

HIGH COURT OF TRIPURA
AGARTALA
Crl. A.J 28/2022

Sri Kush Das

son of late Narayan Das, resident of West Halahali,
P.S. Kamalpur, District- Dhalai Tripura

----Appellant

Versus

1. The State of Tripura

----Respondent

For Appellant(s)	:	Ms. V. Poddar, Advocate
For Respondent(s)	:	Mr. S. Debnath, Addl. PP
Date of hearing and delivery of		
Judgment & Order	:	13.09.2023
Whether fit for reporting	:	Yes / No

HON'BLE MR. JUSTICE T. AMARNATH GOUD

HON'BLE MR. JUSTICE ARINDAM LODH

JUDGMENT (ORAL)

(Amarnath Goud, J)

Heard Ms. V. Poddar, learned counsel appearing for the appellant as well as Mr. S. Debnath, learned Additional PP appearing on behalf of the respondent-State.

2. This appeal has been preferred by the appellant challenging the judgment and order of conviction and sentence dated 30.06.2022 passed by the learned Special Judge, Dhalai Judicial District, Kamalpur, in case No. Special 25 (POCSO) of 2018, whereby the accused/appellant was convicted under Section 6(1) of the Protection of Children from Sexual Offences Act, 2012 (herein after referred as POCSO Act) and sentenced him to undergo rigorous imprisonment for 10(ten) years and to pay a fine of Rs.10,000/- with default stipulation.

3. The fact leading to filing of the present appeal, is that, the complainant (PW-1) lodged complaint with the Officer-in-Charge of Kamalpur police station alleging *inter alia* that on 01.10.2018 at about 9.00 p.m. the accused-appellant called daughter of the complainant i.e. the victim, who is 16 years of age in his house and forcefully committed rape upon her against her

will and scuffled with her and the victim somehow managed to release herself from the hand of the appellant. It was further alleged that the complainant came to know from her daughter that oftenly the appellant committed rape upon her daughter by threatening as well as on pretext of marrying her and due to social stigma and fear, her daughter did not disclose the matter.

4. The said complaint was registered as Kamalpur PS case no. 127 of 2018 under Sections 417/376/506 of the IPC read with Section 4 of the POCSO Act, 2012. The matter was investigated by the investigating officer, and after completion of investigation submitted charge-sheet against the accused-appellant under Sections 417/376(2)(f)/506 of the IPC and under Section 6 of the POCSO Act. At the commencement of trial, the learned Sessions Judge framed charge under Sections 417/376(2)(f) of the IPC and under Section 6 of the POCSO Act IPC against the accused-appellant, to which he pleaded not guilty and claimed to be tried.

5. During trial, the prosecution to establish the charges had adduced 14 witnesses and exhibited some documents. After closure of recording evidences, the accused-appellant was examined under Section 313 Cr.P.C. wherein he denied all the allegations leveled against him by the prosecution witnesses. After hearing arguments and on examining the evidences and materials on record, the learned Special Judge had convicted the accused-appellant, as aforestated. Being aggrieved, the present appeal is preferred by the appellant.

6. Ms. V. Poddar, learned counsel for the appellant has submitted that without properly appreciating the evidences on record, the learned trial court has convicted the accused-appellant, hence, she has prayed for quashing the said order of conviction and sentence. Ms. Poddar, learned counsel also questioned the pupilage certificate of the victim and submitted that the correct

age of the victim has not been ascertained properly. Learned counsel has also submitted that the year of birth has been manipulated in the pupillage certificate of the victim. She has also submitted that there is no eye witness to the alleged incident. Learned counsel has further submitted that the FIR has been lodged after 22 hours of the incident without proper explanation. Learned counsel has urged to set-aside the order of conviction and sentence as passed by the learned trial court.

7. On the other hand, learned counsel appearing for the respondent has urged to maintain the findings of the learned trial court since there is no infirmity or illegality in the findings of the learned trial court.

8. We have considered the submissions for learned counsel appearing for the parties. We have perused the evidences and materials on record and the judgment passed by the learned Sessions Judge. To substantiate the findings of the learned trial court, this court has perused the deposition of the prosecution.

9. PW-1, mother of the victim is the complainant and she in her deposition has stated that her daughter told her that she was raped by the accused on two occasions, firstly on 28.09.2018 and secondly on 01.10.2018. She further deposed that her daughter told her that the appellant had promised to marry her and committed rape upon her in his own home which is adjacent to their house. She further stated that the appellant raped her daughter and threatened her that he will kill them if she discloses the fact to anybody else. She further deposed that her daughter was afraid and she told about the incident to her only on 01.10.2018.

PW-2, is the victim. She in her deposition stated that on 28.09.2018 at 9 p.m. the accused took her to his room in his home and closed the doors and then raped her against her wish and threatened her that he will kill her and her family members if she disclose the incident to anybody. PW-2 further deposed

that on 01.10.2018, the appellant again took her to his room and again raped her. This witness further deposed that she told her mother about the incident and thereafter her mother filed a case before the police. PW-2 also deposed that she was medically examined by doctor after filing of the case and had given statement to the Magistrate at Kamalpur court.

PW-3, is the father of the victim and he heard about the incident from his wife. PWs 4, 5, 6 and 8 are the seizure witnesses. PW-7 is the scribe. PW-9 is the scientific officer from SFSL. PW-10 is a hospital staff. PW-11, examined the victim in Kamalpur hospital. PW-12, examined the appellant in the Kamalpur hospital. PW-13 is the I.O of the case. PW-14 is the Headmaster of Halahali Class XII school who issued pupilage certificate of the victim.

10. On appreciation of the pupilage certificate, it is evident that said certificate was issued by PW-14 wherein it is stated that the victim took admission in class VI on 16.01.2013 and studied till 2016 and as per the admission register her date of birth is 15.01.2002 . As per deposition of PW 14, the victim took admission in the school in Class VI with support of certificate from primary education, which she took from another school and that certificate to prove her actual age was not brought on record by the prosecution. The prosecution witness simply has proved the certificate as per police requisition. Further, PW-14, official of the concerned school failed to establish the actual age of the victim and also the school register of her primary school which can prove her actual age. PW-14 also did not disclose as to where from they have obtained the School Certificate of the victim. The Admission Register of the school in which the victim first attended, would be a relevant piece of evidence for determining her date of birth, but the same has not proved by the prosecution. On the other hand, neither the bone ossification test of the victim has been done for age determination of the victim nor the school register

of the victim and the entry in academic record of the victim have been proved by the prosecution which would have precedence over her medical age determination. Thus, the significance of victim's medical age determination creates serious doubt onto the prosecution case. Further, the prosecution has failed to secure the evidence of the person who had recorded the date of birth of the victim in the register of the earlier school where she prosecuted her primary studies. Thus, it is not proved with preponderance of probabilities that victim was minor on the date of incident and as the date of birth recorded in school record of victim is not free from doubt.

11. From the record it is seen that the complainant, as witness has recorded her statement under Section 164(5) Cr.P.C. before the SDJM, Kamalpur in connection with the instant case and in her statement, the complainant has stated that *Kush and my daughter has a distant relationship of maternal uncle and niece, but it was not known to me that a relationship has developed between them for the last one and half years.* The victim was also examined by the learned SDJM, Kamalpur under section 164(5) CrPC wherein she has stated that *'My mother is the petitioner of this case. She has filed this case against Kush Das for raping me. Kush is my neighbour. For the last one and half year there has grown a love relationship between us. Often he liked to establish physical relationship with me. He used to say that he will marry me. Though I used to love him but I had no support in this matter. On 28.09.2018 AD last at 11 o'clock at night, he called me in his house and raped me. Thereafter again on 01.10.2018 he again raped me in his house. Thereafter I returned to my house and cried and told the matter to my mother in detail. Though I loved Kush but I could not think that he can do this bad act with me.'*

Thus, from the conjoint reading of the statement of the victim recorded under Section 164(5) CrPC and the medical evidence of the victim it can safely

be presumed that the relationship between the accused and the victim was consensual.

12. From statements of the complainant and the victim recorded under Section 164(5) CrPC, it is evident that there was a love affair between the victim and the appellant. It is further evident that the victim went to the house of the appellant on call/request by the appellant wherein the appellant had sexual intercourse with the victim and that incident happened not only once but twice and on both the occasions, the victim went to the house of the appellant which clearly demonstrate that there was no force or pressure or threat for sexual act made on the part of the appellant towards the victim, on the contrary, the victim had consented to have the sexual intercourse with the appellant. Yet, the medical evidence (deposition of PW-11) indicated that the victim had a ruptured hymen; there was no external injury at her private parts. In view of these facts, this court is of the opinion that the prosecution was not able to establish that there was any penetrative sexual assault as a result of coercion or compulsion on the part of the appellant. All the facts proved in this case clearly indicate that the victim had willingness to accompany the appellant for sexual intercourse.

13. Admittedly, the appellant has been held guilty of offence under Section 6(1) of POCSO Act which has been enacted to protect the children from offences of sexual assault, sexual harassment and contains stringent provisions as to safeguard the interest and the well being of the children. 'Child' within the meaning of Section 2(d) of the POCSO Act means *any person below the age of 18 years*. Hence, in order to attract the provisions of the POCSO Act, the onus is on the prosecution to prove that the victim was a 'child' within the meaning of section 2(d) of the POCSO Act, but the age of the victim, to treat her below 18 years has not been proved by any documentary or oral evidence.

When there is doubt about the age of the person, the age has to be determined first on the basis of the date of birth certificate from the primary school or the matriculation or equivalent certificate from the concerned examination board and if no such material is available then on the basis of birth certificate given by a Corporation or a Municipal Authority or Panchayat and in the absence of such evidence on the basis of ossification test or any other medical age determination test, but here in the instant case, such procedure has not been followed which creates serious doubt on to the age of the victim.

14. This discrepancy also leaves room for ample doubt with regard to the correct age of the victim, the benefit of which must necessarily go in favour of the appellant. The prosecution has, therefore, failed to prove beyond reasonable doubt that the victim was below 18 years of age. This was relevant as the evidences on record indicates that the physical relationship between the appellant and the victim was consensual. In the absence of evidence to prove that the victim was below 18 years of age and also establishment of consensual relationship between the victim and the appellant, the provision of the POCSO Act cannot be invoked in this case.

15. In the light of the above, the instant appeal is allowed. The appellant is acquitted and set at liberty forthwith. The conviction and sentence dated 30.06.2022 recorded by the learned Special Judge, Dhalai Judicial District, Kamalpur, in case No. Special 25 (POCSO) of 2018 under Section 6(1) of POCSO Act is hereby set aside. Consequently, the appellant shall be released from custody forthwith, if not required in any other case.

Send down the LCRs.

JUDGE

JUDGE