

**HIGH COURT OF TRIPURA
AGARTALA**

CRL.A(J)No.21 of 2023

Sri Paritosh Sen,
Son of Late Gitesh Sen,
Resident of Madhya Dukli,
P.O. Madhuban,
P.S. A.D. Nagar,
District: West Tripura

----- Appellant(s)

Versus

The State of Tripura

-----Respondent(s)

For Appellant(s) : Ms. R. Majumder, Adv.

For Respondent(s) : Mr. S. Ghosh, Addl. P.P.

Date of Hearing and
date of delivery of
Judgment and Order : 16.07.2024

Whether fit for
Reporting : NO

**HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE BISWAJIT PALIT**

Judgment & Order (Oral)

[Amarnath Goud, J]

This appeal is directed challenging the judgment and order of sentence and conviction dated 20.01.2020 passed by Learned Special Judge, Agartala, West Tripura in connection with Case No. Special (POCSO) 35 of 2016 whereby the appellant-convict was sentenced to suffer RI for 10 years and to pay fine of Rs.25,000/- in default to payment of fine the convict shall suffer SI for six months and the appellant-convict was further sentenced to suffer RI for two years and to pay a fine of Rs.5,000/- for the offence punishable under Section 450 in default to suffer SI for two

months and all the sentences were ordered to run concurrently.

02. Before coming to the conclusion of this appeal let us discuss about the subject matter of the case file before the trial court. On 09.06.2016 at about 8 pm the appellant entered into the dwelling house of the informant and committed rape upon the daughter of the informant, i.e. the victim. OC, West Agartala Women PS on receipt of complaint registered West Agartala, Women PS Case No.2016/WAW/047 under Section 448/376(2) (i) IPC and also under Section 4 of POCSO Act and the case was endorsed to ASI Smt. Upasana Debbarma for investigation. The I.O. conducted the investigation and after completion of investigation being prima facie satisfied laid chargesheet against the present appellant for his prosecution before the court vide West Agartala Women PS Charge Sheet No.55 of 2016 under Section 448/376(2)(i) of IPC and Section 4 of POCSO Act. Accordingly cognizance of offence was taken by the concerned court and formal charge under Section 450/376(2)(i) of IPC and Section 6 of POCSO Act was framed against the appellant to which he pleaded not guilty and claimed to be tried. Hence the trial commenced. During trial to substantiate the charge prosecution before the learned Trial Court in total has adduced nine numbers of witness and some documentary evidences were referred by the prosecution which marked exhibit in this case. The case

of the appellant in course of defence was totally denial of the prosecution and as such the appellant convict during his examination under Section 313 of Cr.P.C. denied the allegation of the prosecution and also denied to adduce witness in support of his defence. Finally on conclusion of trial of the case learned Trial Court convicted the present appellant for the charges proved against him and accordingly this present appeal was preferred. Now let us discuss the evidence on record of the prosecution.

03. PW-1 Smti. Shima Sarkar (Sahani) is the mother of the victim. She deposed that her daughter's date of birth was 27.03.2009 and she knew the appellant since her childhood and according to the appellant used to visit her house frequently. On 09.06.2016 about 7.30/8 pm she and her daughter were in the house and at that time the accused appellant came to their residence. After that keeping the victim with the appellant she went to the shop of her father at Bat Chowmuhani area to bring her father to her residence and that time her husband was not present. At around 8.00 p.m. she returned to her home and found that her daughter was behind the shutter of the door and was crying having mobile phone of Paritosh in her hands. Her frock was lying upwards above her panty. The accused was also at that time in the said hut and when she closed the door of the hut the accused left the house. Thereafter she gave the dinner to her daughter and asked her whether

the appellant had done anything or not. That time she did not divulge anything to her mother. But on the following day around 12 O'clock when she was giving bath to the victim she felt pain in her vagina. Then being asked the victim told that on the previous night the appellant inserted his finger to her vagina. She also told that the accused appellant compelled her to suck his private organ by her mouth and then also left some white colour cough like materials on the floor and also then removed the same from the floor by some materials. Hearing the same she at once met their Gram Pradhan namely Sabita Ghosh and also another person namely Kajal Ghosh and informed them about the incident. They came to their evidence and heard the matter from her daughter. Thereafter they informed the matter to the police and accordingly police came. Thereafter the matter was mitigated but on the following day at about 11 am/12 pm she along with her husband and her daughter went to West Agartala Women PS and narrated the incident to them and lodged the case and after 3/4 days of lodging of the complaint police came to her house and seized the frock and pant of victim in her presence and she signed in the seizure list and identified her signature marked as Exbt.1. She further stated that medical examination the victim was also done and police also seized some materials in a bottle in her presence and she signed in the seizure list but she has forgotten at which place the same was seized. She identified her signature in the seizure list and on

identification seizure list dated 11.06.2016 which was marked as Exbt.2. She further stated that one day the victim was produced before Magistrate where her statement was recorded.

During cross-examination she stated that she did not submit any document of the victim to police and some days prior to the occurrence one day Paritosh was taking some food in the hut of her brother-in-law and thereafter her husband went there and concerning that issue some queries took place between her husband and Paritosh at that time. Said incident of quarrel occurred about four months prior to the date of present incident. She also stated that she brought her father at home at about 8.00 p.m. and on the following day of incident when police came that time she narrated the entire matter to them which was reduced into writing and on the following day of the incident the matter was mitigated between them. She denied the suggestion of the act that they demanded Rs.1 lakh from the accused but he refused to do the same so they filed the case also stated that the house of her parents situated adjacent to her house intervening by another house and they were also apprised about the incident and when the police come her father was also present in the house. She also stated at that relevant point of time the vagina of the victim was found radish when she felt pain at the time of bathing.

04. PW-2 Babul Sahani is the informant of this case and the father of the victim. He deposed that in the year 2016 one day he returned to his home from his work at about 8 pm and at that time his wife told him that on that day accused Paritosh Sen came to their house and inserted his hand inside the panty of her daughter i.e. the victim and touched her vagina. He told that her daughter was aged about 7 years at that time and before his return to his home his wife already informed the neighbouring people who also assembled in the house and police also came on his arrival to his house and thereafter he lodged the ejahar to the police after getting it written by one of his neighbour. He put his signature on the ejahar and identified the same marked as Exbt.3. He further stated that accepting putting his signature he cannot read and write and on that day police seized pant and frock of his daughter from his house and after 2/3 days of lodging of the ejahar police produced her daughter to the hospital for medical examination. He also identified his signature in the seizure list dated 11.06.2016 which on identification was marked as Exbt.2/1.

During the cross-examination he stated that on the day of occurrence although his ejahar was written but he did not submit the same to the police rather told the police that he would consider as to whether he would file any case or not. Finally after some days he submitted the ejahar to the police. Being asked the witness volunteered

that the accused visit their house and after the incident Paritosh was beaten by the local people. That time police also arrived at their locality but he did not lodge the ejahar.

05. PW-3, is the victim. Before recording her statement her veracity was tested by the learned court below. She stated that she knows Paritosh Sen of their locality and he used to visit their house and she used to call him as 'Paritosh Mama'. The victim further stated that the accused would often tell her to suck his private organ and used to come to her house when her mother could go outside the house for some other works. One day her mother was not present in the house and at that time the accused came to their house and removed her panty. Meanwhile, her mother arrived in the house and the accused fled away. On the following day in the noon after her bath was over that time her mother asked her as to what Paritosh had done with her on the previous day then she narrated the entire incident to her. She could not say as to whether she was produced to the court or to the police. But she did not give any statement. That time being produced by the prosecution She identified her two signatures on the 164 statement recorded by Magistrate which were marked as Exbt.4 series and she identified the accused appellant. Nothing came out relevant during the cross-examination.

06. PW-4 Laxmi Sarkar deposed that Babaul Sahani is the husband of her daughter and victim is daughter of

Babul Sahani. About 2 ½ years back one day her daughter Sima Sarkar, wife of Babul Sahani and the victim informed her that on the previous day in the evening the parents of victim were not in the house and that time their neighbour Paritosh Sen attempted to commit rape upon the victim. When Sima came to the house that time she found the accused was sitting in the room and the victim was standing position and her panty was over her frock and on the following day when the victim was taking bath and on query and being pressured by her mother the victim told her that on the previous evening the accused touched her private part to the vagina of the victim by pressing her mouth and threatened her not to disclose the same to anybody otherwise he would kill her and accordingly both the informant and the victim narrated the said fact to her. She further stated that one day police seized frock and panty of the victim from the house of Sima Sarkar in her presence and she signed in the seizure list. The witness identified her signature in the seizure list on identification the same was marked as Exbt.1/1.

During cross-examination she stated that she was not examined by police concerning the incident except her relationship with the victim. Nothing more came out relevant from her cross-examination.

07. PW-5 Pushpa Sahani deposed that Babul Sahani is her son and they are residing in the same but in separate

mess. In the year 2016 one day wife of Babul Saha namely Sima Sarkar informed that about three days back the accused Paritosh Sen had raped daughter of Babul Sahani in the hut of Babul, but she had no personal knowledge about the said incident. During cross-examination she stated that the victim tell her about the incident.

08. PW-6 Bikram Sahani deposed that Babul Sahani is his elder brother. They are residing in the same house but in separate mess. About 2 ½ years back one day in the evening when he returned back to home that time she found Sima Sarkar wife of Babul and other inhabitants of their house were discussing that on that day in the morning the accused Paritosh had raped daughter of Babul Sahani. During cross-examination he stated that he did not say to the police that on the day of incident he heard the said fact from the victim.

09. PW-7, Dr. Ashim Debbarma deposed that on 11.06.2016 was posted as Medical Officer of IGM Hospital, Agartala and he examined the victim girl who was identified Constable Sikha Roy Choudhury and in course of examination he did not find any external injury on the person of the said victim and there was also no sign of injury either external or internal in her vagina. Her hymen was intact. Thereafter he opined that as per his clinical findings the act of rape neither can be confirmed nor can be ascertained. He also collected vaginal swab(dry and wet)

urine sample, nail cutting sample of said girl and then he sent those items to State Forensic Science Laboratory, Narsingarh. After that he prepared his preliminary report of examination and he identified the report which contains two signatures and on identification report was marked as Exbt.5 and the signature of the witness marked as Exbt.5/1 series. He further stated that after the forensic examination was produced before him by police and on perusal of the same he finally opined that in this case occurrence of rape could not be established or excluded conclusively. He identified the final report marked as Exbt.6 and the signature marked as Exbt.6/1. He was declined to cross-examination by the accused-appellant.

10. PW-8, Dr. Subhankar Nath deposed that on 20.07.2016 he was posted as Deputy Director, DNA Typing Division, SFSL, Narsingarh and on the same day their office received one sealed parcel containing following six exhibits in connection with West Agartala Women P.S. Case No.47 of 2016:

Exbt.A –White colour frock having mud like stain at lower portion said to be of victim.

Exbt.B- One yellow colour gani pante (inner) said to of the victim.

Exbt.C- Wet vaginal swab of the victim.

Exbt.D- Dry vaginal swab of the victim.

Exbt.E- Two numbers nail cutting of the victim.

Exbt.F- Blood stain gorge said to be the blood sample of Paritosh Sen.

He examined those items in his DNA Division from 21.07.2016 to 11.08.2016 and opined that:

- 1.The Seminal stain/spermatozoa of human origin was not detected in the exhibits marked as Exbt.'A' 'B', 'C', 'D' & 'E'.
- 2.Blood stain was detected in the exhibit marked 'F'.
3. Blood stain was not detected in the exhibits marked 'A', 'B', 'C' , 'D' & 'E'.

He further stated that as seminal stain/blood stain was not detected in the exhibits marked 'A', 'B', 'C', 'D' and 'E' blood grouping and DNA profiling of control blood sample of accused was dispensed with. He identified the report and on identification the same was marked as Exbt.7 and the signature marked Exbt.7/1 series.

11. PW-9 Upasana Debbarma is the I.O. who after completion of investigation laid chargesheet against the accused-appellant. She identified the signature and handwriting of Paramita Saha on the margin of FIR marked as Exbt.3/1 and identified the printed FIR form which was marked as Exbt.8. She identified the hand sketch map with index marked Exbt.9/1 and 9/2. She identified the seizure list dated 11.06.2016 marked Exbt.1/2. She also identified the seizure list dated 11.06.2016 which was marked Exbt.2/2 and identified the seizure list dated 12.06.2016 in respect of collection of blood sample which was marked as Exbt.10. She further deposed that she had sent the victim to the court for recording her statement and she examined the witnesses.

During cross-examination she stated that she did not cite Dr. Jyotika Debbarma and Dr. Ashim Debbarma as witness in this case and also did not cite Dr. Subhankar Nath as witness in this case and the victim was a school

going child. Her birth certificate was not available. As such she did not try to collect birth certificate and also she did not try to collect that her ossification test for ascertaining her age and also stated that on the basis of appearance of the victim she presume that she was minor. She did not cite SI Paramita Saha as witness in this case.

These were the sum and substance of the evidence on record of the prosecution.

Heard both sides.

12. In course of hearing of argument Ms. R. Majumder, Learned counsel appearing for the appellant stated that the prosecution in this case has failed to prove that the victim to sustain conviction against the appellant under POCSO Act because according to Learned counsel for the appellant the I.O. in course of her examination very specifically stated that during investigation she did not collect the birth certificate nor alleged for any ossification test of the victim rather considering the face of the victim she came to the opinion that the victim was a minor and furthermore according to Learned counsel from the appellant that medical evidence on record of the prosecution and also the scientific report it was clearly established that there was no sign of any forceful rape or vaginal penetration of the victim and there was no evidence on record in respect of sexual assault but the learned court below did not consider the same and held the appellant to be guilty for the alleged charge. Reliance have been placed on the evidences

of PW-3, the victim (the name is withheld for protecting her identity), the medical evidence of PW-7, Dr. Ashim Debbarma, PW-8, Dr. Subhankar Nath and the Exhibits.7 and prayed for allowing the appeal and set aside the order passed by the Court below.

13. On the other hand, Learned Addl. P.P. Mr. S. Ghosh submitted that there was no room to disbelieve the evidence on record of the prosecution and the learned court below rightly convicted the appellant in this case and urged for dismissal of this appeal upholding the order of conviction and sentence awarded by the learned Trial court.

14. We have gone through the evidence on record although in course of examination the parents of the victim by their evidence tried to implicate the appellant with the alleged commission of offence but on perusal of the evidence of the victim it is clear that there was no evidence of any commission of rape upon the victim by the appellant nor he made any sexual assault upon the victim. Furthermore, the medical evidence also did not support the case of the prosecution because the medical examination report as well as the report of SFSL clearly indicated that there was no sign of any vaginal penetration or sexual assault upon the victim and prosecution in this case could not adduce any documentary evidence showing the actual age of the victim. Situated thus, on the face of evidence on record there is no scope to presume the appellant to be guilty with the alleged charges. Since, the offence against

the accused has not been established or attracts, the provisions under POCSO Act under which the appellant has been convicted and he has already undergone an imprisonment of more than four years, this Court considers that it is a case which needs to be rectified and accordingly, the order is set aside and the accused is acquitted from the charge and shall be released. As such, in our considered view learned court below could not appreciate the evidence on record properly and convicted the appellant for which the present appellant is liable to be acquitted from the charge on benefit of doubt which hereby do. Accordingly, the conviction and order of sentence and judgment dated 20.01.2020 passed by Special Judge, West Tripura, Agartala in connection with Case No. Special (POCSO) 35 of 2016 is hereby set aside and the accused appellant is hereby acquitted from the charge on benefit of doubt. He shall be released from the custody henceforth if he is not wanted in connection with any other case.

15. In the result, the appeal is allowed to the extent as indicated above.

Send down the LCRs along with a copy of this order.

JUDGE

JUDGE

MOUMITA DATTA

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