

**HIGH COURT OF TRIPURA
AGARTALA
Crl.A.(J)No.10 of 2022**

Shri Amit Sarkar,
son of late Ratan Sarkar,
resident of Tantipara, Natunnagar,
P.S. Airport, District-West Tripura

.....Appellant(s)

Versus

The State of Tripura

.....Respondent(s)

For Appellant(s)	:	None.
For Respondent(s)	:	Mr. R. Datta, P.P.
Date of Hearing &		
Judgment and Order :		26.04.2023
Whether fit for reporting	:	NO

HON'BLE MR. JUSTICE T. AMARNATH GOUD

Judgment & Order(Oral)

Heard Mr. R. Datta, learned P.P. appearing for the State. There is no representation for the appellant when the matter is taken up.

2. This is an appeal under Section 374 of the Cr.P.C. against the judgment dated 19.03.2022 passed by the learned Special Judge(POCSO), Agartala, West Tripura in Case No. Special (POCSO)10 of 2018 sentencing the appellant to suffer rigorous imprisonment of four years along with a fine of Rs.2000/- for the offence punishable under Section 8 of the POCSO Act.

3. The brief fact of the case is that one Smt. Uma Das submitted a written complaint to the effect that on 02.04.2017 at about 2.00 p.m. in the afternoon, when the informant was engaged in her work as a labourer in a building nearby Madhya Bhubanban and at that time, her minor victim daughter was playing in the nearby locality, thereupon, the accused namely Amit Sarkar

took her to a nearby jungle and forcefully committed sexual assault upon her. On hearing the hue and cry of the said minor victim girl, the local people rushed to the spot and rescued the victim from the clutches of the said accused. Hence, this present appeal. On receipt of the said written complaint submitted by the complainant, the Officer-in-Charge of West Agartala Woman Police Station treated as FIR and registered the case vide No.2017/WAW/027 dated 02.04.2017 under Section 341/376(2)(i) of IPC and under Section 4 of the Protection of Children from Sexual Offences Act, 2012.

4. The police took up the investigation on the basis of the FIR as mentioned above and during the investigation, the Investigating Officer visited the place of occurrence situated Chandinamura, at about 5 kms. north from the PS in an isolated jungle and prepared the hand sketch map of the place of occurrence with separate index. Thereafter, the IO examined all the available witnesses and recorded their statement under Section 161 of the Cr.P.C. Subsequently, she arrested the accused Amit Sarkar and produced him before the Court. She also sent the victim to the Learned Court for recording her statement under Section 164(5) of the Cr.P.C. She also arranged for medical examination of the victim and potency test of the accused person. During the course of investigation, the IO seized one Xerox copy of school certificate of the victim. During investigation, the IO also seized various samples of vaginal swab, scalp hair, nail cut sample, blood sample, saliva and auxiliary hair of the victim by preparing a seizure list. The IO sent all the seized samples for forensic examination and thereupon, collected SFSL examination report. Further, she also collected the medical examination reports of the victim, as well as, the accused.

On completion of the investigation, the IO prima facie found sufficient material against the accused and filed charge sheet vide West Agartala Woman P.S. C/S No.91/2017, dated 21.12.2017 under Sections 341/376(2)(i) of the IPC read with Section 4 of the POCSO Act against the accused person namely Amit Sarkar for facing trial in the open court of law for the ends of justice.

5. During trial, upon hearing and submissions of parties and taking into consideration the record and documents submitted therewith, the Court of learned Special Judge(POCSO), Agartala, West Tripura framed charge against the accused person namely Amit Sarkar under Section 8 of the POCSO Act. The contents of charge was read over and explained to the accused to which he pleaded not and claimed for trial.

6. To prove the charge, prosecution has examined as many as thirteen witnesses and they were cross examined by the defence and thereafter, the accused were examined under Section 313 of the Cr.P.C. and after hearing the argument of both sides, the learned Judge by his judgment dated 19.03.2022 sentencing the accused persons Sri Amit Sarkar to suffer rigorous imprisonment for a term of four years and to pay a fine of Rs.2,000/- for the offence committed under Section 8 of the POCSO Act.

7. Being aggrieved and dissatisfied with the order of conviction and sentence passed by the Trial Court, the appellant begs to prefer this appeal.

8. According to the learned counsel who has appeared on behalf of the accused persons has ventilated his grievances stating that the prosecution has miserably failed to prove its case beyond reasonable doubt. The allegations leveled against the said accused persons are not only false but vexatious. During

the course of argument in the court below the counsel has stated that the victim [PW-1] is the vital witness in the instant case but, she has not been cross-examined and therefore, her deposition has no evidentiary value. Also PW-2 who is the informant, as well as the mother of the victim is not a reliable witness, as she has not witnessed the actual incident. Hence, she cannot be relied upon. PW-3, PW-4 and PW-5 are independent witnesses and none of them have stated anything incriminating the accused person. PW-7 being MO has also not disclosed anything inculcating the accused in his report. Again PW-8 [SFSL Expert] has also not disclosed anything incriminating the accused in his report. Further, PW-9 and PW-11 being the seizure witnesses have also not stated anything against the accused. PW-12, the scribe of ejahar has only reduced the oral version of the informant into writing and is not himself a direct witness of the alleged incident and therefore, he has also not stated anything inculcating and indicating the accused. Therefore, the counsel has categorically stated that the evidences available on record is not very clear and convincing to prove the guilt of the accused beyond any shadow of doubt. As such, there is no ingredients of Section 8 of the POCSO Act against the aforesaid accused person. Thus, it is visible from the evidence appearing on record that the prosecution has fabricated a false story to inculcate the accused with some ulterior motive, without any rhyme and reason. Therefore, the prosecution has miserably failed to discharge its burden of proof beyond reasonable doubt.

9. According to the counsel for the appellant, the Court below has miserably failed that PW-7 and PW-8 did not prove the actual age of the alleged victim which can be corroborated with any documentary evidence. The

prosecution has failed to bring on record that whether PW-12 was available on that day in the alleged occurrence where PW-12 admitted in the cross-examination while he was writing the FIR not in accordance with the version of PW-2 and he was not aware who obtained the thumb impression of the informant in the FIR. So the basis of investigation to find out the actual incident was absent, but the Court below without applying his mind passed the alleged sentence against the appellant which ought to be set aside for the fair ends of justice. The evidence where the alleged incident as allegedly stated in the abandoned house but the persons residing within the boundary of the abandoned room were examined but deposed in cross-examination that no such foul incident was took place by which the appellant could be convicted.

10. PW-1, who is the victim in the instant case, deposed that her mother Uma Das laid one case against one Amit Sarkar of Village-Durjoynagar. She has stated that the alleged incident took place on 2nd of April at about 2 p.m. in the afternoon but she would not be able to say in which year of April the alleged incident took place. The victim continued to depose that on that day, on the relevant point of time, she was playing in a ground nearby the resident of her grandmother namely Mina Rani Sutradhar. PW-1 again deposed that, when she was playing that time the accused Amit Sarkar suddenly appeared therein and forcefully took her in an abandoned hut nearby the said ground at Madhya Bhubanban and she tried to resist herself but failed. This witness also deposed that, thereafter, the accused in the said abandoned hut committed sexual assault upon her putting her underwear(pant) off and she raised shouting when the neighbouring persons there and the said Amit Sarkar absconded. The victim

duly indentified the accused Amit Sarkar present in the court by recognition of his face. The cross-examination, of the victim was reserved on the prayer of the learned counsel for the accused as he was feeling unwell at that time.

11. PW-2, being the mother of the victim deposed that she is the informant of this case and one Subal Sutradhar of Madhya Bhubanban has scribed the FIR on her behalf. After scribing the same, he read over the contents of FIR to the informant and on satisfaction of the contents of the said FIR, she gave her RTI (Right Thumb Impression) on the bottom of the ejahar. PW-2 contined to depose that, the alleged incident took place on 02.04.2017 at about 2 p.m., when she was busy for work as a labourer in a building nearby the alleged ground at Madhya Bhubanban. She has further stated that at that relevant point of time when she was working that time some of the neighbouring persons came to her and informed her that the accused Amit Sarkar committed sexual assault upon her daughter when she was playing in the ground taking her to a nearby abandoned hut. PW-2 has further deposed that the neighbouring persons also detained the said Amit Sarkar and she was also enquired the matter from her daughter when she narrated the incident to her stating that when she was playing that time, the accused forcibly took the victim to a nearby abandoned hut and committed sexual assault upon her by putting her underwear (Pant) off and when she raised shouting the accused tried to flee away but failed as the neighbouring persons detained him. This witness again deposed that thereafter, the said Amit Sarkar was handed over to a policy by the local people and hence, she laid the FIR to OC West Agartala P.S. on the same day. She has also stated that she had given her RTI on the bottom of the

ejahar. Proceeding further, PW-2 deposed that she was not known to the accused earlier but on the date of alleged occurrence, she could know the accused. This witness duly indentified that the accused present in the dock, in the court. PW-2 has further stated that her victim daughter was presently married and leading her conjugal life peacefully, for which neither the victim agreed nor this witness was in a position to bring her before the Court. When confronted with cross-examination, PW-2 admitted the fact that, she did not witness the actual incident. In her cross she has stated that her husband was with her and was in a stable condition. She has also denied the fact that her daughter had an affair with somebody else and failing in that relationship, she lodged the present case falsely against the accused. This witness further stated that the alleged PO was adjacent to their local Ward Office where people remain present throughout the day. PW-2 also admitted the fact that she had stated nothing about the Ward Office in her deposition. She has also denied the fact that she had lodged a false case against the accused.

12. PW-3 deposed that the alleged incident took place on 02.04.2017. This witness continued to depose that he was the resident of West Bhubanban and on the back side of his homestead there was one abandoned building. He has further deposed that on the alleged day at about 2/2.30 p.m. after taking his lunch, he went to the back side of his house for attending natural calls and that time he had heard some crying from that abandoned building. Thereafter, he immediately called one Basanti Bhattacharjee, his neighbour and after that, he along with said Basanti Bhattacharjee and other persons proceeded towards the abandoned building to know the matter and on arrival therein, they had

found the daughter of Ranjit Das therein along with the alleged accused of this case. PW-3 has further deposed that the accused was not known to them and on being asked the said daughter of Ranjit Das informed them that the accused committed rape upon her. Proceeding further this witness deposed that, at the time of incident the accused tried to escape from the place of occurrence but he was detained by the neighbouring persons. Subsequently, police was informed and accordingly, police came and after that the accused was handed over to the police. This witness identified the accused in the dock by recognition of his face. During his cross-examination, PW-3 deposed that one Senior dada of their area informed the police and police on arrival therein inquired the matter from them and noted down their name and address but the police did not individually ask him anything on that relevant point of time and even police later on also did not ask him anything. This witness denied that fact that on 02.04.2017 he did not hear any cry from the abandoned building situated to the back side of his house and on their arrival therein, the victim of this case did not divulge anything showing involvement of the accused with the alleged offence.

13. PW-4 has deposed that he is the inhabitant of Chandinamura and on 02.04.2017, in the noon while he was returning back to his home from town and when he arrived at Chandinamura nearby Ward Office No.2, at that time, he noticed a huge gathering. This witness noticed that a girl of tender age and a boy were surrendered by that huge gathering and he could know that local people handed over that boy to the policy and subsequently, this witness returned back to his home. When PW-4 confronted with cross-examination, he

has stated that when he arrived to that place, he did not notice any police personnel.

14. PW-5 has deposed that she was running one tailoring business at her home and on 02.04.2017 she was at her home. She has stated that at about 2/2.30 p.m., one Chayan Deb came to her house stating that on the opposite side of her house in an abandoned building he has found one male and a girl. Accordingly, after hearing the information, this witness rushed towards this spot and found the girl aged about 14/15 years. PW-5 has further stated that the name of the victim girl who belongs to Madhya Bhubaneswar and she found that boy in a standing condition in front of Ward Office. Thereafter, within a while, huge persons appeared therein and after some time police came and brought that boy with them. Subsequently, this witness returned back to her house and this witness identified the said boy. In the course of cross-examination, PW-5 deposed that Daroga Babu did not examine her in connection with this case, but Daroga Babu noted down her name and address. PW-5 has stated that she did not know the residence of the victim. She denied the fact that the girl was not the age of 14/15 years.

15. PW-6 deposed that on 02.04.2017 at about 2/2.30 p.m. when he had returned back to home that time he could hear from his wife that in front of their house in an abandoned building a girl of tender age and a boy were found. This witness also stated that he cannot say anything furthermore about this case. During cross-examination, PW-6 denied the fact that on that day, he did not hear anything from his wife as stated by him in his examination-in-chief.

16. PW-7 deposed that on 02.04.2017 he was attached to IGM Hospital as a Medical Officer and on that day, he had examined one victim girl aged about 15 years who was brought to Hospital by police. He has also deposed that after examination, he did not find any sign of recent vaginal penetration or any other injury. PW-7 continued to depose that after that he had laid his report which bears his signature and seal. When confronted with cross-examination, PW-7 has stated that when the victim has produced that time no document was also produced to substantiate the actual age of the victim and for age determination, no paper was submitted before him by the police. He has also deposed that the age of the victim was mentioned as per her narration at the time of her examination.

17. PW-8 has deposed that on 18.04.2017 he was posted in Tripura State Forensic Laboratory as Senior Scientific Officer and on that day, their office received one requisition from DSP(CAW), Agartala, West Tripura for examination of nine exhibits marked as A to I as mentioned in the report and accordingly, on and from 26.07.2017 to 17.10.2017 the test was conducted in Biology Serology Division and after examination seminal stain/spermatozoa/blood stain of human origin could not be detected and accordingly, on 20.10.2017 he had laid the report which was forwarded by their Director to DSP(CAW). This witness further deposed that his report and forwarding of their Director containing two sheets. The cross-examination of PW-8 was declined by the defense.

18. PW-9 deposed that on 02.03.2017 she was posted as West Agartala Women P.S. as a constable of Police, on that day SI seized vaginal

swab, scalp hair, nail sample, blood sample by preparing seizure list and obtained her signature on the margin of the seizure as a witness. In the course of cross-examination, PW-9 deposed that at PS different seizures were being made in different cases and at that point of time, the witness was unable to say the time as to when the said seizure was made.

19. PW-10 deposed that on 03.04.2017, she was attached to AGMC & GBP Hospital and MO on that day, had conducted potency test of one Amit Sarkar in c.w. West Agartala Women P.S. Case No.27/2017 under Section 341/376(2)(i) of the IPC read with Section 4 of the POCSO Act and after conducting examination, it revealed that said Sarkar was capable of performing sexual act. This witness continue to depose that she had laid her report. This is the said report laid by her which bears her signature was a whole on identification. She has further deposed that on that day, she had also collected blood sample of said Amit Sarkar as per requisition of police and prepared the memo putting her signature therein. PW-10 has also deposed that the said potency test was conducted with the consent of said Amit Sarkar and his LTI was accordingly taken by her on the report as well as on the memo. During cross-examination, PW-10 has stated that at the time of conducting examination, police produced the accused before her hut but at that time, she cannot recollect as to whether any order of the court was placed before her at this stage after taking LTI no signature was appended by her. PW-10 denied the fact that said Amit Sarkar did not put any LTI in her presence.

20. PW-13 who was the IO of this case deposed that on 02.04.2017, she was posted as SI of Police in the West Agartala Women P.S. and SI Paramita

Saha was the Duty Officer, who on that day, received one ejahar from Uma Das of Chndinamura and registered the same as West Agartala Women P.S. Case 2017/WAW/027 under Section 341/376(2)(i) of IPC read with Section 4 of the POCSO Act. That receipt and registering note along with signature of SI Paramita Saha. This witness further deposed that SI also filled up the printed form of FIR which bears her signature at the bottom. She has further continued to depose that subsequently, OC Inspector endorsed the case to her investigation and in course of which she had arrested the accused and forwarded him before the Court. She has again stated that she had produced the victim before the Magistrate for recording her statement under Secdtion 164(5) of Cr.P.C. This witness again deposed that during investigation, she had visited the PO and prepared the hand sketch map along with separate index. PW-13 further deposed that she had also sent the victim to IGM Hospital, Agartala for her medical examination and also seized various samples of her vaginal swab, scalp hair, blood, saliva and auxiliary hair by preparing a seizure list. The seizure list bearing her signature at the bottom. This witness continued to depose that she had also sent the accused to GBP Hospital, Agartala for his medical examination and seized his blood sample by preparing another seizure list. PW-13 has further deposed that she had also examined all the available witnesses and recorded their statements under Section 161 of the Cr.P.C. This witness continued to further depose that during investigation, she had seized one Xerox copy of school certificate of the victim. The seizure list prepared in this regard bearing her signature in the bottom. PW-13 also stated that she had also collected the medical examination reports of the victim, as well as the

accused and the forensic examination report of the seized articles. PW-13 in her examination in chief has further deposed that on completion of investigation, she had prima facie found that the accused committed the offence punishable under the above narrated sections read with Section 4 of the POCSO Act and hence, submitted charge sheet. This witness was identified the accused as Amit Sarkar who was present in the dock. When confronted with extensive cross examination, PW-13 deposed that she did not specify in the seizure list dated 18.08.2017, the possession from whom she had seized the Xerox copy document. This witness further deposed that she did not specify the exact place of Madhya Bhubanban wherefrom she had seized the Xerox copy. PW-13 has admitted the fact that it was not mentioned who obtained the thumb impression of the informant in the seizure list and she also did not mention the index of the hand sketch map regarding the owners of the houses indicated as F, G, H and I. This witness further deposed that she did not examine anybody from the Ward Office located adjacent to the PO. She has denied the fact that her investigation was perfunctory or that she had submitted a false charge sheet.

21. Per contra, Mr. R. Datta, learned P.P. appearing for the State has submitted that the evidence of informant(PW-2) as well as mother of the victim being supported and corroborated by other witnesses i.e. PWs-3, 4, 5, 6 and 10 available on record, manifest the fact that the accused committed sexual assault upon the victim with sexual intent and this brings the accused within the mischief of Section 8 of the POCSO Act. As such, the prosecution has been successful in discharging his burden of proof beyond reasonable doubt. Thus, learned P.P. has submitted that as per the evidence available on record in the

present case, the prosecution has been able to establish its case against the accused persons for sustaining his conviction under Section 8 of the POCSO Act.

22. Having heard both sides this court is of the considered view that as per the argument made by learned P.P. the evidence of PWs-1, 2 and 3 and the medical evidences and also 164 statement of the victim girl, PW-1, it is seen from the medical report that the hymen is damaged in 6 o clock position and with the 164 statement, this court came to a conclusion that as per the statement of the victim girl that she knows the accused person for quite long time and repeatedly they used to meet and exchange gifts amongst themselves indicates a consenting physical relationship. However, the fact that the victim girl is a minor cannot be ignored to show any lenience for accused for acquittal. But the fact remain that the victim girl is a minor and this court is not in a position to accept her statement that at 2 p.m. in the afternoon she was playing in a ground nearby the resident of her grandmother and suddenly the accused person forcibly took her in an abandoned hut nearby the said ground and tried to commit sexual assault. It is hard to be believed that how this accused person know that the victim girl will come out at 2 p.m. in the afternoon on that particular ground. Hence, this Court feels that this is not a case of kidnap but a case of consent which is subsequently converted into kidnap. Since the victim and the accused person know each other very well and they have exchange gifts indicates a consenting relationship.

Accordingly, the accused who has been sentenced to suffer four years rigorous imprisonment by the Court below is reduced to three years R.I.

The period he is in remand during pendency of the criminal proceeding shall be taken into account.

With the above observation and direction the appeal is partly allowed. The appellant is directed to surrender within one month from today.

Mark a copy to the Court below and to the Station house Officer.

JUDGE

