

**HIGH COURT OF TRIPURA
AGARTALA
Crl.A.(J)No.37 of 2023**

Sri Bishu Majumder,
son of Late Nani Gopal Majumder
of Tulakona, Champamura,
P.S. Bodhjunnagar, District-West Tripura

----Convict-Appellant(s)

Versus

The State of Tripura

----Respondent(s)

For Appellant(s)	:	Mr. S. Sarkar, Sr. Adv. Ms. V. Podder, Adv.
For Respondent(s)	:	Mr. Raju Datta, P.P.
Date of Hearing and Judgment & Order	:	23.07.2024
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*]

This appeal is preferred by the judgment and award of conviction and sentence dated 27.07.2023 delivered by Learned Special Judge, (POCSO), West Tripura, Agartala in connection with Case No.Special(POCSO)12 of 2021. By the said judgment and order of sentence and conviction the appellant has been awarded sentence to suffer rigorous imprisonment for a period of 20(twenty) years and to pay a fine of Rs.30,000/- in default to suffer further rigorous imprisonment for 6(six) months for the commission of offence punishable under Section 6 of the POCSO Act.

2. Heard Mr. S. Sarkar, Learned senior counsel assisted by Ms. V. Podder, Learned counsel appearing for the appellant as well as Mr. Raju Datta, Learned P.P. appearing for the State-respondent.

3. At the very outset, let us discuss about the subject matter of the prosecution before the Learned Court below. The case of the prosecution of the prosecution in short is that on 14.03.2021 one Smt. Ruma Bhattacharjee laid one FIR to OC/concerned P.S. alleging inter alia that on 13.03.2021 in the morning at about 9.30 a.m. she went to consult with Dr. Ashok Majumder at his chamber at Dhaleswar. She along with her husband entered into the chamber of the said doctor, keeping her victim daughter (name withheld), aged about 5 years in the care of the auto-driver, namely Bishu Majumder who was then standing with his auto-rickshaw in front of doctor's chamber. It was reflected from the ejahar that after consultation with doctor, they returned home at about 1 p.m. At night, her victim-daughter while went to urinate, she told her mother that she was feeling pain in her vagina. Initially, the informant could not understand as to why the victim was suffering from such pain. Gradually, when the pain was accelerated, the victim daughter told her mother when they went to the chamber of doctor, that time, the Driver Bishu Majumder inserted his fingers to her vagina and also moved his finger into her vagina. Accordingly, she laid the FIR to OC, Khayerpur Out Post which was forwarded to OC, East Agartala, Women P.S. and accordingly, East Agartala Women P.S. vide No.2021/WEA/012, dated 14.03.2021 under Section 376(AB) of IPC and under Section 6 of POCSO Act was registered and the investigation started. The IO after completion of investigation laid charge-sheet against the appellant vide East Agartala Women P.S. Case No.11/21

under Section 376 of IPC and under Section 6 of POCSO Act. Being prima facie case made out. Accordingly, on receipt of charge-sheet cognizance of offence was taken. The Learned Court below considering the materials on record framed charge against the appellant under Section 354(B)/376(AB) of IPC and also under Section 6 of POCSO Act and the same was explained to the appellant in Bengali which he pleaded not guilty and claimed to be tried as the trial commenced. During trial, prosecution to substantiate the charge in total has adduced 9(nine) numbers of witnesses and the prosecution also tendered some documentary evidence which were marked as Exhibits in this case. The defence theory was total denial of the prosecution story and as such the appellant in course of his examination under Section 313 Cr.P.C. pleaded as innocence simpliciter and denied to adduce any witnesses in support of his defence. Finally, after conclusion of trial, the Learned Court below found the appellant to be guilty under Section 376(AB) of IPC along with Section 6 of POCSO Act but acquitted him from the charge leveled against him under Section 354(B) of IPC and imposed punishment under Section 6 of POCSO Act to suffer rigorous imprisonment for a period of 20(twenty) years and to pay a fine of Rs.30,000/- in default to suffer for simple imprisonment for 6(six) months. Challenging that order of sentence and conviction, the appellant preferred this appeal before the High Court.

4. In course of hearing of argument, Mr. S. Sarkar, Learned senior counsel assisted by Ms. V. Podder, Learned counsel appearing for the appellant drawn the attention of the Court that the prosecution before the Learned Court below has failed to bring whom the charge under Section 354(B) of IPC against the appellant. Learned senior

counsel further drawn the attention of this Court that the prosecution also has failed to bring whom the charge punishable under Section 6 of POCSO Act. But the Learned Court below without appreciating the evidence on record properly found the appellant guilty under Section 6 of POCSO Act for which the interference of the Court is required because the evidence on record does not in any manner supports the case of the prosecution for the alleged charge under Section 6 of POCSO Act for which he has been convicted and urged for interference of this Court by allowing this appeal and to set aside the judgment and order of conviction and sentence passed by the Learned Trial Court.

5. On the other hand, Mr. Raju Datta, Learned P.P. appearing for the State-respondent submitted that the appellant has committed serious/heinous crime and the evidence on record clearly proves his guilt with the alleged charge and the Learned Court below after considering the evidence on record rightly and reasonably found the appellant to be guilty and convicted him for which there is no merit in the appeal and urged for upholding the judgment and order of conviction and sentence passed by the Learned Trial Court.

Considered.

6. Now, before coming to the conclusion, let us see the evidence on record of the prosecution before the Learned Trial Court. As already stated to substantiate the charge the prosecution has adduced in total 9(nine) numbers of witnesses.

7. PW-1, Smt. Shilpi Das deposed that on 15.03.2021, she was posted at East Agartala Women PS as Constable of police. On that day, SI Shipra Das had seized the original Birth Certificate of the victim(name withheld) in her present by preparing a seizure list dated and obtained

her signature. The witness identified her signature on the witness in the said seizure list which was marked as Exbt.1/1 on identification.

During cross-examination, nothing came out relevant.

8. PW-2, Smt. Monika Roy also the another seizure list witness. She identified her signature on the seizure list in respect of seizure of Birth Certificate of the victim(name withheld) which was marked as Exbt.1/2 on identification.

During his cross-examination, nothing also came out relevant.

9. PW-3, Dr. Juthika Debbarma deposed that on 16.03.2021 she was posted as Associate Professor, Department of FMT, AGMC & GBP Hospital, Agartala. On that day, she examined the victim aged about five years in connection with East Agartala Women P.S. Case No.2021/WEA/012 dated 14.03.2021 and prior to the medical examination of the victim, consent was obtained from the mother of the victim on the consent form. After conclusion of examination, she submitted her report and according to the said witness after examination, it appeared to her that there is evidence of penetration of vagina by an object. She identified her report laid by her marked Exbt.2 and the signature marked as Exbt.2/1 series. She also obtained RTI of the victim and on identification marked as Exbt.2/2.

10. During cross-examination, she stated that in a case under POCSO Act, first they confirmed the identification, as well as the name of the child from the police and after that they processed the medical procedures conducted to the guardian or the parents and after that, they conducted medical examination as per procedure. Nothing came out relevant from the cross-examination.

11. During re-examination of the appellant he stated that if a five years old girl faces penetration by some adult penis or by finger and the girl feels pain then she shall also sustain some injury on her private parts. It is also possible that the hymen may also get ruptured. She further stated that the vulva of the girl may also get injured. As per the report of the victim girl, she has not find any injury over the vulva of the victim girl. Her hymen was also intact. As per her report, the age of the victim girl was five years and no injury was found on the anal opening of the victim girl and as per her report the victim girl for the first time the victim girl informed the alleged occurrence to her mother on 14.03.2021, at about 2:00 pm. Nothing more came out relevant.

12. PW-4, Smt. Ruma Bhattacharjee is the informant of this case. She laid the FIR on 14.03.2021 and identified her signature on the bottom of the FIR which was marked as Exhibit-3/1. She further stated that on 13.03.2021, at about 9.30 am she herself and her husband and the victim daughter went to visit a doctor at Dhaleswar. At that time, she was pregnant and in the doctor's chamber, she her herself and her husband went for various tests and her daughter was sitting in the auto rickshaw of the accused Bishu Majumder. They went to Doctors chamber with the auto rickshaw being driven by accused Bishu Majumder. After that they returned back to their house at about 1 pm with the same auto rickshaw. Thereafter, at about 9 pm of that night her daughter started screaming and on being asked she stated that she was facing difficulty in passing urine as there was pain in her private parts. On the following day, i.e. on 14.03.2021, she took her daughter to the doctor where she was examined and treated by doctor. After that, she lodged the instant case. On being asked her daughter, she told her mother that when they

went to Doctors chamber on the that day, that time, the accused Bishu Majumder to whom she used to call 'uncle' inserted his finger to the vagina of the victim girl for which she was experiencing pain to that area. She also told her mother that the accused took the victim daughter to a distance away with his auto rickshaw and has committed the offence. She further stated that the date of birth of her daughter is 07.06.2016. She also identified her signature on the printed FIR form, in column No. 14, which was marked as Exbt.4/1.

13. In the cross-examination, she deposed that she knows the accused since last 15 years and prior to the incident, they have cordial relation with the accused. Her FIR was a written by a lady police personnel at the police station. The auto rickshaw was parked by the accused by the side of the doctor's chamber. The auto was present at a distance visible from the doctor's chamber. She further stated that when she came back to the doctor's chamber, she found her daughter to the back seat of the auto rickshaw. At about 12.30 pm they came out from the doctor's chamber and got her USG done from another shop. Since 1 pm of the day to 9 pm of that night, her daughter did not go to the washroom for attending her natural call. She did not say to IO that the accused took the victim daughter to a distance with his auto rickshaw and committed the offence. Nothing more came out relevant.

14. PW-5 is the victim. Before recording her evidence, her veracity was tested by the Court. She deposed that on the alleged day her father and mother went to the Doctor keeping her inside the auto rickshaw. The accused Bishu Majumder in the auto rickshaw inserted his finger into her vagina and he also moved his finger inside my vagina. She then informed the matter to her mother. She further stated that she

gave her statement before the Court and identified her signature marked as Exbt.5/1 and Exbt.5/2 respectively. She also identified her signature on the medical report marked as Exbt.2/3.

15. During cross-examination, she deposed that till her parents came back from the doctor's chamber she was present in the auto rickshaw. The auto rickshaw was parked by the side of the doctor's chamber. The accused took her to some other place with the auto rickshaw being asked by the Court but she did not say this to the IO and to the Learned Magistrate. Nothing more came out relevant.

16. PW-6, Sri Gobinda Bhattacharjee is the father of the victim. He deposed that his wife laid the FIR in connection with this case on 14.03.2021 before Khayerpur Out post against the accused. On 13.03.2021, at about 9.30 am myself, the witness, his wife and the victim went to visit a doctor namely, Dr. Ashok Majumder at Dhaleswar. In the doctor's chamber, the witness and his wife went keeping the victim-daughter inside the auto-rickshaw. Thereafter, during night hours, his wife told him that his daughter was having some difficulties in passing urine and she was also experiencing pain in her private parts. His wife also told that the accused inserted his fingers into the vagina of his daughter and also moved his fingers inside her vagina which was disclosed by the victim to her mother. On the following day, i.e., on 14.03.2021, the witness and his wife went to PS when the FIR was lodged. Police seized the birth certificate of his daughter and he identified his signature over the seizure list dated 15.03.2021 which was marked as Exbt-1/3. He also identified the birth certificate of the victim which was marked as Exbt.-6.

During cross-examination, save and except denial nothing came out relevant.

17. Similarly, PW-7, Sri Ashutosh Majumder deposed that on 14.03.2021, he had put his signature on the seizure list for seizure of some documents relating to a vehicle and identified his signature on the seizure list dated 14.03.2021, which was marked as Exbt.7/1.

During cross-examination, he deposed that he knows the accused, the informant and her family. Nothing more came out relevant regarding this case from the evidence.

18. PW-8, Sri Tapash Das also identified his signature on the seizure list in respect of seizure of documents marked as Exbt.7/2.

He also deposed like PW-7 during cross-examination. Nothing more came out relevant.

19. PW-9, Smt. Shipra Das is the IO who laid charge-sheet against the accused. She identified the signature of the then OC of East Agartala Women PS on the margin of ejahar which was marked as Exbt. 3/2, identified the printed FIR form marked Exbt.4 and signature marked Exbt.4/2. She further stated that on 14.03.2021, she examined the complainant and the victim and recorded their statements U/S 161 of Cr.P.C. On 14.03.2021 she seized the Auto Rickshaw bearing auto rickshaw bearing registration No.TR01 D-3825 along with its relevant documents and identified the seizure list dated 14.03.2021 marked Exbt.7 and her signature marked Exbt.7/3. She further deposed that on 14.03.2021 she arranged for medical examination of the accused at IGM Hospital, Agartala. On 15.03.2021 she visited the PO and prepared hand sketch map with separate index and identified the same marked Exbt.8, her signature Exbt.8/1, identified the index marked Exbt.9 and her

signature marked as Exbt.9/1. She also recorded evidence of some of the witnesses under section 161 of Cr.P.C. She seized the original birth certificate of the victim by preparing a seizure list and identified the seizure list marked Exbt.1 as a whole and her signature marked as Exbt.1/3. On 16.03.2021 she arranged for medical examination of the victim at the AGMC & GBP Hospital. She also produced the victim for recording the statement of the victim under Section 164(5) Cr.P.C.

20. During cross-examination by the defence she stated that in the statement recorded by Learned Magistrate of the victim there was no mention of any fingering by the accused upon the victim girl. The written complaint was addressed to the OC, Bodhjunnagar P.S. Before lodging the FIR, there was no information regarding the alleged occurrence before the East Agartala Women P.S. She further stated that she recorded the statement of the informant and her husband and victim on the same date at East Agartala Women P.S. Her investigation started on 14.03.2021 and it got concluded on 19.03.2021. She also stated that did not examine Dr. Ashok Majumder as a witness in connection with this case. She did not collect any Sonography report of the informant. Further, she stated that the alleged post of occurrence is situated exactly in front of the house gate of Subrata Paul. She did not arrange for any potency test of the accused after receiving the statement of the victim under Section 164(5) of the Cr.P.C.

These are the sum and substance of the evidence on record of the prosecution to substantiate the charge before the Learned Court below.

21. We have heard arguments of both the sides and gone through the records of the Learned Court below including the judgment.

Here in the given case except the victim no other witnesses are the eye witness of the incident. After the incident in the night, she narrated the incident to her mother from whom the father of the victim could know the said fact. The parents of the victim supported the case of the informant. From the evidence of the victim and also from the evidence of Medical Officer it appears that on the alleged day when the parents of the victim entered inside the chamber of Dr. Ashok Majumder, that time, the appellant inserted his finger upon the vagina of the victim. The appellant by the trend of cross-examination could not raise any circumstance or could not make any defence case to disbelieve the prosecution story. In course of hearing, Learned senior counsel for the appellant submitted that the prosecution before the Learned Court below could not adduce any material evidence to substantiate the charge under Section 6 of the POCSO Act but the Learned Court below in absence of evidence on record punished and convicted the said appellant under Section 6 of the POCSO Act. Learned senior counsel also drawn the attention of the Court that if the prosecution evidence is proved also in that case Section 6 of the POCSO Act would not attract in this case and urged for conversion of Section to any other Section of POCSO Act and alternatively submitted to allow this appeal by setting aside the judgment passed by the Learned Court below.

22. We have discussed the evidence on record of the prosecution in detail. The allegation of the prosecution was that on the alleged day in absence of the parents of the victim the appellant accused inserted his finger to the vagina of the victim. The appellant by the trend of cross-examination of the witnesses of the prosecution could not discard their evidence nor could make out any defence case to disbelieve the

prosecution story. Now, after going through the evidence on record, it appears to this Court that although the Learned Court below found the appellant to be guilty under Section 6 of the POCSO Act but from the evidence on record including the evidence of the victim and the Medical Officer it appears to us that Section 6 of the POCSO Act would not be applied in the given case against the appellant rather there is material evidence on record under Section 9 of the POCSO Act i.e. for aggravated sexual assault for which the appellant is liable to be convicted under Section 10 of the POCSO Act, although he was not charged for that offence because from the perusal of the evidence on record, it appears to us that the appellant has committed offence as provided under Section 9 but the Learned Court below without proper appreciation of the evidence on record convicted the appellant under Section 6 of the POCSO Act for which we are of the considered opinion that the sentence awarded by the Learned Trial Court below would be modified as no offence punishable under Section 6 of the POCSO Act is made out against the appellant.

23. In the result, the judgment and order of sentence and conviction delivered by the Learned Special Judge(POCSO) in connection with Case No.Special(POCSO)12 of 2021 dated 27.07.2023 is modified to the extent that the appellant be convicted for the offence punishable under Section 10 of the POCSO Act and is sentenced to suffer rigorous imprisonment for a period of 5(five) years and he shall also pay fine of Rs.10,000/- in default to suffer further rigorous imprisonment for 4(four) months. The fine money, if released, be given to the victim by the Learned Court below. With the aforesaid observation and modification, the appeal is partly allowed.

Send down the LCR along with a copy of the judgment and also a copy of this judgment be transmitted to Superintendent, Kendriya Sansodhanagar Tripura, Bishalgarh, Sepahijala Tripura for information and compliance.

JUDGE

JUDGE

Digitally signed by SABYASACHI
BHATTACHARJEE
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