

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.154 of 2023

Arising Out of PS. Case No.-211 Year-2020 Thana- BHAGALPUR KOTWALI District-
Bhagalpur

=====

Ajay Kumar Sah @ Ajay Kumar Son of Fakir Sah R/o Mohalla- Mini Market,
Mundichak, P.S.- Tilakamanjhi, District- Bhagalpur

... .. Appellant

Versus

1. The State of Bihar

2. [REDACTED]

P.S.- Tilakamanjhi, Distt.- Bhagalpur

... .. Respondents

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Appearance :

For the Appellant/s	:	Dr. Manoj Kumar, Advocate Ms. Sweety Sinha, Advocate Ms. Kshem Sharma, Advocate
For the State	:	Mr. Parmeshwar Mehta, APP

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE SHAILENDRA SINGH)

Date : 22-07-2025

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

2. This criminal appeal has been filed by the appellant,
Ajay Kumar Sah @ Ajay Kumar, against the judgment of
conviction dated 21.12.2022 and the order of sentence dated
23.12.2022 passed by the learned Exclusive Special Court
(POCSO Act)-cum-7th Additional District and Sessions Judge,



Bhagalpur, in POCSO Case No. 41/2020, arising out of Kotwali (Tilkamanjhi) P.S. Case No. 211/2020. By this judgment, the learned trial court has convicted the appellant for the offences punishable under Section 376 of the Indian Penal Code (in short 'IPC') and under Section 5(m)/6 of the Protection of Children from Sexual Offences Act (in short 'POCSO Act'). By the order of sentence dated 23.12.2022, the appellant has been sentenced to undergo rigorous imprisonment for 20 years, with a fine of Rs. 50,000/- (Rupees Fifty Thousand) under Section 5(m)/6 of the POCSO Act. In default of payment of the fine, he has been directed to undergo simple imprisonment for one additional year. The appellant has not been awarded punishment under Section 376 of the IPC in light of the provision of Section 42 of the POCSO Act.

3. The respondent No. 2, who happens to be the mother of the victim, has not appeared before this Court in this appeal, despite notices having been served upon her.

Prosecution Story:-

4. The substance of the prosecution story is as follows:
As per the informant, on 22.03.2020, at around 7:30 P.M., the appellant, a distant relative of him, came to his house in a drunken state and took his 4-year-old daughter with him on the pretext of



giving her chocolate. After 20-30 minutes, he returned with the daughter and immediately left for his (appellant's) house, leaving the child behind. His daughter was trembling, unable to walk properly, and stumbling. Then she started crying loudly after hugging her mother, who consoled her, and then his daughter informed them that the appellant had attempted to commit an indecent act with her private parts. The victim pointed to her private part while describing the incident. According to the informant, his daughter was in severe pain at that time, which caused him great distress. He immediately informed his family members about the incident. Subsequently, he, along with his family members, went to the appellant's house, but it was found locked from the inside. When neighbours arrived and began calling the appellant, he went upstairs on the roof of his house, started abusing them, and threw bricks and stones, injuring the informant's brother on the ankle of his left leg.

5. Based on the above prosecution story, the informant filed a written application (Ext.-P-3) at Kotwali (Tilkamanjhi) Police Station. This led to the formal registration of FIR bearing P.S. Case No. 211 of 2020 under Sections 363, 376, 354-A, 511, 337, and 504 of the IPC, under Section 8 of the POCSO Act, and



under Section 37(c) of the Bihar Prohibition and Excise Act (in short 'Excise Act'), which set the criminal law into motion.

6. During the course of investigation, the statements of the victim and her mother were recorded under Sections 161 and 164 of the Code of Criminal Procedure (in short 'Cr.P.C.).

7. Upon completion of the investigation, the police submitted a charge sheet against the appellant for the offences under Sections 363, 376, 337, and 504 of the IPC, also under Sections 4/6 of the POCSO Act, and under Section 37(c) of the Excise Act.

8. The learned trial court took cognizance of the same offences under which the appellant was charge-sheeted, except the offence under Section 37(c) of the Excise Act.

9. The appellant was charged with the offences under Sections 363, 376, 337, and 504 of the IPC, under Sections 5(m)/6 and alternatively under Section 18 of the POCSO Act, and also under Section 37(c) of the Excise Act. The charges were read over and explained to him in Hindi, to which he pleaded not guilty and claimed to be tried.

10. During the course of trial, the prosecution examined altogether nine witnesses, who are as under:-

Sl No.	Name
PW-1	Victim's Mother



PW-2	Ruby Devi
PW-3	Victim
PW-4	Dr. Alpana Mitra
PW-5	Nirmala Devi (ASI)
PW-6	Hari Prasad @ Hari Prasad Sah
PW-7	Awanikant Trivedi (Director of FSL, Bhagalpur)
PW-8	Deepak Kumar (Assistant Director of FSL, Bhagalpur)
PW-9	Radha Kumari (J.M. 1 st Class, Bhagalpur)

11. Here, it is important to mention that the informant died before recording his evidence during the course of trial.

12. In addition to oral evidence, the prosecution proved the following documentary evidences and got them marked as exhibits which are as under:-

Ext.-P-1	Medical Report
Ext.-P-2	Formal FIR
Ext.-P-3	Writing and signature of I.O. on statement recorded u/s 161 Cr.P.C.
Ext.-P-4	Writing and signature of victim on statement recorded U/s 161 Cr.P.C.
Ext.-P-5	Seizure list
Ext.-P-6	Charge-Sheet
Ext.-P-7	FSL Report
Ext.-P-8	Writing and signature of victim on statement recorded u/s 164 Cr. P.C.
Ext.-P-8/1	Statements recorded u/s 164 Cr.P.C. of victim and her mother

13. After the completion of the prosecution's evidence, the statement of the appellant was recorded under Section 313 of the Cr.P.C., giving him a sufficient opportunity to answer the incriminating circumstances appearing against him from the



prosecution's evidences. The appellant simply denied all these circumstances and claimed to be innocent without stating his any specific defence.

14. The appellant examined two witnesses in his defence who are as follows:-

DW-1	Om Prakash Sah
DW-2	Hemant Kumar

15. While convicting the appellant for the charged offences, the learned trial court relied upon the victim's and her mother's statements recorded under Section 164 of the Cr.P.C., deeming them to have corroborated the medical evidence, which is completely in favour of the prosecution's allegation. The trial court concluded that the prosecution succeeded in establishing the foundational facts showing the commission of the alleged offences by the appellant with the victim and, thereby, drew a presumption under Section 29 of the POCSO Act against the appellant. The learned trial court further concluded that the appellant had failed to prove his innocence beyond a reasonable doubt. Accordingly, primarily with the aid of Sections 29 and 30 of the POCSO Act, the appellant has been convicted by the learned trial court.



Submissions on behalf of the appellant:-

16. Dr. Manoj Kumar, learned counsel appearing on behalf of the appellant, submits that in this case, there is no evidence against the appellant to show his involvement in the alleged offences. The victim herself did not support the prosecution's story, even though she was not a competent witness at the time of recording her evidence. No independent witness was produced by the prosecution. Even the victim's mother did not support the prosecution's case. Although as per the medical evidence given by the doctor (PW-4), some injuries were found on the private part of the victim, however, PW-4 testified that these injuries could have been sustained by the victim by falling down. Further, the medical evidence does not get corroboration from the ocular evidence. The Investigating Officer did not find anything at place of occurrence during his inspection suggesting that the alleged crime had been committed by the appellant at the place of occurrence.

Submissions on behalf of the Respondent:-

17. On the other hand, Mr. Parmeshwar Mehta, learned Additional Public Prosecutor appearing for the State, has argued that though the evidence of the material witnesses of the



prosecution is not in full conformity with the prosecution's story, however, the medical evidence, coming out after the examination of the victim's private part by the doctor (PW-4), fully corroborates the prosecution's the allegation that sexual assault was committed on the victim. During the investigation, the victim's and her mother's statements were recorded under Section 164 of the Cr.P.C., in which they supported the main allegation mentioned in the FIR. These materials are sufficient to establish the foundational facts with regard to the commission of the alleged offences by the appellant. Thus, in the present matter, the burden shifted on the appellant to prove his innocence in the alleged crime, but he failed to discharge this burden. Hence, the learned trial court rightly convicted the appellant for the offences for which he was charged, and there is no merit in this appeal and the same is liable to be dismissed.

Consideration and analysis :-

18. We have heard both sides and perused the evidences available on the record of the trial court, gone through the statement of the appellant, and have also given our thoughtful consideration to the submissions advanced by both the sides.

19. The learned trial court convicted the appellant mainly in light of the provisions of Sections 29 and 30 of the



POCSO Act, drawing a presumption of the commission of the alleged offences by the appellant with the victim, and also presuming the appellant's culpable mental state while committing the alleged offences. With regard to the commission of the alleged offences, there is a direct allegation against the appellant in the FIR, which was registered by the victim's father just one day after the occurrence. Therefore, there was no delay in lodging the FIR and also in examining the victim medically. The doctor (PW-4) who examined the victim found the following injuries on her person:-

- (i) Abrasions and redness on labia majora and labia minora,
- (ii) Vaginal tear with bleeding.
- (iii) As per PW-4 only 24 milk teeth were present at that time.

After examining the victim, the PW-4 gave the following opinion regarding victim's age and alleged sexual offence:-

Opinion:- According to physical appearance and X-ray report, as well as the number of teeth, the victim was between 3 to 5 years old at the time of examination, and the evidence of sexual assault was present. As per PW-4, the victim's clothes were sent to the Forensic Science Laboratory, Patna (FSL) for chemical



examination, and the FSL report (marked as Ext-7) confirmed that human semen was found on the victim's clothes (jeans pant's cutting), with blood grouping 'B'. During the investigation, the victim and her mother recorded their statements before the Judicial Magistrate under Section 164 of the Cr.P.C., which were proved by the prosecution. Though these statements are against the appellant to some extent, however, its reliability and admissibility will be discussed later. But all these materials are not sufficient to establish the foundational facts regarding the commission of the alleged offences by the appellant and the prosecution is not entitled to get a benefit of the presumption under Section 29 of the POCSO Act, however, the said presumption is rebuttable and it is a settled preposition of law that the presumption is not absolute. The accused can rebut the presumption by challenging the prosecution's evidence i.e. questioning the credibility of the witnesses, pointing out inconsistencies, introducing contradictory evidence and demonstrating the reasonable doubt. Further, the presumption under Section 29 of the POCSO Act, is not a substitute for evidence. While dealing with the presumption under Section 29 of the POCSO Act **Hon'ble Delhi High Court** in the case of **Veerpal vs. State** reported in **2024 SCC OnLine Del 2686** in paragraph no. 20 observed as under:-



“ 20. Section 29 of POCSO Act provides that Court shall presume that the accused has committed the offence for which he is charged with, until contrary is proved. However, the presumption would operate only when the prosecution proves the foundational facts in the context of allegation against the accused beyond reasonable doubt. After the prosecution establishes the foundational facts, the presumption raised against the accused can be rebutted by discrediting the prosecution witnesses through cross-examination and demonstrating the gaps in prosecution version or improbability of the incident or lead defence evidence in order to rebut the presumption by way of preponderance of probability.

Keeping the same in perspective, the prosecution in the first instance is required to establish the foundational fact that the incident, as alleged, was conveyed by the victim to her dadi (grandmother) on 16.09.2016 (i.e. the day of lodging of FIR). However, the evidence and statements during investigation, as discussed above, reflect different dates of alleged communication of the incident, which throws a doubt on the prosecution version. In view of above, in absence of foundational fact not being proved beyond reasonable doubt, the reliance placed upon presumption under Section 29 & 30 of POCSO Act by learned Trial Court to base conviction, appears to be misplaced. Taking in the alternative, even if the foundational facts are considered to be proved, to make the presumption under Section 29 of POCSO Act, the same stands discredited by way of discrepancies brought in cross-examination of the victim, PW3 and witnesses examined in defence.

The presumption of guilt under Section 29 & 30 of POCSO Act taken by the learned Trial Court could not be an edifice to convict the appellant since testimony of victim is unreliable and there are serious flaws and gaps in the



prosecution case. As a wrongful acquittal shakes the confidence of people, a wrongful conviction is far worse. A child abuser in the eventuality of false implication even continues to suffer a blot of social stigma which is much more painful than the rigours of a trial and imprisonment. Prosecution case is marred by inadequacies and contradictions which strike to the root of prosecution case and, as such, prosecution has failed to bring home the charge against the accused beyond reasonable doubt. ”

Similarly, in the case of **Joy vs. State of Kerala** reported in **2019 SCC OnLine Ker 783** the **Hon’ble Kerala High Court** in paragraphs nos. 10 and 11 observed as under:-

“ **10.** This court is not oblivious to Section 29 of the Act which contains a legislative mandate that the court shall presume commission of the offences by the accused unless the contrary is proved. Section 29 of the Act states that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the 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. The court shall take into consideration the presumption under Section 29 of the Act while dealing with an application for bail filed by a person who is accused of the aforesaid offences under the Act (See *State of Bihar v. Rajballav Prasad*, (2017) 2 SCC 178 : AIR 2017 SC 630).

11. However, the statutory presumption under Section 29 of the Act does not mean that the prosecution version has to be accepted as gospel truth in every case. The presumption does not mean that the court cannot take into consideration the special features of a particular case. Patent



absurdities or inherent infirmities or improbabilities in the prosecution version may lead to an irresistible inference of falsehood in the prosecution case. The presumption would come into play only when the prosecution is able to bring on record facts that would form the foundation for the presumption. Otherwise, all that the prosecution would be required to do is to raise some allegations against the accused and to claim that the case projected by it is true. The courts must be on guard to see that the application of the presumption, without advertent to essential facts, shall not lead to any injustice. The presumption under Section 29 of the Act is not absolute. The statutory presumption would get activated or triggered only if the prosecution proves the essential basic facts. If the accused is able to create serious doubt on the veracity of the prosecution case or the accused brings on record materials which would render the prosecution version highly improbable, the presumption would get weakened....”

20. Now, we would examine whether the appellant succeeded in proving his innocence in the offences charged against him or not. In the offences committed against the children punishable under the POCSO Act, the evidence of the victim is considered the most important, if the victim is a competent witness as per the provisions of the Evidence Act. In the present case, the victim was examined as PW-3 on 06.05.2022, and her age was assessed to be 6 years at that time by the trial court. The doctor (PW-4) opined her age to be between 3 to 5 years. But the learned trial court did not properly examine the victim's



competency as a witness by asking sufficient questions. Here it is important to mention that learned trial court did not allow the accused/appellant to cross-examine her, as the trial court deemed it improper to put the victim to cross-examination. In the light of this and considering the fact that the victim was only 6 years old at the time of her examination, we deem her to be an incompetent witness to give evidence in the trial court, as it appears that she was unable to understand the questions posed to her by the trial court and also unable to give reasonable answers to the said questions.

21. As such, the testimony of the victim cannot be taken into consideration either in favor or against both side. The same situation applies to the victim's statement recorded under Section 164 of the Cr.P.C. When that statement was recorded, the victim's age was assessed only four years by the learned Magistrate, and he did not take sufficient care to examine her competency as a witness. He directly put questions to her regarding the commission of the alleged offences, which was not the proper procedure. Therefore, the prosecution is not entitled to derive any benefit from the victim's statement, recorded under Section 164 of the Cr.P.C. It is important to note that Section 35 of the POCSO Act only deals with the evidences which are recorded by the Special



Court so the child's evidence would be significant and admissible only when it is recorded by the Special Court established under POCSO Act. In this regard, we would like to refer to the observations made by the Hon'ble Karnataka High Court in the case of **Hanumantha Mogaveera v. State of Karnataka by Women Police Station**, reported in **2021 SCC OnLine Kar 12300**. Paragraphs 25, 26, and 27 of the said judgment are relevant and reproduced below for ready reference:-

“ 25. We have already highlighted the difference between a statement recorded under Section 164 of Cr.P.C., and evidence recorded under sub-Section (1) of Section 35 of the POCSO Act. In our view, the recording of statement under Section 164 of Cr.P.C. being prior to the commencement of the trial, it cannot be considered to be evidence under sub-Section (1) of Section 35 of the POCSO Act.

26. In this regard reference could be made to Section 3 of the Evidence Act, which is the interpretation clause which defines “Evidence” to mean and include, (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence and (2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

27. It is therefore observed that *the statement recorded under Section 164 of Cr.P.C., made in the course of investigation by the victim child, cannot be*



considered as evidence recorded under Section 35 of the POCSO Act. ”

22. As we have deemed the victim to be an incompetent witness with regard to the prosecution story, so the evidence of other prosecution witnesses becomes crucial in such a situation. The victim's father, who lodged the FIR, passed away before recording his evidence in the trial court. Therefore, the contents of the FIR, revealing the allegations, remained not proved. Although the written FIR (Ext. - P-3) bears the signature of the victim's mother, so she can be deemed to have knowledge of the facts enumerated in the FIR, she was examined as P.W-2. She testified that nothing wrong had been done to her daughter. She deposed that her daughter came home weeping due to some reason, and thereafter, her husband lodged the case due to a misunderstanding. In cross-examination, she stated that she was not willing to proceed with the case. As such, the evidence of PW-2 does not help the prosecution in any way. Although the victim's mother made some allegations in her statement recorded under Section 164 Cr.P.C. against the appellant which are relevant to the prosecution story, but there are serious contradictions between the facts stated by her under Section 164 Cr.P.C. and the facts alleged in the FIR. Firstly, the appellant is alleged to have been in a



drunken condition when he came to the house of the informant, but no such fact was revealed by the victim's mother before the Judicial Magistrate. Secondly, in the FIR, it was alleged that the appellant took the victim under the pretext of giving her chocolate, while in the statement under Section 164 of Cr.P.C., she stated that the appellant asked the victim to come with him to the market where he would feed her *chaat*, and when she and her husband denied permission to the victim to go with him, the appellant entered her room and took the victim with him despite their denial. Such facts have not been alleged in the written FIR. The victim's mother (PW-2) stated in her statement recorded under Section 164 of Cr.P.C. that when the appellant came to her house, she was on bed rest due to having undergone an operation. In such a situation, how could she have been able to go with the informant to the police station and make her signature on the written application as a witness? All these material contradictions have not been explained by the prosecution which creates a doubt in the prosecution's allegations concerning the appellant. Moreover, the statement recorded under Section 164 of Cr.P.C. does not qualify as a substantive piece of evidence though it can be used to corroborate or contradict the evidence of such person, however, it would not be safe to convict someone primarily on the basis of



such statement, particularly when there are serious contradictions in it. However, in the present matter, the victim's mother's evidence recorded in the trial court, is entirely different. The Hon'ble Apex Court in the case of *State of Rajasthan vs. Kartar Singh* reported in (1970) 2 SCC 61 held that a statement recorded under Section 164 of Cr.P.C. is not a substantive piece of evidence, and it may only be used for contradiction under Section 145 of the Evidence Act or for corroboration of the witness who has made such a statement. As such, the statement may be used only for corroborating or contradicting the witness. In the present matter, the prosecution does not get any help from the earlier statement of this witness (victim's mother) recorded under Section 164 Cr.P.C. to corroborate the evidence of this witness given in the court, as both are entirely different rather, the appellant is entitled to use the same to contradict the said witness.

23. Now, we come to the evidence of other witnesses. Prosecution witness, PW-2, did not support the prosecution's case and was declared hostile. PW-4, Dr. Alpana Mitra, who medically examined the victim, deposed that there was abrasion and redness on the labia majora and labia minora of the victim's private part, and also found that there was tear in victim's vagina and bleeding was present. Although this medical evidence suggests the



commission of sexual assault on the victim, but in order to prove the commission of the alleged act by the appellant, there must be strong ocular evidence from the material witnesses of the prosecution. As discussed above, the evidence of the material witnesses does not favor the prosecution although the statements of the victim and her mother recorded during the course of the investigation under Section 164 of the Cr.P.C. go in favor of the prosecution to some extent, but they cannot be made the sole basis to convict the appellant. Furthermore, the said statements were not part of the evidence recorded by the Special Court. Moreover, the learned Magistrate did not examine the victim's competency under the provisions of Section 118 of the Evidence Act before recording her statement. So far as the victim's mother's statement recorded under Section 164 of Cr.P.C. is concerned, there are serious contradictions between the facts narrated in the FIR and the facts stated by her before the Judicial Magistrate. It is important to note that the informant passed away before recording his evidence, so the contents of the FIR remained not proved. The victim's clothes were sent for FSL examination. Although semen of a human being was found on her clothes, but no steps either by I.O. or prosecution was taken to match it with the appellant's group, so the scientific evidence does not help the prosecution in any way.



Conclusion:-

24. After analyzing the prosecution's evidences, we are of the considered opinion that although the medical evidence supports the commission of sexual assault on the victim but the prosecution failed to establish the foundational facts showing the commission of the alleged occurrence by the appellant and the ocular evidence given by the prosecution's witnesses, as discussed above is not inspiring our confidence to affirm the trial court's findings as to convicting the appellant for the charged offences rather the ocular evidence of material witnesses of the prosecution, is sufficient to justify the appellant's claim of innocence in the alleged crime and he is entitled to the benefit of doubt. Accordingly, the judgment of conviction dated 21.12.2022 and the order of sentence dated 23.12.2022 passed by the learned Exclusive Special Court (POCSO Act) -cum- 7th Additional District and Sessions Judge, Bhagalpur, in POCSO Case No. 41/2020 arising out of Kotwali (Tilkamanjhi) P.S. Case No. 211/2020 are not sustainable in the eyes of law and are hereby set aside. The instant appeal stands allowed.

25. The appellant is in judicial custody; therefore, he is directed to be released forthwith if his custody is not required in any other matter.



26. Let the Trial Court’s Records (TCR) and a copy of this judgment be sent immediately to the trial court and the concerned jail authority for information and needful compliance.

(Rajeev Ranjan Prasad, J)

(Shailendra Singh, J)

maynaz/-

AFR/NAFR	AFR
CAV DATE	NA
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