

HIGH COURT OF TRIPURA
AGARTALA

Crl. A(J) No.31 of 2023

Sri Rajesh Das @ Sanku @ Kutan,
S/O Sri Ratish Das, of Paschim Mashauli, P.S. Fatikray, Dist. Unakoti,
Tripura.

..... Appellant(s)

- V e r s u s -

The State of Tripura

.....Respondent(s)

For the Appellant(s)	:	Mr. H.K. Bhowmik, Advocate. Mr. R. Das, Advocate.				
For the Respondent(s)	:	Mr. S. Ghosh, Addl. P.P.				
Date of hearing	:	10th July, 2024.				
Date of delivery of Judgment & order	:	27th August, 2024.				
Whether fit for reporting	:	<table><tr><td>YES</td><td>NO</td></tr><tr><td>√</td><td></td></tr></table>	YES	NO	√	
YES	NO					
√						

HON'BLE MR. JUSTICE S. DATTA PURKAYASTHA
JUDGMENT & ORDER

The appeal arises out of the judgment dated 24.05.2023 passed by learned Special Judge (POCSO), Unakoti, Kailashahar in case No. Special (POCSO) 14 of 2019.

[2] The appellant has been convicted by the impugned judgment under Section 341 and Section 354 of Indian Penal Code (for short-IPC) and under Section 8 of the POCSO Act and has been sentenced to suffer simple imprisonment for 1 (one) month under Section 341 of IPC, and to suffer rigorous imprisonment for 5 (five) years and to pay fine of Rs.5,000/- under Section 354 IPC. Similar sentence like Section 354, IPC has also been passed under Section 8 of POCSO Act and all the sentences have been directed to run concurrently.

[3] The prosecution case is that the victim, a minor girl aged about 10 years on 16.06.2019 at about 11 am went to the house of her grandfather in the same village for playing there and while returning to her home at about 2/2.30 pm by riding a bicycle, the appellant forcefully pulled her to the western side bushes of Noagaon school and raped her.

[4] The father of the victim lodged the FIR on the same day at about 1630 hours and names of two witnesses viz Sri Sadhu Malakar and Smt. Khela Malakar were also stated in the FIR to have witnessed the incident and rescued the victim. The police authority registered the FIR under Sections 341,376 AB and Section 6 of the POCSO Act, 2012 and on completion of investigation laid the charge-sheet under above said provisions of law, but in place of Sri Sadhu Malakar and Smti Khela Malakar, the investigating officer cited therein one Sri Parendra Malakar and his sister Smti Kunturi Malakar as eye witnesses of the incident.

[5] Charges were also framed under by Ld. Special Judge under Sections 341/376AB, IPC and also under Section 6 of POCSO Act to which the appellant claimed trial pleading his innocence. Prosecution examined total 18 witnesses in the trial but the defence did not examine any one as defence witness.

[6] Mr. H.K. Bhowmik, learned counsel for the appellant during hearing gave much stress on his argument that withholding said FIR named witnesses namely Sri Sadhu Malakar and Smti Khela Malakar, two new eye witnesses namely, Parendra Malakar [PW-6] and Kunturi Malakar [PW-9] were produced to design a case for false implication of the appellant and as such both said PW-6 and PW-9 were not at all reliable witnesses.

[7] Mr. Bhowmik also raised the question of competency of the victim to testify in the case on the ground that the learned trial Court before examining her failed to test her maturity of understanding as required by law. Mr. Bhowmik, learned counsel further tried to show some dis-corroborations amongst the evidences of the victim, PW-6 and PW-9 to show them untrustworthy.

[8] According to prosecution version, another girl namely, Anushri was also present in said Noagaon school just before the said alleged incident, but said girl, Mr. Bhowmik argued, was withheld. Referring to the medical evidence, learned counsel also contended that as per victim, after the incident blood seeped out from her genital whereas, as per medical evidence, there no injury was found in the private part and therefore, according to Mr. Bhowmik, learned counsel, the victim herself was an untrustworthy witness as she was not giving the true version of the alleged incident. In this regard, Mr. Bhowmik, learned counsel also referred one decision of this Court in the case of ***Sri Krishnadhan Sarkar vs. The State of Tripura [Crl. A(J) No.30 of 2023]***.

[9] Next point as raised by Mr. Bhowmik, learned counsel was that places of occurrence was also shifted in this case raising further doubt about the veracity of the case, for, as per the FIR, place of occurrence was in a jungle in the western side of said school whereas the victim stated the same to be in the playground of the school and again investigating officer showed it in the urinal point located behind the said school.

[10] Mr. S. Ghosh, learned Addl. P.P., on the other hand, contended that there was no scope of any exaggeration in the prosecution case as within two hours of the incident, the FIR was lodged. He also argued that though said Khela Malakar was not examined but Sadhu Malakar was examined who was actually said Parendra Malakar [PW-6] and same was evident from the testimonies of victim as well as her father and mother.

[11] Ld. Addl. P.P. also argued that medical evidence never contradicted with the evidence of the victim regarding denuding her and also regarding penetration on her private part rather, in her cross-examination, it was further confirmed by the defence that blood also came out from her vagina due to such sexual assault committed by the appellant. According to Mr. Ghosh, some weightage could be given for the same in favour of defence, if she would divulged said fact in her examination-in-chief but the fact which was taken out during cross-examination would further bolster her evidence stated in examination in chief.

[12] Learned Addl. P.P. also submitted that the medical officer had found redness in the vulva of the victim and even her wearing apparel which she wore during the incident, had mud stain and these circumstances were the strong indicators of ravishing the victim sexually. Mr. Ghosh, learned Addl. P.P. also argued that both the victim and the eye witnesses namely, PW-6 and PW-9 corroborated with each other in all material aspects and were very reliable witnesses and therefore, learned trial Court was completely justified in convicting the appellant.

[13] Mr. Ghosh, learned Addl. P.P. to gain support to his submissions referred one decision of the Hon'ble Supreme Court in the case of ***State of Himachal Pradesh vs. Sanjay Kumar alias Sunny, (2017) 2 SCC 51*** regarding the appreciation of evidence of child victim in sexual offences. The relevant paragraph Nos. 30 and 31 of the said decision are extracted below:

"30. By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases. In such a situation one has to take stock of the realities of life as well. Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are not strangers. The danger is more within than outside. Most of the time, acquaintance rapes, when the culprit is a family member, are not even reported for various reasons, not difficult to fathom. The strongest among those is the fear of attracting social stigma. Another deterring factor which many times prevents such victims or their families to lodge a complaint is that they find whole process of criminal justice system extremely intimidating coupled with absence of victim protection mechanism. Therefore, time is ripe to bring about significant reforms in the criminal justice system as well. Equally, there is also a dire need to have a survivor-centric approach towards victims of sexual violence, particularly, the children, keeping in view the traumatic long-lasting effects on such victims.

31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a

victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance (See *Bhupinder Sharma v. State of H.P.*). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.”

[14] Mr. Ghosh, learned Addl. P.P. also relied on another decision of Hon'ble Supreme Court in case of ***B.C. Deva alias Dyava vs. State of Karnataka, (2007) 12 SCC 122*** wherein at Para 18 it was observed by the Apex Court that the plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix and even in absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted.

[15] As it appears, the victim [PW-2] in this case stated that on the date of the incident while she was returning to her home from the house of her grandfather after playing with kid there, the appellant obstructed her way expressing his willingness to train her on bicycle riding but she refused as she already knew how to ride the same. Thereafter, the appellant took her bicycle and started training another girl namely, Anushri but after a while, when Anushri was called by her mother, she left the place. Thereafter, the appellant asked the victim to go behind the Noagaon school premise and also caught hold of her hand. As the victim was then holding a pillar of the school, he removed her hands therefrom and took her in the backside of the school by pressing

her mouth and thrust her on the ground. Thereafter, he opened her panty and his own clothes and inserted his penis into her vagina. She then started crying and at that moment, one Sadhu and another Kunturi came to spot and seeing them, he ran away. According to the victim, said Sadhu tried to catch hold of the appellant but failed as Sanku gave a push to Sadhu. Thereafter, with Sadhu, she went to her home but she did not enter there out of fear of her mother's scolding. Sadhu then informed her mother and her mother thereafter called her inside but due to stomach pain, she was unable to move and therefore, her one 'Pishu' (Bengali slang of husband of father's sister) carried her to her house and she then narrated the incident to her. In her cross-examination, she stated that when the appellant penetrated his private part, blood came out from her vagina. She also confirmed that the investigating officer seized her wearing apparels which she was wearing at the time of said incident. She also confirmed that the bicycle which was taken by the appellant was of her elder sister.

[16] The medical officer namely Dr. Saheli Debnath [PW-11] examined the victim on the same day of incident at about 5.10 pm and she did not find any injury in the vagina except redness of vulva and there was mud stain found on the back side of her wearing apparel. Her hymen was found intact. PW-11 stated that findings of the examination were inconclusive in respect of commission of rape and forensic report was awaited.

[17] Contradicting with the medical officer, the Scientific officer, Dr. Shubankar Nath [PW-16] stated that he did not find any mud stain in Ext.F and F-1 which were the seized short pant and T-shirt of the victim.

He also did not find any seminal stain or spermatozoa of human origin in the vaginal swab, urethral swab, anal swab of the victim and also in the wearing apparels of both the victim and the appellant.

[18] In view of above, it appears that the victim cannot be termed as wholly reliable witness, for, her evidence is stained with some sort of exaggeration. The court is therefore required to circumspect and to look for further corroboration in material particulars by other reliable testimony, direct or circumstantial, before acting upon her testimony. [Ref.- **Lallu Manjhi and another vs. State of Jharkhand, AIR 2003 SC 854**].

[19] As further noticed, before recording evidence of the victim, her maturity of understanding was not tested by the learned trial Court, atleast there is no such indication in the record. In this regard, learned counsel, Mr. Bhowmik also relied on a decision of the Hon'ble Supreme Court in **Pradeep vs. State of Haryana, 2023 SCC Online SC 777** and the relevant paragraphs are excerpted hereinbelow:

"7. We have carefully considered the submissions. The fate of the case depends on the testimony of the minor witness Ajay (PW-1). Under Section 118 of the Evidence Act, 1872 (for short, "the Evidence Act"), a child witness is competent to depose unless the Court considers that he is prevented from understanding the questions put to him, or from giving rational answers by the reason of his tender age. As regards the administration of oath to a child witness, Section 4 of the Oaths Act, 1969 (for short "Oaths Act") is relevant. Section 4 reads thus:

"4. Oaths or affirmations to be made by witnesses, interpreters and jurors.-(1) Oaths or affirmations shall be made by the following persons, namely:-

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by, witnesses; and

(c) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2) "

8. Under the proviso to sub-Section (1) of Section 4, it is laid down that in case of a child witness under 12 years of age, unless satisfaction as required by the said proviso is recorded, an oath cannot be administered to the child witness. In this case, in the deposition of PW-1 Ajay, it is mentioned that his age was 12 years at the time of the recording of evidence. Therefore, the proviso to Section 4 of the Oaths Act will not apply in this case. However, in view of the requirement of Section 118 of the Evidence Act, the learned Trial Judge was under a duty to record his opinion that the child is able to understand the questions put to him and that he is able to give rational answers to the questions put to him. The Trial Judge must also record his opinion that the child witness understands the duty of speaking the truth and state why he is of the opinion that the child understands the duty of speaking the truth.

9. It is well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.

10. Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is advisable to record the

preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court.”

[20] In the case in hand, neither the trial court has put any preliminary question to the witness as to whether she was in a position to understand the question put to her and was capable of giving rational answers. Even, oath was also administered to her though her age was stated to be about 10 years in the Court without verifying whether she understood the nature of the oath or not. There is also no indication in the record that learned Special Judge complied with the provision of sub-section (2) of Section 33 of the POCSO Act, 2012 by not permitting the special public prosecutor or the learned defence counsel to put any direct question to the victim rather, the manner in which the evidence was recorded creates an impression that both the prosecution and defence put the questions to the witness directly. Learned Special Judge, therefore, did not act with all sensitivity as was required. Though for these reasons, the evidence of victim cannot be rejected *in lemini* but non-compliance of these provisions may cause harassment to the victim and simultaneously superior Court loses the scope to appreciate the maturity of understanding of a child witness and also to verify the capacity of the child witness to understand her duty of speaking the truth before the Court. Therefore, trial Judges should be more sensible and pragmatic while examining a child witness and should strictly adhere to the relevant provisions of law in this regard.

[21] Now, another major controversy as arisen in this case is that in the FIR, name of one Sadhu Malakar and another Khela Malakar were mentioned to be eye witness whereas during investigation and also in trial, other two persons namely Parendra Malakar [PW-6] and Smti

Kunturi Malakar [PW-9] were examined as eye witnesses of the occurrence. In this regard, law is fairly settled that FIR is not a substantive piece of evidence and can only be used to corroborate the statement of the maker of the same under Section 157 of the Evidence Act or to contradict him under Section 145 of the Act. Reference in this regard may be made to a decision of the Apex Court in the case of ***Bandlamuddi Atchuta Ramaiah and others vs. State of A.P., (1996) 11 SCC 133*** and the relevant paragraph no. 14 is excerpted below:

"14. It is necessary to point out that the statement attributed to the first accused (Atchuta Ramaiah) in Ext. P-24 was completely disowned by him when he was questioned by the learned Sessions Judge under Section 313 of the Code of Criminal Procedure. Even assuming that this was truly recorded by the police, its utility in evidence is very much restricted by law. A statement in an FIR can normally be used only to contradict its maker as provided in Section 145 of the Evidence Act, 1872 or to corroborate his evidence as envisaged in Section 157 of the Act. Neither is possible in a criminal trial as long as its maker is an accused in the case, unless he offers himself to be examined as a witness (vide *Nisar Ali v. State of U.P.*) Kapoor J. Speaking for the three-Judge Bench in that decision has observed:

"A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 157, Evidence Act, or to contradict it under Section 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. In this case, therefore, it is not evidence."

Earlier thereto, in the cases of ***Dharma Rama Bhagare vs. the State of Maharashtra, (1973) 1 SCC 537*** and ***Pandurang Chandrakant Mhatre and others vs. State of Maharashtra, (2009) 10 SCC 773***, similar ration was laid down by the Apex Court and it was categorically held that FIR cannot be used with regard to the testimony

of other witnesses who deposed in respect of the incident. Even in Dharma Rama (supra), it was further observed that the FIR can by no means be utilised for contradicting or discrediting the other witnesses who obviously could not have any desire to spare the real culprit and to falsely implicate the accused.

[22] In the FIR of the present case in hand, it was alleged that Sadhu Malakar and Khela Malakar rescued the victim from the grip of the appellant and in the evidence, the informant [PW-1] stated that Sadhu Malakar and Kunturi Malakar witnessed the occurrence. But, such departure by the informant from the contents of FIR was not confronted to him by the defence and therefore, the appellant cannot be allowed to take benefit of the same. On similar ground, evidence of PW-6 and PW-9 also cannot be discarded at the threshold, unless there are other reasons to discard their evidences.

[23] The victim as well as her parents in their evidences categorically stated that both said Sadhu Malakar and Kunturi Malakar had witnessed the occurrence. They did not name Parendra Malakar as one of the eye witness of the same. Ld. Addl. P.P tried to convince the Court that as father's name and address of both Parendra and Sadhu are same, therefore, they are same person, but the Court is unable to accept such analogy, especially when the investigating officer has categorically deposed that he did not examine Sadhu Malakar and also did not cite him as witness in the case. Moreover, just on the ground that father's name and address of both the said persons are similar, the court cannot come to a definite conclusion that both are same and single person. However, there is no reason to disbelieve the evidence of Kunturi

Malakar just on the ground that her name was not reflected in the FIR as witness of the occurrence.

[24] Said Kunturi Malakar [PW-9] categorically stated that she found the appellant to take the victim behind the school building and when she was not coming out, she along with her brother Parendra Malakar went there and found the appellant was sitting over the victim and her panty was opened and seeing them the appellant ran away from the spot. This witness could not be shaken in her cross-examination and she corroborated with the victim on material points. In her cross-examination, she stated that her house and the house of Parendra was on the western side of said School. Mr. Bhowmik, learned counsel argued that the houses of PW-6 and PW-9 were not shown in the hand sketch map, but for such defect made by the investigating officer, the evidence of Kunturi Malakar cannot be disregarded when the same is found consistent and reliable. The defence also tried to show by giving suggestions that due to previous enmity between the father of the appellant and said Parendra, she was deposing falsely, but same is also not convincing. The defence could not show any probable reason for false implication of the appellant by said PW-9.

[25] Mr. Bhowmik, learned counsel pointed out that according to the parents of the victim, at the time of occurrence or just thereafter, the informant was not present in the house, whereas PW-9 in her cross-examination stated that she had found father of the victim in the house when she went there with the victim. But such minor discrepancy in her evidence is not sufficient to render her entire evidence unreliable.

[26] As discussed earlier, the Medical Officer [PW-11] categorically stated and also confirmed in her cross-examination that she found redness in the vulva of the victim, but the defence did not try to elucidate further from the said witness about the cause of such redness to create doubt on the prosecution version by showing that such redness could be caused for other reasons.

[27] Regarding the point of shifting of place of occurrence as argued by Mr. Bhowmik, it is noticed that the investigating officer showed the place of occurrence in a urinal point situated behind a school building and the victim as well as PW-9 also stated that the place of occurrence was behind the school building. Mr. Bhowmik, learned counsel also tried to show that in the FIR, the incident was stated to have occurred in a jungle in the back side of the school, but the informant was not an eye witness of the occurrence and moreover, such assertions made in the FIR was also not confronted to him.

[28] While summarizing the aforesaid discussions, what culminates is that though the evidence of the victim is tainted with some sort of exaggeration but she is not completely unreliable witness to brush aside her entire evidence. She has well been corroborated by PW-9 on material particulars. Unexplained redness found in the genital of victim adds further chain link to the prosecution version. In ***Gul Singh @ Guliya and others vs. State of M.P. and another, 2014 SCC Online SC 719***, it has been observed by the Apex Court that that evidence of child witness cannot be rejected unless the same is tutored or unless the same is unreliable.

[29] In kit and boodle, the prosecution has proved the required foundational facts triggering applicability of Section 29 of the POCSO Act

raising statutory presumption against the appellant but the appellant in turn could not show inherent infirmities, improbabilities or any patent absurdity in prosecution case or his false implication therein. Ld. Special Judge was therefore justified in convicting the appellant.

[30] Mr. Bhowmik, Ld. Counsel relied on a decision of Division Bench of this Court rendered in **Krishnadhan Sarkar (supra)**, but said case was based on a complete different sets of facts. Allegations therein were that the accused first inserted his fingers inside the vagina of a 07 years old girl followed by penetration of his penis therein but the Medical officer did not find any injury or swelling in her private part. There were also major discrepancies amongst the material witnesses and other infirmities in the prosecution evidences which created serious doubt about the veracity of the case and therefore the accused therein was acquitted. The appellant in this case cannot take any benefit of said decision which was based on complete different sets of facts and evidence.

[31] However, as it appears, learned trial Court has imposed maximum prescribed punishment both under Section 8 of POCSO Act and also under Section 354 of IPC, but no reason has been assigned for inflicting such a harsh punishment. Mr. Bhowmik, learned counsel submitted that in the relevant letter of investigating officer giving requisition for medical examination of the appellant after his arrest, his age was reflected as 28 years. It is also submitted that his academic qualification is 8th pass and he is the sole bread earner in his family by doing a small business of decorator. Mr. Bhowmik, learned counsel also submitted that he was a first time offender. In view of above, this Court does not find any aggravated factor justifying imposition of such highest

form of punishment under above said both the provisions and accordingly, sentence is required to be modified.

[32] In view of above, it is directed that the appellant shall undergo rigorous imprisonment for 3 (three) years and shall pay fine of Rs.5,000/- (Rupees five thousand) under Section 354 of IPC and in default of payment of fine, he shall suffer further simple imprisonment for 1 (one) month. Similar punishment is also imposed upon the appellant under Section 8 of POCSO Act, 2012 to suffer rigorous imprisonment for 3 (three) years and to pay fine of Rs.5,000/- (Rupees five thousand) and in default of payment of fine, to suffer further simple imprisonment of 1 (one) month. No interference is made regarding the punishment imposed under Section 341 of IPC. The fine money, if realized, be handed over to the victim through her guardian.

All the substantive sentence of imprisonment shall run concurrently.

The appeal is, therefore, partly-allowed and is disposed of accordingly with the above said modification in the sentence.

Pending application(s), if any, shall also stand disposed of.

Registry is to re-consign the LCRs with copy of this judgment. Learned trial Court will issue necessary modified conviction warrant.

Registry will also send a copy of this judgment to Jail Authority.

JUDGE