the incident to son-in-law Govardhan. After informing Govardhan from village Kamta itself, they went to Police Station on the next day.

13. The statement of father of victim (PW-8) was highlighted to bolster similar point that as per his statement also, the bulls were released early in the morning and bulls come back to *Kotha* at around 10-11 A.M. Father of victim clearly admitted that adjacent to *Kotha*, there is a water spring (*Jhiriy*a). In the said spring, since morning till evening, the movement of people and cattle continues. People believe that water of *Jhiriya* is pure and mental diseases can be cured by taking bath in the *Jhiriya*. Thus, people from nearby villages also used to come to *Jhiriya* and take bath. It is pointed out that mother of victim (PW-4) deposed in the same line in para-10 of her statement.

14. Shri Vishal Daniel, learned counsel for the appellant by taking this Court to para-10 of statement of mother (PW-4) and para-7 of statement of father (PW-8) urged that both the statements are candid clear and unambiguous that near the *Kotha* where incident had taken place, there exists a Shiv temple. From Shiv temple, even inside portion of *Kotha* is clearly visible. Both the parents of victim clearly deposed that if *Kotha* is viewed from said Shiv temple, it is totally open and every corner of *Kotha* is visible. Both of them also clearly deposed that there is no door in the *Kotha* from the side of Shiv Temple. Thus, the story of prosecution that door of *Kotha* was locked from inside by appellant and he committed rape is without any basis.

15. On the basis of aforesaid evidence of parents, it is urged that the incident had taken place on 26.12.2012 at 11:00 AM and FIR was registered on 27.12.2012 at 15 O'clock. The reason for delay in lodging the FIR is mentioned as non-availability of conveyance which is apparently incorrect in view of movement of victim and family members to Seoni and from there to village Kamta. Thus, delay in lodging FIR is fatal in the instance case.

16. The statement of mother (PW-4) and father (PW-8) were also relied upon to show that the incident had taken place in *'Kotha'* and adjacent to the same, there exists a *Kirana* shop, a '*Pulia'* in which people used to sit for whole day and enter into gossips. Father (PW-8) clearly stated that any conversation inside the *Kotha* can be heard in shiv temple and in '*Jhiriya*'. Shri Daniel, Advocate submits that the aforesaid statements make it clear that *Kotha* is surrounded by house, kirana shop, temple, *Jhiriya* and it is not an isolated place. Thus, the story of prosecution is totally improbable.

17. As per the statement of father (PW-8), the floor of *Kotha* is uneven and is made of 'muram' and stones. He, in para-8 of his deposition admitted that if somebody is thrown on the floor, he will be injured and even blood may come out of such injury. The prosecutrix in para-12 also clearly admitted about the uneven floor of *Kotha* and accepted the suggestion that if somebody is thrown on the floor he will receive injury. In para-13 of her deposition, she deposed that when appellant thrown her to the floor of *Kotha,* she suffered injuries and this was informed to the doctor during her MLC. Her back and

buttocks were injured and because of sexual assault, she suffered injury even on her private part.

18. Learned counsel for the appellant then placed heavy reliance on the statement of Dr. Chetna Bandre (PW-11). The doctor deposed that she examined the victim on 27.12.2012 at around 7:20 PM. She was walking in a normal way and was fully alert and conscious. During external examination, no injuries were found on the person of the victim including her face. In internal examination also no injuries were found by the said doctor. In para-8 of the cross-examination, she deposed that there were no swelling or bleeding on any body part of the victim. Para-9 of the statement of Dr. Chetna Bandre (PW-11) was highlighted to show that the clothes of victim were sealed by her and in those clothes also there were no sign of any semen or any other spot.

19. Ordinarily, the ocular evidence takes precedence over medical evidence submits Shri Daniel but the exception is that when medical evidence clearly proves that ocular evidence is not trustworthy, it deserves to be discarded. So far delay in lodging the FIR is concerned, it is submitted that independent persons gathered knowledge about the incident immediately after the incident. Thus, it cannot be presumed that family delayed the lodging of FIR because they were either shy or hesitant that society will come to know about the incident. This plea ordinarily available in such cases, is totally unavailable in the instant case where neighbour and friends came to know about the incident almost instantaneously. The distance between the victim's village and Seoni is 30 Km. from Seoni to *Kamta* the family of the victim travelled about 15 Kms. and from *Kamta* they came to their own village from

where they again travelled 25 Kms. to reach Police Station Bandol. Thus, they had some conveyance and the singular excuse put forth for delay in lodging FIR cannot be accepted.

20. The geographical location of *Kotha* and aforesaid evidence makes it clear that the story of prosecution has no legs to stand submits Shri Danial. It is argued that if that being the position and incident has not taken place, the ancillary question would be why appellant was falsely implicated. It is urged that in order to show false implication, the appellant could establish before the Court below by cross-examination of several prosecution witnesses that there existed factional and personal animosity which became the operative reason to arraign the appellant.

21. To elaborate, it is submitted that the appellant was at the time of incident, employee of Yal Singh Kurmi who belongs to *'Kurmi'* community whereas Sanat Mishra hails from '*Brahmin*' community. Victim (PW-3) her mother and father (PW-8) admitted these facts and candidly deposed that there had been animosity between '*Brahmin*' and '*Kurmi*' community. Pertinently, the victim (PW-3) and Surensh Master (PW-9) admitted that at the relevant time, the appellant was employee of Arvind Sanodya. In the house of Arvind Sanodya, the nephew of victim's parents namely Kholu used to work. Kholu, the nephew of PW-4 committed a theft in the house of Arvind Sanodya and present appellant caught him red handed. Arvind Sanodya and appellant had beaten him because of the theft committed by him. This incident had taken place in near past which is admitted by PW-3 and PW-8. The

aforesaid witnesses clearly admitted that there was a clear animosity between appellant and parents of the victim. This factional dispute and personal animosity became the foundation to arraign the appellant submits learned counsel for the appellant.

22. In order to substantiate the argument that appellant has been falsely implicated, heavy reliance is placed on the statement of Suresh Master (PW-9). This witness resides right in front of *Kotha* where incident had taken place. He being an Assistant Teacher in Government Primary School, Singhodi made it clear that the villagers normally informs him about any incident which takes place in the village. On the date of incident, the mother of victim (PW-4) informed him that Dinesh assaulted his daughter and, therefore, she is going to lodge a report in Police Station. The victim and her father were also accompanying the mother (PW-4). Para-11 of his deposition is pressed into service wherein he stated that Dinesh Yadav was working with Yal Singh Kurmi. Victim and her mother informed him that when victim took her goat for grazing to Yal Singh's farm, the appellant abused the victim because her goat was grazing in the ground of his employer. The parents of victim were annoyed because of such abuse and assault by the appellant. Suresh Master (PW-9) stated that he tried to explain that such incidents are normal and must be ignored but when parents of prosecutrix did not agree with him, he said that report may be lodged. The statement of this independent witness clearly shows that a trivial incident of abuse and assault took an ugly shape when it was given the color of rape by victim and her family members.

23. The statements of mother (PW-4), father (PW-8) of victim and the statement of Suresh Master (PW-9) are relied upon to submit that the father and victim were not ready to lodge the report but under the pressure and threat of mother and brother of victim, the report/complaint was ultimately lodged. Suresh Master (PW-9) further deposed that any conversation which takes place inside *Kotha* can be heard by him at his house situated in front of *Kotha.*

24. To bolster the aforesaid, Para-12 of statement of father (PW-8) of victim is relied upon where he in clear terms, admitted that he was not inclined to lodge a report but her wife was very keen to lodge the FIR. The wife and son threatened and even assaulted the victim in order to pressurize her to lodge the report. This backdrop clearly shows that appellant has been falsely arraigned. The statement of Chutniya Bai (PW-6) and Kamal Singh (PW-7) are also relied upon. The said witnesses turned hostile. However, statement of Kamal Singh (PW-7), husband of Chutniya Bai throws light and is in tune with the statement of other prosecution witnesses that nephew of victim's mother namely Kholu was caught red handed while stealing soyabean by appellant and he was beaten by Arvind Sanodya and the present appellant. This statement was used for another purpose that victim was not inclined to lodge police report and it was threatening and beating by her mother and brother which resulted into lodging of such report. This witness also deposed about animosity between '*Brahmin*' and '*Kurmi*' community. The judgment of **Supreme Court in 1996 (10) SCC 360 State of U.P. vs. Ramesh Prasad Mishra & another** is referred to show that evidence of hostile witness can be used by the defence.

25. The FSL report (Ex.P/27) although *prima facie* appears to be against appellant, a minute scrutiny of the entire process shows that the sample collection process is polluted and untrustworthy. The incident had taken place on 26.12.2012 and FIR was admittedly lodged on 27.12.2012. However, sample of victim is shown to have been collected on 26.12.2012 whereas the I.O. Shri Bahuguna collected the sample of appellant on 27.12.2012 which is evident from the document (Ex.P/20) dated 31.12.2012. This document (Ex.P/20) shows that opinion asked from FSL was whether in articles A, B, C, D, E and F there are spermatozoa. It is submitted that the seizure of victim's articles/samples a day before lodging report makes the collection of sample and entire process based thereupon as highly doubtful.

26. By placing reliance on Sections 53-A and Section 164-A of Cr.P.C., it is submitted that these provisions came into being on 23.06.2006. Section 53-A is for the accused whereas Section 164-A is for the victim. The purpose of insertion of these provisions is to make the DNA test as mandatory. If samples were collected by the prosecution, nothing prevented them to send the sample for DNA profiling/examination. Non-conduct of DNA test creates dent on the prosecution story as par **2011 (7) SCC 130 Krishan Kumar Malik vs. State of Haryana.**

27. The FSL report cannot be relied upon for yet another reason submits Shri Danial on the strength of question No.72 asked under Section 313 of Cr.P.C. to the accused. It is submitted that question is ambiguous, lacks material details and particulars and therefore, cannot

pass the test laid down by Supreme Court in **2007 (12) SCC 341 (Ajay Singh vs. State of Maharashtra).**

28. Lastly, by placing reliance on **2020 (3) SCC 443 (Santosh Prasad alias Santosh Kumar vs. State of Bihar),** Shri Daniel submits that on facts also instant case has great similarity and appellant was erroneously held guilty by the Court below.

29. Section 114(g) of Indian Evidence Act and Section 53-A of the Cr.P.C. were conjointly read and projected to show that when DNA report could have been obtained but respondents failed to obtain and produce such material, an adverse inference may be drawn against them.

30. The conviction can certainly be recorded solely on the basis of statement of victim or of a solitary witness but such statement must be of a sterling witness, submits learned counsel for the appellant on the strength of **Rai Sandeep v. State (NCT of Delhi), (2012) 8 SCC 21.** It is submitted that the victim in the instant case cannot be said to be such a sterling witness and, therefore, conviction based on such statement deserves to be jettisoned. **Tameezuddin v. State (NCT of Delhi), (2009) 15 SCC 566** is relied upon to submit that improbable story which belies the logic must be discarded.

31. Another judgment of Supreme Court in **Dola v. State of Odisha, (2018) 18 SCC 695** is relied upon to show that the improbable story cannot become reason to convict an accused. The nature of medical evidence discussed in this judgment is also pressed into service.

32. The need of supporting evidence and corroboration is projected on the strength of **Narayan v. State of Rajasthan, (2007) 6 SCC 465.** The

delay in lodging the FIR is hit by the principles laid down in **(2007) 2 SCC 170 (Ramdas and others vs. State of Maharashtra).**

33. Shri Danial submits that he will be failing in his duty, if he does not deal with the effect and impact of Section 29 and Section 30 of the Protection of Children from Sexual Offence Act 2012. It is submitted that Section 30 (2) is almost *pari materia* to Section 35 of Narcotic Drugs and Psychotropic Substance Act, 1985. It is submitted that such presumptions statutorily created needs to be carefully examined. Reliance is placed on **Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513** and **Trilok Chand Jain v. State of Delhi, (1975) 4 SCC 761.** Furthermore, it is submitted that there cannot be any legal presumption without establishing the foundational fact.

It is submitted that since foundational facts could not be established by the prosecution and this aspect was clearly exposed by the appellant while cross examining the prosecution witnesses, the presumption created under Section 29 and 30 of the Protection of Children from Sexual Offence Act 2012 is of no assistance to the prosecution. He placed reliance on the Division Bench Judgments of Calcutta High Court reported in **2021 SCC Online Cal 2007, (Swapan Mondal Vs. State),** Single Bench Judgment of High Court of Bombay (at Nagpur) reported in **2018 SCC Online Bom 1315, (Ramprasad Vs. State of Maharashtra)**, Division Bench judgment of Gauhati High Court reported in **2019 SCC Online Gau 5947 (Latu Das Vs. State of Assam)** and Single Bench Judgment of Kerala High Court reported in **2020 SCC Online Ker. 4956, (Justin Vs. Union of India, Represented by the Secretary, Ministry of Law And Justice and others)** Shri Danial

submits that said judgment of Kerala High Court was considered by the Supreme Court in **(2022) 10 SCC 321 .**

34. In the light of aforesaid arguments and judgments, it is contended that the Court below has committed an error of facts and law in convicting the appellant.

Contention of State :-

35. Shri Ajay Shukla, learned Government Advocate for the State supported the impugned judgment and placed reliance on the site map (Ex.P/8). By taking this Court to the said site map, it is submitted that place of incident was a covered area which is evident from the map which indicates that there were two doors marked as 'D-1' and 'D-2' in the *Kotha*. Thus, statement of prosecutrix (PW-3) is trustworthy that appellant closed the *Kotha* from inside by taking assistance from one of the door.

36. Shri Shukla, learned Government Advocate placed reliance on the statement of victim (PW-3), her brother (PW-5) and parents (PW-4 & PW-8) respectively. It is submitted that all the witnesses in one voice deposed about the nature of rape. The only embellishment in the statement of father (PW-8) is that brother of victim (PW-5) witnessed the incident of sexual assault. Even if that portion is disbelieved and ignored, the rest of their statements inspire confidence.

37. The F.I.R. was lodged on the next day of incident but the delay is properly explained by the victim and her family members. In cases of sexual assault related to POCSO Act, the Supreme Court has taken a different view regarding delay in lodging the FIR. He placed reliance on **(2010) 5 SCC 445 (Santhosh Moolya v. State of Karnataka).**

38. Lastly, learned Government Advocate placed reliance on the findings of Court below from para-42 onwards and urged that the appreciation of evidence by the Court below is correct and does not warrant any interference from this Court. The Patwari (PW-10) also supported the spot map (Ex.P/8) prepared by him. Thus, incident of rape which has taken place in a covered area cannot be doubted merely because medical evidence does not support the case of the prosecution.

Rejoinder Submissions :-

39. Shri Daniel, learned counsel for the appellant submits that site map (Ex.P/8) prepared by Patwari is not the only site map. Indeed, another site map (Ex.P/7) prepared by Police, needs to be examined and compared with the other site map Ex.P/8. Interestingly, both the site maps were proved by victim and his brother (PW-5). Shri Daniel further submits that in this site map, the position of Shiv Temple and residence in-front of *Kotha* are different. In Patwari map, just in front of *Kotha,* the house of Sharad S/o Bhagwan Prasad is mentioned. As per the map prepared by police, Sanat Mishra's house is adjacent to Shiv temple and in front of *Kotha.* In the site map prepared by the police, no door in the *Kotha* is visible. The site maps, at best, are known as non-substantive piece of evidence which by no stretch of imagination can override or dilute the substantive piece of evidence i.e. the statement of PW-4 and PW-8, who in clear terms admitted that there exist no door in the *Kotha* if viewed from the Shiv Temple. He placed reliance on **1920 SCC OnLine Oudh JC 125 (Barkau Singh and others vs. Emperor)** and urged that site maps can be treated to be a fringed or embroidery to the story and cannot replace and substitute the substantive evidence.

40. Parties confined their arguments to the extent indicated above. The Government counsel has filed written submissions as well.

41. We have heard the parties at length and perused the record.

Findings :

Sensitivity of matter/test :

42. The first and foremost contention of learned counsel for the appellant was that merely because the matter relates to sexual assault on a minor, the appellant cannot be mechanically held guilty. Unless the legal test and requisite evidence is available, appellant cannot be held guilty on the basis of sensitivity of matter alone. We find no difficulty in accepting this argument which is based on the judgment of Supreme Court in the case of **Raju and others (supra)**. Similarly, in **Tameezuddin (supra)** the Apex Court opined as under :

> "9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that the story is indeed improbable."
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> **(Emphasis Supplied)**

Delay in lodging F.I.R :

43. The incident had taken place at around 11:00 AM on 26.12.2012 whereas F.I.R was lodged on 27.12.2012 at 3:00 PM. Learned counsel for the appellant placed reliance on the judgment of Supreme Court in **Ramdas and others (supra)** whereas the Government counsel placed

reliance on the written submissions and on the judgments of Apex Court in **(1996) 2 SCC 384 (State of Punjab v. Gurmit Singh), (2010) 1 SCC 68 (Sohan Singh v. State of Bihar) and (2010) 5 SCC 445 (Santhosh Moolya v. State of Karnataka).**

44. We have carefully gone through the aforesaid judgments of the Apex Court. There is no conflict of view in the said judgments delivered by different Benches. Indeed, the common thread of principle running through the said cases is that in most of the cases of sexual assault, the family does not lodge the report instantaneously. The family discuss among themselves about the impact of such incident as also the consequences if matter is taken to the Police and criminal action is set into motion. In this process, they sometime consult the family, friends, well-wishers etc. This process consumes time and is not fatal to the prosecution when delay is not enormous and it is based on justifiable and *bonafide* reasons. In the instant case, the victim alongwith her parents went to the house of Sanat Mishra and from there went to another village i.e. Kanta to meet another family member in order to decide whether they should move forward for lodging report or not. The delay is neither inordinate nor unjustifiable. Thus, we are unable to persuade ourselves that FIR was lodged with an unexplained and inordinate delay. Thus, this argument deserves to be rejected.

<u>Improbability of the incident</u> :

45. The eyebrows are raised on the nature of incident by projecting that the incident of sexual assault has taken place in the broad day light at 11:00 AM in '*Kotha*' which is in a densely populated area. By showing the statements of mother and father of victim, (PW-4) and

(PW-8) respectively, it was established that- (a) adjacent to '*Kotha*' there exists a kirana shop, (b) a '*Pulia*' in which people used to sit for whole day and gossip amongst themselves, (c) a '*Jhiriya*' where people of same village and other nearby villages continuously come and take bath, (d) a 'Shiv Mandir' from where as per testimony of both the parents the entire '*Kotha*' was visible and both the witnesses deposed that from the side of 'Shiv Mandir', there was no door in the '*Kotha*', (e) it was also admitted by parents of the victim that the cattle were taken for grazing during early morning and by 7-8 AM, (f) the '*Kotha*' needs to be cleaned by removing the cow dung. The cattle come back to '*Kotha*' by 10-11 AM. The cumulative effect of these is that '*Kotha*' is situated adjacent to aforesaid places where movement of public continues for whole day.

46. The testimony of prosecutrix was questioned on yet another ground by contending that she deposed that she suffered injuries because she was thrown on the rough floor of '*Kotha*' by the appellant. However, there no corresponding injuries were found on the body of the victim. In fact, no internal injuries were found on her body. The probability factor is certainly important and it is not safe to accept the statement of victim alone as a gospel truth, unless her statement is of 'sterling quality'.

Sterling witness :-

47. The Apex Court in **Rai Sandeep (supra)** opined about the quality of sterling witness and held as under :

> **"22.** In our considered opinion, the **"sterling witness"** should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness."
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> **(Emphasis Supplied)**

48. If the statement of victim is carefully and minutely examined, it will be clear that her testimony could not be supported by medical evidence. If a girl of 13-14 years was raped by forcibly throwing her on a rough and uneven surface, she would have certainly received some injuries. In a case of this nature, there should be some medical evidence forthcoming to establish the case of the prosecution. The

Apex Court in **Dola Alias Dolagobinda Pradhan and another (supra)** held as under :

> "If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence, as a general rule, **there is no reason to insist on corroboration, except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming**."
>
> **(Emphasis Supplied)**

In the same judgment in Para 13, it was held thus :

> **13.** From the aforementioned admissions of the victim, it is clear that the scene of offence is a busy area wherein a number of buses ply, many shops and residential houses exist, and a school is also situated. The scene of offence is near a circle wherein buses pass through frequently. The business in that area generally ends only at 10.00 p.m., which means that the area in question is a very busy area till 10.00 p.m. According to the prosecution, both the accused persons lifted the victim forcibly from the road, sometime between 7.00 and 8.00 p.m. and took her from that busy area and committed the offence of rape on her. Such a story put forth by the prosecution which prima facie appears to be improbable needs to be proved by the prosecution beyond reasonable doubt. Though both the courts concurrently concluded against the accused persons, we, in order to satisfy our conscience, have gone through the evidence on record.
>
> **(Emphasis Supplied)**

The Apex Court disbelieved the story of prosecution because area where incident had allegedly taken place was a busy area and it

could not be established by credible evidence that incident had actually taken place.

49. Interestingly, in below mentioned paras of same judgment, the Apex Court again considered the medical evidence and injury marks on the victim. The relevant paras are reproduced as under :

> "**15.** Curiously, the victim has not sustained any injury except some bruises on her cheeks. Her clothes were not even soiled with mud. In her cross-examination, she admitted that there was a tussle at the time of the alleged incident, and that she tried to save herself. She also stated that both the accused persons physically lifted her from the spot, and her bangles had been broken, by which she had sustained bleeding injuries on her hands. Furthermore, she said that she also sustained marks of violence on her hands. She did not sustain any injury on her knee, breasts and buttocks. She stated that she has no acquaintance with the accused persons and she did not have any kind of dealings with them. She further admitted that she had worn eight bangles on each of her hands and all her bangles on the right hand were broken and only one bangle of the left hand remained unbroken, and that all the bangles were broken at the spot of offence.
>
> **16.** Although the prosecutrix admitted that she sustained bleeding injuries on her hand because of the shattering of eight bangles worn by her on her right hand and seven bangles on her left hand, and had marks of violence present on her body, the medical records do not support the said version. The report of the medical examination is at Ext. 4. It is clearly mentioned in the said report that there is a bruise mark measuring half a centimetre, which can be caused by a hard and sharp object, on the right cheek. No other mark of injury was seen anywhere on the body. There is no injury on the

breasts, there is no internal injury on any part of the body and no injury was found on the vulva, pelvis and vagina. There are no signs of injury on the thighs as well. Except for one bruise on cheek which measures half a centimetre, no other injury was found on the victim and the same is clear from the medical report (Ext. 4).

17. Thus, medical evidence does not support the case of the prosecution. The doctor (PW 4), who examined the victim, however, has deposed that there were four bruises, each measuring half a centimetre on the left cheek and four bruises each measuring half a centimetre on the right cheek. The doctor opined that the injuries are simple in nature and might have been caused by a hard and sharp object. The doctor did not find any other injury on the body of the victim. There was no injury on the back side of the body of the victim. Although the doctor has deposed in the examination-in-chief that the injuries could have been caused by human bite, he has admitted in his cross-examination that he has not mentioned the shape of the injuries in his report. He further admitted that a bruise can be caused by a blunt object like stone, wood, fist-blow, etc. and can also be caused by a fall. While a bruise is always accompanied by swelling, an abrasion caused by a human bite is elliptical or circular in form, and is represented by separated marks corresponding to the teeth of the upper and lower jaw. If we were to believe that the abrasion was caused by a bite, the same should have been elliptical or circular in form. The said material is not forthcoming from the records.

(Emphasis Supplied)

50. Dr. Chetna Bandre (PW-11) examined the prosecutrix on 27.12.2012 and clearly opined that there was no injury whatsoever as

per internal and external examination of the prosecutrix. She also deposed that the clothes recovered from the victim did not have any sign of any semen or any other spot.

51. A cumulative reading of statement of father (PW-8), victim (PW-3) and mother (PW-4) leaves no room for any doubt that floor of '*Kotha*' was made of '*Muram*' and stones. All the above witnesses candidly admitted that if somebody is thrown on such floor, he will undoubtedly receive injuries. No injury marks were found on the person of the victim.

52. We are not oblivious of legal position that ocular evidence alone can be reason to record conviction. However, as noticed above, the said evidence must be of unimpeachable quality or in other words of a 'sterling quality'. If there exists a serious contradiction between medical evidence and oral evidence and medical evidence makes oral testimony as improbable, ocular evidence can very well be disbelieved. The Apex Court in **2021 SCC OnLine SC 493 (Pruthiviraj Jayantibhai Vanol vs. Dinesh Dayabhai Vala and Others)** held as under :

> **"18. Ocular evidence is considered the best evidence unless there are reasons to doubt it. The evidence of PW-2 and PW-10 is unimpeachable. It is only in a case where there is a gross contradiction between medical evidence and oral evidence, and the medical evidence makes the ocular testimony improbable and rules out all possibility of ocular evidence being true, the ocular evidence may be disbelieved."**
>
> **(Emphasis Supplied)**

53. To summarize, we are inclined to hold that considering the geographical location of '*Kotha*', the availability of people all around at 11:00 AM and absence of injury marks on the body of victim makes the case of prosecution highly doubtful and it is totally unsafe to give stamp of approval to the conviction in absence of any corroboration in the facts and circumstances of the present case. In other words, the statement of prosecutrix alone does not make the case of prosecution as a foolproof case. We are unable to countenance the judgment of conviction based on the statements of victim (PW-3), mother (PW-4) and father (PW-8).

Rivalry/Animosity :

54. Learned counsel for the appellant argued that there were 'factional' as well as 'personal' animosity against the appellant. Pertinently, the Court below disbelieved it by holding that so far personal animosity is concerned, it is not shown to be of proximate past. We deem it proper to dwell with this aspect.

55. So far factional dispute/enmity is concerned, victim (PW-3), mother (PW-4) and father (PW-8) admitted that there has been factional enmity between '*Brahmin*' and '*Kurmi*' community. Most importantly, the victim (PW-3) and independent witness Suresh Master (PW-9) admitted that at the relevant time, appellant was employee of Yal Singh Kurmi. A conjoint reading of statements of aforesaid witnesses shows that there existed a factional dispute between said two communities and appellant was working with a person who belongs to one such community i.e. '*Kurmi*' community.

56. So far personal enmity of appellant with the family of victim is concerned, it needs to be unfolded. Firstly, a suggestion was given that the appellant was taking care of agricultural field of his employer Yal Singh Kurmi. The victim's goat entered the agricultural field of Yal Singh Kurmi and started grazing the field. The appellant objected to it and in the course of said process, abused and assaulted the victim. This incident triggered the entire matter and a false report, as an afterthought, relating to sexual assault was lodged. The suggestion so given to the victim and her parents was not accepted. However, an independent witness Suresh Master (PW-9) deposed that when he met with the family of victim they informed that appellant misbehaved with the victim due to the said incident of grazing by the goat of victim. Suresh Master (PW-9) tried to explain that the incident is trivial in nature and no report needs to be lodged but victim's mother (PW-4) and brother (PW-5) did not agree. This statement of prosecution witness cannot be discarded.

57. We find substance in the argument of learned counsel for the appellant that the statement of Suresh Master (PW-9) casts a shadow of doubt on the story of prosecution because parents of victim i.e mother (PW-4) and father (PW-8) admitted that the nephew of (PW-4) was working with erstwhile employer of appellant i.e. Arvind Sanodya and appellant caught him red-handed while stealing some material and assaulted him. This incident as per victim (PW-3) and father (PW-8) had taken place. Thus, the appellant by cross-examining the prosecution witnesses could establish with utmost clarity that there existed a dispute / animosity between him and mother / family of

victim. The Court below, in our considered opinion, has not properly appreciated the said evidence. The enmity, no doubt is a double edged sword. In cases where factum of enmity is established with utmost clarity and precision, it cannot be ignored. In the instant case, the appellant could establish it with necessary accuracy and precision that there existed an animosity between him and family of the victim. In this backdrop, the appellant could not have been held guilty unless the statement of prosecutrix is of 'sterling quality'. At the cost of repetition, in our opinion, the medical evidence did not support the story of prosecution. The father of victim (PW-8) also admitted that he was not inclined to lodge the Police report but his wife and son compelled him to lodge the report.

Statements of PW-7 and PW-8 :

58. This couple can be called as independent witness. Kamal Singh (PW-7)'s statement corroborates the same story that Kholu nephew of (PW-4) (mother of victim) was caught red-handed while stealing *Soyabean* by appellant and he was beaten for such theft by Arvind Sanodya and present appellant. In view of this corroboration, a serious dent is caused to the story of prosecution. Shri Daniel rightly relied on the judgment of Supreme Court in the case of **Ramesh Prasad Mishra (supra)** to show that the evidence of hostile witness can be used for some purpose. It is apt to consider another judgment on this point wherein it was held that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge to consider the facts

in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be credit-worthy and act upon. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto. (**See: (1976) 1 SCC 727 (Sat Paul Vs. Delhi Administration**). We are inclined to hold that animosity relating to incident of theft by Kholu which was noticed by appellant is duly established by testimony of PW-7 and PW-8.

FSL Report:

59. The criticism on the findings based on FSL report by the appellant has substantial force. The said FSL report cannot be a reason to hold the appellant as guilty because (a) as per question No. 72 of the statement recorded under Section 313 of Cr.P.C., the incriminating material was not confronted with necessary clarity. Reference may be made to the judgment of Supreme Court in **Ajay Singh (supra),** the relevant portion reads as under :-

> **"11.** So far as the prosecution case that kerosene was found on the accused's dress is concerned, it is to be noted that no question in this regard was put to the accused while he was examined under Section 313 of the Code.

12. The purpose of Section 313 of the Code is set out in its opening words — "for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him". In *Hate Singh Bhagat Singh* v. *State of Madhya Bharat* [1951 SCC 1060 : AIR 1953 SC 468] it has been laid down by Bose, J. (AIR p. 469, para 8) that the statements of the accused persons recorded under Section 313 of the Code "are among the most important matters to be considered at the trial". It was pointed out that : (AIR p. 470, para 8)

> "*8*. … The statements of the accused recorded by the committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box [and that] they have to be received in evidence and treated as evidence and be duly considered at the trial."

This position remains unaltered even after the insertion of Section 315 in the Code and any statement under Section 313 has to be considered in the same way as if Section 315 is not there.

13. The object of examination under this section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus.

14. The word "generally" in sub-section (1)(*b*) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular

> part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.
>
> **(Emphasis Supplied)**

60. The same *ratio decidendi* is followed in **AIR 1992 SC 2100 (State of Maharashtra Vs. Sukhdev Singh), AIR 2010 SC 2839 (Ashok Kumar Vs. State of Haryana) and AIR 2010 SC 3570 (Sanatan Naskar Vs. State of W.B.).**

61. In **AIR 2005 SC 3114 (State of Punjab vs. Sawaran Singh)**, it was held as under:

> "Generally, composite questions shall not be asked to accused bundling so many facts together. **Questions must be such that any reasonable person in the position of the accused may be in a position to give rational explanation to the questions as had been asked**. There shall not be failure of justice on account of an unfair trial."
>
> **(Emphasis Supplied)**

62. A Division Bench of Gauhati High Court in **2007 Cr.L.J. 3395 State of Nagaland Vs. Lipok Ao and others** opined that Section 313 of Cr.P.C. is statutory provision which embodies the fundamental principle of a fair trial based on the maxim *audi alteram partem*.

63. The question No.72 asked under Section 313 of Cr.P.C. reads as under :

> "प्र. 72– इसी साक्षी का कहना है कि एफ0एस0एल0 सागर से प्राप्त रिपोर्ट प्र0पी027 है?"

64. The question is ambiguous and does not throw sufficient light so that accused can understand about incriminating portion of the said report. We are constraint to observe that this question was framed in a very stereotype and mechanical manner. Section 313 of Cr.P.C. is codification of principles of natural justice in a procedural statute. The court should eschew the practice of preparing questions in a cursory and mechanical manner. The question so put to the accused must be specific and pregnant with necessary clarity and elaboration. It cannot be forgotten that the root cause and basic purpose for putting incriminating material to the accused is to provide him an adequate, sufficient and reasonable opportunity to give explanation. No cryptic question or a question framed for namesake can substitute the requirement of principles of natural justice. We are, therefore, of the opinion that the Court below has failed to confront the incriminating portion of FSL report to the appellant with necessary clarity.

65. The FSL report can be disbelieved for yet another reason. As rightly pointed out by learned counsel for the appellant that Shri Siddharth Bahuguna (I.O.) (PW-16) collected the sample of appellant

on 27.12.2012 whereas the samples of victim were shown to have been collected on 26.12.2012. Indisputably, the complaint in police station was lodged on 27.12.2012 and hence on 26.12.2012 the prosecution had no clue and knowledge about the incident. Collecting the samples from victim a day before it is like putting a cart before the horse which is an impossible act. This discrepancy also creates doubt on the collection process of sample and for this reason also, we are unable to countenance the impugned judgment.

DNA sample :

66. Section 53-A and 164-A of Cr.P.C. makes it obligatory for the prosecution to undertake the exercise of DNA examination. However, we are unable to hold that if the DNA test was not conducted, as a rule of thumb the prosecution story stands vitiated. It depends on the facts and circumstances of each case. In the case of **Krishan Kumar Malik (supra),** no such principle of law was laid down that non-conduction of DNA examination will vitiate the case of prosecution in all circumstances. For the same reason, we are unable to hold that combined reading of Section 114(g) of Evidence Act and Section 53(A) Cr.P.C. should lead us to draw adverse inference against the prosecution.

Multiple site maps :

67. In the instant case, two site maps were prepared, one by Patwari (Ex.P-8) and another by the Investigating Officer (Ex.P-7). In **AIR 2004 SC 124 (Shingara Singh Vs. State of Haryana),** it was held that the essential features should be shown in the site plan and omission to

show them in the site plan cannot be said to be a mere lapse on the part of investigating agency.

68. In the instant case, if both the aforesaid site maps are examined in *juxtaposition*, it will be crystal clear that both are not identical. Interestingly, both the site maps were prepared at the instance of victim (PW-3) and her brother (PW-5). For example, location of '*Jhiriya*' is important in the instant case because indisputably the large number of people of same and other villages used to visit that '*Jhiriya*' for medicinal purpose and case of defence is that '*Jhiriya*' is adjacent to the '*Kotha*' where incident had taken place. However, in Ex.P-7 prepared by prosecution, there is no mention about '*Jhiriya*'. The location of *Shiv Temple* is also not in similar place if both the maps are compared. The site map cannot be treated as a substantive piece of evidence. In view of clear provision of Section 162 of Cr.P.C., the site map is nothing more than a statement made to the police during investigation. (See: **AIR 1962 SC 399 (Tori Singh Vs. State of Uttar Pradesh)**. We have already discussed in sufficient detail about the geographical proximity of '*Jhiriya*', *Shiv Temple*, *Kirana Store, Pulia* and houses of Sanat Mishra and Suresh Master. Both the maps do not reflect similar position of these places and considering the marked difference or absence of certain particulars, site maps in our opinion, will not improve the case of the prosecution.

Sections 29 & 30 of POCSO Act:

69. Before dealing with the argument of Shri Daniel relating to effect and impact of presumption clause ingrained in Sections 29 and 30 of POCSO Act, it is profitable to quote relevant portion of

judgments of various High Courts on this point. The Division Bench of Calcutta High Court in **Swapan Mondal (supra)** held as under :

> "**102.** The common thread running through these high authorities is that a persuasive burden of proof under a statute requires the accused *to prove the facts necessary to be proved to rebut the presumption under that statute (and not merely lead evidence).* It is important to note also that the provisions that have been construed and interpreted in the aforementioned cases *required the prosecution to prove a certain fact before a presumption can kick in and the burden of proof is reversed.* This only makes sense for if the mere factum of a person being charged or prosecuted could be deemed as requiring the court to presume his commission of an offence, then Viscount Sankey's golden thread of presuming innocence before guilt in criminal jurisprudence would certainly be lost. Finally, it is also seen that a presumption under the aforesaid statutes is a *presumption by operation of law and not a presumption of fact*, for the presumption kicks in not as a matter of logic or a normal understanding of cause and effect in human nature, but as a consequence of the law deeming that proof of one fact shall make the court presume the existence of another.
>
> **103.** However, the standard of proof required, as revealed by the authorities referred to above to prove the necessary facts when the persuasive onus of proof is on the accused is on a balance of probabilities. It is not the same as that of the prosecution, unless the statute states as such, for example, the clarification in Section 35(2) of the Narcotic Drugs and Psychotropic Substances Act, 1985 explicitly states that the reverse burden of proof contained therein has to be discharged by the accused beyond reasonable doubt, just like the prosecution in a criminal case:
>
> > "***35. Presumption of culpable mental state***.- *(1) In any prosecution for an offence under this Act, which requires a culpable mental state of the*

accused, the 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.

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

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

104. However, even then the Supreme Court has blunted the full force of this clarification in *Abdul Rashid Ibrahim Mansuri* v. *State of Gujarat*, reported in (2000) 2 SCC 513 : AIR 2000 SC 821, where Thomas, J. (giving the judgment of a three-Judge Bench of the Supreme Court) stated (at paragraph 22 of the report):

"*22. The burden of proof cast on the accused under Section 35 can be discharged through different modes. **One** is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence.*

In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the Court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence."

105. On the conspectus of authorities, it is clear to me that Sections 29 and 30 of the POCSO Act certainly place a persuasive burden on the accused to show that he did not possess the requisite culpable mental state for the offence for which he is prosecuted. The accused, once such presumption bites, cannot merely adduce evidence to raise an issue that he may not have had the culpable mental state, he has to prove that he did not have the culpable mental state in accordance with the clear words of the statute. The presumption is not the natural or logical consequence of the conduct of human affairs, but a declaration made by law. Moreover, sub-section 2 of Section 30 much like the Explanation found in Section 35(2) of the N.D.P.S. Act states that the standard of proof required to rebut the presumption therein is required to be beyond reasonable doubt.

106. But to construe such a statute strictly by interpreting Section 30 to truly require proof beyond reasonable doubt in a manner that is exactly like the prosecution in a normal criminal case on the part of the accused would certainly fall foul of the presumption of innocence that is ingrained in our legal system. This would be so because requiring proof that a person is not of guilty mind from that person itself would be presuming guilt rather than innocence. This would be violative of the nearly-sacrosanct cannon of construction which states that Parliament is presumed to respect the rule of law and the human rights of individuals especially in light of *Noor Aga* (supra).

107. The same point would apply to the fact that Sections 29 and 30 do not require establishment of a prior fact by the prosecution for the presumption under it to kick in. To construe this literally would be violative of the presumption that Parliament respects individual rights."

(Emphasis Supplied)

70. The Single Bench of Bombay High Court (at Nagpur) in the case of **Ramprasad (supra)** held thus:

"18. Once such a conclusion is arrived at, the presumption under Section 29 of the POCSO Act comes into operation and it has to be presumed that the acts alleged against the appellant (accused) were indeed committed by him until the contrary stood proved. Therefore, the burden becomes heavier on the defence in such cases. It is required to be examined whether the evidence on record indicated that the appellant (accused) was able to rebut the presumption to demonstrate that the prosecution case was not made out. The presumption can be rebutted by showing that on preponderance of probabilities the defence raised by the accused was made out.

20. The abovequoted provision mandates that unless the accused proves to the contrary, it would be presumed that he has committed offences under the POCSO Act for which he is prosecuted. But, there can be no doubt about the proposition that no presumption is absolute and that every presumption is rebuttable. A statutory presumption of this nature can be rebutted by the accused on the touchstone of preponderance of probabilities. In the case of *Babu* v. *State of Kerala* [(2010) 9 SCC 189], the Hon'ble Supreme Court, while examining as to in what manner presumption under a statute could operate against the accused has held as follows:—

> *27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like Negotiable*

> *Instruments Act, 1881; Prevention of Corruption Act, 1988; and Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those Statutes are found to be fulfilled and shift the burden of proof of innocence on the accused.* ***However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact****.*

21. In a recent judgment also, in the face of presumption under Section 29 of the POCSO Act, this Court in *Amol Dudhram Barsagade* v. *State of Maharashtra*, [**Criminal Appeal No. 600/2017 Decided on 23.04.2018**] (Nagpur Bench), held as follows:—

> "*5. The learned Additional Public Prosecutor Shri. S.S. Doifode would strenuously contend that the statutory presumption under Section 29 of the POCSO Act is absolute. The date of birth of the victim 12.10.2001 is duly proved, and is indeed not challenged by the accused, and the victim, therefore, was a child within the meaning of Section 2(d) of the POCSO Act, is the submission. The submission that the statutory presumption under Section 29 of the POCSO Act is absolute, must be rejected, if the suggestion is that even if foundational facts are not established, the prosecution can invoke the statutory presumption. Such an interpretation of Section 29 of the POCSO Act would render the said provision vulnerable to the vice of unconstitutionality.* ***The statutory presumption would stand activated only if the prosecution proves the foundational facts and then, even if the statutory presumption is activated, the burden on the accused is not to rebut the***

> ***presumption beyond reasonable doubt. Suffice it if the accused is in a position to create a serious doubt about the veracity of the prosecution case or the accused brings on record material to render the prosecution version highly improbable."***
>
> **(Emphasis Supplied)**

71. The Division Bench of Gauhati High Court in **Latu Das (supra)** ruled that :

> **25.** However, one must bear in mind that presumption is not in itself evidence, it is only inference of fact drawn from other known or proved facts; and as such, in order to draw a presumption, statutory or otherwise, **there must be existence of proved facts**, from which a presumption can be raised. Therefore, **presumption under section 29 of the POCSO Act, does not absolve the prosecution from its usual burden to prove the guilt of the accused beyond reasonable doubt. It only lessen its burden to some extent and put a corresponding burden on the accused. Initial burden in a criminal case is always on the prosecution to bring on record reasonable evidence and materials to prove that the accusation brought against the accused is true. Once such evidence or materials are brought on record prima facie establishing the case of the prosecution, then only the court is obliged to raise presumption under section 29 of the POCSO Act and in that situation only the burden stands shifted to the accused to rebut the presumption. If the accused fails to rebut the presumption, Court is justified to hold the accused guilty of offence under sections 3, 5, 7 and 9 of the POCSO Act.**
>
> **(Emphasis Supplied)**

72. Another Single Bench of Kerala High Court in **Justin (supra)** opined as under :

> **"76.** Hence the presumptions under sections 29 and 30 of the POCSO Act have to be examined on the anvil of tests laid down in *Kathi Kalu Oghad's case* (supra). While considering similar statutory provisions, Supreme Court, in *Veeraswami's case, Ramachandra Kaidalwar's case, Noor Agas case, Kumar Export's case and Abdul Rashid Ibrahim's case* has **consistently held that the presumptions considered therein, which are similar to sections 29 and 30 of the POCSO Act do not take away the primary duty of prosecution to establish the foundational facts. This duty is always on the prosecution and never shifts to the accused. POCSO Act is also not different. 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.
>
> **77.** In *Noor Aga's case* (supra) it was held that, presumption of innocence is a human right and cannot per se be equated with the Fundamental Right under Art.21 of the Constitution of India. It was held that, subject to the establishment of foundational facts and burden of proof to a certain extent can be placed on the accused. However, Supreme Court in various decisions referred above 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. Hence, prosecution has to establish a prima facie case beyond reasonable doubt. Only when the foundational facts are established by the prosecution, the accused will be under an obligation to rebut the presumption that arise, that too, by adducing evidence with standard of proof of preponderance of probability. The insistence on establishment of foundational facts by prosecution acts as a safety guard against misapplication of statutory presumptions.

78. Foundational facts in a POCSO case include the proof that the victim is a child, that alleged incident has taken place, that the accused has committed the offence and whenever physical injury is caused, to establish it with supporting medical evidence. If the foundational facts of the prosecution case is 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 the peculiar features of the particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour, 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**."
>
> **(Emphasis Supplied)**

73. The common string running through these judgments is that Section 29(2) of POCSO Act is almost *pari-materia* to Section 35(2) of NDPS Act. No doubt, Sections 29 and 30 of POCSO Act are couched in a particular way and creates a presumption, such presumption depends on the ability of prosecution to establish the foundational facts. When no foundational facts could be established by the prosecution, by taking aid of presumption flowing from Sections 29 and 30 of POCSO Act, an accused cannot be held guilty. We are in respectful agreement with the view taken by the aforesaid High Courts. As noticed above, prosecution in the instant case, could not establish the foundational facts with necessary clarity and beyond reasonable doubt. On the contrary, the accused by cross-examining the prosecution witnesses could establish about the improbability of the incident, lack of medical evidence, serious procedural flaws in sample collection and questioning the appellant in the Court under Section 313 of Cr.P.C. and conjoint effect of all such factors is that it cannot be said that prosecution could establish its case beyond reasonable doubt before the Court below. Thus, presumption clause of the statute will not improve the case of the prosecution.

74. The learned Govt. counsel in his written submission has relied on the judgment of Supreme Court in the case of **Nawabuddin Vs.**

State of Uttarakhand (2022) 5 SCC 419, this judgment of Apex Court is based on certain previous judgments. In our opinion, as per these judgments also, the prosecution needs to establish its case beyond reasonable doubt. The said test is never diluted and therefore, cannot be marginalized. Since, prosecution could not establish its case with necessary clarity on legal parameters, the said judgments cited in the written submission are of no help to the prosecution.

75. In view of the foregoing analysis, we are unable to give our stamp of approval to the impugned judgment. Resultantly, the impugned judgment dated 12.01.2019 passed in SCATR No. 7/2013 is set aside. The appellant is acquitted. If his presence in the custody is not required in any other case, he be released forthwith. The appeal is **allowed**.

(SUJOY PAUL)
JUDGE

(AMAR NATH (KESHARWANI))
JUDGE

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