
(2020) 06 GAU CK 0038
In the Gauhati High Court
Case No : Criminal Appeal (J) No. 87 Of 2017

Bhupen Kalita

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 05-06-2020

Acts Referred:

Protection Of Children From Sexual Offences (POCSO) Act, 2012 — Section 2(d), 3, 3(a), 3(b), 4, 5, 7, 9, 29, 30, 30(1), 30(2), 31
Indian Penal Code, 1860 — Section 299, 304(B), 341, 375, 376, 376(1)
Code Of Criminal Procedure, 1973 — Section 2(g), 164, 190, 207, 208, 209, 210, 225, 227, 228, 229, 230, 231, 232, 235, 238, 239, 240, 246, 250, 251, 253, 254, 258, 313, 319, 319(1), 350, 357
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 35, 35(2), 37, 54
Prevention Of Corruption Act, 1988 — Section 7, 11, 20
Unlawful Activities (Prevention) Act, 1967 — Section 43(E)
Negotiable Instruments Act, 1881 — Section 118, 118(b), 119, 137, 138, 139
Evidence Act, 1872 — Section 79, 90(A), 102, 105, 111(A), 113(A), 114, 114(A)
Sexual Offences Act, 1956 — Section 44
Constitution Of India, 1950 — Article 14, 20, 21

Citation : (2020) 06 GAU CK 0038

Hon'ble Judges : N. Kotiswar Singh, J

Bench : Single Bench

Advocate : S.K. Agarwal, K. Gogoi

Final Decision : Dismissed

Judgement

1. The present appeal has been preferred against the judgment dated 26.05.2017 passed by the learned Sessions Judge, Nalbari in Special Case

No.3/2015 by which the appellant has been convicted under Section 4 of the POCSO Act, 2012.

2. The prosecution case was that an Ejahar was lodged by one Shri Diganta Kalita on 28.11.2014 alleging that on 28.11.2014 at about 1.45 pm while

his niece (hereinafter referred to as the Victim/Girl Child), about 10 years was

returning home from her school, on the way at the bridge of Tarajan, the appellant accosted her by threatening with a sharp knife and raped her. The victim on reaching her house narrated the incident to her grandmother and to her stepmother. Thereafter, the relatives and neighbours came to know about the incident who informed the father of the accused but as there was no response, a village â??Raijmelâ? (meeting) was held that day but neither the appellant nor his guardian turned up. Thereafter, on the next day an Ejahar was lodged. Based on the said Ejahar, Tihu PS Case No.104/2014 under Section 341/376(i) of IPC read with Section 4 of the POCSO Act was registered. On completion of investigation, charge-sheet was submitted against the appellant under Section 341/376(1) of IPC read with Section 4 of the POCSO Act.

3. The appellant pleaded not guilty and accordingly, he was tried for the aforesaid offences.

4. The prosecution examined as many as 11 witnesses in support of their case. The appellant did not adduce any evidence in defence.

5. Learned Sessions Judge, after considering the oral and documentary evidences convicted the appellant under Section 4 of the POCSO Act and

sentenced him to undergo RI for 7 years and also imposed a fine of Rs.1000 and in default of payment of fine, to undergo SI for one month.

Compensation under Section 357 CrPC was also directed to be awarded in favour of the victim.

6. In convicting the appellant, learned Sessions Judge mainly relied upon the testimony of the prosecutrix as well as the statement made by her under

Section 164 CrPC. Learned Sessions Judge did not find any material inconsistency in the statements made by her before the Court and under Section

164 CrPC and found the testimony of the victim reliable, trustworthy. Learned Sessions Judge ignored certain minor inconsistencies which had crept in

her statement made before the court qua the statement made under Section 164 CrPC., keeping into consideration the fact that the prosecutrix had

testified before the court after about 10 months of the incident. The trial court did not consider such minor inconsistencies to be of any significance to

doubt the veracity of her statement.

7. As regards the defence plea, the Learned Sessions Judge did not consider the deformity in his arm from which the appellant was said to have been

suffering from, to be of any material significance to support the plea that he being a person with deformity could not have committed the offence.

8. The trial court also did not believe the plea taken by the appellant that the appellant was falsely accused of committing the aforesaid offence

because of certain land dispute with the father of the victim girlchild.

9. The trial court, accordingly, held that the prosecution had been able to prove the case against the appellant beyond reasonable doubt and convicted

the appellant.

10. In the light of the evidences on record and keeping in mind the relevant law in this regard, this Court has to examine the sustainability of the

aforesaid finding of the trial court in convicting the appellant in this appeal.

11. Before embarking upon this exercise, it may be apposite to refer to the relevant law in this regard.

12. The appellant has been charged and convicted under a special penal statute, namely the Protection of Children from Sexual Offences (POCSO)

Act, 2012. It has been provided under Section 29 of the Act that when a person is prosecuted for committing any offence under Sections 3, 5, 7 and

Section 9 of this Act, the Special Court shall presume that such person has committed the said offence unless the contrary is proved. Section 30

further provides that if any prosecution under this Act requires a culpable mental state on the part of the accused, the court shall presume the

existence of such mental state, though the accused can rebut such a presumption, by way of reasonable doubt and not by preponderance of

probability.

13. Under normal criminal jurisprudence, the burden is cast upon the prosecution to prove the offence alleged against an accused beyond reasonable

doubt to fasten criminal liability on the accused. However, under the POCSO Act, which is a special statute enacted to prevent sexual exploitation and

sexual abuse of children which are heinous crimes, the court shall presume the accused to be guilty if he is prosecuted with the offences mentioned

therein and the accused is saddled with the onus to prove his innocence on the basis of the principle of reverse burden of proof.

Under the aforesaid Act, as provided under Sections 29 and 30, there is a presumption that an accused charged under Sections 3,5,7 and 9 of the

aforesaid Act has committed such an offence and such an accused is obligated to

prove his innocence. The principle of presumption of innocence, which is the norm in the criminal proceedings is no more applicable under this Act.

14. In view of the aforesaid provision for reverse burden cast upon an accused, the natural question which will arise, in such cases, is to what extent the prosecution will be required to prove the charge against the accused. Because of the reverse burden imposed upon an accused charged of certain offences mentioned in the Act, is the prosecution still obligated to prove the charge against the accused beyond all reasonable doubts or is the charge to be proved on the basis of preponderance of probability or is the prosecution to make merely a prima facie case, since the wording of Section 29 is that once a person is prosecuted for any offence under Sections 3, 5, 7 and 9 of the Act, the Special Court shall presume that such person has committed the said offence unless the contrary is proved ?

Accordingly, the Court has to examine the degree of the onus cast upon the prosecution to prove the case against an accused under this Act and the corresponding degree of onus on the part of the accused to discharge the reverse burden of proving his innocence.

15. The answer to this, however, is not as simple as it may appear to be, for the reason that the maxim that an accused shall be presumed to be innocent until proven guilty and the charge must be proved beyond reasonable doubt, is part of the classical legal legacy and now so deeply entrenched in the jurisprudence of societies governed by rule of law. In view of the above long held legal tradition, the burden on the part of the prosecution to prove the case against an accused under the Act and the corresponding burden of the accused to discharge the presumption placed upon him is to be examined.

16. In this context, it may be apposite to have a cursory view of the law relating to presumption and burden of proof thrust upon the prosecution and right and liability of the accused in proving his innocence.

17. Presumption of innocence is a legal principal of ancient vintage. Under it, an accused shall be presumed innocent unless and until proven guilty, which is the cornerstone of criminal jurisprudence cutting across countries based on rule of law. This maxim was made famous in the words of

Holroyd J in R vs. Hobson [(1823) 1 Lewinâ??s CC 261] that â??it is a maxim of

English law that ten guilty men should escape rather than one

innocent man should suffer, which maxim was acknowledged by the House of Lords as the golden thread running through English criminal justice

system, subject to the defence of insanity and any other statutory exception, in the celebrated case of *Woolmington v Director of Public Prosecutions*,

[1935] UKHL 1.

18. This principle is so fundamental in criminal jurisprudence that it is explicitly acknowledged as one of the most important principles in most of the international instruments and national laws.

Article 11(1) of The Universal Declaration of Human Rights (UDHR) says that "Everyone charged with a penal offence has the right to be

presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence".

Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) states that "Everyone charged with a criminal offence shall have

the right to be presumed innocent until proved guilty according to law".

Article 8(2) of the American Convention on Human Rights (ACHR) mandates that "Every person accused of a criminal offense has the right to be

presumed innocent so long as his guilt has not been proven according to law".

So as Article 7(b) of the African Charter on Human and Peoples Rights provides for, "The right to be presumed innocent until proved guilty

by a competent court or tribunal".

Article 48(1) of the Charter of Fundamental Rights of the European Union provides that, "Everyone who has been charged shall be presumed

innocent until proved guilty according to law".

Article 6(2) of the European Convention on Human Rights (ECHR) states that, "Everyone charged with a criminal offence shall be presumed

innocent until proved guilty according to law".

Though this principle has not been explicitly mentioned in any statute of India, unlike the national laws of Kenya, Zimbabwe, Cambodia etc. where the

principle finds specific place, it is deeply entrenched in our criminal jurisprudence.

The courts in India, however, have also acknowledged that this principle of presumption of innocence, is not absolute and subject to exceptions well

recognised in law and statutes as explained in *Woolmington* (supra).

19. In recent times, exception to this principle has been increasingly applied in many of the criminal laws, including in India. Under this exception, the burden of proof gets shifted to the accused, to the extent that in some cases the accused has to discharge the burden to prove that he is innocent and did not commit the offence, by reversing the initial burden of proof.

Gray, Anthony (2012), Professor of Law, University of Southern Queensland in his article, Constitutionally Protecting the Presumption of Innocence, University of Tasmania Law Review, 31 (1). pp. 131-152. ISSN 0082-2108 writes that,

“In recent years there has been exponential growth in the use of so called reverse onus provisions, placing the burden of proof in an unconventional way, particularly placing such a burden on a person who is accused of wrongdoing, rather than on the prosecution. Such laws are often thought necessary because, otherwise, it might be extremely difficult for the prosecutor to meet the required burden, sometimes because the person accused of wrongdoing has better access to relevant information in this regard.”

POCSO Act, is one such statute where the burden of proof of innocence is cast upon the accused.

20. In order to discharge the burden of the prosecution under the normal criminal jurisprudence to prove the guilt of the accused beyond reasonable doubt, the prosecution has to establish both actus reus and the mens rea and harmonious interplay between these two elements. On the other hand, the accused in defence is to merely prove which satisfies the “prudent man” standard by creating a reasonable doubt about the existence of one or more necessary ingredients of the offence, which is popularly known as the standard of preponderance of probability. For this, the accused may not himself adduce any evidence but merely point out the lapses or shortcomings in the prosecution narrative.

21. However, where the statute provides for presumption of guilt upon the accused, the prosecution has to merely prove the minimal threshold, also referred to as the basic or predicate facts, covered by the term actus reus, and the culpability of the accused is presumed and the accused is burdened with the responsibility to establish absence of actus reus as well as mens rea. Failure to discharge this burden results in conviction of the accused by presumption. The standard of proof by the accused, however, is based on “

preponderance of probability? which is of a lesser degree requirement of proof beyond all reasonable doubt?. Thus, even if a reasonable doubt remains about the prosecution case, failure on the part of the accused to discharge this burden based on preponderance of probability will result in conviction. The accused has no alternative but to testify to his innocence, even with the possibility of self-incriminating which may go against the right to remain silent.

22. In our country there are numerous statutes including POCSO Act, which have incorporated this principle of reverse burden in varying degrees. To

mention a few, Sections 35 and 54 of the Narcotics Drugs and Psychotropic Substances Act, 1985; Sections 7, 11, 20 of the Prevention of Corruption

Act, 1988; Section 21 of the Prevention of Terrorist and Disruptive Activities (Prevention) Act, 1987 (now repealed), Section 43-E of the Unlawful

Activities Prevention Act, 1967; Sections 118, 119, 137, 138, 139 of the Negotiable Instruments Act, 1881; Sections 304-B of IPC; Sections 79 to 90A,

111-A, 113-A, 113-B, 114, 114-A of the Evidence Act etc. provide for presumption of guilt against the accused.

23. Some such provision for reverse burden of proving innocence by the accused had been subject to challenge as being unconstitutional as in the case

of Sections 35 and 54 of the NDPS Act which raise presumption with regard to the culpable mental state on the part of the accused and burden of

proof placed in this regard on the accused.

The Honâ??ble Supreme Court, while observing that such a principle is inconsistent with the principle of presumption of innocence, which is invoked

for the larger interest of the society, upheld the constitutionality of the aforesaid provisions. At the same time, the Honâ??ble Supreme Court

cautioned that under such situation, a heightened scrutiny test would be necessary to be applied necessitating a higher degree of assurance to convict

an accused in view of the fundamental rights as guaranteed under Articles 14 and 21 of the Constitution of India and other international

covenants/instruments to which India is a signatory.

It was, thus, clarified by the Honâ??ble Supreme Court while dealing with Sections 35 and 54 of the NDPS Act in *Noor Aga v. State of Punjab*,

(2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748 that,

â??40. The provision for reverse burden is not only provided for under the special

Acts like the present one but also under the general statutes like the Penal Code. The Evidence Act provides for such a burden on an accused in certain matters, as, for example, under Sections 113-A and 113-B thereof. Even otherwise, this Court, having regard to the factual scenario involved in cases e.g. where the husband is said to have killed his wife when both were in the same room, burden is shifted to the accused. Enforcement of law, on the one hand and protection of citizen from operation of injustice in the hands of the law enforcement machinery, on the other, is, thus, required to be balanced. The constitutionality of a penal provision placing burden of proof on an accused, thus, must be tested on the anvil of the State's responsibility to protect innocent citizens. The court must assess the importance of the right being limited to our society and this must be weighed against the purpose of the limitation. The purpose of the limitation is the reason for the law or conduct which limits the right. (See *S v. Dlamini* (1999) 4 SA 623: (1999) 7BCLR 771 (CC).) While, however, saying so, we are not unmindful of serious criticism made by the academics in this behalf.

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56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. â??proof beyond all reasonable doubtâ? would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of â??wider civilisationâ?.

The court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree

of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In *State of Punjab v. Baldev Singh* (1999) 6 SCC 172: 1999

SCC (Cri) 1080 it was stated: (SCC p. 199, para 28)

“28. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute

are scrupulously followed.”

(See also *Ritesh Chakarvarti v. State of M.P.* (2006) 12 SCC 321: (2007) 1 SCC (Cr) 744)

(emphasis added)

24. The Hon’ble Supreme Court thus, clarified that the prosecution still needs to establish the foundational facts beyond reasonable doubt and as

far as the accused is concerned, he is not to be burdened with the onus to prove his innocence beyond reasonable doubt. It will suffice if he does so

based on “preponderance of probability”.

Accordingly, it was held in *Noor Aga* (supra) as follows:

“58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place

the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the

trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only

when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as

that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable

doubt” but it is “preponderance of probability” on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours

of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.”

(emphasis added)

25. The same principle was reiterated in *Mohan Lal v. State of Punjab*, (2018) 17 SCC 627, wherein it was held as follows:

12. Unlike the general principle of criminal jurisprudence that an accused is presumed innocent unless proved guilty, the NDPS Act carries a reverse burden of proof under Sections 35 and 54. But that cannot be understood to mean that the moment an allegation is made and the FIR recites compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption is rebuttable. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of ten years, absence of any provision for remission, do not dispense with the requirement of the prosecution to establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. The case of the prosecution cannot be allowed to rest on a preponderance of probabilities.

26. The aforesaid legal position was also explained in an earlier case in *Babu v. State of Kerala*, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 117 9 wherein it was observed that,

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 Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.

(emphasis added)

27. Referring to presumption of guilt of corruption as contemplated under Section 20 of the Prevention of Corruption Act, 1988, the Supreme Court

highlighted the necessity to prove the foundational facts beyond reasonable doubts before the statutory presumption could come to operation as

observed in *V. Sejappa v. State*, (2016) 12 SCC 150 as follows:

“21. While dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it illegal

gratification and that the prosecution has a further duty to prove that what was paid was an illegal gratification, reference can be made to the

following observation in *Mukut Bihari v. State of Rajasthan* : (2012) 11 SCC 642, wherein it was held as under: (SCC pp. 645-46, para 11)

“11. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere

recovery of tainted money is not sufficient to convict the accused, when the substantive evidence in the case is not reliable, unless there is evidence to

prove payment of bribe or to show that the money was taken voluntarily as bribe. Mere receipt of amount by the accused is not sufficient to fasten the

guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification, but the burden rests on the accused

to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to

establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988

Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the

touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called

upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The

complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of

any other interested witness and in a proper case the court may look for independent corroboration before convicting the accused person.”

28. Similarly, in the context of Section 113-B of the Evidence Act and Section 304-B IPC relating to dowry deaths, the Hon’ble Supreme Court

observed in *Kaliyaperumal v. State of T.N.*, (2004) 9 SCC 157 : 2004 SCC (Cri) 141 7that, the prosecution is obliged to prove the cruelty or

harassment before presumption can operate.

5. A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before

her death the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to

bring it within the purview of the death occurring otherwise than in normal circumstances. The expression "soon before" is very relevant

where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the

occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led in by the prosecution.

29. In the context of the presumption as provided under Section 139 of the Negotiable Instruments Act, 1881, regarding discharge of burden by an

accused under the aforesaid Act, it was also held by the Hon'ble Supreme Court in Rangappa v. Sri Mohan, (2010) 11 SCC 441 : (2011) 1 SCC

(Cri) 184 that to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probability". Thus, if the

accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail.

It was thus, held as below:

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving

the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the

rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the

offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a

civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality

should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high

standard of proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in

view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of

“preponderance of probabilities”. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a

legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the

complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.”

30. From the above decisions it is evident that before presumption in these statutes comes to operate, certain foundational facts are proved by the

prosecution beyond all reasonable doubts. However, as regards discharge of the onus placed upon the accused relating to presumption of law as

provided in the statutes, the standard of proof is lighter, that is, by preponderance of probability.

31. In the context of the POCSO Act, however, there seems to be certain lack of unanimity as to how the prosecution has to prove the case, though

the overwhelming view is that the standard of proof expected from the prosecution is the probability or plausibility and not proof beyond reasonable

doubt, before the accused is called upon to prove his innocence. Further, as to how the accused is to discharge his burden under the Act has not been

also clearly laid down, as to whether it should be by way of proof beyond reasonable doubt or on the basis of preponderance of probability. The position

has been compounded by the fact that Section 30(1) of the Act requires that in any prosecution for an offence under 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 culpable mental state. Section 30(2) further provides that for the purpose 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. Thus, if the defence has to prove certain facts to dispel the presumption under Section 30(1), he has to prove that fact beyond reasonable

doubt and not on the basis of preponderance of probability.

32. Section 29 of the POCSO Act provides that the Special Court shall presume that the accused has committed the offence for which he is charged

under the Act, unless the contrary is proved by the accused. The presumption, however, would operate only after the prosecution has been able to prove the foundational facts constituting the offence against the accused. The issue is, whether these foundational facts are to be proved beyond reasonable doubt or by way of preponderance of probability and what would be the degree of the corresponding burden of the accused to be discharged to prove his innocence.

33. As discussed above, in other statutes like NDPS Act, Prevention of Corruption Act, N.I. Act, Indian Penal Code dealing with dowry death etc.,

the view of the Honâ??ble Supreme Court is that before the accused is called upon to discharge the burden of guilt and to prove that he is innocent,

the prosecution has to prove the foundational facts beyond reasonable doubt and not on the basis of preponderance of probability.

It has been also clarified that, while discharging his burden, the accused is saddled with the lesser burden of proof and he can discharge the same on

the standard of preponderance of probability.

34. The issue is whether the same principles can be also applied in the case of offences committed under the POCSO Act?

35. In the opinion of this Court, there would be a paradigm shift in the matter of burden of proof and the degree of proof because of the stringent

provisions of the POCSO Act. Unlike other statutes, some of which have been already referred to above, Section 29 of the Act does not speak of

proof of any foundational fact before the Court presumes that the accused is guilty of the offence. What Section 29 provides is that the presumption

will come into operation, as soon as a person is prosecuted for committing or abetting or attempting to, any offence under Sections 3, 5, 7 and 9 of the

Act. In other words, what is required before presumption operates under the Act is that, the person must be prosecuted.

Section 29 reads as follows:

â??29. Presumption as to certain offences.â??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.â??

(emphasis added)

At the same time, it would be appropriate to remember what the expression "shall presume" means under the Evidence Act, 1872. It has been

defined under Section 4 of the Evidence Act that, "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". If we import the aforesaid meaning of the expression "shall presume" to the POCSO Act, and as also

mentioned under the POCSO Act, it would be quite evident that, the moment a person is prosecuted for committing the offences mentioned under the

Act, he shall be presumed to have committed the said offence and the charges made against him shall be considered to have been proved.

36. It would, thus, be necessary to understand as the meaning and scope of the word "prosecuted" used in Section 29 of the Act, which provides

for the legal presumption of guilt of the accused.

Black's Law Dictionary (6th Edn), 1990 defines the word prosecute as follows:

"To follow-up; to carry on and action or other judicial proceeding; to proceed against the person criminally. To prosecute and action is not merely

to commence, but includes following to an ultimate conclusion."

11th Edn, 2019 of the Black's Law Dictionary defines the word "prosecute" as

1. To commence and carry out illegal action.
2. Institute and pursue a criminal action against a person.

The word prosecution has been defined in the Black's Law Dictionary (6th Edn) as follows:

"A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the

guilt or innocence of the person charged with crime. U.S. v. Reisinger, 128 U.S. 398, 9 S.Ct.99, 32 L.Ed. 480. The continuous following up, to

instrumental it is created by law, of a person accused of a public offence with a steady and fixed purpose of reaching a judicial determination of the

guilt or innocence of the accused."

11th Edn, 2019 of the Black's Law Dictionary defines the word "prosecution" as "a criminal proceeding in which an accused is tried".

In Thomas Dana v. State of Punjab, 1959 Supp (1) SCR 274 : AIR 1959 SC 375 : 1959 Cri LJ 392 , referring to Maqbool Hussain v. State of Bombay,

1953 SCR 730 : AIR 1953 SC 325 : 1953 Cri LJ 143,2 in the context of double jeopardy under Article 20 of the Constitution, it was held that

prosecution would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the

procedure prescribed in the statute which creates the offence and regulates the procedure, with the following words:

“10. It is, therefore, necessary first to consider whether the petitioners had really been prosecuted before the Collector of Customs, within the

meaning of Article 20(2). To “prosecute”, in the special sense of law, means, according to Webster’s Dictionary, (a) to seek to obtain,

enforce, or the like, by legal process; as, to prosecute a right or a claim in a court of law. (b) to pursue (a person) by legal proceedings for redress or

punishment; to proceed against judicially; esp., to accuse of some crime or breach of law, or to pursue for redress or punishment of a crime or

violation of law, in due legal form before a legal tribunal; as, to prosecute a man for trespass, or for a riot.” According to Wharton’s Law

Lexicon, 14th edn., p. 810, “prosecution” means “a proceeding either by way of indictment or information, in the criminal courts, in order to put

an offender upon his trial. In all criminal prosecutions the King is nominally the prosecutor”. This very question was discussed by this Court in the

case of *Maqbool Hussain v. State of Bombay* (1937) 2 KB 309 with reference to the context in which the word “prosecution” occurred in Article

20. In the course of the judgment, the following observations, which apply with full force to the present case, were made:

“...and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial

tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure”.

37. In view of the above, what one can say is that prosecution means the proceeding instituted and carried on before court of competent jurisdiction

for determining the guilt or otherwise of a person accused of committing the offence of which he is charged, on the basis of materials brought before

the court. The prosecution may end in conviction of the accused of such an offence of which he is charged on the basis of the material evidence that

may be adduced before the court, if the court is convinced that the adequate materials exist to prove the accusations against the accused beyond

reasonable doubt. On the other hand, if the court is not satisfied, the accused will be acquitted. The conclusion as to the guilt or otherwise by the court is to be drawn only after the trial is over, i.e., when the prosecution comes to an end.

38. The effective trial commences before a court only after the charge-sheet is filed on completion of the investigation and only after the court is satisfied that there are prima facie materials or evidences before the court to proceed with the trial. If the court does not find sufficient materials to proceed with the trial, the court can discharge the accused at that stage. Then it would be the termination of the prosecution or the trial. It is also to be remembered that at the stage of charge consideration, the trial court is not called upon to scrutinize or minutely examine the admissibility, credibility, reliability of the evidences sought to be relied upon by the prosecution, but to see whether there are adequate materials to proceed against the accused. At this stage, the court is not concerned with whether any fact is proved or not. The court merely assumes the facts to be correct to draw the conclusion that the accused may be guilty and hence needs to be tried. As to whether the facts constituting the offence have been proved or not is to be considered by the court only on conclusion of the trial after hearing the prosecution evidences and of the accused and not prior to it.

39. The aforesaid process of prosecution is prescribed in detail in the Code of Criminal Procedure, 1973. The Code contains the comprehensive procedure dealing with the entire processes involved in the criminal justice system in our country, from the stage of filing of complaint before the police station or before a court, the various stages of investigation of the case by the investigating authority, the manner in which the investigation is to be conducted, rights of the various stakeholders, including the accused, and on completion of such investigation culminating in filing a final report whereby, either because of lack of evidence, the case against the person initially charged, is closed, or if there are sufficient evidences to proceed against him, the court takes cognizance of the offence committed leading to framing of charges against the accused for trial which may culminate either on conviction or acquittal as the case may be. The process of ascertaining the guilt or otherwise of an accused charged of an offence is in fact, initiated with the framing of charges against him. If during the process of framing of charge, it is found that there are no sufficient materials to frame

charge against the accused, he can be discharged. Otherwise, the trial will be initiated, and it is from that stage that it can be said that the actual

prosecution effectively starts. Accordingly, it can be said that when one is prosecuted for an offence, he is tried for the same.

40. The Criminal Procedure Code has exhaustively laid down the procedure for trial. Chapter XVI deals with commencement of procedure before the

Magistrate once the Magistrate takes cognizance of an offence by issuing summons or warrants, as the case may be. Similarly, Chapter XVIII deals

with trial before the Court of Session after the accused person is brought before the Court pursuant to commitment of the case. At that stage, the

Court frames the charge against the accused and if the Court does not find sufficient grounds for proceeding against the accused, the accused is

discharged as provided under Section 227 CrPC. How charge is to be framed is dealt with in detail in Chapter XVII. Chapter XVIII does mention

various stages of the criminal trial with the framing of charge (Section 228), conviction of accused if he pleads guilty (Section 229), and if the accused

refuses to plead guilty, a date is fixed for prosecution evidence (Section 230) and the evidence is recorded on the date fixed by the Court (Section 231)

and after recording of evidence and examination of witnesses of the prosecution as well as the defence, if the Court considers that there is no

evidence that the accused has committed the offence, he shall be entitled to be acquitted (Section 232). In short, Chapter XVIII of the CrPC deals

with actual process of prosecution which may either culminate in the conviction or acquittal of the accused.

41. Section 31 of the POCSO Act provides that save as otherwise provided in the Act, the provisions of the CrPC. shall apply to the proceedings

before the Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions. Thus, most of the

provisions of the CrPC including trial and prosecution will be applicable in a criminal proceeding under the POCSO Act.

42. Several views, however, have been taken by various courts as to when a prosecution can be said to commence. The following are the some of the views.

(i) Prosecution starts with registration of FIR or complaint before the Magistrate.

(ii) Prosecution is initiated when the Magistrate/Court takes cognizance of the

offence.

(iii) Prosecution commences with filing of charge sheet/challan/investigation report by the police.

(iv) Prosecution commences with framing of charges by the court.

43. In this regard, it may be clarified that taking cognizance of an offence and prosecution of an offender are two different aspects as clarified by the

Honâ??ble Supreme Court in *Sunil Bharti Mittal v. CBI*, (2015) 4 SCC 609 as follows,

â??49. Cognizance of an offence and prosecution of an offender are two different things. Section 190 of the Code empowered taking cognizance of

an offence and not to deal with offenders. Therefore, cognizance can be taken even if offender is not known or named when the complaint is filed or

FIR registered. Their names may transpire during investigation or afterwards.â??

44. Explaining the purport of filing of charge sheet, the Honâ??ble Supreme Court in *Amit Kapoor v. Ramesh Chander*, (2012) 9 SCC 460, held that

at the time of framing charge on the basis of the records of the case, the court merely presumes that the accused has committed an offence, but this

presumption is not presumption of law but a tentative view based on the materials before the court for the purpose of continuing with the trial. It was

also clarified that at the stage of framing of charge, any view that that court should form an opinion that the accused is certainly guilty of committing

an offence will be impermissible. Such a view is merely tentative for the purpose of proceeding with the trial.

It was thus, held as follows:

â??17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under

Section 227 of the Code. Under both these provisions, the court is required to consider the â??record of the caseâ? and documents submitted

therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for

presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the section exists, then the court

would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a

presumption of law as such. The satisfaction of the court in relation to the

existence of constituents of an offence and the facts leading to that offence

is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of

Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to

say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an

approach which is impermissible in terms of Section 228 of the Code.

45. As to the meaning of trial, when an accused prosecuted, the Honâ??ble Supreme Court explained the same elaborately in Hardeep Singh v. State

of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 8.6 The Honâ??ble Supreme Court in the said case overruled the view that trial commences on

cognizance being taken.

It was held that â??trialâ? means determination of issues for adjudging the guilt or the innocence of a person after making the person aware of what

is the case against him, and it is only at the stage of framing of the charges that the court informs him of the same. Thus, â??trialâ? commences only

on charges being framed.

It was, thus, held that,

â??25. The stage of inquiry and trial upon cognizance being taken of an offence, has been considered by a large number of decisions of this Court

and that it may be useful to extract the same hereunder for proper appreciation of the stage of invoking of the powers under Section 319 CrPC to

understand the meaning that can be attributed to the words â??inquiryâ? and â??trialâ? as used under the section.

26. In Raghubans Dubey v. State of Bihar AIR 1967 SC 1167 : 1967 Cri LJ 1081, this Court held: (AIR p. 1169, para 9)

â??9. â? once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of

an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police

some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding

initiated by his taking cognizance of an offence.â??

27. The stage of inquiry commences, insofar as the court is concerned, with the filing of the charge-sheet and the consideration of the material

collected by the prosecution, that is mentioned in the charge-sheet for the purpose of trying the accused. This has to be understood in terms of Section

2(g) CrPC, which defines an inquiry as follows:

â??2. (g) â??inquiryâ?? means every inquiry, other than a trial, conducted under this Code by a Magistrate or court.â??

28. In *State of U.P. v. Lakshmi Brahman* (1983) 2 SCC 372 : 1983 SCC (Cri) 489 : AIR 1983 SC 43, 9this Court held that from the stage of filing of

charge-sheet to ensuring the compliance with the provision of Section 207 CrPC, the court is only at the stage of inquiry and no trial can be said to

have commenced. The above view has been held to be per incuriam

in *Raj Kishore Prasad v. State of Bihar* (1996) 4 SCC 495 : 1996 SCC (Cri) 772 : AIR 1996 SC 193 w1,herein this Court while observing that Section

319(1) CrPC operates in an ongoing inquiry into, or trial of, an offence, held that at the stage of Section 209 CrPC, the court is neither at the stage of

inquiry nor at the stage of trial. Even at the stage of ensuring compliance with Sections 207 and 208 CrPC, it cannot be said that the court is at the

stage of inquiry because there is no judicial application of mind and all that the Magistrate is required to do is to make the case ready to be heard by

the Court of Session.

29. Trial is distinct from an inquiry and must necessarily succeed it. The purpose of the trial is to fasten

29. Trial is distinct from an inquiry and must necessarily succeed it. The purpose of the trial is to fasten the responsibility upon a person on the basis of

facts presented and evidence led in this behalf. In *Moly v. State of Kerala*¹⁴ (2004) 4 SCC 584 : 2004 SCC (Cri) 134 8, this Court observed that

though the word â??trialâ?? is not defined in the Code, it is clearly distinguishable from inquiry. Inquiry must always be a forerunner to the trial.

30. A Three-Judge Bench of this Court in *State of Bihar v. Ram Naresh Pandey* AIR 1957 SC 389 : 1957 Cri LJ 567 held: (AIR p. 394, para 6)

â??6. â?| The words â??triedâ? and â??trialâ? appear to have no fixed or universal meaning. No doubt, in quite a number of sections in the Code to

which our attention has been drawn the words â??triedâ? and â??trialâ? have been used in the sense of reference to a stage after the inquiry. That

meaning attaches to the words in those sections having regard to the context in which they are used. There is no reason why where these words are

used in another context in the Code, they should necessarily be limited in their connotation and significance. They are words which must be considered

with regard to the particular context in which they are used and with regard to the scheme and purpose of the provision under consideration.â??

(emphasis supplied)

31. In *Ratilal Bhanji Mithani v. State of Maharashtra* (1979) 2 SCC 179 : 1979 SCC (Cri) 405 : AIR 1979 SC 9, 4 this Court held: (SCC p. 189, para

28)

â??28. Once a charge is framed, the Magistrate has no power under Section 227 or any other provision of the Code to cancel the charge, and reverse

the proceedings to the stage of Section 253 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it, the

proceedings are only an inquiry. After the framing of the charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial in

the manner provided in Sections 254 to 258 to a logical end.â??

(emphasis supplied)

32. In *V.C. Shukla v. State* 1980 Supp SCC 92 : 1980 SCC (Cri) 695 : AIR 1980 SC 962, this Court held: (SCC p. 126, para 39)

â??39. â?| the proceedings starting with Section 238 of the Code including any discharge or framing of charges under Section 239 or 240 amount to a

trial.â??

33. In *Union of India v. Madan Lal Yadav* (1996) 4 SCC 127 : 1996 SCC (Cri) 59,2 a three-Judge Bench while dealing with the proceedings in

General Court Martial under the provisions of the Army Act 1950, applied legal maxim *nullus commodum capere potest de injuria sua propria* (no one

can take advantage of his own wrong), and referred to various dictionary meanings of the word â??trialâ? and came to the conclusion: (SCC pp. 136

& 141-42, paras 19 & 27)

â??19. It would, therefore, be clear that trial means act of proving or judicial examination or determination of the issues including its ownâ? â?

jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial

commences with the performance of the first act or steps necessary or essential to proceed with the trial.

* * *

27. Our conclusion further gets fortified by the scheme of the trial of a criminal case under the Code of Criminal Procedure, 1973 viz. Chapter XIV

â??Conditions requisite for initiation of proceedingsâ? containing Sections 190 to 210, Chapter XVIII containing Sections 225 to 235 and dealing with

â??trial before a Court of Sessionâ? pursuant to committal order under Section 209 and in Chapter XIX â??trial of warrant cases by Magistratesâ?

containing Sections 238 to 250, etc. It is settled law that under the said Code trial commences the moment cognizance of the offence is taken and

process is issued to the accused for his appearance, etc. Equally, at a sessions trial, the court considers the committal order under Section 209 by the

Magistrate and proceeds further. It takes cognizance of the offence from that stage and proceeds with the trial. The trial begins with the taking of the

cognizance of the offence and taking further steps to conduct the trial.â??

(emphasis supplied)

34. In *Common Cause v. Union of India*¹⁹ (1996) 6 SCC 775 : 1997 SCC (Cri) 42 : AIR 1997 SC 153 9th, is Court while dealing with the issue held:

(SCC p. 776, para 1)

â??1. II (i) In cases of trials before the Sessions Court the trials shall be treated to have commenced when charges are framed under Section 228 of

the Code of Criminal Procedure, 1973 in the cases concerned.

(ii) In cases of trials of warrant cases by Magistrates if the cases are instituted upon police reports the trials shall be treated to have commenced

when charges are framed under Section 240 of the Code of Criminal Procedure, 1973 while in trials of warrant cases by Magistrates when cases are

instituted otherwise than on police report such trials shall be treated to have commenced when charges are framed against the accused concerned

under Section 246 of the Code of Criminal Procedure, 1973.

(iii) In cases of trials of summons cases by Magistrates the trials would be considered to have commenced when the accused who appear or are

brought before the Magistrate are asked under Section 251 whether they plead guilty or have any defence to make.â??

(emphasis supplied)

35. In *Raj Kishore Prasad*¹³, this Court said that as soon as the Prosecutor is present before the court and that court hears the parties on framing of charges and discharge, trial is said to have commenced and that there is no intermediate stage between committal of case and framing of charge.

36. In *Narayanaswamy Naidu v. Emperor* ILR (1909) 32 Mad 220 : 1 IC 228, a Full Bench of the Madras High Court held that: (ILR p. 234)

“Trial begins when the accused is charged and called on to answer and then the question before the Court is whether the accused is to be acquitted or convicted and not whether the complaint is to be dismissed or the accused discharged.”

A similar view has been taken by the Madras High Court subsequently in *T. Sriramulu v. K. Veerasalingam* ILR (1915) 38 Mad 585

37. However, the Bombay High Court in *Dagdu Govindshet Wani v. Punja Vedu Wani* (1936) 38 Bom LR 1189 referring to *Sriramulu*²¹ held: (Bom LR p. 1191)

“There is no doubt that the Court did take the view that in a warrant case the trial only commences from the framing of the charge”. But, according to my experience of the administration of criminal justice in this Presidency, which is not inconsiderable, the courts here have always accepted the definition of trial which has been given in *Gomer Sirda v. Queen Empress* ILR (1898) 25 Cal 863 , that is to say, “trial” has always been understood to mean the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock and the representatives of the prosecution and defence, if the accused be defended, present in Court for the hearing of the case.”

A similar view has been taken by the Lahore High Court in *Sahib Din v. Crown* ILR (1922) 3 Lah 115, wherein it was held that for the purposes of

Section 350 of the Code, a trial cannot be said to commence only when a charge is framed. The trial covers the whole of the proceedings in a warrant

case. This case was followed in *Fakhruddin v. Crown* ILR (1924) 6 Lah 176 and in *Labhsing v. Emperor* (1934) 35 Cri LJ 1261 (JCC)

38. In view of the above, the law can be summarised to the effect that as “trial” means determination of issues adjudging the guilt or the innocence of a person, the person has to be aware of what is the case against

him and it is only at the stage of framing of the charges that the court informs him of the same, the "trial" commences only on charges being framed. Thus, we do not approve the view taken by the courts that in a criminal case, trial commences on cognizance being taken.

46. It is to be noted that neither the POCSO Act nor the CrPC defines as to the meaning of the words "prosecuted" and when a prosecution can be said to commence. Under the circumstances, as to when a person is prosecuted or when the prosecution commences has to be understood in the context of the Act and the provisions of the CrPC. As discussed above, it can be said that that a trial commences not from the date of filing of FIR or the charge-sheet or taking of cognizance by the court but from the stage of framing of charge. Prosecution can thus be said to commence from that stage when the court starts applying its mind regarding the culpability of the accused, that is, when the proper judicial consideration of the guilt or otherwise of the accused begins.

47. In view of the above, can it be also said that prosecution under the POCSO Act commences from the stage the charges are framed against the accused and he is called upon to answer and defend himself? It is to be noted that at the stage of framing of charge, the court is called upon to examine whether the ingredients of the offence and supporting materials exist so as to presume that the accused has committed the offence charged and accordingly proceeded for trial. This presumption of the court that accused has committed an offence at the time of framing of charges, however, is not a presumption of law as held by the Hon'ble Supreme Court in Amit Kapoor (supra) and as such this presumption, is to be distinguished from the presumption of law as provided under Section 29 of the Act. The presumption of the court during framing of charge is mere assumption of guilt for the purpose of proceeding with the trial whereas, presumption under Section 29 is a determinative deeming provision when certain fact is legally presumed to be established by holding the accused guilty of the offence charged. Thus, during the process of prosecution, at the stage of framing of charge, the question of proving any allegation or fact against the accused does not arise. Whether a charge or any ingredient of the offence has been proved beyond reasonable doubt or not or by preponderance of probability, is to be determined by the court only at the conclusion of the trial

and after taking in consideration the evidences that may be produced by the prosecution as well as the accused.

48. The language of Section 29 of the Act is that as soon as a person is prosecuted, the Court shall presume that the accused has committed the

offence. If Section 29 is to be literally interpreted, what would amount is that the moment the prosecution is initiated with the framing of charge

against the accused as contemplated under Chapter XVIII of the CrPC, the trial court shall then presume that the accused has committed such an

offence. In such an event, can it be said that, merely because certain allegations have been made against an accused and charge has been framed,

even before the charges could be proved against him, he shall be presumed to be guilty? In other words, can the evidences which were the basis of

framing of charge be also for drawing the presumption of guilt under Section 29 of the Act?

49. Presumption under Section 9 being a legal presumption. If the aforesaid literal interpretation is to be adopted, it will start operating the moment a

person is prosecuted which is understood to commence with the framing of charges, without there being any recording of evidence, other than the

records produced by the prosecution for the purpose of framing of charge. If it is held to be so, obviously, it will lead to serious prejudices against

innocent persons who may be falsely implicated merely on the basis of the materials at the stage of framing of charge, and thus be saddled with the

onerous burden of proving himself innocent. Neither common-sense nor law contemplates such a situation. Such a position would be untenable and

impermissible in the light of the law discussed above and will also fall foul of the Constitution. The prosecution needs to do more than merely filing the

charge-sheet which merely indicates prima facie case against the accused.

As such, this literal interpretation is to be eschewed. Yet, at the same time the language of the statute ought to be also given effect to, as the statute

had been specifically enacted to deal with increasing and rising heinous crimes committed on helpless and vulnerable children. Thus, a more pragmatic

and workable meaning has to be assigned to the provision of Section 29 of the Act.

50. It goes without saying that when a person is brought to trial, there must be cogent material evidences against him as gathered during the

investigation, which would constitute a prima facie case against the accused, on the basis of which the charge is framed. However, merely because a prima facie case has been made out against the accused and the accused is charge-sheeted, it cannot be the basis for drawing a presumption of guilt against the accused as also held in Amit Kapoor (supra). There must be cogent and relevant materials and evidences of a high probability indicating commission of such crime by the accused so as to avoid any innocent person being hauled up in a criminal trial. At the same time, if during the trial the prosecution is able to prove the case against the accused beyond reasonable doubt, there would be no need to apply the principle of presumption against an accused as mentioned in Section 29 of the Act, in which event, Section 29 would become redundant, which is not contemplated under the Act.

Hence, for the purpose of POCSO Act, for the presumption to come into play, at the stage of filing of charge-sheet, a person cannot be said to be prosecuted. It is only after the cogent evidences have been adduced by the prosecution that the accused can be said to be prosecuted for the purpose of invoking the legal presumption under Section 29 of the Act. Presumption will start operating only on the conclusion of the recording of evidence of the prosecution when the prosecution is able to make out a highly probable case on the basis of preponderance of probability.

51. In view of the above, in the opinion of this Court, as also held by many High Courts in this regard, before the presumption in law under Section 29 of the Act comes into operation against an accused, the prosecution must be able to prove the existence of certain foundational facts in course of the trial which would satisfy a prudent man that such a thing had indeed occurred at the instance of the accused.

52. As we continue to examine the scope of presumption under Section 29 of the Act, it will be apposite to examine as to what it meant by presumption, in law.

As to what is presumption, has been explained in Izhar Ahmad Khan v. Union of India, 1962 Supp (3) SCR 235 : AIR 1962 SC 1052 : (1962) 2 Cri LJ

215 as follows:

“The term ‘presumption’ in its largest and most comprehensive signification, may be defined to be an inference, affirmative or

disaffirmative of the truth or falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for

granted. Thus, according to Best, when the rules of evidence provide for the raising of a rebuttable or irrebuttable presumption, they are merely

attempting to assist the judicial mind in the matter of weighing the probative or persuasive force of certain facts proved in relation to other facts

presumed or inferred.

Further, it was held in *State of W.B. v. Mir Mohammad Omar*, (2000) 8 SCC 382 that,

“33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is

disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When

inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the

most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It

empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the

common course of natural events, human conduct etc. in relation to the facts of the case.

53. It is now well settled that presumption is a rule of evidence, which has evolved and is essentially invoked to plug certain loopholes or gaps or

remove lacunae in the evidences, as also observed by the Supreme Court in *Narayan Govind Gavate Vs. State of Maharashtra*, (1997) 1 SCC 133, as

follows.

“21. In judging whether a general or a particular or special onus has been discharged, the court will not only consider the direct effect of the oral

and documentary evidence led but also what may be indirectly inferred because certain facts have been proved or not proved though easily capable of

proof if they existed at all which raise either a presumption of law or of fact. Section 114 of the Evidence Act covers a wide range of presumptions of

fact which can be used by courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it. It is, therefore,

said that the function of a presumption often is to “fill a gap” in evidence.

(emphasis added)

54. It is therefore, clear that before the Court presumes guilt of the accused under Section 29 of the Act, some of the foundational facts which

constitute the offence must be proved, as it is only from these established foundational facts that this legal presumption is to be drawn by the Court.

Presumption of guilt under the Act certainly cannot be based on presumed facts or assumptions, but established facts only.

55. POCSO Act, unlike other statutes like NDPS Act, Prevention of Corruption Act etc. is a special statute, providing stringent provisions as regards

the nature of offences, investigation and trial and providing for steep penalties.

It is to be noted that it has been observed above in Noor Aga (supra) that the more serious the offence, stricter is the degree of proof and a higher

degree of assurance would be necessary to convict an accused. It is also the obligation of the prosecution that only genuine and plausible cases are

tried by the court. Thus, before the court presumes the guilt of the accused, the court must be satisfied that the charges brought against the accused

are highly probable and not the product of figment of imagination, not mere allegations without any proper foundation. There must be cogent materials

before the court to take the view that in all probability, the accused has committed the offence.

56. It may be also kept in mind that this presumption of guilt which is ordained by the statute must also pass the test of reasonableness under Article

14 and justness and fairness implicit in Article 21 as observed by the Supreme Court in Noor Aga (supra). The provisions of POCSO Act, must be

also interpreted by keeping the constitutional spirit as contained in Articles 14 and 21 as well as in various international instruments, so that under all

circumstances the accused has a right of fair trial, and at the same time also keeping in mind the public policy for enacting such a stringent law.

57. In this regard, it may be apposite to recall the following observation of the Supreme Court made in Noor Aga (supra),

53. Dealing with the provisions of Sections 118(b) and 139 of the Negotiable Instruments Act, 1881 in Krishna Janardhan Bhat v. Dattatraya G.

Hegde 17: (2008) 4 SCC 54 this Court upon referring to Hiten P. Dalal v. Bratindranath Banerjee (2001) 6 SCC 16, opined: (Krishna Janardhan Bhat

case17, SCC pp. 65-66, paras 43-44)

43. But, we may at the same time notice the development of law in this area in some jurisdictions.

44. The presumption of innocence is a human right. (See *Narendra Singh v. State of M.P.* (2004) 10 SCC 699, *Ranjitsing Brahmajetsing Sharma v.*

State of Maharashtra (2005) 5 SCC 294 and *Rajesh Ranjan Yadav v. CBI* (2007) 1 SCC 70.) Article 6(2) of the European Convention on Human

Rights provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Although India is

not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law

into line with the Convention, a balancing of the accused's rights and the interest of the society is required to be taken into consideration. In India,

however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of

the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of

presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for

the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has

been emphasised. It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the accused e.g.

honest and reasonable mistake of fact. In a recent Article *The Presumption of Innocence and Reverse Burdens: A Balancing Duty* published in 2007

CLJ (March Part) 142 it has been stated:

"In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof.

How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden?

But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where

the reverse burden would not pose the risk of great injustice" where the offence is not too serious or the reverse burden only concerns a matter

incidental to guilt. And greater weight will be given to prosecutorial efficiency in

the regulatory environment.â?? â??

The above stated principles should be applied in each case having regard to the statutory provisions involved therein.â??

58. It was further held in Noor Aga (supra) that the more serious the offence, the stricter is the degree of proof. Thus, a higher degree of assurance, would be necessary to convict an accused.

It was thus held that,

â??56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened

standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the

court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs

and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. â??proof beyond all reasonable doubtâ?

would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive

towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold

the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the

provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of â??wider civilisationâ?

The court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree

of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Punjab v. Baldev Singh (1999) 6 SCC 172 it was

stated: (SCC p. 199, para 28)

â??28. â?| It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute

are scrupulously followed.â??

(See also Ritesh Chakarvarti v. State of M.P. (2006) 12 SCC 321)

59. Thus, in the case like the present one, the prosecution, must establish that the charges against the accused are in all probability true. At the same

time, if the prosecution has to prove the charges against the accused beyond reasonable doubt, the legal presumption provided under Section 29 of the Act will become redundant. Under the circumstances, the legal position which emerges is that the prosecution must prove the foundational facts, not on the basis of any prima facie materials, but based on preponderance of probability, but falling short of proof beyond reasonable doubt. Thus, once the prosecution has been able to establish the foundational facts on the basis of preponderance of probability, by virtue of Section 29 of the Act, it will then be presumed that the prosecution has been able to establish the charge beyond reasonable doubt.

60. It is to be remembered that the initial onus of the prosecution in any criminal proceeding to prove the offence against the accused beyond reasonable doubt, ever remains, and never gets shifted. However, the aforesaid onus of the prosecution to prove the charge beyond reasonable doubt in a proceeding under POCSO Act is made easier by the statute by drawing presumption against the accused whenever he is prosecuted for any offence under Sections 3,5,7 and 9 of the Act, when the prosecution is able to demonstrate that in all probability the accused has committed the said offence based on certain established foundational facts. Thus, for all practical purposes, once the prosecution is able to prove the offence against an accused under the Act on the basis of preponderance of probability, it shall be presumed that the prosecution has been able to establish the charge against the accused beyond all reasonable doubt.

61. It may be noted that if the prosecution has to prove the charge against the accused beyond reasonable doubt in cases under the POCSO Act, there would not be any need to provide for the provision of presumption of guilt. This legal presumption of guilt has been incorporated by the Parliament in the statute considering difficulties faced by the investigating authorities sometimes in marshalling all the relevant evidences in order to nail the culprit where there is otherwise overwhelming inputs about the crime being perpetrated by the accused, but may fall short of some evidences to prove the case beyond reasonable doubt. The statutory presumption under Section 29 of the Act thus gives a cover to the prosecution for any lacuna or deficiency it may have. But for the presumption of guilt provided under Section 29 of the Act, the prosecution has to prove the foundational

facts against an accused on the basis of proof beyond reasonable doubt. However, it must be also clarified that in a proceeding under POCSO Act, such lacuna or shortcoming which may be present in the prosecution case must not be of such a fundamental nature which goes to the root of the prosecution case. For, in such an event, because of lack of such important evidence or ingredient and existence of such fundamental lacuna, it may not be even possible to establish the charge on preponderance of probability and draw legal presumption of guilt against the accused. The legal presumption provided under Section 29 cannot be the panacea for all the loopholes of the prosecution. The lacunae or the loopholes, or the deficiency, therefore, must not be of a fundamental nature which renders any charge untenable.

62. In view of the above, the proper interpretation of Section 29 of the Act would be that, the presumption of guilt against an accused can arise not at the time of framing of charges but only after the prosecution has been able to establish the foundational facts by adducing evidence on the principle of preponderance of probability that in most likelihood the accused has committed the offence.

63. Having held that the prosecution must establish the foundational facts on the standard of preponderance of probability and not on the basis of proof beyond reasonable doubt, the next aspect to be considered is, what would be the standard of proof which is expected from the accused in order to discharge his burden against the presumption drawn against him under Section 29 of the Act.

64. As regards this issue, there is a long line of decisions since Harbhajan Singh v. State of Punjab, (1965) 2 SCR 235 : AIR 1966 SC 97 : 1966 Cri LJ

82 that as far as the accused is concerned where there is legal presumption of guilt, he has to prove his innocence not on the basis of proof beyond reasonable doubt but, on the basis of preponderance of probability.

65. If we examine Section 29 of the Act carefully, it may be noticed that the onus placed on the accused to prove contrary to the presumption that he is guilty of committing the offence, is somewhat akin to the burden placed upon an accused as provided under Section 105 of the Evidence Act. If an accused claims the benefit of any of the Exceptions provided under Section 105 of Evidence Act, the burden of proving his plea that his case falls

under the Exceptions is on him and the onus is discharged if the accused person succeeds in proving a preponderance of probability.

In Harbhajan Singh (supra) it was held as follows:

14. It is true that under Section 105 of the Evidence Act, if an accused person claims the benefit of Exceptions, the burden of proving his plea that

his case falls under the Exceptions is on the accused. But the question which often arises and has been frequently considered by judicial decisions is

whether the nature and extent of the onus of proof placed on an accused person who claims the benefit of an Exception is exactly the same as the

nature and extent of the onus placed on the prosecution in a criminal case; and there is consensus of judicial opinion in favour of the view that where

the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable

doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but that is

not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where an

accused person is called upon to prove that his case falls under an Exception, law treats the onus as discharged if the accused person succeeds in

proving a preponderance of probability. As soon as the preponderance of probability is proved, the burden shifts to the prosecution which has still to

discharge its original onus. It must be remembered that basically, the original onus never shifts, and the prosecution has, at all stages of the case, to

prove the guilt of the accused beyond a reasonable doubt. As Phipson has observed, when the burden of an issue is upon the accused, he is not, in

general, called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeeds in proving a

preponderance of probability, for then the burden is shifted to the prosecution which has still to discharge its original onus that never shifts i.e. that of

establishing, on the whole case, guilt beyond a reasonable doubt.

The said legal position was reiterated in V.D. Jhingan v. State of U.P., (1966) 3 SCR 736 : AIR 1966 SC 1762 : 1966 Cri LJ 135 7 and Vijayee Singh

v. State of U.P., (1990) 3 SCC 190.

In Vijayee Singh (supra) it was held as follows:

17. We have noticed that Section 105 requires that when a person is accused

of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions or special exception or proviso contained in any part of the Penal Code is on him and the court shall presume the absence of such circumstances. This presumption is rebuttable. In *Parbhoo v. Emperor*⁶, a Full Bench of seven Judges considered the scope of Sections 102 and 105 of the Evidence Act. The majority agreed with the view taken by the Full Bench in *Damapala case*⁵. In *Parbhoo case*⁶, Bajpai, J. in his concurring judgment observed that Section 105 is stated in two forms, that of a rule as to the burden of proof and that of a presumption and that the burden of proving the guilt of the accused always rests on the prosecution and never shifts and the learned Judge further held that the doubt cast in connection with the right of private defence must be a reasonable doubt and if there is such a reasonable doubt, it casts a doubt on the entire case of the prosecution and that the result is that the accused gets a benefit of doubt. (AIR p. 421) The presumption laid down in Section 105, Evidence Act, might come into play but it does not follow therefrom that the accused must be convicted even when the reasonable doubt under the plea of the right of private defence or under any other plea contained in the general or special exceptions pervades the whole case. In *Damapala case*⁵ Dunkley, J. while concurring with the majority view after discussing the law on the subject observed: (AIR p. 88)

The conclusion, therefore, is that if the court either is satisfied from the examination of the accused and the evidence adduced by him, or from circumstances appearing from the prosecution evidence, that the existence of circumstances bringing the case within the exception or exceptions pleaded has been proved, or upon a review of all the evidence is left in reasonable doubt whether such circumstances had existed or not, the accused in the case of a general exception, is entitled to be acquitted, or, in the case of a special exception, can be convicted only of a minor offence.

This case has been followed subsequently by several High Courts.

18. In *K.M. Nanavati V. State Of Maharashtra* 1962 Supp 1 SCR 567: AIR 1962 SC 605: (1962) 1 Cri LJ 521, it is observed that:

In India, as it is in England, there is a presumption of innocence in favour of the accused as a general rule, and it is the duty of the prosecution to

prove the guilt of the accused; to put it in other words, the accused is presumed to be innocent until his guilt is established by the prosecution. But

when an accused relies upon the General Exceptions in the Indian Penal Code or on any special exception or proviso contained in any other part of the

Penal Code, or in any law defining an offence, Section 105 of the Evidence Act raises a presumption against the accused and also throws a burden on

him to rebut the said presumption. Under that section the court shall presume the absence of circumstances bringing the case within any of the

exceptions, that is, the court shall regard the non-existence of such circumstances as proved till they are disproved... This presumption may also be

rebutted by admissions made or circumstances elicited by the evidence led by the prosecution or by the combined effect of such circumstances and

the evidence adduced by the accused. But the section does not in any way affect the burden that lies on the prosecution to prove all the ingredients, of

the offence with which the accused is charged; that burden never shifts. The alleged conflict between the general burden which lies on the

prosecution and the special burden imposed on the accused under Section 105 of the Evidence Act is more imaginary than real. Indeed, there is no

conflict at all.â??

In *Dahyabhai Chhaganbhai Thakkar V. State Of Gujarat* AIR 1964 SC 1563: (1964) 2 Cri LJ 472, it is observed: [AIR Headnote (g)]

â??It is fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution

to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that

the accused caused death with the requisite intention described in Section 299 of the Indian Penal Code. The general burden never shifts and it always

rests on the prosecution. But, under Section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the

exception lies on the accused; and the court shall presume the absence of such circumstances. Under Section 105 of the Evidence Act, read with the

definition of â??shall presumeâ? in Section 4 thereof, the court shall regard the absence of such circumstances as proved unless, after considering the

matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances

of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such

circumstances did not exist, by placing material before the court sufficient to make it consider the existence of the said circumstances so probable that

a prudent man would act upon them. The accused has to satisfy the standard of a "prudent man". If the material placed before the court, such as,

oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of "prudent man", the accused will

have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act, but it may

raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a

reasonable doubt in the mind of the judge whether the accused had the requisite intention laid down in Section 299 of the Penal Code."

A careful reading of these two decisions would reveal that the statement of law therein neither expressly nor impliedly overrules or is in conflict with

the majority view in Parbhoo case⁶. However, in *Rishi Kesh Singh V. State* AIR 1970 All 51: 1970 Cri LJ 132: 1969 All LJ 65,⁷ the question that

came up for consideration before a larger Bench consisting of nine Judges was whether the dictum in Parbhoo case⁶ is still a good law on the ground

that some of the decisions of the Supreme Court have cast a cloud of doubt. A majority of seven Judges approved the principle laid down in Parbhoo

case AIR 1941 All 402 (FB): 1941 All LJ 619. The larger Bench also referred to various subsequent decisions of the Supreme Court including the

K.M. Nanavati V. State Of Maharashtra 1962 Supp 1 SCR 567: AIR 1962 SC 605: (1962) 1 Cri LJ 521, *Bhikari V. State Of Uttar Pradesh* AIR 1966

SC 1: (1965) 6 SCR 194: 1966 Cri LJ 6 3 and *Dahyabhai Chhaganbhai Thakkar V. State Of Gujarat* AIR 1964 SC 1563: (1964) 2 Cri LJ 47. 2Beg, J.,

as he then was, in a separate but concurring judgment after referring to the *K.M. Nanavati V. State Of Maharashtra* 1962 Supp 1 SCR 567: AIR

1962 SC 605: (1962) 1 Cri LJ 521, *Bhikari V. State Of Uttar Pradesh* AIR 1966 SC 1: (1965) 6 SCR 194: 1966 Cri LJ 6, 3 *Dahyabhai* case AIR 1964

SC 1563: (1964) 2 Cri LJ 472 Â and *Mohar Rai and Bharath Rai* case 1 (1968) 3 SCR 525: AIR 1968 SC 1281: 1968 Cri LJ 1479

, held that there is no conflict between what was held by the Supreme Court and the majority view taken in Parbhoo case⁶. After analysing the view

expressed by the Supreme Court in the several above mentioned decisions, Beg, J. observed: (AIR pp. 97-98, paras 160-61)

“After a close scrutiny of every part of each of the seven opinions in Parbhoo case⁶, I have come to the conclusion that the majority of their

Lordships did not lay down anything beyond three important propositions which, if not either directly or indirectly supported by decisions of their

Lordships of the Supreme Court, have not been affected in the slightest degree by these decisions. These propositions are: firstly, that no evidence

appearing in the case to support the exception pleaded by the accused can be excluded altogether from consideration on the ground that the accused

has not proved his plea fully; secondly, that the obligatory presumption at the end of Section 105 is necessarily lifted at least when there is enough

evidence on record to justify giving the benefit of doubt to the accused on the question whether he is guilty of the offence with which he is charged;

and, thirdly, if the doubt, though raised due to evidence in support of the exception pleaded, is reasonable and affects an ingredient of the offence with

which the accused is charged, the accused would be entitled to an acquittal. As I read the answer of the majority in Parbhoo case AIR 1941 All 402

(FB): 1941 All LJ 619 I find it based on these three propositions which provide the ratio decidendi and this is all that needs to be clarified.”

“The practical result of the three propositions stated above is that an accused’s plea of an exception may reach one of three not sharply

demarcated stages, one succeeding the other, depending upon the effect of the whole evidence in the case judged by the standard of a prudent man

weighing or balancing probabilities carefully. These stages are : firstly, a lifting of the initial obligatory presumption given at the end of Section 105 of

the Act; secondly, the creation of a reasonable doubt about the existence of an ingredient of the offence; and thirdly, a complete proof of the

exception by “a preponderance of probability”, which covers even a slight tilt of the balance of probability in favour of the accused’s plea. The

accused is not entitled to an acquittal if his plea does not get beyond the first stage. At the second stage, he becomes entitled to acquittal by obtaining

a bare benefit of doubt. At the third stage, he is undoubtedly entitled to an acquittal. This, in my opinion, is the effect of the majority view in Parbhoo

case AIR 1941 All 402 (FB): 1941 All LJ 619 which directly relates to first two stages only. The Supreme Court decisions have considered the last

two stages so far, but the first stage has not yet been dealt with directly or separately there in any case brought to our notice.â??

Mathur, J., with whom five Judges agreed, while holding that ratio laid down by the majority in Parbhoo case AIR 1941 All 402 (FB): 1941 All LJ 619

is in conformity with law, however, observed that the reasoning in support of the conclusions is erroneous. Beg, J. was not prepared to go to that

extent. The majority speaking through Shri Mathur, J. laid down that the dictum in Parbhoo case AIR 1941 All 402 (FB): 1941 All LJ 619 which is still

a good law, can, however, be modified as follows: (AIR p. 79, para 93)

â??In a case in which any General Exception in the Indian Penal Code, or any special exception or proviso contained in another part of the same

Code, or in any law defining the offence, is pleaded or raised by an accused person and the evidence led in support of such plea, judged by the test of

the preponderance of probability, as in a civil proceeding, fails to displace the presumption arising from Section 105 of the Evidence Act, in other

words, to disprove the absence of circumstances bringing the case within the said exception; but upon a consideration of the evidence as a whole,

including the evidence given in support of the plea based on the said exception or proviso, a reasonable doubt is created in the mind of the court, as

regards one or more of the ingredients of the offence, the accused person, shall be entitled to the benefit of the reasonable doubt as to his guilt and

hence to acquittal of the said offence.â??

66. Thus, by following the above well settled legal position, it would be correct to say that in a proceeding against an accused under the POCSO Act

for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the Act, it would suffice, if the accused is able to prove

his innocence on the basis of preponderance of probability.

Yet, this principle is not absolute, in view of Section 30 of the Act, if it relates to proof relating to culpable mental state on the part of the accused,

which the court may presume. The accused, if he has to prove the absence of culpable mental state has to prove it beyond reasonable doubt and not

based on preponderance of probability. Section 30 of the POCSO Act reads as follows:

â??30. Presumption of culpable mental state.â??"(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.â?"In this section, â??culpable mental stateâ? includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

It is, thus, an exception to the general norm that the burden on the accused to prove his innocence is based on preponderance of probability. In view of

Section 30(2) he has to prove on the basis of proof beyond reasonable doubt any fact to show non-existence of culpable mental state. One is, thus,

confronted with a situation where the statute insists on the accused to prove the absence of culpable mental state, i.e., the mens rea, on the basis of

proof beyond reasonable doubt under Section 30(2) of the Act, whereas, as per well settled legal principle, the standard of proof of denying

commission of the actus reus or disproving the foundational facts by the accused or his innocence will be by the standard of preponderance of probability.

67. As we proceed further, this Court may dwell briefly upon the meaning of the expression â??preponderance of probabilityâ? in contradistinction to â??proof beyond reasonable doubtâ?.

It may be noted that as mentioned under Section 3 of the Evidence Act, 1872 â?? A fact is 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 existsâ?, which clearly indicates that the Evidence Act does not insist upon absolute standard of proof. Evidence Act,

also nowhere defines as to the meaning of proof beyond reasonable doubt or based on preponderance of probability, which are different standards of proof.

These standards of proof have evolved in criminal and civil jurisdictions in course of time considering the differential stakes in these proceedings. In a

criminal proceeding, the stakes are higher for the defendant and involves the precious rights and liberties of the person who would lose the same if

convicted of the offence charged. On the other hand, civil liability is less blameworthy and penalty, if any, is less severe.

Thus, in a criminal proceeding, where the accused is presumed to be innocent until proven guilty, a much stricter standard of proof is required to hold a

person to be guilty. However such stricter standard of proof has to be pragmatic for there cannot be any absolute proof to convict a person, but it

must be a standard where there should not be any reasonable doubt about guilt of the accused and which does not mean proof beyond a shadow of

doubt. Thus, this doubt must be a reasonable, a fair doubt based on reason and common-sense, nothing imaginary, trivial, or merely possible doubt and

free from speculations.

In *Yogesh Singh v. Mahabeer Singh*, (2017) 11 SCC 195: (2017) 4 SCC (Cri) 257, the Honâ??ble Supreme Court held that such reasonable doubt is

not an imaginary, trivial or a merely possible doubt, but a fair doubt based on reason and common sense, as follows.

â??15. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubts. However, the

burden on the prosecution is only to establish its case beyond all reasonable doubt and not all doubts. Here, it is worthwhile to reproduce the

observations made by Venkatachaliah, J. in *State of U.P. v. Krishna Gopal* (2010) 2 SCC 583 : (2010) 2 SCC (Cri) 1054: (SCC pp. 313-14, paras

25-26)

â??25. â?? Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.

To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the

accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary,

trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

26. The concept of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many

of such units constitute proof beyond reasonable doubt. There is an unmistakable

subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimisation of trivialities would make a mockery of administration of criminal justice.â??

[See also *Krishnan v. State* (2004) 11 SCC 346 : 2004 SCC (Cri) Supp 85; *Valson v. State of Kerala* (2003) 2 SCC 401 : 2003 SCC

(Cri) 544 and *Bhaskar Ramappa Madar v. State of Karnataka* (2003) 2 SCC 401 : 2003 SCC (Cri) 544]

The Honâ??ble Supreme Court in *State of U.P. v. Awdhesh*, (2008) 16 SCC 238 : (2010) 4 SCC (Cri) 257, at page 256 observed as follows:

11. â??22. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof

beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to

â??proofâ?? is an exercise particular to each case. Referring to the interdependence of evidence and the confirmation of one piece of evidence by

another, a learned author says [see â??The Mathematics of Proof IIâ??: Glanville Williams, *Criminal Law Review*, 1979, by Sweet and Maxwell, p.

340 (342)]:

â??The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur

together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing

that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged

confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent

people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of

evidence may confirm the other.â??

23. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To

constitute reasonable doubt, it must be free from an overemotional response.

Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

24. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how

many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of

probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained

intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed

legitimation of trivialities would make a mockery of administration of criminal justice. This position was illuminatingly stated by Venkatachaliah, J. (as

His Lordship then was) in *State Of U.P. V. Krishna Gopal*, (1988) 4 Scc 302 : 1988 Scc (Cri) 928.

The above position was highlighted in *Krishnan V. State* (2003) 7 Scc 56 : 2003 Scc (Cri) 1577, at SCC p. 63, paras 22-24.

68. Therefore, even in cases where only circumstantial evidences are available, it must be ensured that there is a chain of evidence so complete as not

to leave reasonable ground for conclusion consistent with the innocence of the accused.

The principles governing circumstantial evidence was summarised in *Pattu Rajan v. State of T.N.*, (2019) 4 SCC 771 : (2019) 2 SCC (Cri) 354 as

follows:

31. As mentioned supra, the circumstances relied upon by the prosecution should be of a conclusive nature and they should be such as to exclude

every other hypothesis except the one to be proved by the prosecution regarding the guilt of the accused. There must be a chain of evidence proving

the circumstances so complete so as to not leave any reasonable ground for a conclusion of innocence of the accused. Although it is not necessary for

this Court to refer to decisions concerning this legal proposition, we prefer to quote the following observations made in *Sharad Birdhichand Sarda V.*

State Of Maharashtra (1984) 4 Scc 116 : 1984 Scc (Cri) 487 : (SCC p. 185,

paras 153-54)

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be

fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned must or should be established. There is not

only a grammatical but a legal distinction between may be proved and must be or should be proved as was held by this Court in Shivaji

Sahabrao Bobade V. State Of Maharashtra (1973) 2 Scc 793 : 1973 Scc (Cri) 1033 where the observations were made: (SCC p. 807, para 19)

19. Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance

between may be and must be is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on

any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the

accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

(emphasis in original)

69. In the context of a civil suit, the expression preponderance of probability has been explained by the Hon'ble Supreme Court recently in

M. Siddiq (Ram Janmabhumi Temple-5 J.) v. Suresh Das, (2020) 1 SCC 1. In the aforesaid case, the Supreme Court applied the test of a prudent man

who upon weighing the various probabilities finds that the preponderance is in favour of the existence of the particular fact.

It was held that,

720. The court in a civil trial applies a standard of proof governed by a preponderance of probabilities. This standard is also described sometimes

as a balance of probability or the preponderance of the evidence. Phipson on Evidence formulates the standard succinctly: If therefore, the evidence is

such that the court can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not. Phipson on

Evidence In *Miller v. Minister of Pensions*, (1947) 2 All ER 372, Lord Denning, J. (as the Master of Rolls then was) defined the doctrine of the

balance or preponderance of probabilities in the following terms: (All ER p. 373 H)

(1) It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the

shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so

strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in

the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice.

(emphasis supplied)

721. The law recognises that within the standard of preponderance of probabilities, there could be different degrees of probability. This was succinctly

summarised by Denning, L.J. in *Bater v. Bater*, 1951 P 35 (CA), where he formulated the principle thus: (p. 37)

"So also, in civil cases, the case must be proved by a preponderance of probability, but there may be degrees of probability within that standard.

The degree depends on the subject-matter.

722. The definition of the expression "proved" in Section 3 of the Evidence Act is in the following terms:

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.

723. Proof of a fact depends upon the probability of its existence. The finding of the court must be based on:

723.1. The test of a prudent person, who acts under the supposition that a fact

exists.

723.2. In the context and circumstances of a particular case.

724. Analysing this, Y.V. Chandrachud, J. (as the learned Chief Justice then was) in *N.G. Dastane v. S. Dastane*, (1975) 2 SCC 326 held: (SCC pp.

335-36, para 24)

“The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities

concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in

favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be

proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is

weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is

this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties

demand a closer scrutiny than those like the loan on a promissory note: “the nature and gravity of an issue necessarily determines the manner of

attaining reasonable satisfaction of the truth of the issue Per Dixon, J. in *Wright v. Wright*, (1948) 77 CLR 191 (Aust.), CLR at p. 210; or as said by

Lord Denning, “the degree of probability depends on the subject-matter”. In proportion as the offence is grave, so ought the proof to be clear

Blyth v. Blyth, 1966 AC 643 : (1966) 2 WLR 634 : (1966) 1 All ER 524 (HL), All ER at p. 536. But whether the issue is one of cruelty or of a loan

on a promissory note, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of

proof to apply for finding whether the burden of proof is discharged.”

(emphasis supplied)

725. The Court recognised that within the standard of preponderance of probabilities, the degree of probability is based on the subject-matter involved.

726. In *State of U.P. v. Krishna Gopal*, (1988) 4 SCC 302 : 1988 SCC (Cri) 928, this Court observed: (SCC p. 314, para 26)

“26. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how

many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge.â??

70. In the opinion of this Court, the aforesaid principle of preponderance of probability though explained in the context of a civil suit would be equally applicable in a criminal case also.

71. In the light of the discussions above, the following legal positions emerge in any proceeding under the POCSO Act.

(A) The prosecution has to prove the foundational facts of the offence charged against the accused, not based on proof beyond reasonable doubt, but on the basis of preponderance of probability.

(B) Accordingly, if the prosecution is not able to prove the foundational facts of the offence based on preponderance of probability, the presumption under Section 29 of the Act cannot be invoked against the accused.

(C) If the prosecution is successful in establishing the foundational facts and the presumption is raised against the accused, the accused can rebut the same either by discrediting the prosecution witnesses through cross-examination or by adducing his own evidence to demonstrate that the prosecution case is improbable based on the principle of preponderance of probability. However, if it relates to absence of culpable mental state, the accused has to prove the absence of such culpable mental state beyond reasonable doubt as provided under Section 30(2) of the Act.

(D) However, because of legal presumption against the accused, it may not suffice by merely trying to discredit the evidence of the prosecution through cross-examination, and the defence may be required to adduce evidence to dismantle the legal presumption against him and prove that he is not guilty. The accused would be expected to come forward with more positive evidence to establish his innocence to negate the presumption of guilt.

72. In the backdrop of the legal position discussed above, in the present case, it has to be ascertained as to whether the â??foundational factsâ?? of the offence had been established by the prosecution on the basis of â??preponderance of probabilityâ??, and thereafter, it has to be seen whether the appellant had been able to discharge the reverse burden of proving his innocence

on the touchstone of â??preponderance of probabilityâ??.

73. As this Court proceeds to examine whether the foundational facts have been proved on the basis of preponderance of probability, the Court has to

first ascertain as to which are the foundational facts which are required to be established by the prosecution. For example, in a case of offence of

rape punishable under Section 376 IPC, the foundational fact would be the actual sexual act perpetrated by the offender as described in the section.

The other foundational fact would be that such sexual act was committed against her will or her consent and even if it was with her consent, her

consent had been fraudulently obtained under the circumstances mentioned in the said Section.

74. In the present case, the appellant was charged with and convicted of penetrative sexual assault committed on the victim child as defined under

Section 3 of the Act. It may be mentioned that the offences as defined under Sections 3 and 4 of the POCSO Act also cover almost all possible

aspects of the offence of sexual assault including rape as defined under Section 375 IPC. Thus, most of the principles as applicable to rape will be also

applicable in the present case.

While Section 3 of the Act deals with sexual assault of lesser gravity, Section 4 deals with more serious and aggravated forms of sexual assault.

75. As far as the present case is concerned, in view of the nature of the charge against the appellant, the prosecution has to establish the foundational

fact, the actus reus, that the appellant had sexually assaulted the victim girl within the meaning of Section 3 of the POCSO Act. The appellant has

been specially charged of inserting his male organ in the vagina of the victim girl. Though lack of consent of the victim girl could be another

foundational fact, in the present case, it will be irrelevant as the victim girl is a child below 18 years as defined under Section 2(d) of the Act and

consent of a minor girl of 18 years is no consent in the eye of law under the Act. This is in consonance with the Sixth description mentioned under

Section 375 of IPC which provides that it amounts to rape if the sexual act is committed with or without her consent when the victim girl is under

eighteen years of age. In the present case, there is no dispute that the age of the victim girl was below 14 years when the incident occurred.

The prosecution produced and proved the school certificate as Exhibit â??X-1â?

in which the date of birth of the girl was recorded as 2.9.2004 to prove that the victim girl was below 14 years old at the time of occurrence. The Doctor who examined the victim girl also opined that she is below 14 years. The oral testimony of the witnesses testifies to that effect that she is about 10/11 years at the time of occurrence and thus below 18 years. The defence has not questioned her age.

76. In this context it would be important to note that, to constitute a crime, both the actus reus and mens rea must coexist. While actus reus can be demonstrated by direct or indirect evidences, mens rea, is the mental element, the knowledge, or the motivating element for commission of the offence which is generally to be inferred from the facts/evidences already established.

Under the normal criminal jurisprudence, mens rea is another ingredient required for proving an offence. To that extent, mens rea can be also a

foundational fact. But where presumption of guilt is ascribed to the accused under Section 29 and also presumption of the existence of culpable mental

state under Section 30 of the Act, it may not be a foundational fact to be proved by the prosecution for the reason that after the actus reus been

established by the prosecution, it would be presumed that the accused had the mens rea as well. Section 30 of the Act provides that 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. The fact of absence of the mental state has to be proved by the accused based on a proof beyond reasonable doubt

as mentioned under Section 30(2) of the Act.

77. In the present case, to ascertain whether the aforesaid foundational fact has been established on the basis of preponderance of probability, the

evidences on record have to be properly scrutinized.

78. The star witness in this case is the victim girl and in fact the conviction of the appellant is primarily based on the account of the victim girl.

The prosecutrix was examined by the Trial court to ascertain whether she could understand properly and had the capacity to testify before the court

and the court after being fully satisfied with her capability to do so, proceeded to examine her.

She vividly described what the appellant had done to her on the fateful day.

The Trial Judge took note of the demeanour of the witness while testifying before the court when she started crying, which perhaps also persuaded the court to consider her testimony to be truthful.

79. She testified that on 28.11.2014 at about 2.30 pm while she was returning from her school, on the way, she was accosted by the appellant with a knife and after gagging her mouth, forcibly brought her down under a culvert and after removing her school uniform, bit her chest.

She further testified that the appellant after removing her panty, inserted his genital on her private part, because of which, blood started oozing out from her private part. She stated that she could not shout at the time when she was sexually assaulted as her mouth was gagged. The appellant also threatened her by showing a knife not to disclose the incident to anybody or else he would stab her. After the incident, she reached her home crying and informed her grandmother about the incident to her, who in turn informed her stepmother about the said incident. She also stated that there was blood stain in her panty because of the said incident. On the next day, she was medically examined, and her statement was also recorded by the Magistrate which was exhibited before the Court.

80. During cross-examination, she stated that she used to return home alone from the School using the same route. Though she admitted that villagers use the said route, on that day, there was none in the said route. She also stated that the appellant had gagged her mouth with his hand and though she tried to escape from his clutches, she could not. She stated that at a certain distance from the culvert, there were some houses.

She also stated that at the time of the occurrence, she was studying in Class V in 694 No. Ranakuchi LP School.

81. As mentioned above, there is no eyewitness. Apart from official witnesses, other witnesses are those to whom the victim girl had narrated her ordeal. In such circumstances, one may ask as to whether the sole testimony of the victim minor girl could be relied upon and be the foundation for conviction of the appellant.

82. As regards testimony of a minor girl it has been held that evidence of a child witness cannot be discarded only on the ground of her being of tender age, though the court would be required to scrutinise the evidence with care and

caution. Further, if the evidence had withstood the test of cross-examination and there is no infirmity in the evidence, then a conviction can be based upon such testimony alone. It has been also held that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence and some discrepancies in the statement of a child witness, if not on material particulars, cannot be made the basis for discarding the testimony. It was thus held in *State of Maharashtra v. Bharat Fakira Dhiwar*, (2002) 1 SCC 622 : 2002 SCC (Cri) 217 as follows:

14. In the case of *Panchhi V. State Of U.P.* (1998) 7 Scc 177 it has been held that it cannot be said that the evidence of a child witness would always stand irretrievably stigmatized. It was held that it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. It was held that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. It is held that it is more a rule of practical wisdom than a law.

15. In the case of *Suryanarayana V. State Of Karnataka* (2001) 9 Scc 129 it has been held that the evidence of a child witness cannot be discarded only on the ground of her being of tender age. It is held that the fact of a child witness would require the Court to scrutinise the evidence with care and caution. It is held that if the evidence is shown to have stood the test of cross-examination and there is no infirmity in the evidence, then a conviction can be based upon such testimony alone. It is held that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. It is held that some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. It is held that discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness. It is held that while appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored.

83. As regards, the law relating to conviction for the offence of rape on the basis of the sole testimony of the victim, it has been held that the same is permissible, if the testimony inspires confidence and is found to be reliable. In *Madan Gopal Kakkad v. Naval Dubey*, (1992) 3 SCC 204 : 1992 SCC (Cri) 598, it was held as follows:

23. There are a series of decisions to the effect that even in cases wherein there is lack of oral corroboration to that of a prosecutrix, a conviction

can be safely recorded, provided the evidence of the victim does not suffer from any basic infirmity, and the probabilities factor does not render

it unworthy of credence, and that as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to

the circumstances of the case, medical evidence can be expected to be forthcoming. Vide (1) Rameshwar v. State of Rajasthan 1952 SCR 377, (2)

Bharwada Bhoginbhai Hirjibhai V. State Of Gujarat (1983) 3 Scc 217 : 1983 Scc (Cri) 728, (3) Krishan Lal V. State Of Haryana 1980 (3) Scc 159.

It was similarly held in State of Rajasthan v. Om Prakash, (2002) 5 SCC 745 : 2002 SCC (Cri) 1210 S,tate of H.P. v. Asha Ram, (2005) 13 SCC 766 :

(2006) 2 SCC (Cri) 296.

84. The aforesaid legal position was reiterated and summarised in the recent decision in Dola v. State of Odisha, (2018) 18 SCC 695 : (2019) 3 SCC

(Cri) 239 as follows:

6. It is well-settled law that if the version of the prosecutrix is believed, basic truth in her evidence is ascertainable and if it is found to be credible

and consistent, the same would form the basis of conviction. Corroboration is not a sine qua non for a conviction in a rape case. The evidence of a

victim of sexual assault stands on a par with the evidence of an injured witness and is entitled to great weight, absence of corroboration

notwithstanding. If the evidence of the victim does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of

credence, as a general rule, there is no reason to insist on corroboration, except from medical evidence, where, having regard to the circumstances of

the case, medical evidence can be expected to be forthcoming. When a grown up and married woman gives evidence on oath in court that she was

raped, it is not the proper judicial approach to disbelieve her outright.

7. In this regard it would be useful to quote certain observations of this Court in Bharwada Bhoginbhai Hirjibhai V. State Of Gujarat 1983 (3) Scc 217

wherein it is observed that: (SCC pp. 225-27, paras 10-11)

10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of

overstating the case, it can be said that rarely will a girl or a woman in India

make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because: (1) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the society or being looked down by the society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

11. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle, the evidence of a victim of sexual

assault stands on a par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-

inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to

great weight, absence of corroboration notwithstanding. And while corroboration in the form of eyewitness account of an independent witness may

often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It

would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the western world

(obedience to which has perhaps become a habit presumably on account of the colonial hangover). We are therefore of the opinion that if the

evidence of the victim does not suffer from any basic infirmity, and the "probabilities factor" does not render it unworthy of credence, as a

general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case,

medical evidence can be expected to be forthcoming, subject to the following qualification: Corroboration may be insisted upon when a woman having

attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of

self-preservation. Or when the "probabilities factor" is found to be out of tune."

(emphasis supplied)

8. In *Sadashiv Ramrao Hadbe V. State Of Maharashtra* (2006) 10 SCC 92 : (2007) 1 SCC (Cri) 16,1 this Court reiterated that the sole testimony of the

prosecutrix could be relied upon if it inspires the confidence of the Court: (SCC p. 95, para 9)

"9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in

the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are

highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be

extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

9. However, as is also evident from the observations above, such reliance may be placed only if the testimony of the prosecutrix appears to be worthy

of credence. In this regard, it is also relevant to note the following observations of this Court in *Raju V. State Of M.P.* (2008) 15 Scc 133 : (2009) 3

Scc (Cri) 751, which read thus: (SCC p. 141, paras 10-11)

“10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspected and should be

believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is

necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they

cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can

cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication,

particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was

present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no

presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.”

Thus, it would be permissible to rely on the sole evidence of the prosecution to convict the appellant.

85. It may however, also be noted that as regards reliability of the sole witness, the Hon’ble Supreme Court had to say the following in *Lallu*

Manjhi v. State of Jharkhand, (2003) 2 SCC 401 : 2003 SCC (Cri) 544:

10. The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the

testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii)

neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single

witness. The difficulty arises in the third category of cases. The court has to be

circumspect and has to look for corroboration in material particulars

by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. (See: *Vadivelu Thevar v. State of Madras* [AIR

1957 SC 614 : 1957 Cri LJ 1000])

86. In this regard, one may also note what was held by the Hon^{ble} Supreme Court in *Ugar Ahir v. State of Bihar*, AIR 1965 SC 277, wherein the

legal position of reliability of the testimonial evidence was explained as follows:

“7. The maxim *falsus in uno, falsus in omnibus* (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly

one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is,

therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it

cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the

rest.”

It was further explained in *State v. Saravanan*, (2008) 17 SCC 587 : AIR 2009 SC 15,2 the Court can overlook “minor discrepancies on trivial

matters” which do not affect “the core of the prosecution case.” The Supreme Court, however, emphasised in *State of U.P. v. Krishna Master*,

(2010) 12 SCC 324 : AIR 2010 SC 3071, that that “it is the duty of the Court to separate falsehood from the truth, in sifting the evidence”. While

doing so it be ensured that the eye-witness testimony is credible and reliable and not contradicted by other eyewitnesses or by the any medical and

forensic evidence.

87. Keeping the aforesaid legal position in mind, this Court will further examine the testimony of the victim girl and whether it is corroborated by any

other evidence.

88. The victim girl had made a statement under Section 164 CrPC. The Trial court did not find inconsistencies between the said statement and her

testimony before the court and took the view that the said statement made under 164 CrPC. corroborates her testimony. This Court also has not

observed any noticeable discrepancy between these two statements which is of any significance. The statement made under Section 164 CrPC. was

recorded by the Magistrate after being satisfied that she was able to understand the questions being put.

It is seen that there is no serious material inconsistency or contradiction in the oral testimony and statement given by the victim under Section 164

CrPC, though it lacks some of the details which the victim stated before the court. However, there is not much discrepancy relating to the main allegation.

89. The defence despite subjecting her to a thorough cross-examination, could not shake her testimony. In other words, her testimony remained unshaken during the trial.

In the opinion of this Court also, the testimony of the victim girl stands corroborated by the statement recorded under Section 164 CrPC.

90. The I.O. of the case on spot visit of the place of occurrence of the crime, which was under the culvert, and noted that as stated by the victim girl, there was no house nearby the place of occurrence. The existence of a boiler chicken farm near the place of occurrence as mentioned by the I.O. is not much of importance for the reason, as it would not normally be inhabited. The I.O. also stated that the appellant was handicapped on his left hand.

This also does not necessarily lead to any inference that the appellant was incapable of perpetrating the crime charged of, in absence of proper description of the degree of the disability.

There was nothing in the testimony of the I.O. that could have cast any doubt on the truthfulness of the testimony of the victim girl.

91. It has been also noted that the medical report does not contradict the claim that she was sexually assaulted by the appellant.

In this regard, the statement of the medical officer Dr. Urmi Choudhury, PW1, who examined the victim girl may be considered.

She deposed that on 30.11.2014 while she was serving as Medical and Health Officer-I at SMK Civil Hospital, Nalbari, examined the victim who was

about 10 years old in connection with Tihu PS Case No.104/2014 under Sections 341/376(i) IPC read with Section 4 of the POCSO Act. The medical finding given by her was as follows:-

â??Teeth6/7 = 28. Height 3ft 8â??. Vagina, vulva â?" Healthy

6/7

On PV examination - Hymen found intact. Small abrasion of size .5x.5 cm, reddish in colour is present at hymen and mild spotting present at hymen.

No finger can be introduced to vagina. Swab is taken from the perennial region and sent for microscopy to see sperm. After examination, no sperm is

seen. Though pregnancy test of urine was given but till the submission of report the victim did not produce test report.

Doctor advised X-ray for age determination of the victim girl and from the radiologist report her age is estimated below 14 years.

Impression : No definite sign of recent sexual intercourse is seen. Small abrasion of size .5x.5 cm is seen over hymen which is reddish in colour and

mild spotting seen from it. She is below 14 years of age. Ext.1 is exhibited as her report. Ext.2 is exhibited as the report of radiologist and Ext.2(1) is

exhibited as the signature of Dr. Probodh Kr. Sarma, SMK Civil Hospital, Nalbari. Ext.3 is the hospital management society printed from where the

report of vaginal swab was written as no sperm seen. Ext.3(1) is signature of Laboratory Technician.â??

On cross-examination, she stated that the abrasion found in the hymen of the patient may be caused by scrapping of nail.

92. Though the doctor gave the opinion that no recent sexual activity was noticed and hymen was intact, a small abrasion of size .5x.5 cm of reddish in

colour was present at hymen and there was mild spotting at hymen. It does indicate that the private part of the victim girl was manipulated, either

voluntarily or non-voluntarily. This injury could have been self-inflicted as suggested during the cross examination of the doctor who opined that it

could have been caused by nail scrapping. But this nail scrapping could have been also caused by the appellant while he was thrusting or attempting to

thrust his male organ to the vagina of the victim girl. There may not have been full penetration of the penis but mere superficial penetration without

damaging the hymen. But in the process the area of hymen could have been scratched. Thus, this injury caused has to be examined in the context of

the statement of the victim girl and the plea of the appellant.

93. While the victim girl categorically states that the appellant had inserted his organ to her vagina causing bleeding, the scenario which can be

visualised is that the appellant had inserted his penis to the vagina of the girl, though not fully, thus not rupturing/damaging the hymen but in the process

scratching her vagina, causing blood to come out from the said small injury. This picturization is fully in consonance with and compatible with the

statement made by the victim girl in her own words, based on the principle of â??preponderance of probabilityâ??.

94. At this stage it may be apposite to note the observation made by the Honâ??ble Supreme Court in State of U.P. v. Hari Chand, (2009) 13 SCC

542 that unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy. It was observed as follows:

â??13. There was no reason for the High Court to discard the credible, cogent and trustworthy evidence of the eyewitnesses. This was certainly not

a case where medical evidence was at a variance with the ocular evidence. The evidence of the eyewitnesses regarding injuries caused by the

firearms is amply corroborated by the evidence of the doctor who found four firearmsâ? wounds. In any event unless the oral evidence is totally

irreconcilable with the medical evidence, it has primacy.

14. â??20. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord

undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnessesâ? account which had to be tested independently and not

treated as the â??variableâ?? keeping the medical evidence as the â??constantâ??.

21. It is trite that where the eyewitnessesâ? account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not

accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial

process. Eyewitnessesâ? account would require a careful independent assessment and evaluation for [their] credibility which should not be adversely

prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested

for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy;

consistency with the undisputed facts; the â??creditâ? of the witnesses; their performance in the witness box; their power of observation, etc. Then

the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.â??

95. In the opinion of this Court, the statement of the medical officer who stated during the cross examination that such abrasion found in the hymen may be caused by nail scrapping, does not distract from the fact that there was injury near the hymen. Such statement which is in the nature of an expert opinion does not militate against the prosecution case. In fact, it would be quite probable that the abrasion could have been caused while the appellant was trying to insert his penis into the vagina of the girl as claimed by the victim girl. Thus, it is consistent, rather being inconsistent with the testimony of the victim girl.

96. The opinion of the medical officer that no definite sign of recent sexual intercourse was seen, does not necessarily rule out sexual assault or render the testimony of the victim girl doubtful, for the reason that to constitute the sexual assault as described in Section 3 of the POCSO Act, even superficial penetration is sufficient.

In the opinion of this Court, the medical opinion does not contradict the statement of the victim girl, rather it corroborates the same. It was certainly probable that the abrasion was caused during the sexual assault by the appellant.

97. Even otherwise also, in view of the well settled principle that the slightest degree of penetration of the penis within the vulva labia majora or the vulva or pudenda without causing any injury or with or without emission of semen or even an attempt of penetration is sufficient to constitute rape, the testimony of the victim girl cannot be doubted.

98. The appellant has been convicted under section 4 of POCSO Act which provides that whoever commits any penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

99. As to what amounts to penetrative sexual assault has been defined under Section 3 of the POCSO Act.

Under Section 3 of the POCSO Act, a person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to

do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes

the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

100. The use of the words "to any extent" in Section 3(a) and (b) means that the penetration may not be necessarily deep or injurious to the

private parts and even a mild or peripheral penetration will constitute penetration within the ambit of Section 3 of the POCSO Act.

101. Thus, even if there is no full penetration of the male organ into the vagina and even if it is superficial, it can amount to penetrative sexual assault

within the meaning of Section 3 of the POCSO Act and punishable under Section 4 of the Act.

102. The offences described under Sections 3 and 5 of the POCSO also cover many aspects of "rape" as defined under Section 376 IPC. It is

now well settled that the slightest degree of penetration of the penis within the vulva labia majora or the vulva or pudenda without causing any injury or

with or without emission of semen or even an attempt at penetration is sufficient to constitute rape.

As to what constitutes rape, the Hon'ble Supreme Court referring to a plethora of authorities, held in *Madan Gopal Kakkad v. Naval Dubey*,

(1992) 3 SCC 204 : 1992 SCC (Cri) 598 as follows:

"37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in *Medical Jurisprudence and*

Toxicology (Twenty-first Edition) at page 369 which reads thus:

"Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of

hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at

penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any

injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not

give his opinion that no rape had been committed. Rape is crime and not a

medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity.

Whether the rape has occurred or not is a legal conclusion, not a medical one.â?? (emphasis supplied)

38. In Parikhâ??s Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

â??Sexual intercourse.â?" In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of

semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.â??

39. In Encyclopedia of Crime and Justice (Vol. 4) at page 1356, it is stated:

â??â?| [E]ven slight penetration is sufficient and emission is unnecessary.â??

40. In Halsburyâ??s Statutes of England and Wales, (Fourth Edition), Volume 12, it is stated that even the slightest degree of penetration is sufficient to

prove sexual intercourse within the meaning of Section 44 of the Sexual Offences Act, 1956. Vide (1) R. v. Hughes (1841) 9 C& P 752; (2) R. v.

Lines (1844) 1 Car & Kir and R. v. Nicholls (1847) 9 LTOS 179.

41. See also Harrisâ??s Criminal Law, (Twenty-second Edition) at page 465.

42. In American Jurisprudence, it is stated that slight penetration is sufficient to complete the crime of rape. Code 263 of Penal Code of California

reads thus:

â??Rape; essentials â?" Penetration sufficient.â?" The essential guilt of rape consists in the outrage to the person and feelings of the victim of the

rape. Any sexual penetration, however slight, is sufficient to complete the crime.â??

43. The First Explanation to Section 375 of Indian Penal Code which defines â?? Rapeâ?? reads thus:

â??Explanation.â?" Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.â??

44. In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High Courts have taken a

consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial. Reference

may be made to (1) *Natha v. Emperor* (1925) 26 CrLJ 1185; (2) *Abdul Majid v. Emperor* AIR 1927 Lah 735 (2); (3) *Mst. Jantan v. Emperor* (1934)

36 Punj LR 35; (4) *Ghanashyammi v. State* 1957 CrLj 469: Air 1957 Ori 78; (5) *Das Bernard v. State* 1974 CrLJ 1098. In *re Anthony* AIR 1960

Mad 308 it has been held that while there must be penetration in the technical sense, the slightest penetration would be sufficient and a complete act

of sexual intercourse is not at all necessary. In *Gourâ's The Penal Law of India*, 6th Edn. 1955 (Vol. II), page 1678, it is observed, "Even vulval

penetration has been held to be sufficient for a conviction of rape."

103. In view of the above, as even superficial penetration may amount to rape which may not necessarily involve full penetration or injury to the

female sexual organ if the testimony of the victim child is credible and trustworthy, the offence of sexual assault may be established. In the present

case, there is already medical evidence to the effect that there was abrasion, which is a kind of scratch and thus even if it is a very minor injury, it

indicates that there was certain kind of manipulations in that region of the body. The said medical evidence, thus, corroborates the testimony of the

victim girl charging the appellant of sexually assaulting her.

104. It may be also mentioned that it is well settled that where the medical evidence is in variance with the ocular evidence, if the eyewitness account

is found to be reliable, such medical evidence, which is in the nature of an expert opinion could be ignored.

In this regard one may also note what the Honâble Supreme Court had held in *State of U.P. v. Hari Chand*, (2009) 13 SCC 542 : (2010) 1 SCC

(Cri) 1112 as follows:

"13. There was no reason for the High Court to discard the credible, cogent and trustworthy evidence of the eyewitnesses. This was certainly not

a case where medical evidence was at a variance with the ocular evidence. The evidence of the eyewitnesses regarding injuries caused by the

firearms is amply corroborated by the evidence of the doctor who found four firearms wounds. In any event unless the oral evidence is totally

irreconcilable with the medical evidence, it has primacy.

14. "20. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord

undue primacy to the hypothetical answers of medical witnesses to exclude the

eyewitnessesâ? account which had to be tested independently and not treated as the â??variableâ?? keeping the medical evidence as the â??constantâ??.

21. It is trite that where the eyewitnessesâ? account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eyewitnessesâ? account would require a careful independent assessment and evaluation for [their] credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the â??creditâ? of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.â??

In the present case, as mentioned above, the medical evidence cannot be said to be in variance with the testimony of the victim girl. In fact, it corroborates the testimony of the victim girl.

105. On the other hand, the appellant had not offered any alternative scenario to explain this abrasion near the vagina. As discussed above, had this trial been under the normal criminal law, the prosecution would have been under obligation to prove the charge beyond reasonable doubt and the appellant was not under any obligation to lead any evidence but could have discredited the version of the prosecution from the evidences produced during cross examination by the prosecution. However, in view of the presumption of guilt of the appellant under Section 29 of the Act, it will be deemed that the charge against the appellant had been proved beyond reasonable doubt and it was not sufficient on the part of the appellant to merely explain the evidences and circumstances. The appellant ought to have led some evidence to discredit this picturization by the prosecution and presumption of guilt. The appellant had to rebut the presumption that he committed the offence and that the facts as alleged by the prosecution did not exist, by placing materials before the court sufficient to render existence of such

facts and circumstances so improbable that a prudent man would not accept them. The appellant had to satisfy the standard of a "prudent man". If the materials placed before the court, such as, oral and documentary evidences, presumptions, admissions or even the prosecution evidence, satisfy the test of a "prudent man", the appellant will have discharged his burden. The appellant had to prove that the accusation of the appellant was most likely and probably not true by applying the test of preponderance of probability. The appellant also has failed to demonstrate any inconsistency or any element of doubt about the statement of the victim girl. In the opinion of this Court, the appellant had not only failed to throw any doubt on the prosecution version, but also miserably failed to prove his innocence even by applying the standard of "preponderance of probability".

106. The witnesses to whom the victim girl narrated her ordeal soon after the incident testified in the court. The contemporaneous statements of these witnesses reiterated before the trial court, though they themselves were not eyewitnesses, lends credence to the genuineness and reliability of the testimony of the victim.

107. PW8, Smt. Ratan Kalita, was the aunt of the informant Diganta Kalita (PW5), and grandmother of the victim girl. She was the first person to whom the victim girl had narrated the sexual assault by the appellant soon after she reached home after the incident. She, the PW 8 testified that on the day of the occurrence, the victim reached home after school. She was found crying and when enquired about the reason, the victim girl informed PW8 about she being raped by the appellant while coming from school by gagging her under a culvert. PW8 also gave a statement under Section 164 CrPC before the Magistrate. She was also subjected to intense cross-examination during which time she reiterated that the victim had disclosed about the incident of rape when enquired from her. Thus, the testimony of PW8 that on reaching home the victim girl was crying and when enquired narrated the incident, would preclude any element of fabrication of the accusation by the victim. It indicates the spontaneity on the part of the victim girl in sharing her trauma with the PW 8 without any undue delay. Any undue delay on the part of the victim girl in informing others of the incident could have cast some doubt about the genuineness of the accusation by the girl as these witnesses were staying together in the same house.

108. Tapan Kalita, PW6, is the uncle of the victim who was informed about the incident by her aunt Ratan Kalita (PW8) on the day of occurrence.

He testified that the victim girl at the time of occurrence was studying in Ranakuchi Primary School which was situated about 1 km from their house

and there is a deserted place between their house and the school and the culvert under which the incident occurred was located in that deserted place.

He also testified that on the next day of the occurrence, a village mel was held in which the appellant did not appear because of which his brother

Diganta Kalita lodged an Ejahar.

The fact that a village mel was held would also obviate any plan to falsely implicate the accused. It would be very unusual that most of the villagers

would be falsely led into believing in such a serious charge made against the appellant, if the same was not true. At the same time, it would be also

most unlikely that the victim girl or her family would make such a reprehensible act to be made public, if the same had not really occurred putting her

dignity and self-respect at stake without any apparent motive.

It may be noted from the evidence of the father of the victim girl (PW9) that he was away from the village and came to the village only in the evening

of the day of the incident which also makes any attempt to falsely implicate the appellant most unlikely.

109. Thus, the probability of the victim girl making a false accusation in public seems to be less than probability of the appellant being falsely accused

under the circumstances as indicated in the case records. It is also not the case of the appellant that they knew each other, and she had made this

allegation for some ulterior motive. In fact, the victim girl says in her testimony that she does not know him. Thus, making such a scandalous allegation

against an unknown person seems to be most unlikely.

110. Sarat Kalita, PW9, is the father of the victim who stated that his daughter, the victim was 13 years as on 1/11/2016. On the day of occurrence,

when he was returning home at around 8 pm, he noticed a huge gathering at the village Namghar and on enquiry, he was informed that the appellant

had violated the victim and people had gathered to take a decision. He then enquired from his daughter who told him about commission of rape by the

appellant. PW9 admitted during the cross examination that the left hand of the appellant was deformed. However, this admission does not make any

dent on the prosecution case. It was not made out by the defence either during the cross examination or by adducing evidence that the deformity was

of such nature that it was almost impossible or not plausible on the part of the appellant to have used force to sexually assault the child.

111. Diganta Kalita, PW 5, is the informant and uncle of the victim who testified about the victim being a student of No. 694 Ranakuchi LP School

and that she was aged about 10 years at the time of occurrence. He stated that when he came home at around 4 p.m. on the day of occurrence, his

sister-in-law Smt. Fulmati Kalita (PW 2) and his aunt Ratan Kalita (PW 8) informed him about the rape of the victim girl by the appellant. He

enquired from the appellant about the incident, but the appellant denied the allegation. He then took the victim girl near the appellant and in his

presence, she narrated about the rape under the culvert.

Nothing has been brought out in course of the cross examination to indicate that he was falsely implicating the appellant.

112. The other witness examined was Phani Kalita, PW4, who stated that on the day of occurrence, the victim informed him about the incident.

He denied that there was any land dispute between the appellant and the victim's family.

113. Jogen Barman, who was examined as PW 7 stated that he also came to know about the incident on being told by the victim. He also admitted

during cross-examination that one hand of the appellant was slightly deformed. However, it was not made out by the defence during the cross

examination that the deformity was of such nature that the appellant could not have forcefully sexually assaulted the child.

114. Rubi Kalita, PW10, was the aunt of the victim who also came to know about the incident after being told by the victim and her evidence may not

be of much importance to the prosecution case.

115. It may be observed that though most of the aforesaid witnesses were not eyewitnesses, they came to know of the incident soon after the incident

was brought on record. The fact that they came to know of the incident very soon on the same day would be inconsistent with the plea of the

appellant that the charge was false and a concocted one. The fact that there was a village gathering to discuss the incident is also indicative of the

spontaneity of the indignation of the villagers and had the accusation been really

false, there ought to have been some protestations from the appellant and/or his other family members, which was absent.

116. Of course, this Court has noted that the weapon associated with the crime, the knife, was not seized nor the blood-stained panty of the victim.

However, this shortcoming in the investigation and deficiency in the prosecution case does not in any way lessen the credibility of the statement of the victim girl.

Certainly, if these had been recovered and produced during the trial, these would have strengthened the prosecution case more but the absence of

these does not dent or vitiate the prosecution case.

117. It is now settled that failure on the part of the investigating agency to recover weapon of crime may not be fatal if the injury is proved. [See

Chand Khan v. State of U.P., (1995) 5 SCC 448 : 1995 SCC (Cri) 915, Ram Singh v. State of Rajasthan, (2012) 12 SCC 339].

118. We may also recall what the Honâ??ble Supreme Court had observed in C. Muniappan v. State of T.N., (2010) 9 SCC 567 : (2010) 3 SCC

(Cri) 1402 that defect in the investigation by itself does not vitiate the prosecutionâ??s case, as follows:

â??55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether

due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be

a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the

faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the

investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the

prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to

whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal

trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. (Vide Chandrakant Luxman V. State Of

Maharashtra (1974) 3 Scc 626 : 1974 Scc (Cri) 116 : Air 1974 Sc 220, Karnel

Singh V. State Of M.P. (1995) 5 Scc 518 : 1995 Scc (Cri) 977 , Ram

Bihari Yadav V. State Of Bihar (1998) 4 Scc 517 : 1998 Scc (Cri) 1085 : Air 1998 Sc 1850, Paras Yadav V. State Of Bihar (1999) 2 Scc 126 : 1999

Scc (Cri) 104 , State Of Karnataka V. K. Yarappa Reddy(1999) 8 Scc 715 : 2000 Scc (Cri) 61 : Air 2000 Sc 185, Amar Singh V. Balwinder

Singh(2003) 2 Scc 518 : 2003 Scc (Cri) 641, Allarakha K. Mansuri V. State Of Gujarat (2002) 3 Scc 57 : 2002 Scc (Cri) 51 9and Ram Bali V. State

Of U.P. (2004) 10 Scc 598 : 2004 Scc (Cri) 2045)

119. In the facts of the case as discussed above, this Court is of the opinion that failure on the part of the prosecution to seize the knife or the panty

does not necessarily undermine the credible evidence of the victim girl that she was sexually assaulted by the appellant. It may be also noted that the

knife was not used to cause any injury on the body of the victim girl but was used to frighten the girl, thus it was not a weapon of crime in the

immediate sense, though it was used indirectly to facilitate the commission of the offence of sexual assault. The claim of the victim girl that she was

frightened into submission has not been discredited by the appellant either by discrediting the evidence of the victim girl or by adducing evidence in this

regard by the appellant. Notably, the appellant has not raised any issue about the non-seizure of the knife, or the panty worn by the victim girl. As

discussed above, since the proof required from the prosecution is on the basis of preponderance of probability, in view of the testimony of the victim

girl, which has not been shaken and other corroborating evidences, this lapse on the part of the prosecution cannot be said to be fatal.

The existence of abrasion near the hymen of the victim girl is a medical evidence corroborating the statement of the victim girl. The mere opinion of

the medical officer that it could have been caused by scratching of nail does not in any way contradict the testimony of the victim.

The only plea of the appellant in defence based on his statement made under Section 313 CrPC. was that he was innocent and was handicapped with

one of his hands and that he was falsely implicated because of certain land dispute with the father of the victim. There is no evidence as to the nature

of the land dispute suggested by the appellant. If there was really a land dispute, more details of the same ought to have been brought on record.

However, apart from his statement made under Section 313 CrPC., the appellant

had not adduced any evidence to bolster his case. In the opinion of this Court, a greater burden was cast upon him to demonstrate that he was not guilty by meeting the standard of preponderance of probabilities, in view of presumption of guilt under Section 29 of the POCSO Act, which provides that the Special Court shall presume that the accused who has been charged of committing any offence mentioned in the Section has committed the same, unless the contrary is proved.

120. Because of the legal presumption of guilt of the accused under Section 29 of the POCSO Act and language used, a much heavier burden was placed on the appellant to discharge this burden. It was thus incumbent upon the appellant to prove to the contrary that he did not commit the offence charged. In the facts and circumstances of the case this proof cannot be by merely casting a doubt on the prosecution case. He must prove by adducing cogent and reliable evidences. But the appellant did not adduce any evidence in support of his plea that he was suffering from such an extremely high degree of handicap that he could not have committed the said crime. He also did not adduce any evidence to show any prior enmity relating to land dispute because of which he claims to have been falsely implicated. In the opinion of this Court, merely stating that he was deformed in one of arms and suggesting that there was certain land dispute, in absence of more positive evidences, there are not sufficient to discharge this burden cast on him by the statute.

121. As far as the age of the victim girl is concerned, there are evidences, both oral and documentary to the effect that she was below 14 years and the defence has not raised any issue about it and as such, there is no difficulty in holding that the victim girl was a child within the meaning of Section 2 (d) of the POCSO Act and as such there is no irregularity about the prosecution of the appellant under the Act.

122. There cannot be a straitjacket formula applicable to all criminal cases. Each case has to be judged based on the evidences obtaining under the peculiar circumstances of the case. It is ultimately the fine sense of justice and proper appreciation of evidences strewn across the entire spectrum of the case and by taking a holistic view under the circumstances as revealed in the case that the court has to arrive at the conclusion about the guilt of the accused.

Having discussed the evidences on record as mentioned above in the light of the relevant law, this Court is also satisfied that the prosecution has been

able to establish the foundational facts based on preponderance of probability.

The fact that the victim was a child within the meaning of the Act has been proved by both oral evidences of the victim girl (PW 3), other witnesses,

viz., PW 1, PW 4, PW 5, PW 6 and documentary evidences, the school certificate as well as the medical report.

The fact that the victim girl was sexually assaulted has been proved by her testimony which has been found to be reliable and corroborated by oral

accounts and medical report as discussed above.

123. It may be observed that once the prosecution has been able to establish the foundational facts based on preponderance of probability, by virtue of

the legal presumption under Section 29 of the Act, the prosecution can be said to have proved the charge against the appellant beyond reasonable

doubt in the light of the evidences available but the appellant failed to prove his innocence.

The conclusion that the charge against the appellant has been proved beyond reasonable doubt, is based on the establishment of the foundational facts

or the actus reus on the basis of preponderance of probability by the prosecution bolstered by the legal presumption provided under Section 29 of the

Act. In other words, it is this legal presumption under Section 29 of the Act, applied on the proved foundational facts, which has metamorphosised and

crystalized the proof of commission of the offence by the appellant on the basis of preponderance of probability, to proof beyond reasonable doubt.

The cardinal principle of criminal law that the charge against an accused must be proved beyond reasonable doubt to convict him ever remains and

cannot be diluted and this has been accomplished in the present case with the aid of legal presumption under Section 29 of the Act applied on the

established foundational facts based on preponderance of probability.

124. Accordingly, for the reasons discussed above, this Court also holds that the charge against the appellant has been proved as to convict him under

the POCSO Act and the appellant failed to discharge the reverse burden of proving his innocence.

125. Resultantly, the impugned judgment order dated 26.05.2017 is upheld and this appeal is dismissed as devoid of merit.

126. Trial court records be remitted to the concerned court.