

JO CODE No. WB 00823
CNR Reg. No. WBML01-000959-2019

**IN THE COURT OF ADDITIONAL SESSIONS JUDGE
CUM
JUDGE SPECIAL, 2ND COURT MALDA POCSO**

Present	:	Smt. Sushmita Gayen,
	-	Addl. Sessions Judge,
		Cum
		Judge Special,
		2nd Court, Malda

Date of Judgment : 05-06-2026

POCSO NO. 26/2019
(CIS Reg. 26/2019
ST No.186/2019

Habibpur-PS Case No.460/2018 dated 26-12-2018, U/s. 363 of IPC adding
Section 365/305 of IPC r/w Section 4 of POCSO ACT.

Details of FIR/ Crime and Police station

Complainant	State of West Bengal
Represented by	Sri Sidhartha Roy
Accused Name, Age & Sex :-	1. Gopal Mandal @ Gopinath @ Gopu, Age 25 & Sex Male
Represented by	Sri Prabir Kr. Jha
Date of offence	10-12-2018
Date of FIR	26-12-2018
Date of Charge sheet	17-04-2019
Date of commencement of Evidence	13-11-2019
Date on which judgment is reserved	NIL
Date of judgment	05-06-2026
Date of sentencing order, if any	N.A.

Accused details

Rank of the accused	Name of the 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.P.C
1	Gopal Mandal @ Gopinath @ Gopu,	22-01-2019	In custody	U/S 363/366A/ 305 of IPC & U/S 6 of POCSO Act, 2012 alternatively u/s 376(2)(i) (n) of IPC	ACQUITTED	NIL	NIL

LIST OF PROSECUTION/DEFENCE/COURT WITNESSES

A. Prosecution :

Rank		Name	Nature of evidence Eye Witness, Police Witness, Expert Witness, Medical Witness, Panch Witness, Other Witnesses
1.	PW1	Mother of the victim	De facto complainant
2.	PW2	Grandmother of victim	Other
3.	PW3	Relative of victim	Other
4.	PW4	Dipak Adhikari	Independent witness
5.	PW5	S.I Amarendranath Saha	Police
6.	PW6	Constable 431Md. Ismail Hoque	Police
7.	PW7	Dr. Asutosh Sarkar	Doctor
8.	PW8	Father of the victim	Eye witness
9.	PW9	Dulal Sarkar	Independent witness
10.	PW10	Inspector Pabitra Kr. Mahato	Police
11.	PW11	Winee John Tamang	Police
12.	PW12	S.I Suan Kumar Singha	Police
13.	PW13	Madhuri Roy	Not tendered
14.	PW14	Gouri Mandal	Not tendered

B. Defnece witnesses, if any : NIL

Rank	Name	Nature of evidence Eye Witness, Police Witness, Expert Witness, Medical Witness, Panch Witness, Other Witnesses

C. Court witnesses, if any : NIL

Rank	Name	Nature of evidence Eye Witness, Police Witness, Expert Witness, Medical Witness, Panch Witness, Other Witnesses

List of prosecution/defence/court exhibits

A. Prosecution

Sr. No.	Exhibit No.	Description
1.	Ext.1	Written complaint
2.	Ext.1/1	Endorsement on the Written complaint
3.	Ext.2	Statement of the mother of the V.G u/s 164 of Cr.P.C

4.	Ext.2/1	Signature of P.W1 over Ext.2
5.	Ext.2/2	Signature of P.W1 over Ext.2
6.	Ext.2/3	Signature of P.W1 over Ext.2
7.	Ext.2/4	Signature of P.W1 over Ext.2
8.	Ext.2/5	Signature of P.W1 over Ext.2
9.	Ext.3	Signature of P.W4 over Inquest report
10.	Ext.3/1	Inquest report
11.	Ext.4	Dead body challan
12.	Ext.4/1	Signature of P.W6 over the dead body challan
13.	Ext.5	Seizure list dt. 10-01-2019
14	Ext.5/1	Signature of P.W6 over the seizure list dt. 10-01-2019
15	Ext.6	Post Mortem examination report
16.	Ext. 7	Formal FIR
17.	Ext.7 A	Written complaint dated 20.01.2019
18.	Ext.8	The original and photocopy of birth certificate
19.	Ext.9	Rough sketch map with index
20	Ext.10	Four photographs

B. Defence Exhibits: NIL

Sr. No.	Exhibit No.	Description

C. Court exhibits : NIL

Sr. No.	Exhibit No.	Description

D. Materials objects : NIL

Sr. No.	Exhibit No.	Description

J U D G M E N T

FACT OF THE CASE:

1. The instant case was initiated on the basis of a missing diary lodged on 26-12-2018 by the mother of the victim girl stating that her minor daughter aged about 14 years was missing since 10-12-2018 and that her daughter had started from her house to go to the school but she did not return and that she was not traceable.
2. Subsequently another complaint was filed on 20-01-2019 and which was diarized at the Habibpur P.S in the General Diary having Entry No. 694 dated 20-01-2019 wherein it was alleged that the accused Gopu Mandal had enticed her 14 year old daughter and had taken her away to Bengaluru on 10-12-2018 and had smeared vermilion on the head of her daughter and established sexual relationship with her daughter. That when they searched for her daughter this fact was unearthed and her daughter had stated this fact to her. That the accused had further disclosed to the victim that he was married and he had a child. That subsequently, the victim died and it has been alleged that the accused had abetted the death of the victim.
3. That on the basis of the missing diary a specific case was initiated being Habibpur P.S Case NO. 460/2018 dated 26-12-2018 y/s 363 of IPC and no specific case was started on the basis of the complaint which was diarized on 20-01-2019.
4. The investigation of Habibpur P.S Case No. 406/2018 was endorsed to LSI Winee John Tamang and during investigation it transpired that this was a case under the Protection of Children from Sexual Offences Act, 2012 (hereinafter, referred to as the **POCSO Act**) and so the case was transferred to this court on 20.02.2019 and after completion of investigation charge sheet being no. 92/2019 dated 17-04-2019 was submitted u/s 363/365/305 of IPC and u/s 4 of POCSO Act against accused Gopal Mandal @ Gopinath.
5. Subsequently, after compliance of Section – 207 of the Cr.P.C, the case was taken into my own file.
6. Charge was framed U/S 363/366A/305 of IPC & U/S 6 of POCSO Act, 2012 alternatively u/s 376(2)(i)(n) of IPC against the accused person on 21-09-2019 and the charge so framed was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried and hence this trial.

7. POINTS FOR DETERMINATION

1. Did the accused person kidnap the minor daughter of the de facto complainant?
2. Did the accused person force or seduce the minor daughter of the de facto complainant to have illicit intercourse with any other person ?
3. Did the accused person abate the commission of suicide by the minor daughter of the de facto complainant ?
4. Did the accused person commit the offence of aggravated penetrative sexual intercourse with the minor girl of the de facto complainant?
5. Is the accused person guilty of the charge levelled against him?

EVIDENCE ON RECORD

8. P.W1, mother of the victim girl (hereinafter referred to as the V.G) has stated in her evidence that about 11 months ago one day her daughter went missing and over that issue she has lodged one complaint which was drafted as per her instruction and after knowing the content of the same she had put her signature. P.W1 has further stated that her daughter has been murdered by Gopi Mandal.
9. P.W1 has further stated that when she lodged the missing diary, she did not have any knowledge as to what actually happened to her daughter and her husband used to drive Lorry at Bengaluru in the State of Karnataka and after some days of lodging the missing diary, her husband rang her and told her that her daughter has been recovered from the place of work of accused Gopi Mandal at Bengaluru. The mother of the victim has further stated that her husband caught both her daughter and accused and took them to his house at Bengaluru and then her husband went out to meet his employer to seek leave so that he could bring back her daughter but in the meantime Gopi Mandal by exerting undue influence took away her daughter from the room of her husband along with Rs.30,000/- which was kept in the pocket of the shirt of her husband in the room. P.W1 has further stated that Gopi brought her daughter to Malda and in the meantime, on getting the news of recovery of her daughter, she along with her ailing mother went to Bengaluru and there she came to know that Gopi had taken her daughter to Malda and after three days, when she was at Bengaluru, she came to know that her daughter has died. P.W1 has further stated that actually her daughter was found hanging from a mango tree by local people and they informed her over phone and she

returned back immediately.

10. P.W1 has further stated that subsequently she was taken to the Ld. Magistrate by police and her statement was also recorded by the Ld. Magistrate where she put her signatures.
11. P.W1 has further stated that when her husband came to know that her daughter is with accused Gopi Mandal at Bengaluru at his work place, her husband went to the work place of Gopi Mandal and met his supervisor (thikadar) and the said supervisor told her husband that Gopi Mandal is already married and her daughter also came to know for the first time that Gopi Mandal is married since before. P.W1 has further stated that subsequently, she came to know that Gopi Mandal also kidnapped his present wife in the same manner and married her. It is her positive assertion that she can produce the school certificate of her daughter to prove her age and claimed that when her daughter died, her daughter was aged about 14 ½ years.
12. In her examination on recall P.W1 again stated that victim girl is her daughter and she is no more. She has also stated that accused Gopi Mandal has taken away her daughter to Bengaluru, thereafter married her, inflicted torture upon her, used to abused her and put vermilion on her forehead and she has lodged a complaint for the missing of her daughter in the year 2018. P.W1 has further stated that Gopu Mandal was already married and having a child and her daughter after return from Bengaluru has narrated her all those and after knowing the fact of previous marriage of Gopu Mandal, her daughter committed suicide. P.W1 has further stated that she has lodged the complaint with Habibpur police station after the death of her daughter against accused Gopu Mandal in the year 2019 and one person near the police station of Habibpur has written the complaint as per her instruction. The mother of the victim has further stated that the year of birth of her daughter is 2004 and she had produced the original birth certificate of her daughter.
13. P.W2 who is the grandmother of victim has stated in her evidence that the incident occurred in the year 2018 after Durgapuja. P.W2 has further stated that her grand daughter used to stay at her maternal grand mother's house at Harishchandrapur and victim was brought up there and after Durgapuja in the year 2018 the victim went to school and from where the victim was missing and she was informed over phone about this fact and her house is about 50 KM away from the house of the maternal grandfather's house of her grand

daughter. P.W2 has further stated that they searched for her grand daughter at the houses of their relatives but could not find the victim and in last part of 2018 one Dulal Mandal saw her grand daughter with Gopu in Bengaluru and he informed to father of her grand daughter and after knowing this, the father of victim recovered the victim and took the victim to his room.

14. P.W2 has further stated that the father of victim was a driver and after keeping the victim at his room he went to unload the vehicle and in the mean time Gopu after changing his dress fled away with victim to other place and after getting information about the death of the victim she went to Chanakhali and found the victim in a hanging condition in a mango tree. P.W2 has further stated that the police of Habibpur P.S went there, brought down the dead body and inquired about the matter and asked her about her relation with the deceased and asked her to put her signature but she put her LTI and she found that the victim had no flesh at some portion of her face and found the victim with jeans, pink churidar and pink orna and she claimed that at that relevant point of time, the victim was a student of class-VII at one school and at that time the victim was aged about 14 years and she admitted that did not know Gopu Mandal but she saw photograph of Gopu Mandal.

15. The P.W.3 being the relative of the victim has stated in his evidence that after Durgapuja victim went to house of her maternal grandmother's house in the year 2018 last part of 2018, from that house she was missing and when her whereabouts was not traced out, her mother lodged complaint before the police station and after that heard that Gopu Mandal took victim in Bengaluru and committed rape with her. P.W3 has further stated that though Gopu Mandal had his families like wife and children. P.W3 has further stated that the father of victim traced her out and took her in his room and the father of the victim being driver went for unloading after stopping vehicle at side of the road in the meantime the accused fled way with victim after wearing dress of father of victim. P.W3 has further stated that the father of victim was plying vehicle and afterwards they came to know that victim was murdered near Chandadighi and at bank of Chandadighi her dead body was found in hanging. P.W3 has further stated that police reached there and took dead body for examination and police obtained his signature and interrogated him and obtained LTI. P.W3 has further stated that at that time the victim was aged about 14 years.

16. P.W4 Dipak Adhikari has stated in his evidence that about 5/6 years back, the

V.G has committed suicide by hanging in a mango tree on the bank of Chana Dighi and on hearing the information like other villagers went there and found the V.G was hanging from the branch of the tree by her orna (vail) and he found her face was in defaced condition. P.W4 has further stated that he had heard that the V.G had a relation of love with accused Gopu Mandal but the accused Gopu Mandal was previously married.

17. P.W5 S.I Amarendranath Saha, being the I.O of this case has stated in his evidence that on 09-08-2019 I/C Habibpur P.S U.D Case No. 01/2019 dt. 09-1-2019 and he has been entrusted to inquiry the matter and accordingly he accompanying with constable no. 431 Ismail Hoque reached the P.O at about 4:00 PM and found the V.G hanging from mango tree. The I.O has further stated that the body of the V.G was brought from the tree in presence of the witnesses and local villagers including local women and held inquest and thereafter he collected photograph of the place and the dead body of the deceased by his own mobile phone and the inquest was held in presence of the local villagers keeping the decency and dignity of the women. The I.O has also stated that he prepared inquest report by him under his own handwriting and signature. P.W5 has further stated that during interrogation it has been learn that the VG was found missing and the dead body of the victim brought to the P.S and as per dead body challan, the body of the deceased was sent to the Morgue for P.M Examination which was prepared by him under his own handwriting and signature.
18. P.W5 has further stated that after P.M Examination, viscera, hair and nail of the deceased, and wearing apparel of the deceased has been produced before him and he has seized the same as per seizure list dt. 10-01-2019 which was prepared by him under his own handwriting and signature.
19. P.W6 constable 431 Md. Ismail Hoque has stated in his evidence that on 09-01-2019 he has escorted the dead body of the victim girl after holding inquest by S.I Amarendranath Saha and brought the dead body to MMCH from Chanadighi Pukur Par of Baidhyapur GP under P.S Habibpur. P.W6 has further stated that the dead body has been handed over to the doctor for PM and identified the dead body to the doctor.
20. P.W6 has further stated that the doctor handed over container containing viscera, nail, hair, one pink colour fulhata top and one jeans pant, black colour ganji and shoe of the V.G to him which he handed over to the I.O at 6:00/6:15 PM and the I.O has seized the same by preparing a seizure list dt. 10-01-2019.

P.W6 has further stated that the P.M of the V.G was held at MMCH.

21. P.W7 Dr. Asutosh Sarkar has stated in his evidence that he conducted P.M examination over the dead body of female girl aged 15 years on 10-01-2019 in connection with Habibpur P.S U.D Case No. 01/2019 dt. 09-01-2019, was identified by constable 431 Md. Ismail Hoque. P.W7 has further stated that on examination he has got the following findings and a moderately built female subject, rigor mortis present all over the body. Eyes closed, cornea hazy, pupil dilated and fixed on both sides, scalp hair 10" black, wearing apparels as per Inquest report gnawing present over the lower lip with chin and exposed the lower teeth with jaw over chin and Post Mortem in nature may be caused by some animal. Injuries:- one oblique non continuous ligature mark 1"x ½ " placed high up around neck with a gap of one and half inch between right mastoid and right angle of mandible, starting at a point 1" below, right angle of mandible 3" above supra external notch and 1" below the left angle of mandible, 1½" below the left mastoid and 3" below the external occipital protuberance and finally terminate 1" below the right mastoid. The skin under the ligature mark is farrowed abraded at places and parchmented. On dissection the subcutaneous tissue under the ligature mark is condensed hardened, whitened and glistening in appearance without any extravasation of blood in it. All the injuries shows evidence of vital reaction and no other injury except those described above could be detected even after careful dissection and examination under a hand lens. Preserved viscera in SSNACL with control. ii. Blood without preservative, iii. Nail cutting and scrapping, iv. Scalp hair, v. vaginal swab and smear, Preserve and sent to P.S for chemical examination.
22. P.W7 has further stated that in his Opinion death was due to the effect of hanging as noted above ante mortem in nature further opinion if any will be given after receipt of chemical examination report which was prepared his own handwriting and signature with seal. He has further stated that the death of the deceased was within 12-36 hours of P.M.
23. P.W8 being the father of the victim has stated in his evidence that the complainant is his wife and she had lodged complaint with Habibpur Police Station and the complaint was lodged as his daughter was found missing and his wife lodged the complaint on 10.12.2018. P.W8 has further stated that he used to work as a driver at Bengaluru and his wife was with him and his daughter was found missing 16 days prior to lodging of the complainant and

his wife returned back from Bengaluru and lodged the missing complaint and that his daughter used to reside with his mother-in-law to look-after his mother in law and used to study by staying there at Harishchandrapur under PS Habibpur. P.W8 has further stated that his daughter went out from house to attend school at about 1 p.m. and was found missing thereafter and at that relevant point of time he was at Bengaluru and his mother-in-law informed him over phone that his daughter was found missing and his wife returned back after 5/6 days.

24. P.W8 has further stated that the complaint was lodged after 16 days of the missing of his daughter and after 3-4 days of lodging of the complaint by his wife, he came to know from Dulal Mandal, his maternal uncle by village relation, that Dulal Mondal had seen his daughter with Gopi Mandal and that he had already stated to his maternal uncle that his daughter was found missing. P.W8 has further stated that he instantly rushed to the spot and brought his daughter and Gopi Mandal to his (PW8's) room and asked them to stay and PW8 came out from his room to inform his (PW8's) employer but in the meantime accused Gopi Mandal, changed his own shirt and wore the shirt of PW8 and taking Rs. 30,000- from the room of PW8 fled away with the victim through the jungle from the back side door and he has seen his daughter having vermilion and bangle wearing on her body.

25. P.W8 has further stated that at that time his daughter was aged 14 years and accused Gopi Mandal was aged 25 years and he had rebuked the accused and accused used to work at Bengaluru as mason.

26. P.W8 has further stated that his daughter has died and after 11 days of her death, complaint was lodged and at that relevant point of time he was at Bengaluru and photographs of his daughter had been sent to his mobile.

27. P.W8 has further stated that the dead body of his daughter was found at a distance of about half kilometer away from the house of his mother-in-law in a mango tree in hanging condition with injuries in her body and his daughter fled away with Gopu Mandal and came to Malda by fleeing away from Bengaluru and after her return to Malda, his daughter came to know that accused Gopu Mandal was already married having his children and his daughter became frustrated after knowing the same and committed suicide or she has been killed.

28. P.W8 has further stated that on knowing death of his daughter, he returned

back to Malda after 3 /4 days from Bengaluru and visited the police station, but the IO of the case denied to hear him and at the time of the incident his daughter was aged about 14 years and was promoted to Class-VIII from Class-VII. He has alleged that during the pendency of this case his mother-in-law has expired and his wife resides at Malda alone and the accused person is threatening to compromise the matter by person and also by phone.

29. P.W9 Dulal Sarkar has stated that he does not have any knowledge about the incident.
30. P.W10 Inspector Pabitra Kr. Mahato has stated in his evidence that on 26-12-2018 he has received one complaint from the complainant, mother of the victim girl and the said written complaint has been treated as FIR and he has identified his endorsement over the written complaint for initiating Habibpur P.S Case No. 460/2018 dt. 26-12-2018 u/s 363 of IPC. P.W10 has further stated that the instant case has been endorsed to LSI Winee Thomang for investigation.
31. P.W11 Winee John Tamang being the second officer has stated in her evidence that on 26-12-2018 S.I Pabitra Kr. Mahato has received the written complaint and recorded the case as R.O. P.W11 has further stated that R.O S.I Pabitra Kr. Mahato has endorsed to her the case for investigation and during the course of investigation she has examined the complainant who has duly corroborated the FIR and accordingly no statement has been recorded u/s 161 statement and in the FIR it has been mentioned that the minor daughter of the complainant has been kidnapped on her way to school and found missing and she has collected birth certificate of the victim girl and according to the birth certificate the date of birth of the victim girl was 16-06-2004.
32. P.W11 has further stated that she has visited the P.O, prepared rough sketch map with index and he has examined the available witnesses and recorded her statement u/s 161 of cr. P.C.
33. P.W11 has further stated that she has put the information of missing of the victim girl in the Missing Portal and the victim girl has committed suicide on 09-01-2019 and accordingly Inquest was done by S.I Amarendranath Saha of Habibpur and she has collected such Inquest report and dead body challan and she collected four copies of photographs from S.I Amarendranath Saha taken by him in his mobile.

34. P.W11 has further stated that S.I Amarendranath Saha has started UD Case No. 01/2019 dt. 09-01-2019 for unnatural death of the victim girl and she has examined and recorded statement of S.I Amarendranath Saha and she has filled up M form in the Recovery Portal and she has further visited the P.O and recorded statement of eye witnesses from the place where the V.G has committed suicide namely Dipak Adhikari, Chandan Saha, Probhash Kirtoniya and Laxmi Mandal. P.W11 has further stated that she has seized the viscera and the wearing apparel of the victim girl as per seizure list dt. 10-01-2019 and the articles has been produced by constable Md. Ismail Hoque.
35. P.W11 has further stated that she has received the second complaint lodged by the complainant to the effect that accused Gopu Mandal after commission of suicide of the victim girl and she has mentioned the CD about the second complaint lodged by the complainant and accordingly G.D.E No. 694 dt. 20-01-2019 has been registered with Habibpur P.S and she has further examined the complainant and recorded his statement u/s 161 of Cr. P.C and she has made a prayer for recording of statement u/s 164 of Cr. P.C of the complainant.
36. P.W11 has further stated that she has held raid at the P.O and arrested the accused Gopu Mandal on 21-01-2019 and forwarded him to the Ld. Court on 22-01-2019 and she has made a prayer for capability test of the accused and she has also made a prayer for adding section 365/305 of IPC and under section 4 of POCSO Act. P.W11 has further stated that the statement of the complainant was recorded by the Ld. Magistrate u/s 164 of Cr. P.C and she has collected P.M report from MMCH on 19-02-2019. P.W11 has further stated that on 20-02-2019 in view of her order of transfer made over the case to the then I/C of Habibpur P.S.
37. P.W12 S.I Suman Kumar Singha has stated in his evidence that on 20-02-2019 S.I Sunil Kumar Deb was attached to the same P.S and he was at Habibpur P.S from 20-02-2019 to 28-09-2020. S.I Sunil Kumar Deb was known to her and he has died.
38. P.W12 S.I Suman Kumar Singha has further stated he has brought the relevant papers duly authenticated by I/C Habibpur P.S containing death certificate of S.I Sunil Kumar Deb and lists of officers posted at Habibpur from 01-01-2019 to 01-05-2019.
39. P.W12 S.I Suman Kumar Singha has further stated on 20-02-2019 the CD was

handed over to S.I Sunil Kumar Deb and he knows his handwriting and signature and the running page no. 31 to 35 of the CD has been written by S.I Sunil Kumar Deb under his handwriting.

40. P.W12 S.I Suman Kumar Singha has further stated that he filed the charge sheet being Habibpur P.S Charge Sheet no. 92/2019 dt. 17-04-2019 u/s 363/365/305 of IPC r/w sec. 4 of POCSO Act against accused Gopu Mandal @ Gopinath Mandal has been submitted by S.I Sunil Kr Deb on 17-04-2019 under his handwriting and signature and forwarded by the then I/C Habibpur Tridib Pramanik and the handwriting and signature of S.I Sunil Kr. Deb are well known to him and he came to depose in view of the written direction of I/C Habibpur P.S and he has filed the relevant paper before the court.

ARGUMENT FORWARDED BY THE PARTIES

41. By the Prosecution

The Learned Advocate on behalf of the prosecution heavily relied on section 29 of the POCSO Act and stated that it is for the accused to prove that he is innocent. He argued that the victim was last seen with the accused and the father of the victim had seen the victim and the accused together and the father of the victim had recovered the victim from Bengaluru. He relied on Explanation 1¹ of section 107 of the IPC and argued that the accused concealed the fact that he was already married and had a child and got the victim to follow him to Bengaluru and at Bengaluru pretended to marry the victim. He canvasses on the point that concealment of the fact of marriage by the accused clearly comes within the purview of Explanation 1 of Section 107 of the IPC and thus, the accused has abetted the commission of suicide by the victim. His next limb of argument is that hymen may not be ruptured even if there is intercourse and he has relied on some book on medical jurisprudence (name of the book or author's name not supplied only photocopy of one page has been supplied to this Court.) He has vehemently argued on the point that since the accused and the victim were last seen together at Bengaluru, and since the accused failed to prove his innocence as per the provisions of Section 29 of the POCSO Act, so the accused must be awarded the maximum sentence.

¹ Explanation 1.— A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

42. By the Defence

The Learned Advocate on behalf of the defence vehemently argued on the point that Section 29 of the POCSO Act would come into play only when the prosecution has been able to prove its own case. He argued that since the prosecution has not been able to prove its own case there is no burden on the defence to prove anything. He argued that the victim was allegedly recovered from Bengaluru but there is no witness to the recovery. Not a single independent witness saw the accused and the victim together at Bengaluru. The IO never visited Bengaluru to find out if at all the victim was recovered from Bengaluru or not. He harped on the point that there is no proof that the accused and the victim were last seen together. His plea is that the accused has been falsely implicated and he therefore prays for acquittal of this accused.

JUDGMENTS RELIED ON BY THE PARTIES

43. By the Prosecution

1. 2016 Cri.L.J 3449²
2. 1962(2) Cri.L.J 751 (Vol. 65, CN. 235)³
3. 1962 (2) Cri.L.J 761 (Vol. 65 C.N. 239)⁴

44. By the Defence

Defence did not rely on any judgment.

45. By the Court

1. [Sahid Hossain Biswas Vs. State of West Bengal](#)⁵ (Calcutta High Court Paragraph 84 of this Judgment)
2. [Navin Dhaniram Baraiye v State of Maharashtra](#)⁶
3. [Amol Dudhram Barsagade. vs. State of Maharashtra](#)⁷

DECISION WITH REASON

2 Nankun Naik V State of Orissa , Orissa High Court
 3 A. W Khan V State
 4 Dagadu Bonder V Babusingh Gappaisingh (Madhya Pradesh High Court)
 5 C.R.A. No.736 of 2016 With C.R.A.N. No.1035 of 2017
 6 AIRONLINE 2018 BOM 986
 7 CRIMINAL APPEAL NO.600 OF 2017

46. **Points No.1, 2, 3, 4 and 5:** All these points being interrelated are taken up together for discussion for the sake of brevity of discussion and to avoid unnecessary repetition.

47. This case was initiated on the basis of a missing diary which was subsequently treated as FIR and a specific police case was started being Habibpur P.S Case No. 460/2018 dated 26-12-2018 but after the death of the victim the matter was informed to the P.S and another G.D.E was made by Entry No. 694 dated 20-01-2019. It will not be out of place to mention here that this G.D. Entry was not produced before the court along with the charge sheet but was subsequently exhibited on 14-01-2025 when the de facto complainant was examined on re-call.

48. From the evidence of P.W1 I find that she was examined twice once on 13-11-2019 and again on recall on 14-01-2025. On 13-11-2019 P.W1 who is the de facto complainant of this case stated that *“my husband used to drive lorry at Bangaluru in the state of Karnataka. After some days of lodging the missing diary my husband rang me and told me that my daughter has been recovered from the place of work of accused Gopi Mandal at Bangaluru. My husband caught both my daughter and accused and took them to his house at Bangluru. Then my husband went out to meet his employer to seek leave so that he can bring back my daughter. But in the mean time Gopi Mandal by exerting undue influence took away my daughter from the room of my husband along with Rs. 30,000/- kept in the pocket of shirt of my husband lying in the room. Gopi brought my daughter to Malda.”* On this day, she was cross examined in full and discharged and her evidence was concluded.

49. Subsequently, again she was examined in chief on 14-01-2025 on recall, that is after five years and in her evidence on 14-01-2025 she further developed her case and she stated that *“accused Gopi Mandal has taken away my daughter to Bengaluru thereafter married her, inflicted torture upon her, used to abuse her and put vermilion on her forehead.....my daughter after return from Bengaluru had narrated me all those. After knowing the fact of previous marriage of Gopu Mandal, my daughter committed suicide.”* So, I find that in her evidence which was recorded on 13-11-2019 there was

no mention of the facts which she narrated on 14-01-2025. The original G.D.E register was not produced before the court.

50. P.W2 who is the grand mother of the victim she stated that Dulal Mandal informed the father of the victim that he saw the victim with Gopu at Bengaluru. But P.W1 did not state this fact. P.W8 the father of the victim has also stated that Dulal Mandal had informed him that Dulal saw the victim and the accused at Bengaluru. But prosecution did not examine any Dulal Mandal but prosecution examined one Dulal Sarkar as P.W9 but he was not favourable to the prosecution.

51. P.W3 who is the relative of the victim goes a step further and states that he came to know that the victim was murdered.

52. P.W4 stated that he heard that the victim had a love affair with the accused.

53. P.W5, P.W6, P.W7, P.W10, P.W11 and P.W12 are all official witnesses (medical and police personnel).

54. To sum up, P.W1 is the mother and P.W8 is the father of the victim. It is the prosecution case that the victim went missing and P.W1 lodged a missing diary to that effect and subsequently P.W8 the father of the victim detected the victim at Bengaluru allegedly along with the accused and took both of them that is the victim and the accused to his house but both of them managed to escape and subsequently the victim was found hanging from a tree at Malda. Now, let me tally the evidence of P.W1 and P.W8. P.W8 stated that *"I used to work as driver and my wife was with me. My daughter was found missing 16 days prior to lodging of the complaint and my wife returned back from Bengaluru and lodged the missing diary"*. In her evidence P.W1 did not state that she was at Bengaluru when her daughter went missing. Her version is *"My husband used to drive lorry at Bengaluru in the state of Karnataka"*. P.W1 did not even whisper that she was at Bengaluru when her daughter went missing. Rather in her statement recorded u/s 164 of Cr. P.C, I find that she stated that *"amar meye jokhon hariye jaye tokhon amar maa ashustha chhilo. Ami tokhon amar baper barite chhilam"* (when my daughter went missing at that relevant point of time my mother was sick and I

was at my paternal home). So from Exbt.-2 (statement of P.W1 recorded u/s 164 of Cr. P.C) I find that when her daughter went missing P.W1 was at her paternal home but P.W8 stated in his evidence that P.W1 was at Bengaluru. Nowhere in her evidence before this Court did P.W1 say that at the time when her daughter went missing she was at Bengaluru and that she returned from Bengaluru and lodged this complaint. So, statements of PW1 and PW8 are absolutely contradictory to each other. In my opinion, this story of P.W1 staying at Bengaluru was incorporated subsequently only to explain the delay in lodging the missing diary since there was 16 days delay in lodging the missing diary. Hence, in my considered view, there is no explanation as to the cause of delay in lodging the missing diary which was treated as FIR.

55. P.W1 stated on 13.11.2019 that *“my husband rang me and told me that my daughter has been recovered from the place of work of accused Gopu Mandal at Bengaluru..... In the mean time on getting the news of recovery of my daughter, I along with my ailing mother went to Bengaluru and there I came to know that Gopi had taken my daughter to Malda”*. On 14-01-2025 P.W1 stated in her evidence *“..... and my daughter after return from Bengaluru has narrated me all those”*. Her own statements are contradictory because on 13-11-2019 P.W1 stated that on receiving the news that her husband had recovered her daughter at Bengaluru P.W1 went to Bengaluru but at Bengaluru P.W1 found that her daughter had already gone to Malda and when P.W1 was at Bengaluru she received an information that her daughter had expired. So, when did P.W1 meet her daughter and when did her daughter narrate anything to her. So, I am not inclined to rely on the statement of P.W1 that accused had taken her daughter to Bengaluru and thereafter married her daughter and subjected her daughter to torture and had abused her daughter and had put vermilion on the forehead of her daughter.

56. Surprisingly, I find, P.W1 stated in her cross examination *“ I have not named the accused in my statement u/s 164 of Cr.P.C as till then I did not know his name”*. So, from the evidence of P.W1 recorded on 13.11.2019 I find that she did not state the name of the accused in her statement recorded u/s 164 of Cr. P.C. But, in her evidence recorded on 14.01.2025 I find she stated that her daughter

narrated everything to her. If her daughter had narrated everything to her then why did she not know the name of the accused. The question which arises in the mind of a prudent man is when did PW1 meet her daughter? When did PW1 get the opportunity to interact with the victim? PW1 specifically stated that after her daughter returned from Bengaluru her daughter had narrated everything to her, but from her own statement it is crystal clear that when her daughter returned from Bengaluru at that relevant point of time PW1 was at Bengaluru and PW1 returned only after the death of her daughter. In my considered view, if PW1 had interacted with the victim then she would have surely known the name of the accused and would have divulged the name of the accused when her statement was recorded under Section 164 of the Cr.P.C. No other witness that is PW2 the grandmother of the victim or PW8 the father of the victim corroborated PW1 in this aspect that PW1 had interacted with the victim after her alleged recovery from Bengaluru. In her statement recorded under section 164 of the Cr.P.C also, PW1 did not say that she had interacted with the victim after her alleged recovery from Bengaluru. So, I am not inclined to believe that PW1 had interacted with the victim or that PW1 had heard anything from the victim after her alleged recovery.

57. In her cross-examination recorded on 13.11.2019, **P.W1** stated that *“I have seen the accused for the first time at Habibpur P.S after his arrest”* again she stated that *“.....also had shown the pictures sent to my Mobile phone by my husband”* ie she had shown the pictures of the accused and the victim to the police. If she had seen the picture of the accused in the Mobile phone then why did she say that she saw the accused for the first time at Habibpur P.S. So, in my considered view, in this respect also the statement of P.W1 is absolutely contradictory to her own statement. That apart, PW8 did not say that he had sent any picture to PW1 over mobile phone.

58. Not a single independent witness deposed to the effect that the victim was recovered from Bengaluru. If the victim was recovered by PW8 then surely there would be some witnesses to the alleged recovery. PW8 admitted during cross-examination that he did not inform the matter to the police at Bengaluru. If, PW8 had recovered his daughter and the accused again took away his daughter then PW8 should have informed the matter to the police at Bengaluru. No reason

has been assigned by PW8 as to why the said matter was not informed to the police at Bengaluru.

59. The victim went missing on 10.12.18, the matter was reported to the police after sixteen days on 26.12.1018, the victim was allegedly recovered at Bengaluru after 2-3 days of lodging the missing diary and again the accused allegedly managed to take away the victim but the matter was not reported to the Bengaluru police or the police at Malda, the victim committed suicide on 8.1.19 or 9.1.19 and the matter was formally informed to the police after 11-12 days on 20.01.2019. None of the delays have been explained.

60. PW1 stated that *“In the meantime on getting news of recovery of my daughter, I along with my ailing mother went to Bengaluru and there I came to know that Gopi had taken my daughter to Malda”* So, from the statement of PW1 it is evident that she did not know before leaving Malda or on her way to Bengaluru that the accused had taken away her daughter again from the custody of PW8. According to PW8 after receiving the news that Dulal Mandal had seen his daughter he immediately went to the spot and in this respect he stated *“I instantly rushed to the spot and brought my daughter and Gopi Mandal to my room and asked them to stay and I came out of my room to inform my employer. In the meantime accused Gopi Mandal brought my daughter wearing my shirt, taking Rs.30,000/- from my room and fled away with my daughter through the jungle from the back side door”*. So, allegedly, the victim remained in the custody of PW8 at Bengaluru only for few minutes or maybe an hour or so. If PW8 had informed PW1 about the recovery of the daughter then what prevented PW8 to inform PW1 about the missing of his daughter once again? In her cross-examination PW1 has stated that she had shown the pictures of the accused to the police at Malda before leaving for Bengaluru. Then why the fact of the accused again taking away the victim was not informed to the police at Malda?

61. It is the cardinal principle of Law that there is no place for surmise and conjecture in a criminal trail and the prosecution is not absolved of its duty to prove its case relying on section 29 of the POCSO Act and in this respect I would rely on the most celebrated judgment of the Calcutta High Court in [Sahid Hossain Biswas Vs.](#)

State of West Bengal⁸ where the Hon'ble High Court at Calcutta observe: I am not unmindful of the statutory presumption available to the prosecution in a case under the POCSO Act, 2012. Section 29 of the said Act reads as follows:-

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

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

Section 3:-

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

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

Section 4:- "Shall presume".--Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."

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

Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross-examination or by exposing the patent absurdities or

inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case, eg. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to mechanically accept the mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution, howsoever, patently absurd or inherently improbable it may be.

62. In *Navin Dhaniram Baraiye v State of Maharashtra* the Hon'ble Bombay High Court observed: The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in [Articles 14](#) and [21](#) of the Constitution. (Vide: [Hiten P. Dalal v. Bratindranath Banerjee](#), (2001) 6 SCC 16;

63. In *Amol Dudhram Barsagade. vs. State of Maharashtra* Bombay High Court observed : The submission that the statutory presumption under [Section 29](#) of the POCSO Act is absolute, must be rejected, if the suggestion is that even if foundational facts are not established, the prosecution can invoke the statutory presumption. Such an interpretation of [Section 29](#) of the POCSO Act would render the said provision vulnerable to the vice of unconstitutionality. The statutory presumption would stand activated only if the prosecution proves the foundational facts, and then, even if the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond reasonable doubt. Suffice it if the accused is in a position to create a serious doubt about the veracity of the prosecution case or the accused brings on record material to render the prosecution version highly improbable."

64. So, borrowing wisdom from the above noted judgments it may

be concluded that in order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary, unfortunately, in the case in hand prosecution has failed to establish the foundational facts. When prosecution has failed to prove the foundational facts then the statutory presumption does not come into play. In this instant case the accused has create a serious doubt about the veracity of the prosecution case and the accused has brought on record materials to render the prosecution version highly improbable.

65. Learned Spl. PP-in-charge has relied on 2016 Cri.L.J 3449 to show that delay in lodging the FIR can be condoned if the parents of the victim was out of station but in the case in hand I have already in my [previous discussion](#) (Paragraph 77) that the delay has not been explained that there is no proof that both the parents were out of station. That apart, even if for argument sake, without admitting, if it is presumed that both the parents were out of station then PW1 admitted in her cross-examination that she did not intimate the police for the first 15-16 days of the missing of her daughter as she was searching for her daughter. In her explanation during her cross-examination she did not say that she was out of station her explanation for delay was that she was searching for her daughter. So, the prosecution does not find any support from this judgment.

66. Prosecution next relied on 1962 (2) Cri.L.J 761 (Vol. 65 C.N. 239)⁹ to show that non rupture of hymen is not conclusive of the fact that there was no sexual intercourse but in this case in hand prosecution has not been able to prove that the victim was with accused, in the custody of the accused or was last seen together with the accused. In the given premises the question of sexual intercourse does not arise at all and as such the prosecution does not find any support from this judgment either.

67. Thus, taking a bird's eye view of my whole discussion, I do hold that the prosecution has miserably failed to bring home the charge levelled against the accused person and as a corollary, the

accused person merits acquittal.

Hence, it is

ORDERED

that accused person **A1** namely Gopal Mandal @ Gopinath @ Gopu is found not guilty of the charge labeled against him and he is acquitted as per the provision of section 235(1) of the Code of Criminal Procedure.

The accused person be discharged from his bail bond(s), if any; and be set at liberty forthwith but the accused person shall remain on fresh bail bond of ₹1,000/- with one surety for six months from this day as per the provisions of Section – 437A of Cr.P.C and which bail bond(s) shall be accepted subject to the satisfaction of the Ld. CJM Malda with direction to appear before the Higher Court as and when such Court issues notice in respect of any appeal or petition filed against the Judgment and if, he fails to appear the bond shall stand forfeited u/s.446 of Cr.P.C.

The seized *Alamat*, if any, be destroyed after the period of appeal.

Let a copy of this judgment be sent to District Magistrate, Malda as per the provisions of Section 365 of the Code of Criminal Procedure.

Let a *pdf* copy of this judgment be sent to the Chairperson, DLSA, Malda through official mail with a request to inform the victim of his/her right to prefer an appeal availing Legal Aid.

Dictated and corrected by

***Judge, Special Court,
ADJ 2nd Court, Malda.***

***Judge, Special Court,
ADJ 2nd Court, Malda.***