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 Decided on : 21/08/2024
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FORM - A Exh. __

**IN THE COURT OF SPECIAL (POCSO) JUDGE,
 DHRANGADHRA.**

Present: Mukeshkumar Pratapbhai Chaudhari Special (POCSO) Judge & 3 rd Additional Sessions Judge, Dhrangadhra. Date of Judgment : 21/08/2024 Special POCSO Case No. 91 / 2022 Details of FIR/Offences/Police Station	
Cr.R.No.11211014220146/2022 Surendranagar District.	
Police Station	Dasada Police Station
Offences	Section 354(A)(1)(1) of IPC and Sections 7, 8, 9(F)(M) of POCSO Act.
Charges Framed	Section 354(A)(1)(1) of IPC and Sections 7, 8, 9(F)(M) of POCSO Act.
COMPLAINANT :	State of Gujarat 
REPRESENTED BY :	Ld. A.P.P. Mr.V.H.Bhatt
ACCUSED:	Varsangbhai @ Raja Naranbhai Rathvi Aged about : 48 years, Resi. of : Aadriyana, Ta. Dasada Dist. Surendranagar.
REPRESENTED BY	Ld.Adv. Mr.C.H.Shukla

FORM – B

Date of Offence	09/09/2022
Date of FIR	10/09/2022
Date of Charge-sheet	03/11/2022

Date of Framing of Charges	04/09/2023
Date of commencement of evidence	23/01/2023
Date on which judgment is reserved	07/08/2024
Date of the Judgment	21/08/2024
Date of the Sentencing Order, if any	-

ACCUSED DETAILS

Rank of the Accused	Name of Accused	Date of Arrest	Date of Release on Bail	Offences charged with	Whether Acquitted or Convicted	Sentence Imposed	Period of Detention Undergone during Trial for purpose of section 428, Cr. PC
1	Varsangbhai @ Raja Naranbhai Rathvi	13/09/2022	--	Section 354(A)(1) (1) of IPC and Sections 7, 8, 9(F) (M) of POCSO Act.	Acquitted	--	13/09/2022 till date

FORM – C**LIST OF EVIDENCES OF PROSECUTION SIDE****ORAL EVIDENCES**

Sr.No.	Name of Persons		Exh.
1	Prahladbhai Maganbhai Panvecha	Panch witness	8
2	Virambhai Dolabhai Panvecha	Panch witness	10
3	Bhathibhai Surabhai Panvecha	Panch witness	11
4	Ajitbhai Prabhubhai Panvecha	Panch witness	13
5	Kirtikumar Bhaluji Thakor	Jr. Clerk	14
6	Dr. Heli D/o. Rohitkumar Bhatiya	Medical Officer	16

7		Step father of victim	27
8		Aunt of victim	29
9		Grandfather of victim	30
10		Mother of victim	31
11	Deposition of victim	-	32
12	Deposition of victim	-	37
13		Witness	39
14	Kishanbhai Kakubhai Panvecha	Sarpanch	40
15	Maunaben Bharatkumar Vyas	Teacher	41
16	Bharatbhai Kamabhai Ratvi	Teacher	42
17	Rameshbhai Hirabhai Valmiki	Husband of sarpanch	43
18	Bharatbhai Kalubhai Bhavvad	Talati-cum-Mantri	44
19	Harshadbhai Labhshankarbhai Thakar	PSI	45

DOCUMENTARY EVIDENCES

Sr.No.	Name of Persons	Exh.
1	Panchnama of place of offence	9
2	Arrest panchnama	12
3	Birth certificate	15
4	Case paper of victim	16
5	MLC of victim	17
6	Police yaadi of victim	20
7	MLC of victim	21
8	Consent letter of victim	22
9	Rojnishi of victim	23
10	MLC of second victim	24
11	Consent letter of second victim	25
12	Rojnishi of second victim	26
13	Complaint	28

14	Birth certificate of victim	33 & 34
15	Birth certificate of victim from school	35
16	Statement of the victim	36 & 38
17	Report for recording statement of victim	46
18	Letter to primary school teacher	47
19	Letter regarding medical examination of victim	48
20	Copy of school register	49

J U D G M E N T

1. An offence has been registered against the accused with Dasada Police Station vide C.R.No.11211014220146/2022 for the offence punishable under sections 354(A)(1)(1) of the Indian Penal Code, 1860 ('the IPC" for short) and under Sections 7, 8, 9(F)(M) of the Protection of Children From Sexual Offences Act, 2012 ('the POCSO Act' for short).

2. **CASE OF THE PROSECUTION :**

Complainant [REDACTED] has lodged a complaint before Dasada Police Station, alleging that the accused was a teacher in primary school and during the recess time, the accused called the victim daughter, who was a minor to an empty class and has touched the chest and face of the victim aged 6 years and also the accused has forcefully tried to remove the saree of the victim daughter aged 12 years of witness Jhilabhai Tadshibhai Thakor, who was also a minor and has committed sexual assault and for the aforesaid incident, complainant has lodged the complaint.

3. **Arrest and bail :-**

Accused was arrested for the alleged offence and is an UTP.

4. **Investigation and Charge Sheet:-**

The I.O. has investigated the offence and on collection of sufficient

evidences, has filed charge-sheet U/s. 173 of Cr. P. C., for the alleged offences against the present accused.

Since the offences are exclusively triable by the Special Court designated to try the POCSO cases, charge-sheet was filed before this Court.

5. **Charge and Plea :-**

Ld. Advocate Mr. C.H.Shukla has filed his Vakalatnama on behalf of Accused while, on behalf of prosecution, Ld. A.P.P. Mr. V.H.Bhatt has presented the case of the State.

The accused was called upon before this Court and after verifying the compliance regarding providing police papers and also after hearing Ld. A.P.P. for the State & Ld. Advocate for the accused, the charge was framed Vide Ex.6 on 04/09/2023 as provided U/s. 228 of the Criminal Procedure Code. Charge was read over to the accused and statement of the accused was recorded vide Ex. 7, wherein he has denied the allegation and not plead guilty and further claimed trial.

6. To prove the guilt of the accused, Prosecution has adduced oral as well as documentary evidence as mentioned hereinabove in Form C. The prosecution has filed closing pursis vide Exh. 50. On filing of closing pursis vide Ex. 50 by the Prosecution, further statement U/s. 313 of Cr. P. C. was recorded wherein, accused has denied all the charges & allegations and also stated that, he has been falsely implicated in the offence.

7. **Arguments :-**

Heard Ld. A.P.P. for the State. Ld. A.P.P., V.H.Bhatt has argued that Prosecution has examined all material witnesses and successfully proved the case. Therefore, accused is required to be convicted for the offences and there is no reason to discard evidence produced on record. On the other hand, Ld. Advocate Mr. C.H.Shukla for the accused has vehemently argued that, there is no case of sexual

assault as complainant and the victim have not supported the Prosecution case. It is submitted that material witnesses have turned hostile and the accused cannot be convicted only on the basis of the corroborative evidence of the doctor/investigating officer. Ld. Advocate Mr. C.H.Shukla has further submitted that, looking to the evidence of the minor victim girl, no ingredients of alleged offence have come on record which would lead to involvement of the accused for the alleged offences and therefore, accused is required to be acquitted from the charged leveled against him.

8. **Points for determination:-**

In view of the submissions and also from the facts and evidence on record, following points has been arisen for just determination of this case.

POINTS FOR DETERMINATION

1. Whether the prosecution proves beyond reasonable doubt that on 09/09/2022, the accused was a teacher in primary school and during the recess time, the accused called the victim daughter, who was a minor to an empty class and has touched the face and chest of the victim aged 6 years and also the accused has forcefully tried to remove the saree of the victim daughter aged 12 years of witness Jhilabhai Tadshibhai Thakor, who was also a minor and thereby committed the offence punishable under Section 354(A)(1)(1) of IPC and Sections 7, 8, 9(F)(M) of POCSO Act. ?
2. What order ?

ANSWERS TO THE AFORESAID POINTS OF DETERMINATION:

9. The answers to the aforesaid points of determination are as under:
 - (1) In negative
 - (2) As per final order.

: REASONS :

10. In every criminal trial, the trial begins with the presumption that the accused is innocent according to main principles of the criminal justice system. Under normal circumstances, the burden of proof in criminal proceedings rests with the complainant side. In the present case, the accused is charged with offences under the POCSO Act. If the prosecutrix's testimony is found to be credible by the court, the testimony of such a prosecutrix does not require other supporting evidence and based on the evidence of the sole prosecutrix, the accused can be found guilty in the case. In this regard, in the judgments of Hon'ble Supreme Court as well as the Hon'ble Gujarat High Court have made it clear that the testimony or evidence of the prosecutrix does not become unreliable due to the contradictions or exaggerated stories or flaws in the minor details filed during the testimony of such prosecutrix. In view of such legal situation, it is required to evaluate the evidence produced by the complainant side in the present case.

11. I have considered the submissions of Ld. Advocates for the parties and the record. It is settled proposition of law that the prosecution has to stand on its own feet and it cannot take the benefit of the weakness of the defence of the accused. Prior to adverting to the evaluation of the oral as well as documentary evidence, it would be necessary to refer certain judgments. When there is a significant discrepancy between the evidence of the star witness/prosecutrix/eye witness of the case and the medical evidence, and especially who has not provided any supporting evidence to the case of prosecution side, the accused may not be found guilty. Such an advantage should be given to the accused only when there is a contradiction which is important and the main contradiction which affects the origin of the case. In addition when the prosecutrix in its deposition voluntarily states before the court that there was no incident as per the prosecution's side case and when other witnesses support her, there is no reason to doubt such evidence or reject such evidence. If the medical opinion indicates alternative possibility then it cannot be accepted as final. This principle has been stated by the Hon'ble Supreme Court and Hon'ble High Court in the following judgments.

- (1) Radhakrishna Nagesh Vs. State of Andhra Pradesh
Criminal Appeal No.1707/2009 - S.C., Dt. 13/12/2012.
- (2) Dayal Singh and others Vs. State of Uttaranchal
[(2012) 7 SCALE 165] 29.
- (3) Kamaljit Singh Vs. State of Punjab
[2004 Cri.L.J.28],SC.

Appreciation of Evidences:-

12. Now, in the light of the aforesaid guidelines, this Court shall advert to discuss the oral and documentary evidence led by the prosecution to prove the guilt of the accused.

13. In the present case, the prosecution has examined the **Panch witnesses – Prahladbhai Maganbhai Panvecha as PW 1 and Bhathibhai Surabhai Panvecha as PW 2** at Exh. 8 and 11, respectively. They are the panch witness to the panchnama of place of offence. On 10/09/2022, they were at their labour work and they were made sign the papers and they have only signed the papers. They have produced the panchnama of place of offence at Exh. 9 but they did not know anything related to the panchnama. They have not supported the version of the prosecution, therefore they were declared hostile. They were cross-examined by the Ld. A.P.P. at length but the Ld. A.P.P. could not elicit anything against the accused from their cross-examination.

14. The prosecution has examined the **Panch witnesses – Bhathibhai Surabhai Panvecha and Ajitbhai Prabhubhai Panvecha as PW 3 and 4** at **Exhs.11 and 13**, respectively. They are the panch witnesses to the arrest panchnama of the accused produced at Exh. 12. They have stated that, on 13/09/2022, when they were at labour work at that time the sarpanch asked them to sign the papers and therefore they went to the police station to sign the same, other than that, they do not know anything. They have not supported the version of the prosecution, therefore they were declared hostile. They were cross-examined by the Ld. A.P.P. at length but

the Ld. A.P.P. could not elicit anything against the accused from their cross-examination.

15. The prosecution has examined the **Junior Clerk, Nagarpalika, Kirtikumar Bhaluji Thakor** as **PW 5** at Exh. 14. He has deposed that, he is serving his duty at Chanasma Nagarpalika since last 10 years. He has produced the birth certificate of the victim at Exh. 15 which was issued by nagarpalika on 01/11/2022, which is registered in the register on 25/10/2015.

In his cross-examination, he has admitted that, the birth certificate at Exh. 15 is issued as per the records available with them and he does not know anything about the certificate. It is admitted that, in the register at their office, they register the name of the informant. It is denied that, the date of birth of the victim was not stated from the hospital. It is admitted that, in the details from the hospital, there were only mentioning of a girl child not the name of the girl child. It is admitted that, he does not know how the name of the victim came in the birth certificate.

16. The prosecution has examined **Medical Officer, Dr. Heli D/o. Rohitkumar Bhatiya** as **PW 6** at Exh. 16. It is deposed that, on 10/09/2022, when she was serving her duty at that time, the victim was brought before her for medical examination and case papers of the victim were prepared which is produced at Exh. 17. It is stated that, when the victim was brought before her at that time the victim was 11 years of age. Thereafter, the second victim was brought before her and her case papers were prepared which is produced at Exh. 18. On 10/09/2022, the victim was brought before her through police yaadi produced at Exh. 20. The history of the victim was given by her grandmother. He has produced the MLC of victim at Exh. 21. He has produced the consent letter of the victim at Exh. 22, rojnishi at Exh. 23, MLC of second victim at Exh. 24, consent letter of second victim at Exh. 25, rojnishi at Exh. 26.

In the cross-examination, it is admitted that, both the victim were brought before her through police yaadi by woman constable. She has collected necessary samples of the victims. It is admitted that, there were relatives of victims, when they were brought before her. It is admitted that, no names or date of the incidents were mentioned in the history. It is admitted that, in the certificate at Exh. 17 and 18 no opinions has been mentioned. It is admitted that, Exh. 17 and 18 are fitness certificates. It is admitted that, there were no injuries on the body of the victims. It is denied that, proper medical examination have not happened and the victims have narrated history before her.

17. The prosecution has examined the **Stepfather of victim** – [REDACTED] as **PW 7 at Exh. 27**, wherein he has deposed that, he was married to Kailashben and earlier Kailashben was married to Prahladbhai Thakor and after his demise, she married Mehulbhai. His wife had two daughters from her former marriage, wherein the age of the victim is 6 years and the date of birth of the victim is 13/10/2015 and he is the stepfather of them. The incident took place six months before and he does not know anything related to the incident. He has not filed the complaint, but he went to labour work and he got a call to sign the papers. He has produced the complaint at Exh.28. He does not know anything related to complaint. He has not supported the version of the prosecution, therefore he was declared hostile. He was cross-examined by the Ld. A.P.P. at length but the Ld. A.P.P. could not elicit anything against the accused from his cross-examination.

In his cross-examination, it is admitted that, when he reached the police station, he has signed the prepared complaint and he does not know anything related to the complaint.

18. The prosecution has examined **Aunt of the victim** – [REDACTED] at Exh. 29. She has deposed that, the victim is her niece. No incident has occurred. She does not know the accused. The police has not taken any statement of her. She denied the contents of her statement before the police. She has

not supported the version of the prosecution, therefore she was declared hostile. She was cross-examined by the Ld. A.P.P. at length but the Ld. A.P.P. could not elicit anything against the accused from her cross-examination.

19. The prosecution has examined the **Grandmother of victim** – [REDACTED] as PW 9 at Exh. 30. She has deposed that, she has three sons whereas victim is the daughter of Mehulbhai and she does not know the date of birth of the victim. Kailashben has remarried her son and the victim is the daughter of Kailashben. She does not know anything related to the incident. The police has not taken any of her statement and she has denied the contents of her statement. She has not supported the version of the prosecution, therefore she was declared hostile. She was cross-examined by the Ld. A.P.P. at length but the Ld. A.P.P. could not elicit anything against the accused from her cross-examination.

20. The prosecution has examined [REDACTED] – **Mother of the victim** as PW 10 at Exh. 31. She has deposed that, her first marriage was with Prahladbhai in which she has two daughter from which one is the victim. After the demise of her first husband she got remarried to Mehulbhai and is residing with him with her two daughters. She does not know anything related to the incident. The victim has not told anything to her. She does not know the accused. The police has not taken her statement. She has denied the contents of her statement. She has not supported the version of the prosecution, therefore she was declared hostile. She was cross-examined by the Ld. A.P.P. at length but the Ld. A.P.P. could not elicit anything against the accused from her cross-examination. She had been asked questions by the Court itself wherein she has stated that, she does not know anything related to the incident.

21. The prosecution has examined **Victim D/o.** [REDACTED] as PW 11 at Exh. 32. She has deposed that, no incident has occurred. Her teacher's name is Monaben. She was studying at 8th standard at the time of incident. She does not know the accused and police has not recorded her statement. She has produced the

birth certificate at Exh. 33 and 34. She has produced the birth certificate issued by the school at Exh. 35. She has denied the contents of her statement. She has produced her statement u/s. 164 of Cr.P.C. She has not supported the version of the prosecution, therefore she was declared hostile. She was cross-examined by the Ld. A.P.P. at length but the Ld. A.P.P. could not elicit anything against the accused from her cross-examination.

In her cross-examination, she never wears saree and it has not happened that, she went for school wearing saree. It is admitted that, incident mentioned in Exh. 36 has not happened.

22. The prosecution has examined **Victim D/o. [REDACTED]** as **PW 12** at Exh. 37. She has deposed that, no incident has occurred. She does not know the accused and police has not recorded her statement. She does not know any rajasaheb at her school. There are different schools for girls and boys in their village. She has produced her statement u/s. 164 of Cr.P.C. She has not supported the version of the prosecution, therefore she was declared hostile. She was cross-examined by the Ld. A.P.P. at length but the Ld. A.P.P. could not elicit anything against the accused from her cross-examination.

In her cross-examination, it is admitted that, incident mentioned in Exh. 38 has not happened and if the contents as narrated by her grandmother is written then she does not know about it.

23. The prosecution has examined **Father of Victim – [REDACTED]** as **PW 13 at Exh. 39**, wherein he has deposed that, he does not know anything related to the incident. At the time of the incident, the victim was studying in the school. He has denied the contents of his statement. He has not supported the version of the prosecution, therefore he was declared hostile. He was cross-examined by the Ld. A.P.P. at length but the Ld. A.P.P. could not elicit anything against the accused from his cross-examination.

In the cross-examination, he has admitted that, the police has only asked his name and address and nothing otherthan that.

24. The prosecution has examined **Sarpanch – Kishanbhai Kakubhai Panvecha** as **PW 14** at Exh. 40, wherein he has deposed that, at the time of incident, he was the Sarpanch of Panva village but he does not know anything related to the incident. He was at Gandhinagar at the time of the incident. He has denied the contents of his statement before the police. He has not supported the version of the prosecution, therefore he was declared hostile. He was cross-examined by the Ld. A.P.P. at length but the Ld. A.P.P. could not elicit anything against the accused from his cross-examination.

In the cross-examination, he has admitted that, the police has only asked his name and address and nothing otherthan that.

25. The prosecution has examined **Teacher – Maunaben bharatkumar Vyas** as **PW 15** at Exh. 41, wherein she has deposed that, she is teacher at primary school since 2022 and the accused also used to teach in the same school. She does not know anything related to the incident and the day after the incident she was not present and came to know after two to three days later. She later on came to know from the village people that the accused has done something to victim. The police has recorded her statement.

In the cross-examination, she has admitted that, the police has only asked her name, number and address and nothing other than that. It is admitted that, she does not know anything related to the incident.

26. The prosecution has examined **Teacher – Bharatbhai Kamabhai Rathvi** as **PW 16** at Exh. 42 and he has deposed that, he is working as main teacher at primary school since last eight years and the accused was also teaching in the same school only. She does not know anything related to the incident and next day he came to know that, complaint is going to be filed against Varsangbhai. He does

not know what had the accused did to the victim. The police has recorded his statement. He has admitted that both the victims are of his school only.

In the cross-examination, she has admitted that, the police has only asked her name, number and address and nothing other than that.

27. The prosecution has examined husband of **Sarpanch – Rameshbhai Hirabhai Valmiki** as **PW 17** at Exh. 43 and he has deposed that, his wife was the sarpanch of Panva village at the time of incident. He does not know the accused and he came to know about the incident. He has denied the contents of his statement. He has not supported the version of the prosecution, therefore he was declared hostile. He was cross-examined by the Ld. A.P.P. at length but the Ld. A.P.P. could not elicit anything against the accused from his cross-examination.

In the cross-examination, he has admitted that, the police has only asked his name and address and nothing other than that.

28. The prosecution has examined **Talati-cum-Mantri – Bharatbhai Kalubhai Bharwad** as **PW 18** at Exh. 44 and he has deposed that, he was not serving as Talati-cum-Mantri at the time of the incident, though he was served with summons. He has brought the birth register with him and the date of birth of victim D/o. Jalubhai Talaji is produced at Exh. 33 and 34 and he has recognized the signature of then Talati-cum-Mantri.

In his cross-examination, he is giving the deposition as per the records available in his office. It is admitted that, as per the records available in their office in the register, they issue birth and death certificate. It is admitted that, the name of the applicant is mentioned in the register and they also maintains the register which shows the relation with the persons whose certificate is being issued. It is admitted that, the birth certificate at Exh. 33 and 34 were applied by Dhirbhai Rajsinhbhai. It is admitted that, the name of the victim was mentioned in the register.

29. The prosecution has examined **PSI, Harshadbhai Labhshankar bhai Thakar** as **PW 19** at Exh. 45, wherein he has stated that, he was serving as PI on 09/09/2022, at that time the complainant filed complaint before him. He has investigated the matter and has collected necessary evidences, recorded the statements, collected the birth certificate of the victim, drawn the panchnama of the clothes of victim, sent the muddamal clothes of the victim to FSL for analysis, sent the victim for physical examination along with woman police constable and attained the medical samples of the victim. He has produced the letter regarding recording of statements of victim at Exh. 46, letter to primary school teacher at Exh. 47, letter regarding medical examinations of victims at Exh. 48 and copy of school register at Exh. 49. He has arrested the accused and drawn the arrest panchnama. He has narrated the contents of the statements recorded.

In his cross-examination by the Ld. Advocate for the accused, he has denied that, he has not written the complaint as narrated by the complainant. It is denied that, panchnamas were not drawn in presence of panchas and the signatures of panchas were taken on the prepared panchnamas. It is denied that, the statements of the witnesses were not recorded and has written as per their wish. It is denied that, he has not collected anything related to the work of the accused. It is denied that, evidence regarding the presence of the accused at the school, at the time of the incident, was not taken by him. It is denied that, he has not taken deposition of any independent witness. It is denied that, no procedure was followed before recording the statement of the victims. It is denied that, both the victim has given the statements due to the police pressure. He has denied that, without any cogent evidences, charge-sheet has been filed against the accused.

30. In the light of the aforesaid oral as well as documentary evidences, now the question arises as to whether the prosecution has proved the age of the victim girls. The prosecution in order to verify the age of the victims has produced the birth certificate of the victim at Exh. 15, 33 and 34, respectively, wherein the

date of birth of the victim D/o. [REDACTED] at Exh. 15 is mentioned as 13/10/2015 and the date of birth of the victim D/o. [REDACTED] at Exh. 33 is mentioned as 01/12/2009 and at Exh. 34 is mentioned as 27/11/2009, but looking to the certificate of school related to the date of birth of victim at Exh. 35, the date of birth of the victim is mentioned as 01/12/2009. Thus, in the light of the aforesaid oral and documentary evidence, it is evident that the date of birth of the victims are 13/10/2015 and 01/12/2009, respectively and the victim D/o. [REDACTED] was aged was 06 years 10 month and 27 days and victim D/o. [REDACTED] was aged 12 years 9 months 8 days at the time of occurrence. Hence, at the time of the incident, the victims were minors.

31. The victims in their deposition has stated nothing against the accused in their chief-examination or cross-examination. The relatives of the victim have also deposed that they does not know anything related to the incident and has not stated anything against the accused and has not stated that the accused has sexually assaulted the victim girls. The history of the victim aged 6 years was given by her grandmother before the doctor. So far as the medical history given by the victim girl before the doctor is concerned, the doctor has proved the medical history but the medical history narrated by the Doctor is only hearsay. As per **section 60 of the Indian Evidence Act, the evidence must be direct**. Therefore, the history given by the victim girl before the doctor is not admissible in evidence as the prosecutrix has turned hostile. So far as the medical history given by the accused person before the doctor is concerned, at that time the accused was in the police custody. Therefore, **the confession made by the accused before the doctor is hit by section 26 of the Indian Evidence Act**.

32. So far as the evidence of PW-19 is concerned, he is the PSO/Investigating Officers and his evidence is only corroboratory and when there is no any substantial evidence, the accused cannot be held guilty on the basis of the corroboratory evidence.

33. In the present case, neither the prosecutrix nor her mother or the school teacher or main teacher have fully supported the facts of the case of the prosecution and their testimony vide Ex.31, 32, 37, 41 and 42 respectively do not prove the involvement of the accused in the present case.

34. Considering the testimony of the original complainant, the prosecutrix, the mother of the victim and the teachers of the victims in the present case, these main witnesses in this case have not supported the case of the prosecution. Among the medical evidence produced by the prosecution, in the present case, the oral evidence of the prosecutrix in court is direct evidence. While the FSL report is secondary and incidental evidence. As discussed above, inconsistency between secondary evidence and direct evidence is found when the original complainant or the prosecutrix does not merely endorse the prosecution's case in direct evidence from their testimony before the court and accused can bring any evidence relating to the crime in the present case to the prosecution's record. Not at all the prosecutrix also stated in their testimony that the history written by the doctor in person, but did not support it. Oral evidence should be taken into consideration while considering the principles established by the Hon'ble Supreme Court as well as various Hon'ble High Courts when discrepancies are found in the medical evidence, giving preference to oral evidence.

35. In the present case, the prosecution has produced above stated documentary evidence like Complaint, Statement of prosecutrix recorded u/s.164 of Cr.P.C, Medical case papers of prosecutrix, Police yadi written to Medical officer for examination of accused, Medical certificate of accused, Panchnama for the recovery of clothes of the accused as well as victim, Panch Slips, Police yadi written to Medical officer for examination of prosecutrix, Medical certificate of Prosecutrix, Yadi for given the samples of prosecutrix to police by medical officer for examination, Yadi for the samples of Prosecutrix sent by medical officer for examination, Yadi written by police for taking statement of prosecutrix u/s. 164 of Cr.P.C., Muddamals, etc. But when all these documentary evidence are not

corroborated by prosecutrix as well as the original complainant's evidence, the lack of support for such important strong evidence diminishes the importance of all documentary poetic evidence and cannot be linked to accused by giving any such evidence.

36. At this stage, considering the Section 29 of the POCSO Act :

Presumption to certain offences :-

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

Presumption under this section is rebuttal presumption, when any evidence against the accused is produced on the record by the prosecution, it is the responsibility of the accused to refute the evidence against him. But first it is imperative for the complainant party to produce any evidence against the accused on the record then the responsibility of refutation can be placed on the accused. There is no question of rebuttal of the evidence by the accused in the even that no evidence as per the indictment against the accused is produced on the record.

In this regard, the judgment of the Hon'ble Bombay High Court (Nagpur Bench) dated : June 25, 2018 has ruled that

Navin Dhaniram Baraiye (In Jail) Vs. State of Maharashtra Thr. P.S.O. ...on 25 June, 2018

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH : NAGPUR Criminal Appeal No.406/2017

17. *In this backdrop, it is first necessary to examine the effect of presumption under section 29 of the POCSO Act and the manner in which the accused could rebut such presumption. Section 29 of the POCSO Act reads as follows :-*

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

A perusal of the above quoted provision does show that it is for the accused to prove the contrary and in case he fails to do so, the presumption would operate against him leading to his conviction under the provisions of the POCSO Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttal. The presumption under Section 29 of the POCSO Act is absolute and it would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and witnesses would have to be accepted as gospel on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under Section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law.

37. Perusing all the evidence produced on record in the present case along with the principles established in the above stated judgment, the investigator as well as the doctor have testified in the present case as per action taken as part of their duty but when the most important witnesses in this case is while the prosecutrix as well as her mother and school teachers have not uttered a single word against any of the allegations against the accused, the prosecution has failed to prove that the accused has committed any offence under section 7, 8, 9(M), 9(F) of POCSO Act. So in the present case, when the prosecution fails to produce the evidence against the accused on record, there is no question of refutation of the evidence by the accused. In these circumstances, it does not seem justifiable for the prosecution to convict the

accused when any of the offence mentioned against the accused has not been proved beyond a reasonable doubt.

38. In view of the all the above discussions and the principles established in the judgments, the star witnesses of the present case i.e. the prosecutrix and the mother of the victim and school teachers do not support the case of the prosecution in their testimony on the affidavit before the court vide Ex.31, Exh. 32, Ex.37 and Ex.41 and Ex.42 respectively. According to testimony of prosecutrix, the victims stated in their testimony that no incident happened and the present accused has not committed any offence. They have not mentioned anything against the accused and that the accused has not sexually assaulted them and had not committed sexual assault on them at anytime. In such circumstances, when the prosecutrix herself and her mother do not support the prosecution's case in their depositions before the court and their testimony does not prove the involvement of the accused in the incident, the accused cannot be found guilty.

39. It is also necessary to consider the judgment of Hon'ble Gujarat High Court in the case of **Hansaben Ramabhai Dhanabhai Vs. Tejabhai Kalabhai Dama ; R/Cr.A/1542/2019** wherein it is held as under ;

5. Having regard to the submissions made by the Ld. advocates for the respective parties and to the documents on record, more particularly, the depositions of the witnesses and the findings recorded by the Special Court, it appears that the prosecutrix was aged about 17 years and 6 months on the date of alleged incident on 06.03.2018, however, in her evidence before the Special Court, she had stated that she had left the house as her mother had scolded her and she had gone to the house of the maternal uncle. She had further stated that after four days of the incident, her mother having telephoned her, her maternal uncle had again brought her back to her parents. In short, the prosecutrix herself had not supported the case of the prosecution that the respondent-accused had forcibly taken her from the lawful custody of her parents and committed rape on her, as alleged by the prosecution. The other witnesses i.e. the brother and Bhabhi of the

prosecutrix also had turned hostile. Thus, the material witnesses having turned hostile, there was hardly any evidence connecting the respondent-accused with the alleged crime. It is needless to say that when two views are possible, the appellate court should be slow interfering with the judgment of acquittal. The Special Court having recorded the findings that the prosecution had failed to prove the charges levelled against the respondent-accused beyond reasonable doubt, this Court is not inclined to interfere with the said findings, more particularly, when Mr. Pandey, Ld. advocate for the appellant, has failed to point out any illegality or infirmity in the impugned judgment and other passed by the Special Court.

40. It is also necessary to consider the judgment of the Hon'ble Gujarat High Court in the case of **Ajitkumar Kumarsinh Bhagora Versus State Of Gujarat ; 2020(1) GLR 27**, wherein it is held as under ;

22. In the cases of rape, the law does not require corroboration and, therefore, if the evidence of the prosecutrix is believed, there is no bar to convict the accused on her testimony alone. To put it in other words, there is no such law which requires corroboration before the statement of the prosecutrix is acted upon. Indisputably, a prosecutrix is a competent witness (vide section 118 of the Evidence Act). She is not an accomplice within the domain of section 133 of the Evidence Act. Thus, her statement, as such, does not require a corroboration within the meaning of section 114-B (114-A) of the Evidence Act which provides that an accomplice is unworthy of credit unless she is corroborated in material particulars. The prosecutrix is a victim like any other victim of any other offence. Hence, the same weight is to be attached to her statement which requires to be attached to the statement of an injured person. Therefore, if the statement of the prosecutrix is quite clear and unequivocal on the point as to who has ravished her, there is no reason, whatsoever, as to why the said statement, without any corroboration from any quarter, whatsoever, cannot form the basis of conviction. Thus, her statement is to be scrutinized like the statement of any other witness and if there is a ring of truth about it and if it inspires confidence, the Courts would be under an obligation to rely thereupon. However, the principal question we need to answer is to what extent we should accept the case of the prosecutrix having regard to the evidence on record. If the statement of the prosecutrix suffers from serious infirmities, inconsistencies and the overall case put up by the prosecution does not inspire any confidence, then it would be very hazardous to base the conviction solely on the evidence of the prosecutrix.

41. Considering the above judgments and the evidence on record, especially considering the testimony of the prosecutrix, her mother and school teachers, they have not given the slightest support to the case of the prosecution. Victims have admitted that, they were not subjected to any sexual assault by the accused. Therefore the prosecutrix is not ordered to pay any amount of compensation under section 357(A) of Criminal Procedure Code read with the Scheme of Gujarat prosecutrix Compensation.

42. It is important to note that the medical evidence is required to be used for the purpose of corroborative piece of evidence. When there is no ocular and substantive evidence on record against the accused then no conviction can be recorded relying upon the medical evidence only. The most material thing is that whether the accused is involved in the offence or not? As per the deposition of material witnesses, they have not given any evidence that accused had committed sexually assaulted the victim when they were minor. Moreover, the victim in the deposition has stated about their statements which was recorded u/s 164 of Cr.P.C. produced vide Exh. 36 and 38, respectively but in their cross-examination they have clearly admitted that, no incident happened as mentioned in the statements at Exhs. 36 and 38 respectively. Therefore, considering the entire facts and circumstances as well as evidence produced before this Court that the prosecution has not produced cogent evidence that the accused had committed offence as alleged against him. Therefore, considering the evidence produced by the prosecution is not suffice and sufficient to connect and clinching the accused for the charges leveled against him. It is general rule that the prosecution has to prove its case beyond reasonable doubt. Therefore, looking to the evidence placed on record, it is not suffice, trustworthy and sufficient to connect the accused for the charges to bring home as guilty. There is material & major contradiction and inconsistency between the testimony of the

prosecutrix, her mother and school teachers as well as the alleged allegations made by the prosecution against the accused.

43. Thus, in the light of the aforesaid discussions, the prosecution has also miserably failed to prove that the accused as a teacher in primary school and during the recess time, the accused called the victim daughter of complainant, who was a minor to an empty class and has touched the chest and face of the victim aged 6 years and also the accused has forcefully tried to remove the saree of the victim daughter aged 12 years of witness Jhilabhai Tadshibhai Thakor, who was also a minor the accused has kidnapped the victim from the lawful guardianship and committed sexual assault. Therefore, the accused is required to be acquitted from all the charges leveled against him and the benefit of doubt is required to be extended to accused. Hence, I decide point No.1 in the negative.

ISSUE NO.2 :

44. After at the end of all above discussion, I pass the following order in respect of issue No.2 :

ORDER

1. Accused **Varsangbhai @ Raja Naranbhai Rathvi, Aged about : 48 years, Resi. of : Aadriyana, Ta. Dasada, Dist. Surendranagar** is hereby acquitted from all the charges levelled against him vide CR No.11211014220146/2022 registered at Dasada Police Station for the offences punishable under Section 354(A)(1)(1) of IPC and Sections 7, 8, 9(F)(M) of POCSO Act.
2. Muddamal articles, if any, be destroyed after expiry period of appeal. If appeal is preferred, then muddamal be dealt with subject to order of Hon'ble Appellate Court.
3. Bail bond stands canceled and surety is discharged, forthwith.
4. The accused is directed to furnish a personal bond of **Rs.25,000/- (Rupees Twenty Five Thousand Only)** and one surety of the like amount in

accordance with section 437-A of the Code of Criminal Procedure,1973, to appear before the Higher Court, if any appeal is preferred against the judgment and the said bail bond shall be in force for a period of six months.

Pronounced in the Open Court today on 21st day of August, 2024 at Dhrangadhra.

Date : 21/08/2024
Place: Dhrangadhra.

[Mukeshkumar Pratapbhai Chaudhari]
Special (Pocso) and 3rd Additional District Judge,
Dhrangadhra.
UID. No.GJ 00653

VM.Nair