

**HIGH COURT OF TRIPURA
AGARTALA**

CRL.A.No.16 of 2023

Sri Krishan Das @ Chan,
S/O. Sri. Sukumar Das,
Resident of East Aralia, Surjya Sen Colony,
P.S. East Agartala,
District- West Tripura.

.... Appellant(s)

Versus

The State of Tripura

....Respondent(s)

For Appellant(s)	:	Mr. T. K. Deb, Adv, Mr. Biswajit Debnath, Adv.
For Respondent(s)	:	Mr. S. Ghosh, Addl. P.P.
Date of Hearing	:	16.08.2024
Date of delivery of Judgment and Order	:	21.08.2024
Whether fit for Reporting	:	YES

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

This appeal is directed challenging the judgment and order of conviction and sentence dated 17.07.2023 delivered by Learned Special Judge, POCSO, West Tripura, Agartala in connection with case No.SPL (POCSO) 30 of 2018. By the said judgment, the appellant has been sentenced to suffer SI for three years and to pay fine of Rs.20,000/- for the offence punishable under Section 8 of the POCSO Act, ID to suffer SI for further one month.

02. Heard Learned Counsel, Mr. D. Deb for the appellant and also heard Mr. S. Ghosh, Learned Additional P.P. for the State-respondent.

03. At the time of hearing of argument, Learned Counsel for the appellant drawn the attention of the Court referring the FIR laid by the informant and submitted that on the basis of the FIR, O.C., East Agartala Women P.S. registered a case under Section 352/376(2)(i) of IPC against the appellant and also under Section 4 of the POCSO Act and on completion of investigation, the I.O. laid charge-sheet against the appellant. The Learned Trial Court below on the materials on record framed charge under Section 376(2)(i) of IPC and also under Section 6 of POCSO Act. But to substantiate the charge, prosecution before the Learned Trial Court could not produce any materials on record to sustain the charge either 376(2)(i) or under Section 6 of POCSO Act. Further, Learned Counsel also submitted that in this case, before the Learned Trial Court the prosecution could not prove the birth certificate in accordance with law, so, no reliance can be placed upon that. But the Learned Trial Court below at the time of delivery of judgment did not consider the same and based on the oral testimony of the mother of the victim, came to the observation that on the day of alleged occurrence of offence, the victim was a child and found the appellant to be guilty for the offence punishable

under Section 8 of the POCSO Act, but to substantiate the charge under Section 8 of the POCSO Act, no materials relevant to Section 7 of the POCSO Act could produce by the prosecution in the case. Learned Counsel also referred the evidence of the informant and the victim and referring their evidence, he submitted that there was material contradiction to the evidence of said witnesses and from their evidence also no evidence, showing involvement of the appellant with the alleged offence under Section 7 of the POCSO Act revealed against the appellant. So, the judgment and order of conviction awarded by the Learned Trial Court below cannot be sustained in the eye of law. It was further submitted that before delivery of the judgment, the Learned Trial Court below did not consider the relevant provision of Section 222(4) of CrPC. He further submitted that prosecution before the Learned Trial Court below has failed to satisfy the requirements of Section 222(4) of Cr.P.C. Finally, Learned Counsel submitted that since the evidence on record does not justify warrant of conviction against the appellant but the Learned Trial Court at the time of delivery of judgment failed to appreciate the evidence on record and convicted him for which interference of the Court is required. He further submitted that even to substantiate the allegation, prosecution before the Learned Court below could not adduce any independent public witness to support the

case of the prosecution and furthermore, there is evidence on record that there was previous enmity between the father of the appellant and the father of the victim for which the appellant has been falsely implicated in this case.

04. On the other hand, Learned Addl. P.P. taking part in the hearing submitted that admittedly prosecution before the Learned Trial Court below could not adduce any material to substantiate the charge framed under Section 376(2)(i) of IPC and also under Section 6 of the POCSO Act, but there is materials on record that the prosecution has been able to prove the charge under Section 8 of the POCSO Act, although no separate charge was framed under the aforesaid Section in view of Section 222(2) of Cr.P.C., because if the evidence of the victim and her mother is scrutinized, in that case it will be found that the appellant by the trend of cross-examination could not raise any doubt to disbelieve the evidence of the victim and the informant. Furthermore, the appellant in this case has adduced two witnesses in support of his defence, but by adducing defence witnesses, the appellant could not raise any doubt/cloud to disbelieve the prosecution story. So, according to Learned Addl. P.P. for the State-respondent, the Learned Court below rightly and reasonably found the appellant to be guilty and convicted him accordingly. Regarding birth certificate relied upon by the prosecution in absence of the author, Learned Addl. P.P.

submitted that since the birth certificate was a public document and in view of the principle of law laid down by the Hon'ble Apex Court in (2009) 7 SCC 783 there was no scope to disbelieve the birth certificate and more so, the said document was marked as Exhibit without any objection from the other side and furthermore, the mother, being the natural guardian of the victim, herself stated about the date of birth of the victim. So, there was no scope to disbelieve the actual date birth of the victim, i.e. on 23.12.2011.

Finally, Learned Addl. P.P. submitted that there is no merit in the appeal and urged for dismissal of this appeal as the appellant has failed to make out any case for interference of the judgment of the Learned Trial Court below.

05. Now, let us project the evidence on record of the prosecution adduced before the Trial Court by the prosecution as well as by the accused. To substantiate the charge, prosecution before the Learned Trial Court has adduced in total 18 nos. of witnesses.

06. PW-1 is the victim of this case. Before recording her evidence, her veracity was tested by the Learned Court below and being found that she was capable of making rational answers of questions put to her and accordingly, being satisfied, her evidence was recorded. She deposed that

she used to call the appellant as 'Chan Kaka'. When she was reading in class-I, she used to take tuition under Chan Kaka, at that time, one day at about 3pm she went to the house of Chan Kaka for tuition where said Chan Kaka removed her wearing apparels and made her nude. Thereafter, he also removed his wearing apparels and pressed her breasts and she felt pain. After that he pressed his penis into her 'nunku' and she got pain. Meanwhile, her mother arrived then she started crying. Then her mother took her to house. She further stated that one day police produced her to the Court, where she gave her statement to a lady officer, who recorded the same and read over the contents thereof to her and she signed therein. She identified her two numbers of signatures in the said statement which were marked as Exhibit-1 series. She further stated that police produced her before one doctor when she was medically examined.

During cross-examination she stated that she did not say to the Magistrate that Chan Kaka pressed his penis to her vagina. Nothing more came out relevant from her cross-examination.

07. PW-2, Smt. Lipika Deb deposed that she is the informant of this case. In the year 2018, her victim-daughter used to take tuition under Krishan Das and she used to the house of Krishan at about 2 pm. On 05.04.2018, the victim

as usual went to the house of the appellant to take tuition. But it was at about 3.30 pm when she was not returning back, so being worried, she went to the house of the appellant as the house of the appellant was adjacent to their house. She went to the house of appellant and found both the appellant and the victim in nude condition and the appellant was lying on the victim on a cot. Then she asked to the appellant as to why he was doing so. Then he begged apology to her. After that she brought the victim to her house. Meanwhile, mother of the appellant came and then she informed the matter to her mother. After that with the help of the villagers, she lodged FIR against the appellant. He got the ejahar written by one Khokan Biswas of their locality, which was written as per her version. She identified the ejahar marked as Exhibit-2 and her signature marked as Exhibit-2/1. She further stated that after the incident, on the same day, the victim told her that on some previous occasions the appellant committed the same crime, misdeed with her and thereafter, threatened her not to divulge it to anybody and as such she did not divulge it to her. After lodging of the ejahar, on that night, police arranged for her medical examination. On 06.04.2018, the police also produced the victim in the Court of Magistrate where her statement was recorded. She further stated that police on 06.04.2018 seized birth certificate from her custody and she

signed on the seizure list. She identified her signature in the seizure list dated 05.04.2018 marked as Exhibit-3. She further stated that on 05.04.2018 police seized frock and pant of the victim in the police station on her production. She identified the birth certificate of the victim marked as Exhibit-4 and as per birth certificate her date of birth was 23.012.2011.

During cross-examination she stated that she did not specifically mentioned in her ejahar that she found the appellant and victim in nude condition and the appellant was lying upon the victim on a cot. She also did not say to police that the victim told her that on previous occasion also the appellant had committed the same misdeed with her. She also stated that about 2/3 years back prior to the incident, one day father of the appellant namely, Sukumar Das physically assaulted her husband. She further stated that on the day of incident, mother of the accused was not available in the house.

08. PW-3, Laxmi Deb is the grandmother of the victim. She deposed that in the month of April, 2018 at about 3/3.30 pm, daughter of the informant went to her tutor's house in the same locality out their house and the name of her private tutor was Kishan Das. When the victim-girl was not returning back to home despite her usual time of

coaching was over, the mother of the victim-girl went to the house of Kishan and found that he was committing rape upon her girl in his house and Lipika, i.e. the informant after returning back to home, narrated the said incident to her. She identified her signature on the seizure list dated 05.04.2018 marked as Exhibit-5.

During cross, nothing came out relevant.

09. PW-4, Alo Saha is the near relative of the informant. She deposed that about 11 months back, one of her neighbours, Pradip Nama told her that Kishan Das raped the victim. Immediately, she went to the house of the victim but did not find the victim and her mother. She could learnt that they went to a local BJP Leader to inform the incident and on the same day, in the evening, police came to their house and after that arrested the accused and seized one half pant of the accused from his house and she signed in the seizure list. She identified her signature on the seizure list dated 05.04.2018 marked Exhibit-5/1.

During cross examination, she stated that she did not say to police that she had learnt the said incident from Pradip Nama. She also did not say to police that on her arrival to the house of the victim, she found that the victim and her mother went to meet one BJP Leader to inform about the incident. Nothing more came out relevant.

10. PW-5, Sreemati Das was the neighbour of the victim. Although she could not say anything about the prosecution case, but she stated that she heard that the appellant-accused committed rape upon the victim about 10/11 months back when she went to the house of the accused.

Nothing came out relevant during cross-examination.

11. PW-6, could not say anything about the prosecution case.

12. PW-7, Namita Deb is a seizure list witness. She deposed that on 05.04.2018, the I.O. seized some samples and she signed on the seizure list and identified the signature in the seizure list marked as Exhibit-6.

13. PW-8, Smt. Puspa Sarkar deposed that on 05.04.2018 the I.O. seized vaginal swab of the victim-girl at East Agartala Women P.S. in her presence and she signed on the seizure list. She identified her signature on the seizure list dated 05.04.2018 marked as Exhibit-6/1.

14. PW-9, Smt. Rashmani Das deposed that about one year back, one day the informant, Lipika Deb with her daughter came to her house, when the informant told her that the accused had committed rape upon the victim after

removing her pant on that day accordingly, she told her to inform the matter to other neighbours. She could not say anything further more.

Nothing more came out relevant from her cross-examination.

15. PW-10, Dr.Pranab Choudhury examined the appellant-accused and found him fit for performing sexual intercourse in normal circumstance. He identified his report marked as Exhibit-7 and his signature marked as Exhibit 7/1 series. He also identified the signature of the appellant-accused on the seizure list on the report marked as Exhibit 7/2.

He was declined to cross-examination by the appellant.

16. PW-11 is another seizure list witness. She identified her signature on the seizure list dated 06.04.2018 marked as Exhibit-8.

17. PW-12 is another seizure list witness. She identified her signature on the seizure list dated 06.04.2018 marked as Exhibit-8/1.

Both the witnesses were declined to cross-examination by the appellant.

18. PW-13, Suman Nama is another hearsay witness. He deposed that about one year back the informant came to his house and told that her daughter was raped by the accused Kishan Das and knowing the fact, she sent the informant to the local leader, namely Rakhi Das. She could not say anything further more about this case.

Nothing came out relevant from his cross-examination.

19. PW-14 deposed that about one year back, one day in the evening, the informant Lipika Deb met him on the road and requested him to write one ejahar on her behalf alleging that her daughter was raped by one of their locality. Accordingly, he scribed the ejahar of the informant Lipika Deb and the same was read over to her. Said Lipika Deb signed on the ejahar and he also signed. He identified the ejahar marked as Exhibit-2/1.

During cross-examination, he deposed that the house of the informant and the accused were situated at a distance of 1 ½ km from his house and there were few educated persons residing in the neighbourhood of the informant. He could not say anything about the case of the prosecution.

20. PW-15, Rupali Majumder deposed that on 17.04.2018, she was posted as Scientific Officer at State

Forensic Science Laboratory, Narishingarh and their office received one sealed parcel containing the following items:

- 1) Exbt.A – Sample of swab taken from vulva area of victim Riya Deb.
- 2) Exbt.B - High vaginal swab sample of Riya Deb.
- 3) Exbt.C – Perianal swab sample of Riya Deb.
- 4) Exbt.D – One pink colour frock with black and white print.
- 5) Exbt.E – One orange colour panty.
- 6) Exbt.F - Blood sample of Kishan Das.
- 7) Exbt.G - One green colour half pant of Kishan Das.

She examined those items in their laboratory of Bio/Sero Division from 18.04.2018 to 20.04.2018 and finally opined that seminal stain/spermatozoa/blood stain of human origin could not be detected in Exbt.A, B, C, D, E & G. Thereafter, she prepared her report and signed the same. She identified her said report and on identification, the same was marked as Exhibit-9 and signature of the witness therein was marked as Exhibit-9/1.

21. PW-16 is the father of the victim. He deposed that the incident took place on 05.04.2018. On that day, he was called by his wife, Smt. Lipika Deb over telephone. That time, he was available at his shop at Motorstand. After

getting information, immediately, he went to his house when his wife told him that Kishan Das, his neighbour made his daughter naked and accused was found on the person of his daughter. His wife informed the matter to the Police Station. Thereafter, FIR was lodged against the accused. He could not say the exact date of birth of his daughter. He identified his signature on the seizure list prepared by the I.O. marked as Exhibit-3/1.

He was confronted with the statement that he stated to I.O. that he was informed by his wife, but the said statement was not found in his statement recorded by I.O. under Section 161 of Cr.P.C. He admitted that he did not say to I.O. that the accused raped his daughter and further admitted that there was a quarrel with him by the father of accused. He further stated that father of accused assaulted him. He again further stated that before taking his signature on the seizure list Daragababu read over the contents of the seizure list to him.

22. PW-17, Smt. Sharmistha Roy deposed that on 08.05.2018, she was posted at AGMC and GBP Hospital as Medical Officer. On that day, she had given medical examination report on the basis of the forensic examination of Vulval area, high vaginal swab, perneal area inter alia that

there was no evidence of any seminal stain, spermatozoa, blood stain of any human origin.

She was declined to cross-examination by the accused.

23. PW-18, Ramfanmawii, the I.O. deposed that on 05.04.2018, she was posted as SI of police at East Agartala Women P.S when Inspector Sima Biswas was the O.C., who on that day received one ejahar from Lipika Deb of East Aralia, Surjya Sen Colony and registered the same as East Agartala Women P.S. case No.2018/WEA/029 under Sections-342/376 (2) (i) of IPC read with Section 4 of the POCSO Act. She identified the signature of Sima Biswas on the margin of ejahar marked as Exhibit-2/3. She also stated that Inspector, Sima Biswas filled up the printed FIR form which bears her signature at the bottom and identified the same marked as Exhibit-10 and Exhibit-10/1. She further stated that being endorsed with the case, she started investigation of the case, visited the P.O. and prepared hand sketch map along with separate index and identified the same marked as Exhibit-11 and Exhibit-11/1 respectively. She arrested the accused and produced the victim for recording her statement under Section 164(5) of Cr.P.C. She further stated that during investigation, she examined some witnesses and recorded their statement under Section 161 of

Cr.P.C. She seized the birth certificate of the victim and one coloured printed frock, one panty and prepared seizure list. She identified the seizure list which bears her signature at the bottom and identified the same marked as Exhibit-3/2 and Exhibit-3/3 respectively. She seized a half pant of the accused and prepared another seizure list and identified the seizure list and signature marked as Exhibit-5/2 and Exhibit-5/3 respectively. She confirmed Exhibit-4. She also identified the seized samples of swab, wearing apparels of the victim and half pant of the victim marked as Exhibit-MO.1 series. She identified another seizure list marked as Exhibit-6/2 and Exhibit-6/3 respectively. She seized the blood sample of the accused by a seizure list and identified the seizure list with signatures marked as Exhibit-8/2 and Exhibit-8/3 respectively. Finally, she laid charge-sheet against the appellant-accused.

During re-cross-examination, she stated that she started investigation of the case on the basis of section mentioned in the printed FIR form. She further stated that she visited P.O. on 06.04.2018 and after going to the P.O., she found Suman Nama and Rasmoni Das. She did not examine the School Authority where the victim studied. She also did not enquire from any other persons the name of other students who used to undergo tuition from the alleged appellant. She did not cite the Issuing Authority of the birth

certificate as witness in the case. She did not examine the staff nurse of AGMC and GBP Hospital, namely Mani Saha.

24. The appellant-accused, in course of his examination, under Section 313 of Cr.P.C., pleaded as innocent and desired to adduce witness in support of his defence and accordingly, two witnesses were adduced by the accused in support of his defence.

25. DW-1, Jhuma Das deposed that she know the accused since his childhood. He is a good person. She further stated that father of the victim, being intoxicated used to quarrel with the accused and threatened the accused and his family that he would teach them a lesson. She was never examined by the police in connection with this case though she was an adjacent neighbour of the accused. She could not say as to whether the victim used to take private tuition from the accused or not. She further stated that after 3/4 days of the quarrel between the father of the victim girl with the accused and his father, the informant i.e. the mother of the victim girl have lodged this case falsely against the accused person. Further stated that prior to living in the area, the family of the victim used to stay in some other place and they left that area after making quarrels with some others.

During cross-examination by the prosecution save and except denial nothing came out relevant.

26. Similarly, DW-2, Shefali Biswas also deposed in the same manner like DW-1 in her examination-in-chief in affidavit.

During cross-examination nothing came out relevant.

These are the synopsis of the evidence on record of the accused-appellant in support of his defence before the Learned Trial Court.

27. I have heard argument of both the sides at length and gone through the evidence on record of the prosecution as well as the appellant before the Learned Trial Court. Admittedly, in this case, the Learned Trial Court below initially framed charge against the appellant under Section 376(2)(i) of IPC and also under Section 6 of the POCSO Act against the appellant, but convicted the appellant under Section 8 of the POCSO Act as no evidence revealed against the appellant during recording of evidence under Section 376(2)(i) of IPC and also under Section 6 of the POCSO Act.

28. In course of hearing of argument, Learned Counsel for the appellant drawn the attention of the Court referring the provision of Section 222 of Cr.P.C and submitted that before the Learned Trial Court prosecution has failed to satisfy the conditions requisite for initiation of proceedings in respect of the minor offence. So, in absence

of requisite conditions being fulfilled by the prosecution, there was no scope to found the appellant to be guilty under Section 8 of the POCSO Act as submitted by Learned Counsel for the appellant. Now for the sake of convenience, I would like to refer herein below the provision of Section 222 of Cr.P.C.:

"222. When offence proved included in offence charged.—(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.
(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.
(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.
(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."

29. On perusal of the same, it appears that for commission of minor offence there was no bar on the part of the Court below to find the convict-appellant guilty for a minor offence. Here in the case at hand, the prosecution was set into motion on the basis of an FIR, laid by the informant, Lipika Deb on 05.04.2018. It is the settled position of law that FIR is not a substantive piece of evidence but on the basis of the FIR, generally the prosecution sets into motion.

In the FIR, the informant stated that when she went to the house of the accused, that time she found that the accused had committed rape upon the victim. But at the time of recording evidence before the Court, she stated that when she went to the house of the accused-appellant, on that relevant point of time, she found both the appellant and the victim in nude condition and the appellant was found lying on the victim on a cot and being asked he sought apology to her.

During cross-examination she stated that she did not specifically mentioned in the ejahar that she found the victim and the accused in nude condition and the appellant was found lying upon the victim on a cot.

So, according to the appellant, this portion of evidence was improved version which the informant did not mention in her ejahar. But for this improvement, it cannot be said that the prosecution case is false. Now, if we go through the evidence of the informant and the victim, it appears that the appellant inspite of cross-examination of those witnesses could not shatter their evidence at any length. Now regarding commission of offence of rape, there is no medical evidence on record against the appellant. Now, if we go through the evidence of the victim, it appears that the victim, in course of her examination before the Court, specifically stated that after removing her wearing apparel,

the appellant pressed her breasts, for which she felt pain and he also pressed his male organ to her female organ and she got pain. But regarding penetration, as already stated, the Medical Officer did not find any sign to substantiate the charge punishable under Section 376(2) (i) of IPC and also under Section 6 of the POCSO Act. The appellant inspite of cross-examination of the victim failed to shatter her evidence. Furthermore, from her cross-examination also, it cannot be said that she was used to lodge false against the appellant.

30. Learned Court below, at the time of delivery of judgment, elaborately discussed all these issues and finally found the appellant to be guilty under Section 8 of the POCSO Act as according to the Learned Court below, after appreciating the evidence on record, it appears to the Learned Court below that the appellant committed offence punishable under Section 7 of the POCSO Act. Now, for the sake of convenience, I would like to refer herein below the relevant provision of Section 7 of the POCSO Act which provides as under:

Section 7 of the POCSO Act:

7. Sexual assault.- whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

From the above definition, it appears that there must be 'sexual intent' to constitute offence under Section 7 of the POCSO ACT.

To understand the meaning of sexual intent, assistance of ChatGPT is taken with the following query:

To constitute offence under Section 7 of POCSO Act what would be the meaning of sexual intent?

ChatGPT said:

Under Section 7 of the Protection of Children from Sexual Offences (POCSO) Act, 2012, the term "sexual intent" plays a crucial role in determining whether an act constitutes an offence. The section deals with "sexual assault," which is defined as touching a child with sexual intent in any part of the body or doing any act with sexual intent which involves physical contact without penetration.

Meaning of Sexual Intent

"Sexual intent" is not explicitly defined in the POCSO Act, but it generally refers to the intention or purpose behind a person's actions that are sexual in nature. The term implies that the actions were done with the purpose of gratifying sexual desires or indulging in sexually motivated behavior.

How Sexual Intent is Determined:

- 1. Context and Circumstances:** The intent is often inferred from the context and circumstances of the act. For instance, the nature of the touch, the area of the body involved, and the manner in which the act was committed are all important factors.
- 2. Behavior and Conduct:** The behavior of the accused before, during, and after the act can be considered to infer sexual intent. For example, actions such as inappropriate remarks, gestures, or expressions might indicate sexual intent.
- 3. Lack of Innocent Explanation:** If there is no innocent explanation for the act, it might be inferred that the act was done with sexual intent. For instance, touching a child's private parts without any justifiable reason is likely to be interpreted as having sexual intent.
- 4. Judicial Interpretation:** Courts in India have interpreted "sexual intent" in various cases under the POCSO Act. The courts often rely on the principle that the intent must be evident from

the circumstances and should not be presumed automatically. The presence of sexual intent is a factual determination based on evidence.

Examples of Sexual Intent:

- Inappropriate touching of a child's private parts.
- Kissing a child on the lips with no innocent explanation.
- Fondling or groping a child in a way that is not justifiable under any normal social interaction.

Absence of Sexual Intent:

If an act is committed without sexual intent, even if it involves touching, it may not constitute an offence under Section 7 of the POCSO Act. For example, a pat on the back or a touch on the shoulder during normal social interaction, without any sexual motivation, would not be considered an offence.

Conclusion:

Sexual intent is central to determining whether an act constitutes an offence under Section 7 of the POCSO Act. It must be proven that the act was done with the intention of engaging in sexually motivated behavior. The courts consider all relevant factors, including the nature of the act, the circumstances, and the behavior of the accused, to establish whether sexual intent was present.

31. Here in the case, if we go through the evidence of the victim, it appears that on that alleged day, the appellant with sexual intent removed the wearing apparel of the victim and pressed her breasts, for which she sustained pain. Regarding penetration, there is no medical evidence on record as already stated. But the intention to commit sexual assault without physical contact and without penetration also falls under the purview of Section 7 of the POCSO Act. The appellant by the style of cross-examination could not brush aside the aforesaid prosecution story, specifically the evidence of the victim, i.e. PW1 and her mother PW2. Other

witnesses of the prosecution even the father of the victim was not present to the place of occurrence at the time of alleged occurrence. PW-3, the grandmother of the victim to whom the informant disclosed about the prosecution story, after returning back to home soon after the incident. Her evidence also could not be discarded by the appellant. PW-4, Alo Saha heard the fact of incident and she was also a seizure list witness. Similarly, PW-5, Sreemati Das heard the fact of incident but they were not present to the place of occurrence. Other witnesses were police personnel or the seizure list witnesses. They could not whisper anything about the prosecution story. The appellant in support of his defence adduced two witnesses. Those witnesses stated that the accused is a man of good character and the appellant was falsely implicated in this case due to some inimical relation. They denied the prosecution allegation. The prosecution also by the trend of cross-examination could not raise any circumstance to disbelieve their evidence. Now, the question before this Court is that whether in such a situation, the evidence of the victim, who is a minor girl should be discarded because at the time of alleged occurrence, excepting the victim no other persons were there. The mother of the victim appeared to the place of occurrence almost after the occurrence, although she found both the appellant and the victim in nude condition. But from her

evidence, it cannot be conclusively said that she found the appellant to cause penetrate upon the victim. Medical evidence also did not support her story. It may so happen that the appellant attempted to commit the offence when she went therein. But the appellant by the style of cross-examination could not raise any circumstance to disbelieve the story of the victim regarding pressing of her breasts by the appellant, for which she sustained pain and regarding attempt of penetration, as alleged, the same may not come in the report of Medical Officer.

32. So, after going through the evidence on record, there is no scope to disbelieve the evidence of the victim girl, although the prosecution failed to shatter the evidence on record of the accused-appellant. But those witnesses of appellant were not present to the P.O. at the time of alleged occurrence. More so, regarding bad antecedent of the informant party, the appellant could not adduce conclusive evidence on record. Hon'ble the Supreme Court in **CIDCO vs Vasudha Gorakhnath Mandevlekar** dated 12.05.2009 reported in **(2009) 7 SCC 283**, wherein in para No.18 Hon'ble the Apex Court observed as under:

"18. The deaths and births register maintained by the statutory authorities raises a presumption of correctness. Such entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Evidence Act. It would prevail over an entry made in the school register, particularly, in absence of any proof that same was recorded at the instance of the guardian of the respondent. (See *Mirad Mal*

Singhvi v. Anand Purohit: 1988 Supp SCC 604)."

33. It appears that the informant in course of her examination relied upon Exhibit-4, i.e. the birth certificate issued by the Register of Births and Deaths, AGMC & GBP Hospital issued under Section 12/17 of the Registration of Births and Deaths Act, 1969, from which it appears that the date of birth of the victim was 23.12.2011. So, on the day of alleged occurrence of offence, the victim was a child within the meaning of Section 2(D) of the POCSO Act, 2012 and relying upon the principle of the aforesaid citation of the Hon'ble Apex Court, here in this case, I do not find any scope to disbelieve Exhibit-4 for non-examination of the Issuing Authority of the said certificate. More so, the appellant at the time of admission of the said Exhibit-4 did not raise any objection before the Learned Trial Court to discard the same. Further, regarding presumption, I would like to refer herein below the relevant provisions of Section 29 and 30 of the POCSO Act:

Section 29 and 30 of the POCSO Act:

"29. Presumption as to certain offences.—
Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. Presumption of culpable mental state.—
(1) In any prosecution for any offence under this Act which requires a culpable

mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.—In this section, “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.”

34. From the aforesaid definition, it appears that in the given case the appellant by the art of cross-examination and also by adducing defence witness has failed to rebut the presumption of the offence for which he was charged. Thus, after hearing both the sides and also after going through the judgment of the Learned Court below in my considered view, Learned Court below rightly found the appellant to be guilty in view of the provision provided under Section 222(2) of Cr.P.C. for the offence punishable under Section 8 of the POCSO Act, for which I do not find any infirmity/perversity in the judgment of the Learned Trial Court below.

35. In the result, the appeal filed by the appellant stands dismissed being devoid of merit. The judgment and order of sentence and conviction delivered by the Learned Special Judge POCSO, West Tripura, Agartala, in connection with case No.SPL (POCSO) 13 of 2018 dated 17.07.2023 is

hereby upheld and accordingly, it is affirmed. The appellant is to surrender before the Learned Court below to serve out the sentence. The case is thus, accordingly disposed of.

Send down the LCRs along with copy of the judgment for immediate compliance.

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

JUDGE

