

2019 SCC OnLine Gau 5947 : (2021) 1 Gau LR 70 : (2020) 205 AIC 697

In the High Court of Gauhati  
(BEFORE MIR ALFAZ ALI AND MANISH CHOUDHURY, JJ.)


Latu Das ... Appellant;  
*Versus*  
State of Assam ... Respondent.

Crl. A. No. 55(J) of 2018  
Decided on October 29, 2019

Protection of Children from Sexual Offences Act, 2012, S. 29 — Person prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 9 of the Act — Special Court to presume that such person has committed or abetted or attempted to commit the offence unless the contrary is proved — Reverse burden put on the accused — Section 29 creates a restriction on the accused's right to remain silent — Presumption under section 29 of the Act does not absolve the prosecution from its usual burden to prove the guilt of the accused beyond reasonable doubt.

We also take note of the presumption under section 29 of the POCSO Act which provides that when a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 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. The above statutory presumption, which a court is bound to raise in a prosecution for offence under sections 3, 5, 7 and 9, of the POCSO Act put a reverse burden on the accused, which is an exception to the general principle of criminal justice, that burden to prove the guilt beyond reasonable doubt lies on the prosecution, and the accused has a right to remain silent. The statutory

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presumption under section 29 of the POCSO Act creates a restriction on the accused's right to remain silent. Because once there are adequate material for raising a presumption under section 29 of the POCSO Act, the special court is justified in recording conviction on the basis of such presumption, unless the accused rebut, the presumption, or proves the contrary, to what was/were the basis of raising presumption

[Para 24]

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

[Para 25]

Advocates who appeared in this case :

Mr. Arunangshu Dhar for the appellant.  
Mr. M. Phukan for the ... Respondent.

## JUDGMENT AND ORDER

MIR ALFAZ ALI, J.: — Heard Mr. Arunangshu Dhar, learned amicus curiae and Mr. M. Phukan, learned Additional Public Prosecutor.

2. This appeal is directed against the judgment and order passed by learned Sessions Judge-cum-Special Judge, Sivsagar in Special (P) Case No. 2/2017. By the said judgment, learned trial judge convicted the appellant under section 6 of the POCSO Act and convicted him to rigorous imprisonment for life and fine of Rs. 2,000 with default stipulation.

3. The prosecution case as unfolded during trial is that on 13.1.2017, there was a feast on the occasion of Bihu, where appellant was also present. The accused-appellant dragged the victim from outside the house, to a nearby jungle by gagging her mouth and committed rape on her. One Babu Das (PW 8) came out hearing hue and cry raised by his mother (PW 7) and recovered the victim from the place of occurrence. Immediately, the police



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was informed by PW 8 over phone, on the basis of which a G.D. entry was made. The police arrived the place of occurrence, recovered certain incriminating materials and took preliminary steps for investigation and then the formal report was lodged on the next day by the father of the victim (PW 9). Treating the report lodged by the father of the victim as FIR, police registered Nazira Case No. 7/17 under section 4 of the POCSO Act and commenced investigation. In course of investigation, the police recorded the statement of the witnesses including the victim, got the statement of the victim and her mother recorded by Magistrate under section 164, Cr.PC, sent the victim and also the accused-appellant for medical examination and on conclusion of the investigation, submitted charge sheet against the accused-appellant under section 4 of the POCSO Act.

4. In course of trial, learned Special Judge framed charge under section 6 of the POCSO Act against the accused-appellant which was abjured by him.

5. In order to bring home the charge, the prosecution examined 11 witnesses. After completion of the prosecution evidence, the accused was examined under section 313, Cr.P.C. In course of the examination under section 313, Cr.PC, the accused-appellant took the plea of innocence and stated that he was not present at the place of occurrence. On appreciation of evidence, the learned trial court convicted the appellant under section 6 of the POCSO Act and awarded sentence as indicated above.

6. We have considered the submissions made by the learned counsel for both the sides.

7. PW 2, the victim stated in her evidence that she was sent to the house of Debojit Gogoi (PW 6) by her mother to give meat and at that time, the accused Latu Das was dancing and others were preparing meal. When she came back after giving the bowl of meat to PW 6, the accused-appellant grabbed her and dragged her to the jungle by gagging her mouth, where the appellant unclothed her and committed rape. She also stated that the accused threaten to kill her and upon her resistance, the accused-appellant slapped her. She further stated, that in the meantime, the mother of Babu Das (PW 7) raised alarm and the accused-appellant had fled away. During cross-examination, she stated that she recognised the accused-appellant but initially she did not know his name and she could know the name of the accused-appellant later on, from her mother.

8. PW 1 Baby Sharma, the mother of the victim deposed that at about 11 o'clock at

night, she sent the victim to the house of PW 6. When the victim did not return, she was searching her and in the meantime, PW 7

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Alpana Das, who went to attend the call of nature, raised alarm on the back side of the house that there was a thief. On hearing alarm raised by PW 7, her son Babu Das (PW 8) came out. She (PW 1) also proceeded towards the place of occurrence and hearing cry of the victim, Babu Das went to the place of occurrence and lifted the victim and handed over to her. She also stated to have noticed blood stains on the face and the private part of the victim. She further stated, that the wearing apparels like Pant, sandal, etc., of the victim were missing. After recovery of the victim, PW 7 informed the police over phone. She went on saying, that on being asked by her, the victim told that accused Latu Das dragged her to the place of occurrence and threaten her to kill in case she raise alarm. The accused also slapped her and did "bad thing" (sexual assault) on her by removing her clothes. This witness also stated to have noticed scratch marks on the legs of the victim. She also deposed that the police picked up some articles being ATM card, driving licence, etc., of the accused from the place of occurrence. Though, both these two witnesses were subjected to extensive cross-examination, nothing material could be elicited so as to create any dent in their testimony. The statement of the PW 1 and PW 2 recorded under section 164, Cr.PC also shows that both these witnesses have been very much consistent in their version throughout the proceeding.

9. PW 7, Alpana Das deposed that at about 10/11 at night, she went to the back side of her house for urination and noticed one person running away. She tried to chase the person and her son Babu Das (PW 8) also followed her. While chasing the person running away, she heard the cry of someone saying "Bachao Bachao" (Save me Save me) and then the victim was recovered by her son (PW 8) from the place of occurrence. She also stated that the victim was naked at that time and she noticed injury on her face, ears, eyes. Immediately, she was taken to her mother and after sometime, police arrived there. She had shown the place of occurrence to the police, where from the police recovered one pair of sports shoe, one hawai chappal, money bag, I-card, etc., of Latu Das. During cross-examination, of this witness also nothing material could be elicited and her evidence on material facts remained unshaken.

10. Close on the heel of the evidence of PW 7, the PW 8 Babu Das deposed, that hearing cry of his mother saying "chor chor" (thief thief), he got up from sleep and rushed to the back side of the house and followed her mother. While he was following his mother, he heard the cry of someone "Bachao Bachao" (Save me Save me) and noticed the victim. He recovered the victim in a naked condition. He also stated to have seen blood stain on her private part and injury on her nose, ear, etc. During

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cross-examination, it was further confirmed that while he picked up the victim, she was in naked condition.

11. PW 6, Sri Debojit Gogoi stated that he requested the mother of the victim to send little prepared meat for him and PW 1 sent the victim to his house with the meat. According to PW 6, he came out after the victim was recovered and noticed that her clothes were tom and grass stuck to her clothes and she was not in a position to talk.

He further stated that police went to the back side of the residence of Alpana Das (PW 7) and recovered some articles, namely, one pair sports shoe, one hawai chappal, voter ID card, one driving licence, Pan Card in the name of Latu Das. He also identified those articles in Court as Material Exhibits 1 to 8.

12. PW 4, Sri Debojit Hazarika deposed that at about 11/11-30 p.m. hearing hue and cry he came out and the mother of the victim, told that the accused committed rape on her daughter. He also deposed to have seen bleeding injury on the private part of the victim. He further stated that he accompanied the police to the place of occurrence, where from one pair of sports shoe, one hawai chappal, one yellow under pant, one three-quarter half pant, green colour sleeves, money bag, voter ID card in the name of Latu Das were seized by police. He also identified all these articles in Court as material Exhibits 1 to 8.

13. PW 3, Dr. Amiya Saikia, who examined the accused-appellant found the following injuries:

"4 Linear abrasions present on left side of face 3 cm × 1 mm, reddish in colour."

14. In the opinion of the doctor, the injuries were simple. The doctor also opined that the scratch marks present on the face of the accused was straight and such scratch marks apparently was caused by finger nails. Further during cross-examination, the doctor stated that the scratch marks found on the body of the victim could also be caused by some other objects.

15. PW 5, Dr. Mukut Ch. Deka, examined the victim found the following injuries:

*"Mark of violence on the body—*

1. 2-3 scratch marks (superficial) and fresh seen in medial aspects of right thigh.
2. Abrasion injury seen just above the upper lip and blood clot in upper lip seen.
3. Superficial lacerated injury lateral aspects of right labia muscle of vagina seen. No bleeding seen.



4. Tear in fourchette of vagina seen.

5. Tear of hymen seen with redness of vagina oozing of blood seen.

*Examination of genitalia-*

Pubic hair — absent. Clitoris — normal.

Labia, majora and minora — poorly developed.

Fourchette — tear seen. Hymen — tear.

Vagina — redness and oozing of blood seen.

Injury — nil Discharge and stains — blood stain.

*Laboratory investigation:*

Vaginal smear test — spermatozoa not seen.

Pregnancy test (HCG in urine) — report reveals — negative.

*Radiological examination:*

X-ray left elbow and wrist joint reveals incomplete fusion of epiphysis of both bone."

16. The doctor opined that the evidence of forceful attempt of sexual act was seen. There were multiple marks of violence on her body and age of the victim was about 7 years. During cross-examination it was elicited that rupture hymen might be caused due to cycling and jumping. It was further stated by the doctor during cross-

examination, that mere torn hymen is not the conclusive evidence of penetration.

17. PW 9, Sri Parmananda Sharma, the father of the victim, testified that hearing hue and cry he got up from sleep and came to know about the occurrence from the victim. This witness also stated about the seizure of sport shoes, one hawai chappal, one yellow under pant, 3-quarter half pant, green colour sleeks, money bag, voter ID card, one driving licence and ATM in the name of Latu Das. During cross-examination, it was elicited that the accused-appellant was his neighbour.

18. According to PW 10, Sri Krishna Bora while he came out hearing hue and cry raised by a lady by saying "Chor Chor" (thief thief). He noticed that the son of the said lady (PW 8) was bringing the victim in naked condition. He also deposed to have seen injury on the face, body, leg and private part of the victim. He further deposed that he accompanied the police to the place of occurrence, where from the police seized one pair of sports shoe, one hawai chappal, one yellow underpant, one three-quarter half pant, green colour sleeks, money bag, voter ID card, one driving licence, ATM card in the name of Latu Das.



19. PW 11, Sri Nurtaz Ali was the Investigating Officer, who deposed that on the basis of telephonic information received by the O.C., a G.D. entry was made and he was entrusted to investigate the matter. He also proved the G.D. entry as Exhibit 7. PW 11 further deposed that having come to the place of occurrence, he found one pair sports shoe, one hawai chappal, one yellow underpant, one three-quarter half pant, one green colour sleeks, one money bag, one voter ID card, one driving licence, ATM card in the name of Latu Das and seized those articles vide Seizure List (Exhibit 4). He also stated to have seized the birth certificate of the victim which was proved as Exhibit 11. During cross-examination, it was elicited that the seized articles were found scattered at the place of occurrence and the people accompanying him, helped in collecting all those articles.

20. Learned amicus curiae, Mr. Dhar referring to the statements of the victim recorded under section 164, Cr.PC contends that she did not mention the name of the accused in her previous statement and as such, no reliance can be placed on her evidence to implicate the accused.

21. We have carefully perused the statement recorded under section 164, Cr.PC, which shows that she did not mention the name of the accused. However, during evidence in court she identified the accused. She also deposed that initially she did not know the name of the accused and she came to know the name from her mother later on. Evidence of the PW 9 father of the victim shows that accused was their neighbour. PW 9 and PW 2 deposed that the accused was present there at Bihu feast, immediately before the occurrence. In fact, the accused also during his cross-examination under section 313, Cr.PC clearly stated that he was also enjoying the feast and later on left for his home. The above evidence clearly demonstrates that appellant was a close neighbour of the victim and he was also present at the feast. Therefore, we find no reason to hold that the victim could not identify the accused. Having regard to the age of the victim, it is quiet natural, that she might not know the name of the accused, but from the facts and circumstances, we are unable to accept the submission of the learned amicus curiae, that she could not recognise the accused who was her close neighbour. Therefore, when the victim herself stated that initially she did not know the name of the accused which she came to know from her mother,

we find no fault in the previous statement, where she did not mention the name of the accused-appellant.

22. The evidence of PW 2, the victim, that she was subjected to penetrative sexual assault find corroboration from the evidence of PW 1, PW 4, PW 7 and PW 8 who had seen the injuries on the body of the victim including on her private part immediately after the occurrence. The medical



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evidence of PW 5, Dr. Mukut Deka, who examined the victim, found injury on the body including private part of the victim which gave clear indication of forceful sexual acts. Thus, the medical evidence also fully corroborates the oral testimony of the victim as well as PW 1, PW 4, PW 7 and PW 8. The evidence of PW 3, Dr. Amiya Saikia, who examined the appellant immediately after the occurrence, and found injury on his face, which according to the doctor was apparently caused by finger nail also reinforced the prosecution case, that the victim was subjected to non-consensual and forcible sexual assault. This apart, recovery of the money bag, voter I.D., A.T.M., etc., of the accused from the place of occurrence also lent added support to the prosecution case, establishing the presence of the accused at the place of occurrence beyond reasonable doubt.

23. Thus, the oral testimony of the PW 2 (victim) coupled with the medical evidence as well as the oral testimony of other ocular witnesses, namely, PW 1, PW 4, PW 7 and PW 8 who arrived at the place of occurrence immediately after the occurrence and had seen the injuries on the body of the victim corroborated by the medical evidence, leaves no room for doubt that the victim was subjected to penetrative sexual assault of aggravated nature by the accused-appellant.

24. We also take note of the presumption under section 29 of the POCSO Act which provides that when a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 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. The above statutory presumption, which a court is bound to raise in a prosecution for offence under sections 3, 5, 7 and 9, of the POCSO Act put a reverse burden on the accused, which is an exception to the general principle of criminal justice, that burden to prove the guilt beyond reasonable doubt lies on the prosecution, and the accused has a right to remain silent. The statutory presumption under section 29 of the POCSO Act creates a restriction on the accused's right to remain silent. Because once there are adequate material for raising a presumption under section 29 of the POCSO Act, the special court is justified in recording conviction on the basis of such presumption, unless the accused rebut, the presumption, or proves the contrary, to what was/were the basis of raising presumption.

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



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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.

26. The appellant in the present case has not adduced any evidence, except making a fragile attempt to raise a plea of alibi during examination under section 313, Cr.PC. But neither any evidence has been adduced by the accused nor there is any other material on record to prove such plea. Though the burden of the accused to prove the defence plea is not as strict as is required in case of prosecution and usually the defence plea is to be tested in the touchstone of preponderous of probability, a plea of alibi, it is required to be proved strictly by a higher standard of evidence, than the preponderous of probability. Evidence must be of such conclusive nature, so as to completely rule out the presence of the accused at the scene of occurrence. In the present case absolutely no evidence has been adduced by the accused to prove the plea of alibi. Rather the evidence brought on record by the prosecution, that accused was present in the proximity of the place of occurrence few minutes before the occurrence falsify the plea of alibi. As already noticed that, prosecution in the present case, not only adduced evidence for enabling the court to raise a presumption under section 29, rather, in our considered opinion the evidence discussed here in above has proved the charge against the accused beyond reasonable doubt.

27. Thus, having regard to the overwhelming evidence adduced by the prosecution, establishing the guilt of the accused, beyond reasonable doubt, we find no reason to take a view different from the one taken by the learned trial court. Accordingly, we uphold and confirm the impugned judgment of the learned Sessions Judge recording conviction of the accused-appellant under section 6 of the POCSO Act. However, having taken note of the facts from the records, that there was no criminal antecedent of the appellant and his young age, we reduce the sentence from life imprisonment to rigorous imprisonment for ten years, retaining the fine and sentence in default, awarded by the learned Sessions Judge.



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28. Accordingly, the appeal stands partly allowed, with the modification in respect of substantive sentence of imprisonment.

29. Send down the LCR.