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

Case No. : CRL.A(J)/26/2019

PURNA NAHAR DEKA
S/O. LT. CHAKRADHAR NAHAR DEKA, R/O. LONGJONG ALICHINGA
GAON, P.S. JOYPUR, DIST. DIBRUGARH.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR. S ISLAM, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE PARTHIVJYOTI SAIKIA

JUDGMENT & ORDER

Date : 10.09.2021

P.J. Saikia, J

Heard learned amicus curiae Mr. S. Islam for the appellant and learned Addl. P.P., Ms. B. Bhuyan for the respondent.

2. This appeal is directed against the judgment and order passed by the learned Sessions Judge, Dibrugarh in POCSO Case No. 41/2017 (GR Case No. 2907/2017), by which, the learned Sessions Judge convicted the appellant under Section 6 of POCSO Act and sentenced

them to rigorous imprisonment for 14 (fourteen) years and to pay fine of Rs. 25,000/- (Rupees Twenty Five Thousand) only with default stipulation.

3. The factual matrix giving rise to the prosecution case against the appellant - the appellant is the father of a minor girl. When she was in Class-VI, since then, the appellant used to sexually assault her. She complained to her mother on several occasions, but the mother did not believe her. Finally, on one occasion, the mother saw some incident of sexual assault upon her daughter and since then, she had quarreled with her husband. In the meantime, the minor attained puberty. It is alleged that on the third day of attaining puberty, the appellant committed forcible penetrating sex upon her. After knowing about that incident, the mother became angry and the appellant even tried to strangle his wife.

4. Since prior to that occasion, the wife of the appellant had already informed the villagers about the activity of the appellant and on the day, when the appellant had committed rape upon her daughter, she invited the village Gaonburha and other relatives to her house. Thereafter, the Gaonburha had lodged the FIR alleging the aforesaid facts.

5. During the period of investigation, the victim girl was subjected to medical examination. The report of the doctor goes like this –

“On genital examination: Genital organs were developed. Vulva is healthy.

Hymen: Old tear at 3 and 9 O'clock position. Vagina and cervix is healthy. Uterus not palpable per abdomen. Vaginal smears were taken from posterior fornix in and around the cervix result of which does not show any spermatozoa.

Urine for beta HCG (pregnancy kit test): Negative

OPINION:- On the basis of Physical examination, Radiological & Laboratory Investigation done on Smti. Dulumoni Nahardeka, I am of the opinion that –

- (1) Evidence of recent sexual intercourse not detected on her person;*
- (2) Evidence of recent injury not detected on her private parts;*
- (3) Her age is above 12 years and below 14 years;*
- (4) Evidence of pregnancy not detected on her person.*

Ext. 4 is the Medico-legal Report wherein Ext.4(1) to Ext.4(3) are my signatures.

I have placed my report before the Head of the Department, who concurred with my findings and forwarded the same. Ext. 4(4) is the signature of Dr. RK Gogoi, Professor & Head of the Forensic Medicine.

Old tear at 3 and 9 O'clock position mentioned in 20(c) in the Medico-legal Report is suggestive of vaginal penetration."

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6. The victim girl was also brought before a Judicial Magistrate, for recording her statement under Section 164 Cr.P.C., who recorded her statement.
7. Finally, on completion of the police investigation, charge sheet was filed against the appellant.
8. The trial court framed the charges under Section 376(2)(i)/307 IPC and under Section 6 of the POCSO Act. The appellant denied the charges.
9. The prosecution side examined 7 witnesses including the Police Officer and the doctor, who had examined the victim girl at the time of police investigation to bring home the guilt of the appellant. On completion of the prosecution evidence, the accused was examined under Section 313 CrPC, wherein the accused person pleaded innocence. However, no defence evidence was adduced by the appellant.
10. On appreciation of evidence, learned Sessions Judge passed the impugned judgment and order and awarded sentence as indicated above.
11. We have considered the submissions made by the learned amicus curiae and the learned Addl. P.P. and scrutinized the evidence brought on record.
12. The first prosecution witness examined is the victim girl. She has stated in her evidence that her father often used to sexually assault her. She complained to her mother on many occasions. The victim girl has stated that her mother initially did not believe her, but on one

occasion, her mother herself noticed such an incident. After that, her mother had quarreled with her father. The victim girl has stated that on the third day of attaining her puberty, her father had committed rape upon her. According to the victim girl, her mother had called the villagers and the Gaonburha and the villagers ultimately apprehended the appellant and handed him over to police.

13. The cross examination portion of the evidence of PW-1 consist such suggestion pertaining to what she did not state before police. In response to such quarries by the defence accused, she has stated that her father was having an extra marital affair with another married woman.

14. The second prosecution witness is the mother of the victim girl. She has stated in her evidence that initially she did not believe her daughter, when she had made complaint about the appellant accusing him that he had committed sexual assault upon her. The mother has stated that on the third day of attaining puberty, the appellant had committed rape upon her daughter. The mother has further stated in her evidence that when she called meeting of the villagers on the issue of rape committed by her husband, she also informed the sister of the appellant. According to this witness, the villagers handed her husband to police.

15. The cross examination portion of the evidence of the PW-2 is also similar. She has stated that in the year 2017, she alone had gone to Manipur leaving behind her family and after some time, her mother brought her back. During cross examination of Bhaben Nahardeka, the appellant never challenged the fact that on a previous occasion, the appellant had given a written undertaking promising not to misbehave with his daughter in future.

16. The third prosecution witness is Bhaben Nahardeka. He has stated in his evidence that the mother of the victim girl informed him that her husband sexually abused her daughter. Bhaben Nahardeka, in turn, informed the other women of the village and on the next day, they had a meeting on that issue. Bhaben Nahardeka has stated that he had advised the wife of the appellant to inform police, but inspite of that she did not inform police because the appellant had threatened her of dire consequence. This witness has stated that after the victim had

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attained puberty, the appellant again sexually assaulted her. This witness has disclosed that he came to know about the latest occurrence from the wife of the appellant and his sister-in-law, Amiya Nahardeka. Thereafter, on 4th day of attaining puberty by the girl, the villagers had a meeting in the house of the appellant. This witness had attended the said meeting. Bhaben Nahardeka has further disclosed that the meeting advised the appellant not to repeat such act upon the victim girl and according to this witness, the appellant agreed and gave a written undertaking that he will not misbehave with his daughter. Bhaben Nahardeka has stated that he came to know that on the next day of the meeting, the appellant again committed rape upon the victim girl and therefore, some villagers apprehended the appellant and handed him over to police.

17. The fourth prosecution witness is the aunt of the appellant. She has stated that the appellant had misbehaved with his daughter and thereafter the villagers handed him over to police.

18. There is nothing relevant in the cross examination portion of the evidence of PW-4.

19. The fifth prosecution witness is the sister-in-law of the appellant. She has stated in her evidence that the occurrence took place in the month of '*Bhadra*'. According to this witness, her sister-in-law Moonmi Nirmalia informed her that the appellant had committed rape upon his own daughter. Thereafter, this witness confronted the victim girl in order to know the actual truth. The witness has disclosed that the victim girl told her that her father had committed rape upon her. This witness accordingly informed the village Gaonburha.

20. In the cross examination of this witness, the appellant did not challenge the fact that the victim girl had stated before PW-5 that the appellant had committed rape upon her.

21. The sixth prosecution witness is the doctor, who had examined the victim girl. She spoke about her report.

22. The doctor (PW-6), who examined the victim girl at the time of investigation has stated in her evidence that the old tear at 3 and 9 O'clock position is suggestive of vaginal penetration. This witness has stated that such old tear occurs because of forceful intercourse. The doctor has also stated that the old tear at 3 and 9 O'clock position may not always occur due to sexual intercourse, but may occur due to some other kind of penetration.

23. The seventh prosecution witness is the Police Investigating Officer. He also spoke about the police investigation.

24. In the cross examination of the Investigating Officer (PW-7), he stated that the victim did not tell him that when her father sexually assaulted her, he threatened her that he will kill her brother and sister if she raised alarm. The Investigating Officer also confirmed that the victim girl did not tell him that she informed her mother several times that her father had sexually assaulted her, but her mother did not believe her.

25. At the time of examination of the appellant under Section 313 Cr.P.C., he has stated that it is his wife, who had spread the false rumor in the village that he had sexually assaulted his own daughter. He has denied the allegation that he had sexually assaulted his own daughter. The appellant further stated that it was because of his wife, the villagers handed him over to police and that is also the reason why he had committed murder of his wife.

26. We have carefully gone through the prosecution evidence.

27. The evidence of the prosecutrix (PW-1) is corroborated by her mother (PW-2). Furthermore, the evidence of the prosecutrix is also corroborated by the medical evidence (PW-6). We are of the opinion that the evidence of PW-1, PW-2 and PW-6 inspired confidence.

28. The POCSO Act empowers the Special Judge to have a presumption about the guilty of an accused. The doctrine of reverse burden is applicable in such cases.

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29. At this stage a brief visit to Section 29 and 30 of the POCSO Act would be fruitful.

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

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

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

30. We would reiterate two paragraphs of a judgment of this court that was rendered in the **Manirul Islam @ Manirul Zaman Vs. State of Assam**. They are -

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

42. The doctrine of reverse burden is not peculiar to the POCSO. There are a number of other Legislations in India which contains such provisions. Sections 35 and 54 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short NDPS) are an example. While dealing with challenge made to the validity of section 35 and 54 of the NDPS, in so far as it imposes reverse burden upon the accused, the Apex Court has observed in the case of Noor Aga Vs State of Punjab reported in (2008) 16 SCC 417, as follows :-

“58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would

clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of [Section 35](#) of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established."

31. The question arises as to how the trial court shall presume the guilt of an accused. In the case of **Babu Vs. State of Kerala** reported in **(2010) 9 SCC 189**, the Apex Court held as under:

"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."

32. In the instant case, the evidence of the victim girl is corroborated by her mother and medical evidence. This court is of the opinion that the foundation, for having a presumption, has been established. Now it is the duty of the accused to prove his innocence. In **Manirul Islam** (supra), this court has already held as under:

"51. From the above, it becomes apparent that mere insertion of [sections 29](#) and [30\(2\)](#) in the POCSO does not altogether relieve the prosecution of the burden of proof contemplated under [sections 101](#) and [102](#) of the Evidence Act but merely lessen the burden on the prosecution by shifting the onus upon the accused. However, such reverse onus would shift upon the accused only when the prosecution succeeds in prima facie establishing the charge by adhering to the standard of proof of preponderance of probability. It is only then, the accused would have to displace the

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presumption of guilt. What therefore, follows is that conviction in a proceeding initiated under the POCSO cannot be based solely on presumption of guilt of the accused under sections 29 & 30 of the Act. For the above reasons, we find ourselves in agreement with the guiding principles laid down in paragraph 71 of Bhupen Kalita (supra) formulating the parameters to be satisfied for drawing presumption of guilt by the Court under sections 29 and 30(2) of POCSO.

33. Section 29 and 30 of the POCSO Act does not actually relieve the prosecution of its burden to prove a case. These provisions of law, however, lessen the burden of the prosecution by shifting the onus of proof to the accused. Once the foundation for holding the presumption is established, after that the duty is cast upon the accused to prove his innocence. In the case in hand, the appellant did not prove his innocence by adducing evidence. Therefore, this court is of the opinion that the appellant failed to discharge his statutory burden. The learned trial court rightly held that the charge brought against the appellant has been proved beyond all reasonable doubt. We are of the opinion that the learned trial court has correctly appreciated the prosecution evidence in the light of the aforesaid statutory provision. We, therefore, hold that the impugned judgment does not require any interference. Accordingly, we hereby hold that the appeal is devoid of merit and therefore, the appeal stands dismissed.

34. Appreciating the assistance rendered by Mr. S. Islam, learned Amicus Curiae, we hereby provide that he will be entitled to Rs. 7500/- as professional fee, which shall be paid to him by the Gauhati High Court Legal Services Committee upon production of a copy of this judgment.

35. Send down the LCR.

JUDGE

JUDGE

Comparing Assistant