AFR

RESERVED

Court No. - 45
Case :- CAPITAL CASES No. - 13 of 2021
CONNECTED WITH REFERENCE NO.10 OF 2021
Appellant :- Monu Thakur
Respondent :- State of U.P.
Counsel for Appellant :- From Jail, Archit Mandhyan, Vinay Saran(Senior Adv.)
Counsel for Respondent :- A.G.A.
Hon'ble Manoj Misra,J.
Hon'ble Sameer Jain,J.

(Delivered by Manoj Misra, J.)

1. This appeal, forwarded by the Senior Superintendent, District Jail, Aligarh, vide letter dated 27.09.2021, on the request of the appellant Monu Thakur, assails the judgment and order of the court of Additional District and Sessions Judge /Special Judge (Pcoso Act), First, Hathras, dated 23.09.2021, in Special Sessions Trial No.40 of 2019, convicting the appellant Monu Thakur under Sections 302, 376, 326-A, 354, 354-A, 452 IPC and Sections 7/8 and 5/6 of the Protection of Children from Sexual Offences Act, 2012 (for short Pocso Act) and sentencing him as follows:

(i) Under Section 302 IPC, death sentence with fine of Rs.50,000/- and a default sentence of additional six months S.I.;

(ii) Under Section 326-A IPC, imprisonment for life with fine of Rs.5,000/- and a default sentence of additional six months S.I.;

(iii) Under Section 376 IPC read with Section 5/6 of Pocso Act, imprisonment for life with fine of Rs.50,000/- and a default sentence of additional six months S.I.;

(iv) Under Section 354 IPC read with Section 7/8 of Pocso Act, five years R.I. with fine of Rs.5,000/- and a default sentence of additional one month S.I.;

(v) Under Section 452 IPC, seven years R.I. with fine of Rs.10,000/- and a default sentence of additional three months S.I.;

(vi) Under Section 354-A IPC, three years R.I. with fine of Rs.3,000/- and a default sentence of additional fifteen days S.I.

All sentences to run concurrently.

2. As death penalty was awarded by the court below, a reference has been sent to this Court under Section 366 (1) CrPC for confirmation of death penalty which has given rise to Reference No.10 of 2021.

3. Considering the nature of the crime, we are not disclosing the name of the victim, members of her family as well of the witnesses of that area (locality) and, therefore, wherever required, they have been described by their witness number.

INTRODUCTORY FACTS

4. The prosecution case is based on a written report (Ex. Ka-1) dated 16.04.2019 submitted by PW-1 (the informant - father of the victim) at P.S. Sikandrarao, District Hathras, at 11.57 hours, of which GD entry (Ex. Ka-4) and Chik FIR (Ex. Ka-3) was made / prepared by PW-4. In the FIR, it was alleged that, on 15.04.2019, at about 10 pm, when PW-1 and his wife (not examined) were away, their daughter (the victim), aged about 14 years, who was with her maternal grand mother *(Nani)* (PW-2), the accused-appellant, aged 25 years, came to the house and misbehaved with the victim. When victim resisted his actions, the accused set her ablaze. On registration of the FIR, PW-4 prepared a letter for medical examination of the victim and got the victim medically examined on 16.04.2019, at 3.25 pm, through a lady constable Sadhna (not examined), of which medical / injury report (Ex. Ka-6) was prepared by Dr. Gufran Ahmed (PW-6) at J.N. Medical College Hospital, Aligarh Muslim University, Aligarh. The injury report reflected thermal burns to the extent of 85% on head, neck, part of face, anterior and posterior trunk, upper limb and lower limb, genitalia. Thermal burns were from kerosene oil and were

found grievous in nature. The general condition of the patient was noted as critical. In the column concerning Central Nervous System of the patient it was noted conscious and oriented. The internal examination of Genitalia was made by doctor on duty of Obstetrics and Gynaecology Department. The remarks in respect thereof were as follows:- no bleeding seen; no tear on vulva; and small healed tear present on hymen at 7 O'clock position. After being admitted in the said hospital on 16.04.2019, the victim died there on 01.05.2019, at 1.45 am. Autopsy was conducted by PW-5, who prepared an autopsy report (Ex. Ka-5) dated 2/5/2019, which indicates that autopsy started at 12.15 hrs and completed at 12.45 hrs. In the column relating to ante-mortem injuries, it is mentioned in the autopsy report that there were superficial to deep burn all over body except parts of chest, legs, feet and buttocks. The cause of death was septicaemia as a result of ante mortem 80% thermal burn injuries. At the bottom of the autopsy report, there is a note made under the signature of Dr. Rashmi Choudhari (not examined), dated 2/5/2019, which reads: *Local examination- labia B/L swelling; Pv- Hymen intact; no bleeding from vagina; vaginal slide & swab prepared for spermatozoa detection.*

5. The inquest was conducted on 01.05.2019 at the hospital itself. Inquest report (Ex. Ka-2) was also witnessed by PW-1. A death certificate (Ex. Ka-7) was also issued. The vaginal smear slide and vaginal swab were sent for forensic examination and they did not reveal presence of spermatozoa though there was presence of blood. Half burnt jeans and half burnt bra and plastic kerosene container recovered during the course of investigation were also sent for forensic examination wherein the presence of kerosene oil was proved. After investigation, the second Investigation Officer (I.O.) (PW-8) submitted a charge sheet on which, after taking cognizance, vide order dated 22.07. 2019, charges were framed against the appellant by the court of Special Judge (Pocso Act) of offences

punishable under Sections 452, 354, 354-A, 326-A, 302 IPC and, later, by order dated 13.09.2021, charge of offence punishable under Section 376 IPC and Section 5/6 of Pocso Act was added.

PROSECUTION EVIDENCE

6. During the course of trial, the prosecution examined as many as nine witnesses. Their testimony is being noticed below.

7. **PW-1** is the informant who is not an eye witness of the incident. PW-1 stated that on the date of the incident i.e. 15.04.2019 he and his wife were out of their home; his daughter (the victim), aged 14 years, was at home with her maternal grand mother (PW-2) when, at about 10 pm, the accused-appellant entered the house and misbehaved with the victim. When the victim resisted, the accused-appellant set her ablaze. PW-1's mother-in-law (PW-2) tried to nab the accused but he escaped. In respect whereof, PW-1 lodged report, scribed by 'X' (not examined), on 16.4.2019 at P.S. Sikandrarao, District Hathras. He proved the written report, which was marked Ex. Ka-1. He also stated that the place of occurrence was shown to the I.O. by his mother-in-law and that in the inquest report he had put his signature, which was marked Ex. Ka-2.

During cross examination, he stated that the written report was not read out to him by the scribe; that he had just put his signatures thereon; that the name which he mentioned in the report, he does not know; that the I.O. had recorded his statement. He stated that during the investigation, while recording his statement under Section 161 CrPC, he had stated that on 15.04.2019, at about 10-10.30 pm, while the victim and his mother-in-law were at home and he and his wife were out, on return, his mother-in-law (PW-2) had informed him that the victim met with an accident on account of which, she got burnt and, after coming to know about the truth, he, his wife, his

mother-in-law, the victim and one villager had given affidavits to *Kaptan Sahab* (the Superintendent of Police) through the I.O. He stated that in his presence the I.O. had not recorded the statement of his daughter. He also stated that when he returned home and had taken the deceased to Medical College Aligarh, she was not conscious. He also stated that in his presence, no Magistrate had taken the statement of the victim and that he is not aware whether victim's statement was recorded by the Magistrate. He stated that his daughter had turned conscious after several days but she did not disclose to him that the incident occurred because of the accused-appellant. He stated that whatever he had stated to the I.O. was told to him by his mother-in-law and that the name of the accused-appellant was mentioned in the report on being prompted by the villagers due to their enmity in the village. He stated that the information with regard to the incident was given to him at home by his mother-in-law (PW-2).

On further cross examination, he stated that he is not sure with regard to the date on which the victim died. He stated that victim remained in the hospital for 20-21 days. He stated that the I.O. had not recorded the statement of his mother-in-law in his presence. He admitted that at the time of the incident only his mother-in-law (PW-2) and the victim were present in the house. He stated that he is not aware whether PW-3 was present. He stated that his wife is now no more alive.

In the cross examination on 5.08.2020, he added that when his daughter had regained consciousness, she had told him that she caught fire while cooking food on the gas because when she tried to pick up *Masala Dani* (spice container) from the almirah, the bottle of kerosene oil fell over the gas burner. PW-1 stated that when he came to know about the truth, he submitted an affidavit to the Superintendent of Police. He also stated that when the Magistrate had come to record the statement of his daughter, PW-1's wife, PW-1's mother-in-law and

3-4 ladies of the village were present, who gave their statement to the Magistrate, but the victim had not given any statement because she was unconscious. He further stated that PW-1's wife and mother-in-law (PW-2) had informed the Magistrate that what the ladies have told him is incorrect. When that was told to the Magistrate, the Magistrate left stating that he would return as and when the victim regains consciousness. But, the Magistrate did not come thereafter to record victim's statement. PW-1 reiterated that the accused-appellant neither misbehaved with the victim nor set her on fire.

8. **PW-2 (the maternal grand mother of the victim)**. She stated that at the time of the incident on 15.04.2019, she was sitting outside the house. The victim was cooking food. Kerosene oil fell and the victim caught fire; and by the time PW-2 and others could rush to douse the fire, the victim got burnt. She stated that the incident must have occurred at around 8 pm; and because of the incident, the case was got registered against the accused-appellant. She stated that her statement was recorded by the I.O.; that at the time of the incident, there was no one else, except her; and that she showed the place of the incident to the I.O.

In the cross examination, she stated that the victim caught fire because kerosene bottle fell over the gas burner while the victim was cooking food. She stated that at the time of the incident, her son-in-law (PW-1) and her daughter were out of home. She stated that her statement was recorded by PW-7 and not by any other I.O. She confirmed that she had stated before the I.O. that the victim caught fire while cooking food on gas burner as the bottle of kerosene oil accidentally fell on the gas burner when the victim tried to pick a *Masala Dani* (container of spices) from the cabinet above. She reiterated that the accused-appellant did not misbehave with the victim and that he did not ablaze the victim after pouring kerosene.

She stated that when PW-1 and her daughter returned, they were informed about the incident and when they came to know the truth, they gave their affidavits.

On further cross examination, she stated that victim remained in the hospital for 20-22 days and that, during her treatment, PW-2 did not visit the hospital. PW-2 stated that she does not know when the victim regained consciousness though she visited the hospital once. She stated that she had shown the burnt clothes of the victim and the bottle of kerosene to the I.O. She stated that PW-2' daughter (mother of the victim) used to stay with the victim at the hospital and after her daughter's death (victim's mother), she has shifted to Mathura.

9. **PW-3**. He stated that while he was on his way to the village, on 15.04.2019, between 10-10.30 pm, he heard loud noises coming from the house of PW-1. When he entered the house of PW-1, he saw PW-1's daughter (the victim) ablaze and PW-2 trying to douse the fire, consequently, as a matter of courtesy and humanity, he helped her in dousing the fire. He stated that PW-2 told him that the victim got burnt while cooking food on gas as kerosene bottle fell over the gas burner while picking up *Masala Dani* (container of spices). This witness was declared hostile and was cross examined by the prosecution.

In the cross examination, when confronted with his statement recorded under Section 161 CrPC he admitted what was written there. He denied the suggestion that the accused-appellant had misbehaved with the victim and had put her on fire. He also denied the suggestion that PW-2 had not informed him that the victim got accidentally burnt on account of kerosene oil bottle falling over gas burner.

In the cross examination at the instance of the accused-appellant, he stated that the accused-appellant had not misbehaved

with the victim and that the report against the accused was got lodged through PW-1 by persons inimical to the accused-appellant. He stated that he, PW-1, PW-2 and the victim's mother all had given affidavits to the Superintendent of Police, Hathras through the I.O. On being confronted with the affidavit, he recognised his signatures on the affidavit. He also stated that the victim had turned unconscious at the time of the incident and had regained consciousness 4-5 days later at Aligarh Medical College. He stated that the concerned Magistrate had not recorded the statement of the victim as the victim was not in a state to give her statement, as she was unconscious. He also stated that whatever the Magistrate had recorded was told to him by the ladies present at the hospital and that when it was pointed to the Magistrate that the victim was not conscious, therefore how her statement could have been recorded, the Magistrate said that he would come again, but he never came.

10. **PW-4-Constable Anil Kumar**. He proved the GD entry / registration of the FIR (Case Crime No.190 of 2019) made on 16.04.2019, at 11.57 hours. He stated that the victim was sent with lady constable Sadhna and a Chitthi Majrubi (letter for medical examination of the injured) to the hospital and was got medically examined. In his cross-examination he denied the suggestion that no incident had taken place or that the case was registered without a written report.

11. **PW-5- Dr. J.M. Sharma**, the doctor, who carried out autopsy of the body, proved the autopsy report and stated that the internal examination of genitalia of the body was carried out by Dr. Rashmi Chaudhary (not examined). The cause of death, according to him, was on account of septicemic shock, caused by infection on account of 80% thermal burns.

12. **PW-6 - Dr. Gufran Ahmad**, the doctor who medically

examined the victim on 16.04.2019. He stated that on 16.04.2019, at 3.25 pm, the victim, aged 13 years, was brought by lady constable Sadhna for medical examination. At that time, he was posted as Chief Medical Officer in the Medical College and he carried out the medical examination. He stated that the victim was brought on a stretcher; her pulse was 108 per minute; respiration was 18 per minute; blood pressure was 90/62; and she had thermal burns upto 85% on account of being burnt by kerosene oil. PW6 stated that he referred the victim to the plastic surgery department. He proved the injury report which was marked Ex. Ka-6.

In the cross examination, he stated that when the victim was brought before him, she was serious and 85% burnt and was not in a position to walk. In PW-2's presence the victim remained for about half an hour and thereafter, was shifted/referred to another department after being provided first aid.

13. **PW-7-Manoj Kumar Sharma (the first investigation officer)**. He stated that after registration of the case, he took over the investigation under the direction of the Inspector In-charge, D.K. Sisodiya (PW-8). Upon registration of the FIR, the victim was sent for medical examination through a lady constable Sadhna. The victim was taken to J.N. Medical College, Aligarh. When he went there with lady constable, he came to know that the victim is under treatment and is not in a position to get her statement recorded. When he came to the house of the victim, no one in the neighbourhood was prepared to give statement on fear of generation of ill-will. Thereafter, he made effort to arrest the named accused but he could not be found. On 17.04.2019, the statement of PW-2 (witness of the incident) was recorded. On inspection of the place of incident, one 5 liter empty bottle of kerosene and half burnt clothes of the victim were recovered. On 19.04.2019, he recorded the statement of the informant (PW-1)

and his wife. On 22.04.2019, he again went to J.N. Medical College to record the statement of the victim but came to know that she was put on oxygen. He also tried to get her statement recorded under Section 164 CrPC but as she was not in a condition to appear in court, her statement under Section 164 CrPC could not be recorded. During investigation, he came to know that the statement of the victim was recorded by ACM-II, Aligarh, which was perused by him on 01.05.2019 in which it was written that when the victim was cooking food, three persons including one Monu had tried to misbehave with her and when she resisted, they poured kerosene and set her on fire. He stated that after the death of the deceased, vide GD entry No.36, dated 05.05.2019, Section 302 IPC was added and the investigation was taken over by PW-8. He also stated that statement of the victim was recorded, which was video-graphed. *(**Note:**- This alleged statement was neither exhibited nor the video recording of that was proved and got exhibited. This appears to be a part of the case diary; it exculpates the accused-appellant and supports the story of accident as stated by PW-2)*. PW-7 further stated that during the course of investigation he had received affidavit of victim and PW-3. He also stated that he had collected the school certificate of the victim which disclosed her date of birth as 02.10.2007. He proved the site plan of the place prepared by him during investigation, which was marked Ex. Ka-7. He proved the recovery of half burnt clothes and the container of kerosene oil. The recovery memo of which was marked as Ex. Ka-8.

In the cross examination, he stated that he could not record the statement of the victim initially but when the victim's condition improved, he recorded her statement in the presence of lady constable Sadhna Sagar (not examined). He stated that recording of her statement was video-graphed and computer CD was also prepared. *(**Note:**- Neither a transcript nor the video recording of this statement*

was got exhibited and importantly the lady constable Sadhna Sagar was not examined). He further stated that prior to the recording of the statement of the victim, he had recorded the statement of informant (PW-1) and victim's mother (not examined) as well as victim's grand mother (PW-2) and the witness (PW-3). He stated that the affidavit of the victim was obtained on 29.04.2019. He stated that he made an effort to get the statement of the victim recorded under Section 164 CrPC. He stated that he had incorporated the contents of the affidavit and the dying declaration of the victim in the case diary.

14. **PW-8- D.K. Sisodiya**. He is the investigating officer who took over the investigation after the death of the victim. He stated that he raided places to arrest the accused and, ultimately, on 17.05.2019, he could manage to arrest the accused and got his statement recorded. On 21.05.2019, he got the statement of informant and the inquest witnesses recorded. Thereafter, on 24.05.2019, he recorded the statement of grand mother and mother of the victim; and on 28.05.2019 he recorded the statement of an independent witness and Dr. J.M. Sharma and Dr. Gufran Ahmad, thereafter, submitted charge sheet against the accused-appellant, which was exhibited as Ex. Ka-9. He also stated that after submission of the charge sheet, the report of the forensic laboratory was received, which was incorporated in the case diary.

In the cross examination, he stated that at the time when he was assigned investigation the victim was dead, therefore he had no opportunity to record the statement of the victim. He admitted that the victim's statement was recorded by the earlier I.O., Manoj Kumar Sharma and lady constable Sadhna of which entry is there in the Case Diary (CD). He admitted that he had not recorded the statement of the victim though he had read the statement of the victim incorporated in

the case diary. He denied the suggestion that without proper investigation of the matter, he submitted charge sheet.

15. **PW-9 Shaheen**, the doctor who did internal medical examination of the victim on 16.04.2019. She stated that, on 16.04.2019, the victim, aged 13 years, was brought to the hospital in a burnt condition. PW-6 had medically examined her and in the team constituted for internal examination of the victim, she was a member. During internal examination, she did not notice any bleeding from victim's private part and there were no injuries noticed though the hymen was found torn at 7 O'clock position. She proved her notings on the injury report marked Ex. Ka-6. On being questioned by the court as to when hymen can be torn at 7 O'clock position, she stated that this could be a consequence of sexual assault (rape) or penetration or manipulation. She reiterated that hymen was found torn.

In her cross examination by the defence, she reiterated what she stated above but added there was no injury noticed on the vulva. She denied the suggestion that she submitted report without medical examination.

16. The incriminating circumstances appearing in the prosecution evidence were put to the accused-appellant who claimed that he is innocent and not guilty. He, however, did not disclose the reason as to why he was implicated. But, interestingly, the dying declaration alleged to have been recorded either by the Magistrate or by the I.O. was neither exhibited nor put to the accused during his examination under Section 313 CrPC. The defence, however, led no evidence.

TRIAL COURT FINDINGS

17. The trial court found the victim to be a minor with her date of birth being 02.10.2007; that the lodging of the FIR and submission of charge sheet against the accused-appellant was proved by PW-1 and

PW-8, respectively; that the place of incidence was proved by the prosecution witnesses; and that the medical report (Ex. Ka-6) proved that hymen of the victim was torn therefore, by placing reliance on the provisions of Section 29 of the Pocso Act, burden was cast on the accused to prove his innocence and, thereafter, by relying on the dying declaration (Paper No.39 Ka/1) and the statement of PW-2 that because of the incident FIR was lodged against Monu Thakur, held that the prosecution was successful in proving the charge against the appellant. Consequently, the trial court recorded conviction and awarded punishment as above.

18. Challenging the judgment and order of conviction and sentence, this appeal has been filed.

19. We have heard Sri Vinay Saran, learned Senior Counsel, assisted by Sri Pradeep Kumar Mishra and Sri Archit Mandhyan, appointed by the High Court Legal Services Committee to represent the appellant; and Sri H.M.B. Sinha along with Sri Awadhesh Shukla, learned AGA, for the State and have perused the record

SUBMISSIONS ON BEHALF OF THE APPELLANT

20. The learned counsel for the appellant submitted that the reverse burden put by Sections 29 and 30 of the Pocso Act applies only when the foundational facts in respect of commission of specified offences by the accused are proved by legally admissible evidence. In absence of proof of foundational facts with regard to commission of offence punishable under the Pocso Act, the reverse burden cannot be placed on the accused to prove his innocence therefore, the judgment and order of the trial court is vitiated by a manifestly erroneous approach in law. Sri Saran submitted that the prosecution examined only two eye witnesses, namely, PW-2 and PW-3. Neither PW-2 nor PW-3 stated before the court that the accused-appellant misbehaved with the

deceased or poured kerosene on the deceased and set her on fire. Rather, they deposed that the deceased got burnt accidentally because the kerosene oil bottle fell over the gas burner while the deceased was cooking food. In so far as PW-1, the informant, is concerned, he is admittedly not an eye witness and his statement in the FIR is hearsay and cannot be considered substantive evidence to enable the court to proceed with an assumption that foundational facts of the specified offences punishable under the Pocso Act are proved.

21. In respect of the dying declaration, Sri Saran submitted that, no doubt, from the testimony of the I.O. it appears that he received information of the dying declaration having been recorded by a Magistrate but the recording of the dying declaration by the Magistrate concerned and the fitness certificate of the doctor concerned for its recording is neither proved nor any such witness was examined to prove the same. Further, the dying declaration, on which reliance has been placed, is not even marked an exhibit and has not been put to the accused while recording his statement under Section 313 CrPC therefore, on this ground alone, the said dying declaration could not have been relied upon by the trial court. Sri Saran further pointed out that this is a case where even during investigation the witnesses had given their affidavits resiling from the allegations made in the FIR, and those affidavits were part of the police report, thus, the court ought not have treated the appellant as an accused sent for trial much less raising a presumption of his guilt under Section 29 of the Pocso Act. Summing up his submissions, learned counsel for the appellant submitted that this is a case where there is virtually no legally admissible evidence to record conviction and therefore the award of the death sentence is completely unwarranted. It has been submitted that, under the circumstances, the judgment and order of the trial court should be set aside and the appellant be honourably acquitted of all the charges for which he has been tried.

SUBMISSIONS ON BEHALF OF THE STATE

22. **Per contra**, learned AGA supported the judgment and order of the trial court and submitted that it is a case where witnesses were under pressure, may be for whatever reason, and therefore, they resiled from the accusation made in the FIR but that, by itself, cannot earn an acquittal for the accused-appellant inasmuch as the lodging of FIR against the appellant was proved and the medical examination report of the victim, who was a minor, was proved, which revealed that her hymen was torn at 7 O'clock position therefore, the foundational fact of offence punishable under Pocso Act was proved. Hence, the burden was rightly placed on the accused-appellant to prove his innocence, which he failed to discharge as he led no evidence. Further, at the time of admission in the hospital on 16.04.2019, the victim was marked conscious and oriented by the doctor who prepared the injury report and, therefore, as there appears a dying declaration on record and the foundational facts of the offence of penetrative sexual assault on a minor been proved, the burden was rightly placed on the accused to prove his innocence and, in absence of defence evidence, conviction was justifiably recorded. He further submits that though the recording Magistrate might not have been examined but as the existence of the dying declaration (Paper No.39 Ka-1) on record is admitted by the I.O., it could be taken into consideration. He therefore submits that the conviction recorded by the court below suffers from no infirmity.

23. On the question of sentence, learned counsel for the State submitted that since it is a case of rape of a minor and, thereafter, the minor was brutally burnt, which resulted in her death, death sentence awarded to the accused-appellant is not unwarranted, therefore, the appeal be dismissed and the death penalty be confirmed.

ANALYSIS

24. Having noticed the rival submissions and having perused the record carefully, before proceeding further, we would have to first examine as to what is the true import of the provisions of section 29 of the Pocso Act (for short the Act) and as to when the benefit of that section would be available to the prosecution and to what extent. To have a clear understanding of the issue it would be necessary to have a look at the broad features of the Act and the offences punishable thereunder. The Preamble of the Act after narrating its genesis, sets out the object, purpose and reason for its enactment as follows:-

> *"An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.*
>
> *WHEREAS clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;*
>
> *AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;*
>
> *AND WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;*
>
> *AND WHEREAS it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;*
>
> *AND WHEREAS the State parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent—*
>
> *(a) the inducement or coercion of a child to engage in any unlawful sexual activity;*

(b) the exploitative use of children in prostitution or other unlawful sexual practices;

(c) the exploitative use of children in pornographic performances and materials;

AND WHEREAS sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

BE it enacted by Parliament in the Sixty-third Year of the Republic of India as follows:—"

25. Chapter-I of the Act includes provisions relating to title, extent and commencement of the Act as also definitions of the terms used in the Act. Chapter-II relates to sexual offences against children. Sexual offences are categorised as: (A) Penetrative Sexual Assault; (B) Aggravated Penetrative Sexual Assault; (C) Sexual Assault; (D) Aggravated Sexual Assault; and (E) Sexual Harassment. Chapter II also provides punishment for the offences specified therein. Chapter-III relates to using child for pornographic purposes and punishment therefor. Chapter-IV relates to abetment of and attempt to commit an offence and punishment therefor. Chapter-V relates to the procedure for reporting of cases. Chapter-VI relates to procedures for recording statement of the child. Chapter-VII relates to Special Courts as also presumption as to certain offences and presumption of culpable mental state including application of Code of Criminal Procedure, 1973 (CrPC), save as otherwise provided, to proceedings before a Special Court and for appointment of Special Prosecutors. Chapter-VIII relates to the procedure and powers of special courts and recording of evidence. Chapter-IX contains miscellaneous provisions.

26. Section 42 falling in Chapter-IX provides that where an act or omission constitutes an offence punishable under the Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376-AB, 376B, 376C, 376D, 376DA, 376-DB, 376E, section 509 of the Indian Penal Code (45 of 1860) or section 67 B of the

Information Technology Act, 2000 (21 of 2000), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under the Act or under the Indian Penal Code as provides for punishment which is greater in degree.

27. Section 42A provides that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of the Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

28. Having noticed the broad features of the Act, we now proceed to notice the presumptive provisions contained in section 29 of the Act on which reliance has been placed by the trial court while convicting the appellant. In fact, there are two separate sections in that regard in the Act, namely, section 29 and section 30, they read as follows:-

> "**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.
>
> Explanation.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or

reason to believe, a fact."

29. A perusal of the provisions of Section 29 of the Act would reflect that they relate to the offences defined under Sections 3, 5, 7 and 9. Section 3 relates to penetrative sexual assault; Section 5 relates to aggravated penetrative sexual assault; Section 7 relates to sexual assault; and Section 9 relates to aggravated sexual assault. Neither penetrative sexual assault nor aggravated sexual assault to be an offence, punishable under section 4 and section 6 respectively, requires a culpable mental state of the offender. For commission of an offence of sexual assault as defined in Section 7 of the Act, presence of sexual intent on the part of the offender is required. Similarly, for an offence of sexual harassment as defined in Section 11, the presence of sexual intent on the part of the offender is required. To obviate the burden of proving sexual intent of the offender, the Legislature in its wisdom has put Section 30 in the Act which provides that where any offence under the Act requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state though it shall be a defence for the accused to prove the fact that he had no such mental state with respect to that act charged as an offence in that prosecution.

30. Section 31 of the Act applies the provisions of Code of Criminal Procedure, 1973 (CrPC) including the provisions as to bail and bonds to the proceedings before a Special Court save as otherwise provided in the Act. Section 31 also provides that for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a public prosecutor. The special provisions relating to procedure and powers of special courts and recording of evidence have been engrafted in the Act through Chapter-VIII thereof. Section 33 of the Act is relevant in the context of the instant case, and is extracted below:-

*"***33. Procedure and powers of Special Court.***—(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.*

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.—For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence

> *as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974) for trial before a Court of Session. "*

31. Sub-section (1) of section 28 of the Act provides for designation of Special Courts to try offences under the Act. Sub-section (2) of section 28 of the Act provides that while trying an offence under the Act, a Special Court shall also try an offence other than the offence referred to in sub-section (1), with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial. A conjoint reading of Sections 28, 31 and 33 of the Act would make it clear that the Special Court empowered to try an offence punishable under the Act shall be deemed to be a Court of Session and shall have all the powers of a Court of Session to try offence under the Act as well as other offences, with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial. Meaning thereby that, by virtue of section 220 (1) of the Code of Criminal Procedure, 1973, if in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial, for every such offence. But, now, a question would arise as to whether on those other offences, the presumptive provisions of Sections 29 and 30 would apply as would apply to the offences specified under the Act. Before we proceed to dwell on this issue it would be useful to first examine as to when and in what situation a presumption under section 29 could be raised.

32. The principle that a person should be presumed innocent until proven guilty is a fundamental principle in criminal jurisprudence and finds support in Article 14 (2) of the International Covenant on Civil and Political Rights. But in special circumstances the legislature may put a reverse burden on the accused to prove his innocence. In a challenge to the vires of one such reverse burden clause, namely, the

presumptive provisions contained in section 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), the Apex Court in **Noor Aga vs. State of Punjab: (2008) 16 SCC 417,** in paragraph 33 of its judgment, observed: *"Presumption of innocence is a human right as envisaged under Article 14(2) of the International Covenant on Civil and Political Rights. It, however, cannot per se be equated with the fundamental right and liberty adumbrated in Article 21 of the Constitution of India."* In paragraph 34 of the judgment it was observed: *"Only because the burden of proof under certain circumstances is placed on the accused, the same, by itself, in our opinion, would not render the impugned provisions unconstitutional."* After observing as above, the court in paragraph 35 of the judgment observed: *"A right to be presumed innocent, subject to the establishment of certain foundational facts and burden of proof, to a certain extent, can be placed on an accused."* Ultimately, while upholding the vires of the provisions of Sections 35 and 54 of the NDPS Act, in paragraph 54 of the aforesaid judgment it was observed: *"provisions imposing reverse burden, however, must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the statute in question."* In **Bhola Singh v. State of Punjab, (2011) 11 SCC 653,** the Apex Court following its earlier decision in **Noor Aga's case (supra)**, in paragraph 10 of its judgment, with regard to the applicability of section 35 of the NDPS Act, observed: *"that as this section imposed a heavy reverse burden on an accused, the condition for the applicability would have to be spelt out on facts and it was only after the prosecution had discharged the initial burden to prove the foundational facts that section 35 would come into play."* In **Gorakh Nath Prasad V. State of Bihar, (2018) 2 SCC 305**, in paragraph 5 of the judgment, while dealing with a prosecution under the NDPS Act, the Apex Court observed: *"The NDPS Act provides for a reverse*

burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proven guilty. This shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the Act will not ipso facto shift the burden on to the accused from the very inception. Compliance with statutory requirements and procedures shall have to be strict and scrutiny stringent. If there is any iota of doubt the benefit shall have to be given to the accused." In **Babu v. State of Kerala, (2010) 9 SCC 189,** in paragraph 27 and 28 of the judgment it was observed:

> *"27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like the Negotiable Instruments Act, 1881; the Prevention of Corruption act, 1988; and the Terrorists 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.*

> *28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those as referred to herein above, that the burden of proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution."*
>
> ***(Emphasis supplied)***

33. In the light of the decisions noticed above, the legal position that emerges is that though the presumption of innocence is a human right but there can be statutory exceptions to it. A statutory provision laying down the procedure for holding an accused guilty of an offence by raising a presumption with regard to his guilt, must meet the tests of being fair, just and reasonable as enshrined in Articles 14 and 21 of the Constitution of India. To ensure that a statutory provision putting a reverse burden on the accused does not violate the mandate of Articles 14 and 21 of the Constitution, it has to be interpreted in a manner that it does not lead to absurd result such as mistaken conviction on mere failure to lead satisfactory evidence in defence after submission of police report. As a result, the courts have been consistent in holding that the burden to prove his innocence can be cast on the accused with the aid of presumptive clause only where the prosecution succeeds in proving the basic or foundational facts with regard to commission of the offence by the accused in respect of which the presumption is available to the prosecution under the statute. Mere registration of a case punishable under the statute, without proving the foundational facts with regard to its commission by the accused, will not ipso facto shift the burden on to the accused to prove his innocence. More so,

because to prove a negative is difficult, if not impossible. It is only when a foundation is laid to prove, at least prima facie, existence of a fact that one can expect a person, called upon to refute its existence, to lead evidence negating its existence. Interpreting the provisions of section 29 of the Act in a manner that it puts absolute burden on the accused to prove a negative i.e. innocence, even in absence of prosecution proving the basic facts with regard to commission of specified offence(s) by the accused, in our view, would lead to complete miscarriage of justice and thereby render the provisions of section 29 of the Act vulnerable and in the teeth of Articles 14 and 21 of the Constitution. We, therefore, hold that to take the benefit of the presumptive provisions of section 29 of the Pocso Act, the prosecution, by leading legally admissible evidence, would have to prove the foundational or basic facts in respect of commission of the offence(s) specified therein by the accused. Mere submission of police report against the accused in respect of the offence(s) specified in section 29 of the Pocso Act would not absolve the prosecution of its responsibility to lead legally admissible evidence to prove the foundational facts with regard to their commission by the accused.

34. The above interpretation of section 29 of the Act is consistent with the view taken by various High Courts i.e. Karnataka High Court in the case of **Mahadevu @ Papu V. State of Karnataka, 2020 SCC OnLine Kar 3327 : (2020) 6 Kant LJ 545;** Bombay High Court in the case of **Amol Dudhran Barsagade V. State of Maharashtra, dated 23.04.2018, in Crl Appeal No.600 of 2017**; and Calcutta High Court in **Swapan Mondal Vs. State: (2021) SCC Online Cal 2007,** where a Division Bench, while affirming the view taken by a Single Judge Bench of that Court in **Shahid Hossain Biswas Vs. State of West Bengal, reported in (2017) 3 Cal LT 243**, in paragraph 109 of the judgment, observed as follows:-

"109. This leads us to an interpretation that the foundational facts of the prosecution's case have to be established by leading evidence before the statutory presumption in Section 29 or 30 can kick in. In this conclusion, I am inclined to refer to the judgment of Bagchi, J. in Shahid Hossain Biswas v. State of West Bengal, reported in (2017) 3 Cal LT 243, (at paragraphs 21-24 of the report) without any attempt at summarizing the same on my part, given the correctness of His Lordship's exposition of the law. Needless to say, while the following dicta is on Section 29, it is equally applicable mutatis mutandis to Section 30:

'21. ….I am not unmindful of the statutory presumption available to the prosecution in a case under the POCSO Act, 2012. Section 29 of the said Act reads as follows:-

"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 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."

22. The law, therefore, provides for a reverse burden upon the accused in a prosecution under sections 3, 5, 7 and 9 of the aforesaid Act. The statutory presumption creates an exception to the ordinary rule of presumption of innocence available to an accused in a criminal trial and puts the onus on the accused to rebut such presumption and establish his innocence. Presumption of innocence is a basic human right which is a vital facet of fair trial rights enshrined in various international covenants like the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights (to which India is a signatory) but is not a fundamental right under Part III of the Constitution. [See Noor Aga v. State of Punjab, (2008) 16 SCC 417]. The concept of presumption of innocence has, in recent times, been reversed in many situations by creating statutory presumptions like under sections 113A, 113B or 114A of the Evidence Act shifting the burden on the accused to prove his innocence. Section 29 of the POCSO is, therefore, a species of such exception to the ordinary rule of presumption of innocence and must be borne in mind while appreciating the evidence of prosecution witnesses in a trial under the POCSO Act. The expressions "shall presume" and "unless contrary is proved" in the aforesaid provision creates a reverse burden on an accused to prove his innocence to earn an order of acquittal and absolves the burden of the prosecution to prove his guilt beyond reasonable doubt. How is the accused to discharge such burden? Sections 3 and 4 of the Evidence Act define the words `proved', `shall presume' and `disproved' as follows:-

Section 3:-

"Proved" - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved"- A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

Section 4:-

"Shall presume".-Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."

23. A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would show that in a prosecution under the POCSO Act an accused is to prove `the contrary', that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see Sait Tarajee Khimchand v. Yelamarti Satyam, (1972) 4 SCC 562, Para-15]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.

24. Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross-examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case, eg. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched

> *enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to mechanically accept the mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution, howsoever, patently absurd or inherently improbable it may be."*

35. The view taken by the Calcutta High Court has also been followed by Kerala High Court in **Justin Vs. Union of India and others: (2020) SCC Online Kerala 4956** wherein, in paragraphs 74 to 78 of the judgment, it has been observed as follows:-

> *"74. Evaluation of the above judicial pronouncements lead to the conclusion that, statutory provisions which exclude mens rea, or those offences which impose strict liability are not uncommon and that by itself does not make such statutory provisions unconstitutional. Further, Statutes imposing limited burden on the accused to establish certain facts which are specifically within his knowledge, is neither rare in Indian Criminal Law and nor do they, by itself make such statutory provisions unconstitutional. However, the statutory burden on accused should only be partial and should not thereby shift the primary duty of prosecution to establish the foundational facts constituting the case, to the accused. Such a provision should also be justifiable on the ground of predominant public interest. Hence, sections 29 and 30 of the POCSO Act, do not offend Articles 14 and 19 of the Constitution of India. They do not in any way violate the Constitutional guarantee, and hence not ultra vires to the Constitution.*
>
> *75. It is stated that Art.21 will be infringed if the right to life or liberty of a person is taken away, otherwise than by due process of law. It has been judicially affirmed that Article 21 affords protection not only against executive action, but also against legislations which deprive a person of his life and personal liberty otherwise than by due process of law. When a statutory provision is challenged alleging violation under Art.21 of Constitution of India, State is bound to establish that the statutory procedure for depriving the person of his life and personal liberty is fair, just and reasonable. The main contention of the petitioners based on the alleged violation of Articles 20(3) and 21 of the Constitution of India on the ground that the presumption under the POCSO Act imposes a burden on the accused to expose himself to cross examination which amounts to testimonial compulsion and that, it amounts to breach of his right to silence, and that the burden of proof*

is heavily tilted against him has to be considered in the light of the law laid down by the Supreme Court in Kathi Kalu Oghad's case (supra). The larger Bench held that the bar under Art.20(3) of the Constitution will arise only if the accused is compelled to give evidence. To bring such evidence within the mischief of Art.20(3), it must be shown that accused was under a compulsion to give evidence and that the evidence had a material bearing on the criminality of the maker. Supreme Court explained that, compulsion in the context must mean duress. The law as explained by the Larger Bench holds the field even now.

76. Hence the presumptions under sections 29 and 30 of the POCSO Act have to be examined on the anvil of tests laid down in Kathi Kalu Oghad's case (supra). While considering similar statutory provisions, Supreme Court, in Veeraswami's case, Ramachandra Kaidalwar's case, Noor Agas case, Kumar Export's case and Abdul Rashid Ibrahim's case has consistently held that the presumptions considered therein, which are similar to sections 29 and 30 of the POCSO Act do not take away the primary duty of prosecution to establish the foundational facts. This duty is always on the prosecution and never shifts to the accused. POCSO Act is also not different. Parliament is competent to place burden on certain aspects on the accused, especially those which are within his exclusive knowledge. It is justified on the ground that, prosecution cannot, in the very nature of things be expected to know the affairs of the accused. This is specifically so in the case of sexual offences, where there may not be any eye witness to the incident. Even the burden on accused is also a partial one and is justifiable on larger public interest.

77. In Noor Aga's case (supra) it was held that, presumption of innocence is a human right and cannot per se be equated with the Fundamental Right under Art.21 of the Constitution of India. It was held that, subject to the establishment of foundational facts and burden of proof to a certain extent can be placed on the accused. However, Supreme Court in various decisions referred above has held that, provisions imposing reverse burden must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the Statute. Hence, prosecution has to establish a prima facie case beyond reasonable doubt. Only when the foundational facts are established by the prosecution, the accused will be under an obligation to rebut the presumption that arise, that too, by adducing evidence with standard of proof of preponderance of probability. The insistence on establishment of foundational facts by prosecution acts as a safety guard against misapplication of statutory presumptions.

> *78. Foundational facts in a POCSO case include the proof that the victim is a child, that alleged incident has taken place, that the accused has committed the offence and whenever physical injury is caused, to establish it with supporting medical evidence. If the foundational facts of the prosecution case is laid by the prosecution by leading legally admissible evidence, the duty of the accused is to rebut it, by establishing from the evidence on record that he has not committed the offence. This can be achieved by eliciting patent absurdities or inherent infirmities in the version of prosecution or in the oral testimony of witnesses or the existence of enmity between the accused and victim or bring out the peculiar features of the particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour, or bring out material contradictions and omissions in the evidence of witnesses, or to establish that the victim and witnesses are unreliable or that there is considerable and unexplained delay in lodging the complaint or that the victim is not a child. Accused may reach that end by discrediting and demolishing prosecution witnesses by effective cross examination. Only if he is not fully able to do so, he needs only to rebut the presumption by leading defence evidence. Still, whether to offer himself as a witness is the choice of the accused. Fundamentally, the process of adducing evidence in a POCSO case does not substantially differ from any other criminal trial; except that in a trial under the POCSO Act, the prosecution is additionally armed with the presumptions and the corresponding obligation on the accused to rebut the presumption."*
>
> ***(Emphasis Supplied)***

36. At this stage, we may clarify that though the presumptive provisions contained in sections 29 and 30 are there in the Act but their operation is limited to the offences specified therein. No doubt, by virtue of sub-section (2) of section 28 of the Act, while trying an offence under the Act, a Special Court has also to try an offence other than the offence referred to in sub-section (1) of section 28 of the Act (i.e. the offences punishable under the Act), with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial but, as the presumptive provisions of section 29 are applicable only to the offences specified therein, they would not apply to prove an offence of murder punishable under section 302 IPC. In our view therefore, the trial court completely misunderstood the true

import of the presumptive provisions contained in section 29 of the Pocso Act.

37. Now, reverting to the facts of the present case, as we have already noticed the entire prosecution evidence, we find that the prosecution has been successful in establishing the following: that a first information report was lodged by PW-1 *(who is not an eye witness)* in respect of an incident in which PW-1's daughter got burnt; that PW-1's daughter was a child; that in a burnt condition PW-1's daughter was admitted in the hospital on 16.04.2019 and was medically examined by PW-6 and PW-9 on that day; that she stayed alive in the hospital till her death, which took place on 01.05.2019; that her injury report (Ex. Ka-6), dated 16.04.2019 disclosed that the victim had suffered thermal burns to the extent of 80% - 85% referable to kerosene oil burns; that victim's internal medical examination, dated 16.04.2019, by PW-9 disclosed a rupture of her hymen at 7 O'clock position; and that the victim died due to septicaemia as a result of burn injuries sustained by her. However, with regard to the participation of the accused appellant in causing thermal burn injuries to the victim or making a penetrative sexual assault on the victim, the prosecution witnesses of fact in their deposition have not supported the story taken in the first information report. Rather, they claimed that the victim got accidentally burnt while cooking food as kerosene oil bottle slipped and fell on the gas burner. The prosecution witnesses also did not depose about the presence of the accused-appellant in the house at the time of the incident. Thus, by the evidence on record, the prosecution has not been able to prove that the accused-appellant entered the house of the victim, misbehaved with her, or sexually assaulted her in any manner, and, thereafter, set her on fire. In absence of admissible evidence to prove the foundational facts of commission of penetrative sexual assault, or sexual assault, on the victim by the accused, the

presumptive provisions of Section 29 of the Pocso Act would not get attracted as against the accused -appellant and, therefore, in our view, the judgment of the trial court is vitiated by a wrong approach in law.

38. The question that now arises for our consideration is whether there is any admissible evidence on the basis of which the conviction could be sustained. In this regard, the trial court placed reliance on Paper no. 39Ka/1, alleged dying declaration of the deceased and on statement of PW-2 in her statement in chief that because of the incident FIR was lodged against Monu Thakur. Before we deal with the dying declaration (Paper No.39 Ka/1), we shall examine the import of the statement made by PW-2 referred to above. It is well settled that for proper appreciation of oral testimony, the testimony has to be read in its entirety. Picking up a stray sentence, out of context, and coming to a conclusion is not at all permissible. The statement of PW-2 on which the trial court placed reliance is not that the FIR was lodged because Monu Thakur (the accused appellant) committed the act. Rather, it is that because of the incident, FIR was lodged against Monu Thakur. This statement in our view is not sufficient to conclude that the prosecution was successful in proving the foundational facts so as to trigger the presumption against the accused appellant under section 29 of the Act. Having said that, we shall now examine whether, in view of the alleged dying declaration of the victim/deceased (Paper No.39 Ka/1), stated to have been recorded on 16.04.2019, the appellant is liable to be convicted for the charged offences.

39. A dying declaration is admissible under Section 32(1) of the Evidence Act as an exception to the rule against hearsay evidence. If a dying declaration is duly proved and is found truthful, it can on its own form the basis of conviction. But before a dying declaration is relied upon by the court its making would have to be proved by

legally admissible evidence. Unfortunately, in the instant case, neither the recording Magistrate nor the doctor, who certified the mental and physical condition of the victim, has been examined. Even if we assume that the concerned doctor was examined as one of the prosecution witnesses, he stated nothing about the dying declaration, probably, because the public prosecutor might not have deemed it necessary to lead evidence in that regard. Interestingly, the I.O. (PW-7) states that he came to know about the dying declaration having been recorded on 01.05.2019, the day the victim died. Notably, on death of the victim, the investigation was taken over by PW-8 from PW-7. But, surprisingly, even PW-8 does not proceed to record statement of the recording magistrate and does not enlist him as a witness. Thus, though the dying declaration (Paper No.39 Ka/1) is on record but this dying declaration has not been exhibited and it has also not been put to the accused while recording his statement under Section 313 CrPC, *a fortiori*, the same cannot be read and form basis of conviction. Consequently, we have no hesitation in holding that the conviction recorded by the trial court is unsustainable and is liable to be set aside.

40. Having found that the judgment of the trial court is liable to be set aside for the reasons recorded above, we shall now examine whether, for the reason that there exists a not proved and non-exhibited dying declaration on record, the matter should be remitted to the trial court for a retrial, or we, in exercise of our appellate power to take additional evidence, summon the recording magistrate and the doctor concerned to ensure that the alleged dying declaration stands exhibited.

41. As to when an appellate court, in an appeal against an order of conviction, exercising its power under section 386 (1) (b) CrPC, may direct for a retrial, a Constitution Bench of the Apex Court in the case

of **Ukha Kolhe V. State of Maharashtra, AIR 1963 SC 1531** held thus:

> *"An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the court trying the proceeding had no jurisdiction to try it or that the trial is vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interest of justice the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of retrial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons."*
>
> *(Emphasis supplied)*

After holding as above, the Court proceeded to notice a Division Bench decision of the Calcutta High Court in **Ramanlal Rathi V. State, AIR 1951 Cal 305,** wherein Harries, C.J. observed:

> *"If at the end of a criminal prosecution the*

> *evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case.*
>
> *(Emphasis supplied)*

42. After considering various decisions including the Constitution Bench decision in **Usha Kolhe's case (supra),** in a recent decision in **Nasib Singh V. State of Punjab and another, (2022) 2 SCC 89**, a three-judge Bench of the Apex Court, on the issue as to when an appellate court may direct for a retrial, summarised the law, in paragraph 33 of its judgment, as follows:

> *"33. The principles that emerge from the decisions of this Court on retrial can be formulated as under:*
>
> *33.1. The Appellate Court may direct a retrial only in 'exceptional' circumstances to avert a miscarriage of justice;*
>
> *33.2. Mere lapses in the investigation are not sufficient to warrant a direction for re-trial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed;*
>
> *33.3. A determination of whether a 'shoddy' investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence;*
>
> *33.4. It is not sufficient if the accused/ prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the Appellant*

Court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process;

33.5. If a matter is directed for re-trial, the evidence and record of the previous trial is completely wiped out; and

33.6. The following are some instances, not intended to be exhaustive, of when the Court could order a retrial on the ground of miscarriage of justice :

(a) The trial court has proceeded with the trial in the absence of jurisdiction;

(b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and

(c) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade."

In view of the law noticed above, it is clear that a retrial can be directed in exceptional circumstances but not merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons.

43. In the instant case, we notice that the investigating officer (PW-7 & PW-8) in spite of having noticed that there existed a dying declaration on record did not care to record the statement of the magistrate concerned who recorded the dying declaration. In fact, the public prosecutor or the special prosecutor, as the case may be, also made no attempt to apply to the court to summon the recording magistrate to record his statement to get the alleged dying declaration exhibited. It is not a case where the prosecutor has been disabled or prevented from leading evidence material to the charge. The reason for not getting the dying declaration exhibited / proved appears in the testimony of the witnesses. It has come in the testimony of PW-1, the father of the victim, that when the magistrate had come to record the statement of the victim, the victim was not in a state to give her

statement and, therefore, the magistrate had recorded what the ladies present there had told him and when the magistrate was questioned in that regard, the magistrate said that he would come again but he never came. Further, from the prosecution evidence including the statement of the I.O. (P.W.7), it is clear that the witnesses even during the course of investigation had exonerated the accused by giving their affidavits wherein they took a stand that it was a case of accidental burns. Otherwise also, the non-exhibited dying declaration, namely, paper no. 39 Ka/1, makes allegation against three persons. Two of them are not named whereas name of Monu is mentioned without parentage and proper address. Importantly, two doctors, namely, PW-6 and PW-9, of the hospital where the victim was admitted have been examined but they did not speak a word about recording of dying declaration. In these circumstances, if the prosecution chose not to prove the dying declaration, it can not be said that the prosecution was prevented from leading evidence in that regard. Rather, there may be some reasons which the prosecution did not want to disclose. Be that as it may, as we have not been shown any application from victim's family to recall or call any witness and there is also no complaint brought to our notice with regard to extension of threat, or of coercion, upon the witnesses to desist from speaking the truth, we are of the considered view that merely because the dying declaration was not proved, the matter does not call for a retrial.

44. We also examined whether we should summon the magistrate concerned to get the alleged dying declaration exhibited. After examining the issue we have taken a decision that it would not be appropriate on our part to summon the magistrate concerned for the following reasons: (a) that the alleged dying declaration implicates three persons, out of which only one is named; (b) that the one named, is Monu without the suffix "Thakur" and his parentage is also not disclosed and even the address is not complete; (c) that there

exists no forensic evidence such as DNA profiling to connect the appellant to the crime, if any; (d) that there is no application moved by any party to summon the recording magistrate or the doctor to prove the alleged dying declaration; and (e) that PW-1, PW-2 and PW-3, namely, the witnesses of fact, have not supported the prosecution case as against the appellant and as per the statement of I.O. (PW-7), during the course of investigation, affidavits were given by witnesses exonerating the accused-appellant. Under these circumstances, we do not deem it necessary to summon the concerned magistrate to get the alleged dying declaration exhibited, particularly, when the prosecution as well as the victim's family both are not relying on it.

45. In view of the discussion above, as we have found that there is no worth-while evidence on record to prove the charges against the accused-appellant; and that in absence of proof of foundational facts with regard to commission of specified offences punishable under the Act, the benefit of presumption would not be available to the prosecution under section 29 of the Act, we have no hesitation in allowing the appeal and rejecting the reference. The appeal is therefore **allowed**. The judgment and order of the trial court is set aside. The reference to confirm the death penalty is rejected. The appellant is acquitted of the charges for which he has been tried. He shall be released forthwith unless wanted in any other case subject to compliance of the provisions of section 437-A CrPC to the satisfaction of the trial court below.

46. Let the lower court record be sent along with certified copy of the order to the trial court for compliance.

Order Date :- 04.03.2022
AKShukla/-