IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.205 of 2023

Arising Out of PS. Case No.-89 Year-2020 Thana- SACHIVALAYA District- Patna

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Jai Krishna Yadav S/O Late Kailu Yadav, Resident of Village- Khurda, P.S.- Kumar Khand, District- Madhepura.

... ... Appellant/s

Versus

1. The State of Bihar Through Chief Secretary Govt. of Bihar, Patna. Bihar
2. …., M/o the victim, W/o ….., Resident of Village – Newan, P.S. - Panpur, District – Patna, residing at Chidiyakhana Gate No. 2, Circular Road, Quarter No. 13(b), P.S. - Sachivalaya, District - Patna

... ... Respondent/s

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Appearance :
For the Appellant/s : Mr. Md. Irshad, Amicus Curiae
For the Respondent/s : Mr. Dilip Kumar Sinha, APP

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SOURENDRA PANDEY

CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE SOURENDRA PANDEY)

Date : 25-11-2025

Heard Mr. Md. Irshad, learned Amicus Curiae for the appellant and Mr. Dilip Kumar Sinha, learned APP for the State. We find that the notice was sent to respondent no. 2 and the same was received by father of the victim/husband of the informant and, therefore, was taken as validly served by the order dated 04.11.2025 of this Court, however, despite valid service of notice nobody appears on behalf of respondent no. 2.

2. The present appeal arises out of the judgment of conviction dated 09.11.2022 (hereinafter referred to as the '*impugned judgment*') and the order of sentence dated 15.11.2022 (in short referred to as the '*impugned order*') passed by the learned

Additional Sessions Judge-VI-cum-Spl. Judge POCSO, Patna in connection with Special (POCSO) Case No. 150 of 2020, arising out of Sachivalaya P.S. Case No. 89 of 2020.

3. By the impugned judgment the appellant namely Jai Krishna Yadav has been convicted for the offences under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (in short referred to as the 'POCSO Act') and has been sentenced to undergo 20 years S.I. for the offence under Section 6 of the POCSO Act and to pay a fine of Rs. 25,000/-. In default of payment of fine to further undergo S.I. for 6 months.

Prosecution Case:

4. The prosecution case is based on the written application dated 24.08.2020 given by the informant/mother of the victim (P.W. 3). In her written report, she has stated that on 24.08.2020 at about 12:30 P.M., she woke up from her sleep after hearing her daughter crying. It is alleged that when she asked her about the reason for her crying, she disclosed that when she was playing with Ankit near the vehicle, Krishna uncle took her forcibly on his lap to his room, closed the door and started inserting his penis inside her anus. The minor daughter of the informant started yelling with pain upon which the accused scolded her to remain silent and started rubbing his penis on her

anus. It is further alleged that she started shouting for her parents and somehow fled away to her house after shrugging from the hold of the accused and wearing her pant. It is further alleged that when the informant checked, she found that the anus of her daughter was wounded with scratches. It is further alleged that accused lives in the room in the north of the quarter of the informant and was posted as Homeguard in the official residence of Anjani Kumar Singh, Ex-Chief Secretary. It is alleged that the informant scolded the accused and told about the entire incident to her husband.

5. On the basis of the aforesaid written application, Sachivalaya P.S. Case No. 89 of 2020 dated 24.08.2020 under Section 376 of the IPC and Sections 8, 12 of the POCSO Act.

6. After completion of investigation, the Investigating Officer (I.O.) submitted charge-sheet being Charge-Sheet No. 92 of 2020 dated 12.11.2020 under Section 376 of the IPC and Sections 4, 6 of the POCSO Act.

7. On the basis of the police report, cognizance was taken *vide* order dated 03.04.2021 under Section 376-AB of the IPC and Sections 4, 6 of the POCSO Act against the accused/appellant Jai Krishna Yadav.

8. Charges were read over and explained to the appellant/Jai Krishna Yadav in Hindi to which he pleaded not guilty and claimed to be tried.

9. In course of trial, the prosecution examined as many as five witnesses and exhibited several documents to prove the prosecution case.

List of Prosecution Witnesses:

P.W. 1	Father of the victim
P.W. 2	The victim
P.W. 3	Mother of the victim
P.W. 4	Amrita Rani, S.I.
P.W. 5	Dr. Anju Kumari

List of Exhibits on behalf of the Prosecution:

Ext. P-1	Signature of father of the victim on written application
Ext. P-2	Signature ofo the father of the victim on the seizure list
Ext. P-3/P.W. 4	Endorsement of SHO on Fardbeyan
Ext. P-4/P.W. 4	Formal FIR
Ext. P-5/P.W. 4	Arrest Memo
Ext. P-6/P.W. 4	Seizure list of victim's pant
Ext. P-7/P.W. 4	Seizure list of accused/appellant underwear
Ext. P-8/P.W. 5	Photocopy of Register of Medical Report
Ext. P-9/P.W. 5	Photocopy of Register of Medical Report
Ext. P-10	F.S.L. Report No. 1172/20 dated 27.11.2020
Ext. P-11	F.S.L. Report No. 1172/20 dated 29.11.2020

List of Exhibits on behalf of the Defence:

1.	Exhibit A

2.	Exhibit B

List of Court Exhibits:

1.	Exhibit C-1/CW 1
2.	Exhibit C-2/CW 2

List of Material Objects:

1.	MO 1
2.	MO 2

10. The accused/appellant was examined under Section 313 of the Code of Criminal Procedure on 07.07.2022, wherein he stated that he either stated in negative or that all the allegations are false and that he is innocent.

Findings of the Learned Trial Court:

11. The learned Trial Court has held the submissions of the defence with regard to the victim being inflicted with injury upon which there was redness and swelling around the anal opening, as superfluous on account of the fact that the victim and other witnesses had stated that the victim never used to climb on tree and has specifically told that the accused rubbed his penis on the private parts of the victim.

12. The learned Trial Court held that the defence failed to make out any dent in the credibility of the evidence of the victim and other prosecution witnesses. On the point of interested

witnesses the learned Trial Court held that the parents are natural and the best witness of such type of occurrences and hence cannot be said to be interested witnesses and the defence has not been able to make out any dent in the credibility of the evidence of the victim and other prosecution witnesses.

13. The learned Trial Court has further held that it is evident from the evidence of P.Ws. 1 and 2, who have specifically stated that the victim or her family had no prior enmity with the accused therefore, in such circumstances, it cannot be imagined that parents and relatives of an innocent minor girl, who have become victim of rape, will falsely implicate any innocent person.

14. The learned Trial Court has thus held that on evaluation of the entire evidence at hand the ingredients of Section 376-AB of the IPC and Section 6 of the POCSO Act are made out in the present case.

15. The learned Trial Court on the point of age of the victim has held that the age of the victim has been mentioned in the written information to be five years and even at the time of recording of the statement of the victim under Section 164 Cr.P.C., her age has been said to be five years by the learned Judicial Magistrate, 1st Class, Patna and lastly even the Medical Board has found the age of the victim to be between 5 – 6 years in her

medical examination and, therefore, this fact has been proved and the victim was child at the time of occurrence as per the definition of child under Section 2(d) of the POCSO Act.

Submissions on behalf of the appellant:

16. Mr. Md. Irshad, learned Amicus Curiae appearing for the appellant has submitted that the competency of the victim has not been tested by the learned Trial Court prior to her deposition and therefore, her statement should not be taken into account considering her age and she being a child witness. It has further been submitted that 164 Cr. P.C. statement of the victim was not brought on record and has not been exhibited in the present case causing prejudice to the appellant. It has been pointed out that the learned Trial Court did not consider the contradictions in the FIR and statements of P.W. 1, P.W. 2 and P.W. 3 wherein the initial allegation was of rubbing the penis of the appellant against the anus of the victim, however, the said version subsequently changed and it was stated that the appellant made a penetrative sexual assault on the victim causing injury around her anus and P.W. 3 deposing that victim was bleeding.

17. Learned counsel appearing on behalf of the appellant has pointed out that from perusal of the written information, it would be evident that it is a computer typed written report lodged

by the mother of the victim which goes on to show that it was in a pre-planned manner the present case was lodged after much deliberation and it would be evident that the informant had put her thumb impression on the written report, however, there is no averment in the report that the contents of the application was dictated by her or the contents were read over and thereafter she had put her thumb impression on the same.

18. Learned counsel on behalf of the appellant has drawn the attention of this Court towards the statement of the accused/appellant made under Section 313 of the Cr.P.C., wherein in reply to a question - "*why have the witnesses deposed against you? What do you have to say about the same before this Court?*", the appellant has given the details of the dispute between the parties wherein he has stated that the father of the victim used to consume Alcohol and Ganja and he had beaten the father of the victim and also complained about his conduct to the officer under whom he worked. It has also been stated by the accused/appellant that the father of the victim had once committed theft of a bag of rice and had kept it in his room for which also he had made a complaint against him and because of all these incidences he has falsely been implicated in the present case.

19. Learned counsel for the appellant has pointed out that as per the medical report, the Doctor has not found any external or internal injury on the private part or back part of the body of the victim and there is no sign of rape. It has been submitted that the appellant being the Homeguard of an officer of the rank of Chief Secretary, Government of Bihar could not in all possibility have committed such a crime during day-time. It has been submitted by the learned counsel appearing on behalf of the appellant that most importantly the appellant has not been examined medically after the said incident despite the fact that he was arrested on the same day *i.e.* 24.08.2020. In the facts of this case, non-examination of the accused/appellant has caused serious prejudice to the case of the defence.

20. Learned counsel for the appellant submits that from perusal of the statement of the victim (P.W. 2) it appears that she has admitted during her cross-examination in paragraph-17 that the officer under whom her father works used to scold him and they were also scolded by the wife of the officer. In paragraph-19, a suggestion was given to her about an altercation taking place on account of taking water to which she denied. It has further been submitted that the victim in paragraph-20 has categorically stated that she was taught by her mother and father prior to coming for

depose and in paragraph-21, she has stated that she gave her statement as told by "*Daroga Ji*" (police officer). Thus, it has been submitted that from the aforesaid version of the victim it is clear that she had been tutored to depose by her parents and there was an element of differences between the two families and a suggestion to the same was also given to the father of the victim (P.W. 1).

21. It has been submitted that there is no independent witness to the occurrence which had occurred in the afternoon and it does not stand to reason as nobody had witnessed the said forceful carrying away of the daughter of the informant to the room of the appellant. It has also been pointed out that in the written report, it is stated that the victim had disclosed to her mother that while she was playing with Ankit the appellant had forcibly picked her up and took her inside his room, however, the said boy namely Ankit neither raised any alarm nor had been examined by the police or during the course of trial.

22. Learned counsel appearing on behalf of the appellant has drawn the attention of this Court towards the evidence of P.W. 5, Dr. Anju Kumari who had examined the victim after the incident and in paragraph -6 referring to the external examination, she has categorically stated that no mark of injury was found on the person

of the victim. It has further been pointed out that contrary to the claim of the prosecution witnesses and the victim on pelvic examination no injury on vaginal or labial region was found. It was only reported that there was redness and swelling found near the opening of the anus. During the cross-examination, the doctor had accepted that redness and swelling may have been caused by fall on hard surface.

23. Learned counsel for the appellant has pointed out towards the FSL report (Ext.-P/11) from the perusal of which, it would be evident that the result of the test of blood grouping was found to be inconclusive and therefore, by any stretch of imagination the blood found on the clothes of the victim was not even confirmed that the same was of the victim.

24. It has also been pointed out that no blood was found in the underwear of the appellant (Ext. P-7/P.W. 4) and no semen was detected in both the pant of the victim (Ext. P-6/P.W. 4) and the underwear of the appellant.

25. Learned counsel for the appellant has referred to the deposition of P.W. 4, Amrita Rani (I.O.) of the case, who during her cross-examination has stated that during her inspection of the place of occurrence she had referred the Folding Cot of one Moiuddin Khan and though she had recorded the statement of

Moiuddin Khan, however, she did not register it. She has also admitted that she had not recorded the statement of the officer and his family members, in whose residence the father of the victim was working.

26. In paragraph-20, the I.O. has deposed that during the course of investigation she did not get the medical examination of the accused done. She has accepted that she did not investigate on the aspect of previous enmity between the parties. Therefore, it is submitted that nothing has been elicited from the deposition of the I.O., which could be said to be conclusive in order to hold the appellant guilty of the offences alleged. Learned counsel for the appellant has submitted that from the statements of the prosecution witnesses with regard to the time of offence, it would be evident that P.W. 3, mother of the victim in the written report has stated the time of the offence to be 12:30 P.M., while during the course of Trial she has stated the time to be 12:00 P.M.

Submissions on behalf of the State:

27. Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor for the State has opposed the submissions of the learned counsel for the appellant. It has been submitted that the age of the victim to be between 5 – 6 years at the time of occurrence has been proved and she has been found a minor and

her statement alone shall be enough to prove the guilt of the appellant.

28. Learned APP for the State, however, submits that from the evidence of the I.O., it is clear that the accused/appellant was not medically examined which is a requirement under the law as contemplated under Section 53A of Cr.P.C. Though it has been submitted that this Court may not draw any adverse inference on account of his non-examination as it would not be of any help.

29. Learned APP for the State further submits that there might have been no injury found on the body of the victim, however, redness and swelling around the opening of the anus would go on to prove the statement made by the victim and therefore, her statement stands corroborated by the medical evidence and thus the learned Trial Court has rightly convicted the appellant.

Consideration:

30. Having heard learned counsel for the appellant and the learned Additional Public Prosecutor for the State and also on perusal of the records, this Court finds that initially the written report which was given by the father of the victim (P.W. 1), contained a statement that the victim had come back and told her mother that the appellant had rubbed his penis around her anus and

the mother on opening the pant of the victim found that there was a bruise around the anus. However, during the deposition P.W. 1, the father of the victim, has stated that when he was told about the incident by his wife, he opened the pant of his daughter and saw that there was abrasions not only around the anus but also in the vagina. The informant (P.W. 3), mother of the victim has stated that when her daughter came back crying she saw that blood was coming out from her vagina as well as from her anus and even the pants had blood stain. From the above evidence, it would be clear that the prosecution version has been changed and it could be seen that initially only the allegation of rubbing of the penis was made but subsequently the prosecution witnesses have further improved upon the same and have stated that there was abrasion both in the vagina as well as anus of the child victim and thereafter it was even stated that blood was coming out from both vagina as well as anus of the victim.

31. From the evidences which we have observed, hereinabove, it would be evident that the prosecution witnesses have tried to make out a case of penetrative sexual assault however, the medical evidence does not corroborate their version of the story as the doctor very specifically has pointed out that on pelvic examination, no injury on vaginal or labial region was

found and only redness and swelling were found near the opening of the anus and, therefore, it cannot be said that penetrative sexual assault was committed upon the victim.

32. We have observed that in her deposition the victim (P.W. 2) has in paragraph-20 admitted that her parents have tutored her to give evidence in the Court. While in paragraph-21, she has stated that earlier she was told by "*Daroga Ji*" (police officer/I.O.) then she had given her evidence.

33. We have further found that in this case, the victim who was a child witness and her age has been mentioned six years at the time of her deposition during the trial. On the perusal of the testimony of the victim, we find that the learned Trial Court did not put her any question so as to assess her competence in order to ascertain the importance of speaking truth. We have observed that the deposition contains only the age of the victim and thereafter her examination-in-chief was done followed by cross-examination.

34. As regards child witness, the Hon'ble Supreme Court in case of ***Pradeep vs. State of Haryana*** reported in ***AIR 2023 SC 2345*** and ***P. Ramesh vs. State Represented by Inspector of Police*** reported in ***(2019) 20 SCC 593*** has observed that it would not be safe to base the conviction only on the testimony of the child witness which does not inspire confidence. The Hon'ble

Supreme Court in the case of ***P. Ramesh*** (supra) has held that when an evidence of a child is recorded, it is the bounden duty of the judicial officer to put preliminary question to a child with a view to ascertain whether the child can understand the question put to him/her and then ascertain as to whether the child is in a position to give rationale answers. Both the judgments, referred to above, have been discussed by the Hon'ble Division Bench in the case of ***Rudal Chaupal vs. the State of Bihar*** reported in ***2024(2) BLJ 231 (HC)***.

35. We find from the evidence of the child witness as evident from her deposition, she has accepted that the officer and his wife used to scold his father when he used to do something wrong. Such fact can be corroborated from the statement of the accused made under Section 313 of the Cr.P.C., wherein he has given details of the incidences wherein he had complained to the officer against the father of the victim.

36. We have also gone through the medical report (Ext. P-8/P.W. 5) which is being extracted herein for ready reference:

> a) Mark of identification:- Black til on anterolateral part of forearm and black til on the left upper part of the neck.
>
> (b) Physical examination: Height- 3 ft. ½ inches, Weight- 12 kg. Teeth Upper-10, Lower- 11 nos.
>
> (c) Secondary sexual character were not developed.
>
> (d) External Examination:- No injury found on the person of the victim.

(e) Pelvic Examination:- On inspection, no injury on vaginal and labial region. On inspection of anus- redness and swelling was found present around the anal opening. Vaginal and anal swab taken on slide, sealed and sent to the Pathology Deptt., PMCH, Patna in sealed envelope. Patient was referred to Radiology Deptt. PMCH, Patna for age determination.

(f) X-ray both wrist (A.P. View):- There was evidence of appearance of ossification of six carpel bones. Radial epiphysis appeared but not fused. Ulnar epiphysis have not appeared.

(g) X-ray both elbow (A.P. View):- There was non-appearance of epiphysis of the medial epicondile of humerous and radial head.

(h) As per report, no spermatozoa found in vaginal & anal swab.

Opinion :- According to report received from PMCH, Patna, the age of the victim is in between 05 to 06 years at the time of examination. According to above findings, opinion about attempt of rape cannot be given.

37. The doctor, who had conducted the medical examination of the victim (P.W. 5) has categorically deposed that there was no mark of injury found on the person of the victim and on pelvic examination no injury on vaginal or labial region was found and only redness and swelling were found present around anal opening. From the perusal of the above, the medical report does not corroborate the claim of the prosecution witnesses who have stated that there was abrasion in the vagina as well as near the anus of the victim. It has been specifically opined by the doctor that according to the above findings, opinion about attempt of rape cannot be given and lastly during her cross-examination the doctor has admitted that the redness and swelling may be caused by fall on hard surface.

38. We are of the view that in the present case the medical evidence rules out a case of rape and hence it would not be safe to convict the appellant on the basis of sole testimony of the child witness (P.W. 2). We also observed that evidence of penetration to any extent was not found by the doctor and in absence of any such evidence, the conviction of the appellant under Section 6 of the POCSO Act cannot be sustained in law and the Trial Court has grossly misdirected itself in treating external rubbing as “penetrative sexual assault” as defined under Section 3 of the POCSO Act.

39. The I.O. (P.W. 4) has defined the place of occurrence but has not given the details of the room where the said incident is said to have occurred from her deposition, it would be evident that she has given the description of the entire premises and not of the room with specific details of the belongings within the room especially the size of the door, the position of the locks present on the door etc. We observe the same because we have found that in the written report it has been stated that the victim has stated that the appellant took her inside the room and had locked the door and thereafter had committed the alleged incident and thereafter the victim started shouting and she anyhow managed to free herself from the clutches of the appellant and after opening the lock of the

door came back running to her house. We are reminded that the girl is stated to have been merely five years of age at the time of incident and therefore such detailing of the place of occurrence ought to have been tested by the I.O. in order to verify the veracity of the statement being made by the victim, mother of the victim or father of the victim. We have also noticed that the pants which were seized by the I.O. said to be containing blood stain was sent for FSL examination, however, the blood grouping did not elicit any conformity with regard to it being blood of the victim.

40. On complete reading of the evidences available on the record, we are of the considered opinion that the victim cannot be put in the category of sterling witness especially for the fact that she has admitted in her deposition that she was tutored by her parents to depose before the Court and also by the I.O. prior to giving the evidence. Even the victim had improved upon her earlier version of the appellant rubbing his penis around her anus and went on to say that the appellant was rubbing his penis both in the vagina as well as her anus and she had sustained wound in the anus, however, the medical examination of the victim does not support her statement or even the statement of the mother of the victim who has gone on to state that the victim was bleeding when she came back. We have already noted that the prosecution has not

got the appellant medically examined which has been admitted by the I.O. (P.W. 4) in her deposition. In view of aforementioned evidences available on record, it would not be safe to convict the appellant believing the testimony of the victim girl.

"**43.** We are conscious of the fact that it is a case under the POCSO Act 2012 and also aware of the provisions of Section 29 of the POCSO Act which reads as under:-

> **29. Presumption as to certain offences.-** Where a person is prosecuted for committing or abetting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

44. In the case of **Veerpal @ Titu versus State (CRL.A.223/2023 dated 15th April, 2024)**, the Hon'ble Delhi High Court has discussed the kind of presumption provided under Section 29 of the POCSO Act. The views expressed by the Hon'ble Calcutta High Court in the case of **Subrata Biswas and Another versus State** reported in **2019 SCC Online Cal 1815,** and the views expressed by Hon'ble Kerala High Court in the case of Joy versus **State of Kerala reported in (2019) 1 KLT 935** have been relied upon by this Court in the case of **Heera Das Vs. State of**

Bihar & Anr. reported in **2025 (2) BLJ 517**. Paragraph '33', '34' and '35' of the judgment in the case of **Heera Das** (supra) are being reproduced hereunder:-

> "**33.** In the case of **Veerpal @ Titu (supra),** the Hon'ble Delhi High Court has discussed the kind of presumption provided under Section 29 of the POCSO Act. Paragraph '20' of the judgment in the case of **Veerpal @ Titu (supra)** is quoted hereunder for a ready reference:-
>
> "**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.
>
> For the foregoing reasons, appeal is allowed and the judgment and order on sentence passed by the learned Trial Court is set aside. Appellant is acquitted and be released forthwith, if not required in any other case.
>
> Pending applications, if any, also stand disposed of.
>
> A copy of this judgment be forwarded to the Jail Superintendent and the learned Trial Court for information and compliance. A copy be also provided to the appellant, free of cost."

34. Similarly, in the case of **Subrata Biswas (supra)**, the Hon'ble Division Bench of Calcutta High Court has discussed the scope of statutory presumption under Section 29 of the POCSO Act, 2012. Paragraphs '22' and '23' of the judgment in the case of **Subrata Biswas (supra)** are quoted hereunder for a ready reference:-

> "**22.** The statutory presumption applies when a person is prosecuted for committing offence

under Sections 5 and 9 of the Act and a reverse burden is imposed on the accused to prove the contrary. The word "is prosecuted" in the aforesaid provision does not mean that the prosecution has no role to play in establishing and/or probablising primary facts constituting the offence. If that were so then the prosecution would be absolved of the responsibility of leading any evidence whatsoever and the Court would be required to call upon the accused to disprove a case without the prosecution laying the firm contours thereof by leading reliable and admissible evidence. Such an interpretation not only leads to absurdity but renders the aforesaid provision constitutionally suspect. A proper interpretation of the said provision is that in a case where the person is prosecuted under Section 5 and 9 of the Act (as in the present case) the prosecution is absolved of the responsibility of proving its case beyond reasonable doubt. On the contrary, it is only required to lead evidence to establish the ingredients of the offence on a preponderance of probability. Upon laying the foundation of its case by leading cogent and reliable evidence (which does not fall foul of patent absurdities or inherent probabilities) the onus shifts upon the accused to prove the contrary. Judging the evidence in the present case from that perspective, I am constrained to hold that the version of the victim (PW-1) and her mother (PW-2) with regard to twin incidents of 24th March, 2016 and 18th April, 2016 if taken as whole, do not inspire confidence and runs contrary to normal human conduct in the backdrop of the broad probabilities of the present case.

23. Hence, I am of the opinion that the evidence led by the prosecution to establish the primary facts suffer from inherent contradictions and patent improbabilities particularly the inexplicable conduct of the victim herself. One part of the prosecution case improbabilises the other part to such an extent that no man of reasonable prudence would accept the version as coming from the witnesses. Hence, I am of the

> opinion that the factual matrix of the case does not call for invocation of the aforesaid statutory presumption so as to convict the appellant on the charges levelled against him."
>
> **35.** The same views have been expressed by the Hon'ble Kerala High Court in the case of **Joy versus State of Kerala** reported in **(2019) 1 KLT 935.** It has been held that the duty to rebut the presumption arises only after the prosecution has established the foundational facts of the offence alleged against the accused and the court must be on guard to see that the application of presumption, without adverting to essential facts shall not lead to injustice. In the present case, the foundational facts such as that the victim was taken away by the appellant at 11:00 am by alluring her after giving a biscuit and then the rape was committed inside the house has not been established. The prosecution story as discussed in the written report giving rise to the present FIR and then the evidence of PW-7 are materially inconsistent and this Court has discussed hereinabove why the evidence of PW-7 would not inspire confidence."

41. In the context of the present case, we are of the considered opinion that the prosecution has not been able to prove the foundational facts through cogent evidence and the defence has been able to prove its case by preponderance of probability as we have already seen and observe that the appellant in his statement under Section 313 of the Cr.P.C. has categorically stated as under:

> "पीड़िता का पिता दारू–गॉजा पीता है जिसके कारण मेरा पीड़िता के पिता से झगड़ा हुआ और मैंने पीड़िता

> के पिता को मारा था। मैंने उक्त संबंध में हमलोगों के साहब से भी शिकायत किया था। हमारे साहब और मैडम भी पीड़िता के पिता की उक्त के कारण पीटायी किये थे। साहब का राशन का सामान में से एक बोरा चावल भी पीड़िता के पिता ने चुराकर अपने कमरे में रख लिया था जिस संबंध में भी मैंने पीड़िता के पिता का हमलोगों के साहब से शिकायत किया था। पीड़िता के पिता ने मुझसे ब्याज पर पचीस हजार रू0 की भी मॉग किया था जिसे देने से मैंने इन्कार कर दिया था। उक्त सभी कारणों से पीड़िता के पिता द्वारा मुझे इस गलत केस में फॅसाया गया है। मैं निर्दोष हूॅ।"

42. From the discussions made above, it seems that the learned Trial Court has erred in appreciating the evidence on record and we find that the appellant has made out a case for acquittal giving him benefit of doubt. We also find that the prosecution has failed to prove the charge under Section 6 of the POCSO Act beyond all reasonable doubt and thus, the appeal deserves to be allowed.

43. In the result, the impugned judgment and order of the sentence are set aside.

44. The appellant is in incarceration in connection with this case, so he will be released forthwith if not wanted in any other case.

45. This appeal is allowed.

46. Let a copy of this judgment together with the trial court's records be sent down to the learned trial court.

47. Before we part with the appeal, we must appreciate the assistance provided by learned Amicus Curiae Mr. Md. Irshad

on behalf of the appellant. Secretary, Patna High Court Legal Services committee is directed to pay Rs. 15000/- to the learned Amicus Curiae towards honorarium.

(Sourendra Pandey, J)

Rajeev Ranjan Prasad, J :

(Rajeev Ranjan Prasad, J)

krishna/-

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