

HIGH COURT OF TRIPURA
AGARTALA

Crl.A(J) 33 of 2023

Sri Prasanta Sarkar Alias Balu Alias Prasenjit

---Appellant(s)

Versus

The State of Tripura

---Respondent(s)

For Appellant (s)	:	Mr. P. K. Biswas, Sr. Advocate. Mr. P. Biswas, Advocate.
For Respondent(s)	:	Mr. S. Ghosh, Addl. PP.
Date of hearing and date 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)

T.Amarnath Goud, J

Heard Mr. P. K. Biswas, learned senior counsel assisted by Mr. P. Biswas, learned counsel appearing for the appellant also heard Mr. S. Ghosh, learned Addl. PP appearing for the state-respondent.

[2] This is an application under Section 374(2) of Cr.PC against the judgment dated 17.06.2023 passed by the Ld. Special Judge, POCSO, West Tripura, Agartala in Case No.SPL.(POCSO) 21 of 2019 convicting the appellant under Section 376(3) of IPC, to suffer rigorous imprisonment for 20 years and also to pay a fine of Rs.20,000/- in default of payment of fine the appellant is to suffer further simple imprisonment (S.I) for 2 months and also convicting him under Section 363 of IPC to suffer R.I for 2 years and also to pay fine of Rs.10,000/- in default to suffer S.I for 1 month and convicting him under Section 343 of IPC to suffer R.I for 6 months and also to pay fine of Rs.5,000/-, in default, to suffer S.I. for 15 days.

[3] The brief facts, as has been reflected from the written complaint is that the informant/mother along with her minor victim-daughter (name withheld), came to the

house of her full blood sister at Indranagar and was staying there. On 28.01.2019, the minor victim- daughter of the informant was missing and during search, the informant along with her sister could know from the neighbours that the accused Prasenjit Sarkar, S/o. Sri Indrajit Sarkar of Indranagar forcefully kidnapped her victim-daughter against her will. Thereafter, on 29.01.2019 the informant went to the house of accused Prasenjit and found her victim- daughter, whereupon, victim disclosed that she had been forcefully kidnapped. According to the informant, at that time, her victim-daughter wanted to come back with her but the family members of accused Prasenjit Sarkar forcefully detained the victim in their house.

[4] Based on the written complaint of informant (mother of the victim) a case was registered at East Agartala Women PS, vide Case No.2019/WEA/007, dated 01.02.2019 under Sections-366/34 of the IPC and Section-8 of the POCSO Act against the accused Prasenjit Sarkar and other house inmates. The case was accordingly investigated by police. During the course of investigation, the IO namely, Ramfanmawii on 01.02.2019, examined the victim and all the available witnesses namely Sima Modak and Sanchita Modak and recorded their statements under Section-161 of Cr.PC. On the same date the IO arrested the accused Prasanta Sarkar and forwarded him before the Court on the following day. On 01-02-2019, IO also visited the first PO and prepared hand sketch map along with separate index, arranged for medical examination of the victim girl from the GB Hospital, Agartala, seized the vaginal swab of the victim-girl by preparing the seizure list. Thereafter, on 02-02-2019, IO of the case arranged for the potency test of the accused Prasanta Sarkar from the AGMC & GBP Hospital, Agartala and sent the victim before the Magistrate for recording her statement under Section-164(5) of Cr.PC. On the same date, IO seized the blood sample of the accused person by preparing the seizure list.

[5] During the course of investigation, the IO of the case on 03-02-2019, visited the second PO and prepared hand sketch map along with separate index. Subsequently, on 11-02-2019 IO of the case seized birth certificate of the victim and the photocopy of the Aadhar card of the victim girl. Thereafter, she made arrangement for sending the seized samples to the SFSL Narsingarh for their forensic examination, received the SFSL report in connection with this case and also received the final opinion regarding the medical report of the victim-girl. During the course of investigation, the IO further examined the witness namely, Nantu Das, Swapan Barman and Swarnalaxmi Debbarma and recorded their statements U/s 161 of CrPC.

[6] Thus, on completion of investigation, she was prima facie satisfied that the accused person namely, Prasanta Sarkar @ Balu @ Prasenjit committed the offences punishable under Sections-366/376(2)(i) of IPC read with Section-4 of the POCSO Act and submitted charge sheet against the said accused person under those sections of law. The IO of the case also submitted charge sheet against the accused persons namely, Smt. Kabita Sarkar and Indrajit Sarkar U/S 366/212 of IPC and hence, submitted vide East Agartala Women PS C/S. No. 17/19, dated 28-05-2019 to face trial in the open Court of Law.

[7] During trial, upon consideration of the record, the documents submitted therewith and after hearing submission of both sides, charge under Section-363/376(2)(1) of the IPC and Section-6 of the POCSO Act was framed against the accused Prasanta Sarkar by my Learned predecessor-in-office on 03.01.2020 and the said charge was read over and explained to the accused to which he pleaded not guilty and claimed trial. As there was no prima-faice material to frame charge against the accused persons namely, Kabita Sarkar and Indrajit Sarkar, both of them were discharged under the same order.

[8] To substantiate the charge, the prosecution adduced as many as 16 [Sixteen] witnesses including the complainant and also exhibited certain relevant

documents and materials [Exbts.1 to 15]. Thereafter, the accused-appellant was examined separately under Section-313 of Cr.P.C. for having his response in respect of the incriminating materials those surfaced in the evidence as adduced by the prosecution.

[9] After hearing both sides, the learned trial Court delivered the judgment and order of conviction and sentence dated 17.06.2023 wherein, the accused-appellant has been convicted as under:

In the result, the convict namely, Prashanta Sarkar stands sentenced to suffer rigorous imprisonment (RI) for 20 (twenty) years and to pay fine of Rs. 20,000/- for the offence punishable under Section 376(3) of IPC, in default of payment of fine, the convict shall suffer simple imprisonment (SI) for further 2 months and to suffer rigorous imprisonment (RI) for 2 years and to pay fine of Rs. 10,000/- for the offence punishable under Section 363 of IPC, in default of payment of fine, the convict shall suffer simple imprisonment (SI) for 1 month and to suffer rigorous imprisonment (RI) for 6 months and to pay fine of Rs. 5,000/- for the offence punishable under Section 343 of IPC, in default of payment of fine, the convict shall suffer simple imprisonment (SI) for further 15 days.

[10] Being aggrieved by and dissatisfied with the judgment and order of conviction, the present appeal has been preferred by the appellant.

[11] It is contended by the counsel for the appellant that the victim stated that she went along with the appellant on his repeated insistence and she was taken to one of the relative of the appellant. The accused proposed to marry her to which she was little bit confused and did not accept the said offer and on that day, she stayed in that house and at night. The appellant received a call from police and on the following day, he put vermilion on her forehead and conch bangles to show that they are married. Thereafter, they went to police station where the accused stated that they are married and have developed physical relations. Both of them were not detained by police and their statement was recorded. Both of them were allowed to go from the premises of the police station. Thereafter, she came back from the PS. After 2 days, both the appellant and the victim were called to the PS and they appeared before the police from where, the police sent the victim to her mother. In cross-examination, the victim stated that both of them started loving each other and she came to Agartala on 14.01.2019 from the date of which,

both of them started meeting each other at different places. On perusal of the statement of the victim, it is crystal clear that she, on her own will went to the accused and as such, the order of conviction and sentencing is liable to be quashed and set aside.

[12] Learned senior counsel for the appellant has placed his reliance on a judgment of the apex court in *Alamelu and Another versus State* reported in (2011) 2 SCC 385 where it has been categorically observed as follows:

46. In addition, the High Court failed to consider the expert evidence given by PW 13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognised by this Court in Jaya Mala v. Govt. of J&K : (1982) 2 SCC 538. In the aforesaid judgment, it is observed as follows:

"9. ... However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

[13] On the other side, Mr. S. Ghosh, learned Addl. PP appearing for the state-respondent has vehemently opposed such statement and contended before this court that the impugned order as passed by the learned court below is just and proper and further prayed to dismiss the appeal.

[14] On perusal of the evidence of PW-10, the minor girl, this court is of the considered opinion that it is not a case of kidnapping or any abduction but it is a case of love relation between the accused and the PW-10, the victim girl. PW-10 has not indicated before the court below whether she was kidnapped or she was sexually assaulted or, she had been raped by the appellant herein. On the other hand, she confirmed that she was into marital relation with the accused-appellant who has applied vermilion on her head and conch bangles to her hands. All these happened in a Kali Temple in their vicinity. Thereafter, they started living with each other. On receipt of a complaint and on couple of times, both of them visited police station. They were present before the investigating officer and also cooperated with the investigation. But to their surprise on the strength of the medical evidence, ie. the ossification test conducted

wherein the doctor PW3 has indicated the age of the girl would be more than 16 and around 17 years.

[15] This court is of the considered view that on the basis of the ossification test conducted by the PW3, the age of the victim girl can be considered as 17 years by placing a reliance on **Alamelu** (supra) where it has been categorically observed by the Apex Court that the margin of error in age ascertained by radiological examination is two years on either side. This court considers the girl is physically and mentally matured and she personally volunteered to go with the accused appellant and solemnize her marriage with him. They stayed together under one roof for a brief period and from the above discussion, this can be opined that the present case in hand does not attract the provision of POCSO Act and the accused appellant is not liable to be punished. In our opinion, the conclusion recorded by the learned court below is wholly perverse. The appellant is clearly entitled to the benefit of doubt. In view of the above, the appeal is accordingly allowed. The judgment dated 17.06.2023 passed by the Ld. Special Judge, POCSO, West Tripura, Agartala in Case No.SPL.(POCSO) 21 of 2019 is set aside.

B.Palit, J

T. Amarnath Goud, J

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