

**HIGH COURT OF TRIPURA
AGARTALA
Crl.A.No.20 of 2023**

Sri Rakhal Chandra Debnath,
son of Late Nibaran Debnath
of West Radhapur, Dharmanagar,
District-North Tripura

----Convict-Appellant(s)

Versus

The State of Tripura

----Respondent (s)

For Appellant(s)	:	Mr. B. Deb, Adv.
For Respondent(s)	:	Mr. S. Ghosh, Addl. P.P.
Date of Hearing	:	27.09.2024
Date of Judgment & Order	:	07.10.2024
Whether fit for reporting	:	YES

HON'BLE MR. JUSTICE BISWAJIT PALIT
Judgment & Order

This appeal is preferred challenging the judgment and order of conviction and sentence dated 27.07.2023 delivered by Learned Special Judge (POCSO), North Tripura, Dharmanagar in connection with Case No.Special (POCSO)03 of 2021. By the said judgment, Learned Special Judge convicted the appellant under Section 354 of IPC and sentenced him to suffer RI for three years and to pay fine of Rs.1000/-, id to suffer further imprisonment for one month and the Learned Special Judge also convicted the appellant under Section 8 of the POCSO Act and sentenced him to suffer RI for three years and to pay fine of Rs.1000/-, id to suffer further imprisonment for one month and it was also ordered that both the sentences shall run concurrently.

[2] Heard Mr. B. Deb, Learned counsel appearing on behalf of the appellant as well as Mr. S. Ghosh, Learned Addl. P.P. appearing on behalf of the State-respondent.

[3] Before proceeding further with the merit of the appeal, let us discuss about the subject matter of the prosecution before the Learned Court.

[4] On 26.11.2020 at about 1330 hrs. when the victim (the name withheld) along with her friends Ms. Sima Debnath and Ms. Reshmi Debnath went to the jungle nearby to their house at West Radhapur under Dharmanagar P.S. to collect fire woods and during that time, the accused-appellant Rakhal Debnath suddenly came there and initially caught hold the hand of said Ms. Sima Debnath but Ms. Sima Debnath somehow managed to free herself along with Ms. Reshmi Debnath from the clutch of Sri Rakhal Debnath, the appellant and managed to fled away from the place. After that, the accused managed to detain the victim and outraged her modesty by touching her chest and thereafter, the victim managed to leave that place and returned home and informed the matter to her parents and accordingly, the mother of the victim Smt. Sabita Nath laid an FIR to O/C Dharmanagar Woman P.S. and accordingly, a specific case was registered and the IO after completion of investigation laid charge-sheet against the accused-appellant under Section 354 of IPC and Section 8 of POCSO Act. Before the Learned Special Judge, formal charge under Section 354 of IPC and also charge under Section 8 of POCSO Act was framed against the appellant by the Learned Special Judge and the same was explained to him in Bengali to which he pleaded not guilty and claimed not to be tried.

[5] During trial to substantiate the charge, the prosecution in total has adduced thirteen numbers of witnesses and the prosecution also relied upon some documents which were marked as exhibits in this case. For the sake of convenience, the name of witnesses of the prosecution and the exhibits are mentioned herein below :

"A) Prosecution Witnesses :

PW-1 :- Ms. Reshmi Debnath

PW-2 :- Smt. Ratna Debnath

PW-3 :- Smt. Manibala Nath

PW-4 :- Smt. Basumati Debnath

PW-5 :- Smt. Prativa Nath

**PW-6 :- Smt. Aparna Nath
PW-7 :- Smt. Rabina Chakma
PW-8 :- Dr. Bidhan Ch. Roy
PW-9 :- Ms. Priyanka Nath
PW-10 :- Ms. Sima Debnath
PW-11 :- Smt. Sabita Nath
PW-12 :- Sri Ajit Nath
PW-13 :- Smt. Sanchita Nath**

B) List of Exhibits on behalf of the prosecution :

**Exhibit-1/1 :- Signature of PW-2 on the seizure list of birth certificate of Ms. Priyanka Nath.
Exhibit- 1/2 :- Signature of PW-7 on the seizure list.
Exhibit- 1/3 :- Signature of PW-11 on the seizure list dated 29.11.2020.
Exhibit- 2/1 :- Signature of PW-2 on the seizure list of birth certificate of Ms. Sima Debnath.
Exhibit- 2/2 :- Signature of PW-7 on the seizure list.
Exhibit- 2/3 :- Signature of PW-11 on the seizure list dated 29.11.2020.
Exhibit-3 as a whole :- Signature of PW-8 on the medical report.
Exhibit-4 as a whole :- Signature of PW-8 on the x-ray report for age determination.
Exhibit-5/1 series :- Signature of PW-9 on statement u/s 164 Cr.P.C.
Exhibit-6/1 series :- Signature of PW-10 on statement u/s 164 Cr.P.C.
Exhibit-7/1 :- Signature of PW-11 in ejahar.”**

After conclusion of trial, Learned Special Judge, POCSO found the appellant to be guilty and convicted him under Section 354 of IPC and also under Section 8 of POCSO Act and challenging that judgment, this appeal was preferred before the High Court.

[6] In course of hearing of argument, Mr. B. Deb, Learned counsel appearing for the appellant has drawn the attention of the Court that the evidence of the prosecution suffers from various infirmities but the prosecution failed to explain the same before the Learned Trial Court and the Learned Trial Court at the time of delivery of judgment did not consider those points for which the judgment is suffering from perversity. It was further submitted that at the time of framing of charge, Section 212 of Cr.P.C. was not complied with by the Learned Special Judge(POCSO). He further submitted that the evidence of the victim is contrary to the FIR and the evidence of PW-2 is contradictory to the evidence of PW-1. No independent witnesses were adduced to support the case of the victim in this case. No adjacent neighbouring witnesses were produced so, on the face of evidence on record, there was no scope to convict

the appellant to be guilty in this case but the Learned Trial Court did not consider the same. Finally, Learned counsel for the appellant urged for allowing this appeal by setting aside the judgment and order of conviction and sentence by the Learned Court below.

[7] Per contra, Mr. S. Ghosh, Learned Addl. P.P. appearing for the State-respondent submitted that before the Learned Trial Court, the prosecution has projected the evidence in such a manner that there was no room to disbelieve the evidence on record of the prosecution and the Learned Court below after considering the evidence on record rightly and reasonably delivered the judgment finding the appellant to be guilty. So, in summing up, Learned Addl. P.P. urged for dismissal of this appeal upholding the order of conviction and sentence delivered by the Learned Special Judge(POCSO).

[8] Now, let us examine the evidence on record of the prosecution adduced before the Learned Trial Court to substantiate the charge

PW-1, Miss Reshmi Debnath deposed that one day in the afternoon she along with Sima Debnath and the victim entered into a jungle nearby their house at West Radhapur with intent to collect firewood. While they were collecting firewood inside the jungle suddenly she saw accused-appellant Rakhal Dadu to appear from the backside of a bush and caught hold the hand of the victim to commit something wrong. The witness and Sima Debnath being frightened noticed the accused-appellant rushed out from the jungle and informed one woman of their locality about the incident. Subsequently that woman took PW-1 and Sima Debnath to their respective houses and she identified the accused.

During cross-examination she stated that the jungle from where they went to collect firewood was nearby their house. There were Segun plants in the jungle where she went on that day. She further stated that she (PW-1) concealed herself by entering into the bathroom of Sanjoy. Sima Debnath also

concealed herself in the kitchen of Nirmal Debnath. She could not say the name of that woman.

PW-2, Smt. Ratna Debnath deposed that the victim is the friend of her daughter Miss. Sima Debnath. About one year back one day her daughter Miss. Sima Debnath along with her friends Miss. Reshmi Debnath and the victim entered into a jungle nearby their house at West Radhapur with intent to collect firewoods. Subsequently, while her daughter along with her two friends were collecting firewoods inside the jungle, suddenly, the accused Rakhal Debnath appeared therein and caught hold the hands of her minor daughter with some ulterior motive. Her daughter somehow managed to free herself from the grip of the accused but the accused caught hold the victim with ulterior motive. Then and there her daughter and her friend Miss. Reshmi Debnath rushed out from the jungle and informed the matter to the wife of Sri Nirmal Debnath. Later on, her daughter was taken to their house by one Smt. Aparna Debnath. During the course of investigation, one day the police seized the birth certificate of the victim and the birth certificate of her daughter by preparing separate seizure in presence of her and others and obtained her signature on the seizure list and the witness identified her signature on the seizure list in respect of seizure of birth certificate of the victim which was marked as Exhibit-1/1 and she identified another signature on the seizure list in respect of the birth certificate of her daughter which was marked as Exhibit-2/1.

During cross-examination, she stated that the distance between the place of occurrence and her house will be half kilometer approx and there are two houses near the PO. One of the house is belonging to the victim and the other house is of her uncle. Nothing more came out relevant from the cross-examination.

PW-3, Smt. Manibala Nath deposed that about a year back one day at about 12.30 pm her minor daughter Miss. Reshmi Debnath along with

her two friends the victim and Miss. Sima Debnath entered into a jungle nearby their house at West Radhapur for collecting firewoods. When her daughter and her friends were collecting firewoods inside that jungle suddenly the accused Rakhal Debnath appeared therein and tried to detain Miss. Sima Debnath. Subsequently her daughter rushed out to the jungle and informed that matter to Smt. Basumati Nath, one of her co- villager.

During cross-examination, she stated that in the said jungle there were some small trees of teak. She further stated that her daughter Reshmi Debnath had concealed her in the bathroom of Smt. Basumati Debnath out of fear.

PW-4, Smt. Basumati Debnath deposed that about a year back one day at about 12.00/ 12.30 pm when she entered into their bathroom with intent to take bath that time, she noticed Miss. Reshmi Debnath, the minor girl of their neighbour Sri Rabindra Debnath inside their bathroom. She asked Miss. Reshmi Debnath to go outside the bathroom but she did not. Then on being asked by her Miss. Reshmi Debnath told her that she along with her two friends namely Miss. Sima Debnath and the victim entered into a jungle for collecting firewoods but that time accused Rakhal Debnath of their village tried to detain all of them and ultimately Rakhal Debnath was successful to detain one of the friends of Miss. Reshmi Debnath. Subsequently one of her neighbourers sent Reshmi Debnath and her friend Miss. Sima Debnath to their respective houses.

During cross-examination she stated that Miss. Reshmi Debnath and her friends used to collect firewoods from the nearby tilla lands almost on everyday. Nothing more came out relevant.

PW-5, Smt. Prativa Nath deposed that on 26-11-2020 at about 12.00/12.30 pm a girl namely Sima Debnath aged 11 years rushed to their house and entering into their kitchen asked her to save her life. Being asked by her Sima Debnath told her that she along with her friends were collecting

firewoods inside a jungle when accused Rakhal Debnath tried to detain Sima Debnath but somehow she managed to flee away from the jungle but that time accused Rakhal Debnath could detain one of the friends of Sima Debnath. Sima Debnath also disclosed that her friend i.e. the victim was detained by accused Rakhal Debnath.

During cross-examination, she stated that during investigation, police examined her and recorded her statement but she did not tell to the Investigating Police Officer that victim Sima Debnath had requested her to save her life after entering into their kitchen. She was confronted with the statement that she stated to Investigating Police Officer that Sima Debnath informed her that accused Rakhal Debnath had detained the victim but on drawing attention, such part of statement was not found in the statement of the witness recorded by IO under Section 161 of Cr.P.C. Nothing more came out relevant.

PW-6, Smt. Aparna Nath deposed that on 26-11-2020 at about 11.00 am she was in the house of their neighbour Sri Nirmal Nath. When the witness and Smt. Prativa Nath, wife of Sri Nirmal Nath were chewing betel leaf in the house of Sri Nirmal Nath, suddenly a girl namely Sima Debnath aged 11 years rushed to the house of Sri Nirmal Nath and asked to save her life. Being asked, Sima Debnath told that she along with her friends were collecting firewoods inside a jungle when the accused Rakhal Debnath tried to detain said Sima Debnath but somehow she managed to flee away from the jungle but by this time accused Rakhal Debnath could detain one of the friend of Sima Debnath. Sima Debnath also disclosed that her friend i.e. the victim was detained by accused Rakhal Debnath. Later on, when she(witness) was taking to Miss. Sima Debnath to their home she met the victim on the public road and came to learn that accused Rakhal Debnath had detained her inside the jungle while she along with her friends were collecting firewoods and that time accused Rakhal Debnath touched the breast of the victim.

During cross-examination, she stated that she told to the Investigating Police Officer that Miss. Sima Debnath requested her and to Smt. Prativa Nath to save her life but on drawing attention such part of statement was not found recorded by IO in the statement of the witness. Nothing more came out relevant.

PW-7, Smt. Rabina Chakma deposed that on 29-11-2020 she was posted at Dharmanagar Women PS as a Constable. On that day WSI, Sanchita Nath seized one birth certificate of the victim at Dharmanagar PS by preparing a seizure list in presence of her and others on production of the birth certificate by Smt. Sabita Nath, the mother of victim and obtained the signature on the seizure list as a witness. The witness identified his signature on the seizure list marked as Exhibit-1/2. On the same day WSI, Sanchita Nath also seized one birth certificate of the victim Miss. Sima Debnath at Dharmanagar PS by preparing a seizure list in presence of her and others on production of the birth certificate by Smt. Ratna Debnath, the mother of victim Miss. Sima Debnath and obtained her signature on the seizure list marked as Exhibit-2/2.

During cross-examination, she stated that there was no other independent witnesses at Dharmanagar Women PS at the time of seizure of birth certificates except the family members of the victim and Miss. Sima Debnath.

PW-8, Dr. Bidhan Chandra Roy deposed that on 29-11-2020 as Medical Officer of Dharmanagar District Hospital he received one requisition from WSI, Sanchita Nath of Dharmanagar Women PS for arranging ossification test and medical examination of two girls namely the victim and one Miss. Sima Debnath. At the relevant point of time, the legal guardian of the victim girl did not accompany them in the emergency block of the District Hospital. Being asked by him, Miss. Sima Debnath expressed her unwillingness to go for any medical examination as well as ossification test. So, he mentioned the matter on the requisition slip and put his signature with official seal and the

report was marked as Exhibit-3. He examined the victim aged about 13 years after obtaining her consent and found no external injury. He also advised x-ray for determination of her age. Later on, he prepared one report and identified the report in respect of the victim which was marked as Exhibit-4 (as a whole).

During cross-examination, he stated that the victim did not make any physical complaint to him at the time of her medical examination.

PW-9, (the name withheld) is the victim. She deposed that the informant of this case is her mother. On 26th November, 2020 at about 01.00 pm she herself along with her cousin Miss. Sima Debnath and Reshmi Debnath went to a nearby jungle at West Radhapur for collecting firewood. While they were collecting firewood inside the jungle that time, Rakhal Dadu suddenly came from a bush and caught hold the hands of her cousin Sima Debnath. Then her cousin gave a teeth bite on the hands of Rakhal Dadu for which he was compelled to release Sima Debnath. That time, she attempted to save Sima Debnath but all on a sudden Rakhal Dadu caught hold her hands and forcibly took her to the house nearby the place of occurrence. After taking her to the house, accused Rakhal Debnath touched her breast when she raised alarm. Subsequently accused Rakhal Debnath released her when some local people rushed to the house of the accused person hearing her shouting and rescued her from that place. By that time her cousin Sima Debnath and Reshmi Debnath also came to the house of Rakhal Debnath accompanied by some of the villagers. Then she narrated the incident to everyone. During investigation, she was brought to Dharmanagar Court where she made a statement to the Judicial Magistrate and the witness put her signature on the statement sheet and identified her signature which is marked as Exhibit-5/1 (series).

During cross-examination, she stated that she was unable to say who is the owner of the said jungle area. Previously, it was belonged to accused Rakhal Debnath. She further stated that she did not tell to the

Investigating Police Officer that the accused Rakhal Debnath was compelled to release her cousin Sima Debnath while she gave teeth bite to accused Rakhal Debnath. She also did not tell the Investigating Police Officer that accused Rakhal Debnath had concealed him behind the bush. She could know that she could learn from the villagers that her cousin Reshmi Debnath took shelter inside a bathroom of a villager after the incident. The house of accused Rakhal Debnath was adjacent to the place of occurrence inside the jungle. There were also 10/ 12 houses at a few distance from the house of accused Rakhal Debnath. She further admitted that she herself and her cousin had the habit to collect firewood from that jungle and also admitted that accused Rakhal Debnath obstructed them one day to collect firewood from the jungle.

PW-10, Miss. Sima Debnath deposed that informant, Smt. Sabita Nath is her paternal aunt and the victim is her cousin and Miss. Reshmi Debnath is her friend. On 26th November, 2020 at about 01.00 pm she along with her cousin i.e. the victim and friend, Reshmi Debnath went to a nearby jungle at West Radhapur for collecting firewood. While they were collecting firewood inside the jungle suddenly Rakhal Dadu suddenly came out from a bush and caught hold her hands. Then she raised alarm and gave some nail bites to the hands of Rakhal Dadu for which he was compelled to release her. At that time the victim also tried to save her but all on a sudden accused Rakhal Debnath detained the victim. Thereafter, she herself and her friend Reshmi Debnath left the place and informed the matter to some elderly villagers. She could not say anything further more. During the course of police investigation one day she was brought to Dharmanagar Court when she made her statement before one lady Judicial Magistrate and put her signature on the statement recorded by Learned Magistrate and identified her signature marked as Exhibit-6/1 (series).

During cross-examination, she stated that police examined her and recorded her statement in connection with this case. She further stated

that she did not tell IO that the victim attempted to save her from the hands of accused Rakhal Debnath. She also did not tell to the IO that she informed the incident to some elderly people of their village. She further admitted that she took shelter in the kitchen of one Smt. Arpana Debnath but she did not say anything to said Aparna Debnath or any of her family members. Nothing more came out relevant.

PW-11, Smt. Sabita Nath is the mother of the victim. She deposed that on 26-11-2020 at about 01.30 pm her daughter i.e. the victim, along with her niece, Miss. Sima Debnath and Miss. Reshmi Debnath went to a jungle nearby their residence at West Radhapur with intent to collect firewoods. At that relevant point of time accused Rakhal Chandra Debnath was waiting behind a bush. Suddenly accused Rakhal Chandra Debnath caught hold the hands of her niece Miss. Sima Debnath with ulterior motive but somehow Sima managed to escape from the hands of accused Rakhal Ch. Debnath by giving nail bite. At the same time her daughter also came forward to rescue Sima Debnath but suddenly accused Rakhal Ch. Debnath caught hold the hands of her daughter and forcibly took her daughter to the nearby house of accused. By this time Sima Debnath and Reshmi Debnath rushed to a house of their village and reported the incident to some villagers when those villagers accompanied with Sima and Reshmi visited the house of accused Rakhal Ch. Debnath and on hearing the shouting of the local villagers accused Rakhal Ch. Debnath released her daughter i.e. the victim from his house. Later on, her daughter reported the incident to her and others after returning home. She further stated that her daughter told her that accused Rakhal Ch. Debnath touched her breast after taking her daughter to his house. Thereafter she laid the FIR which was prepared with the help of her nephew Sri Partha Nath. She put her signature on the ejahar marked as Exhibit-7/1. She further stated that during investigation on 29-11-2020 the IO seized the original birth certificate of her daughter i.e. the victim and her niece, Sima Debnath by preparing two

separate seizure lists and obtained her signatures on those seizure lists. The witness identified her signature on those seizure list marked as Exhibit-1/3 and Exhibit- 2/3.

During cross-examination, she stated that her daughter and her niece used to visit that particular jungle occasionally for collecting firewoods. Police examined her and recorded her statement. She did not tell IO that the accused was waiting inside that jungle concealing himself beside a bush area. She further admitted that the house of Sri Niranjan Nath, Sri Subrata Nath and Sri Nunua Goala are situated adjacent to the house of accused Rakhal Ch. Debnath. Nothing more came out relevant.

PW-12, Sri Ajit Kumar Nath deposed that the informant is his wife. About 2 years back one day at about 04.00 pm his wife requested him over phone to come residence forthwith as an unwanted incident was occurred. He immediately came back and on the way while he reached near the house of accused Rakhal Ch. Debnath he saw a large gathering in front of the house of accused. There he found his wife Smt. Sabita Nath and being asked, Sabita Nath told him that on the day in the afternoon his daughter i.e. the victim along with her niece Miss. Sima Debnath and Miss. Reshmi Debnath went to a nearby jungle for collecting firewoods when accused Rakhal Ch. Debnath chased his daughter and nieces and somehow accused Rakhal Ch. Debnath managed to detain his daughter and later on outraged her modesty by taking her to the house of the accused. His daughter further informed him that accused Rakhal Ch. Debnath touched the private parts of his daughter. Thereafter his wife lodged an FIR against the accused.

During cross-examination he stated that there was a gathering of at least 100 people. Nothing more came out relevant from his cross-examination.

PW-13, Smt. Sanchita Nath is the IO of this case. She deposed that on 27-11-2020 she was posted as SI of Police of Dharmanagar Woman

PS. On that day, Dharmanagar Woman PS Case No.29 of 2020 was registered and the case was endorsed to her for investigation. After taking up the investigation, she examined the victim and the informant of the case and recorded their statements. She visited PO and prepared hand sketch map caused arrest of accused Rakhal Ch. Debnath and after completion of investigation, she laid charge-sheet against the accused. She further stated that she arranged for recording the statement of the victim and witness Sima Debnath in the Dharmanagar Court. She also arranged for medical examination of the victim in the Dharmanagar Hospital.

During cross-examination, she stated that the PO is a jungle and it is owned by one Karuna Nath. Further stated that the incident took place on 26-11-2020 at about 1.30 p.m and the information was received at P.S on 27-11-2020 at 1830 hours and there was no explanation for the delay.

These are the sum and substance of the evidence on record of the prosecution in respect of determination of the charge laid against the accused-appellant by the Learned Trial Court below.

[9] I have heard arguments of both the sides at length and also gone through the evidence on record very carefully. Admittedly, in this case, the prosecution could not adduce the adjacent neighbours of the appellant to the Learned Trial Court in support of the prosecution case whose houses are nearby the residence of the accused-appellant. In this case, the charge was framed against the appellant under Section 354 of IPC and also under Section 8 of the POCSO Act. So, considering the nature of the allegation we are to see how far the evidence of the victim were relevant for conviction of the appellant in this case. From the evidence on record, it appears that on the alleged day the victim and her one cousin and another friend went to a nearby jungle nearby the residence of the victim for collecting firewoods that time, the appellant appeared therein and first of all caught hold the hand of Sima Debnath but somehow she managed to escape from the clutch of the appellant

by giving bite injury to his hand and thereafter, when the victim came forward to rescue her, that time, the appellant caught hold her hand and dragged her to his house and behind the house the accused-appellant pressed the breast of the victim and thus, outraged her modesty. To support the aforesaid story as already stated, the prosecution has adduced in total thirteen numbers of witnesses. PW-1, Miss Reshmi Debnath, PW-10- Miss. Sima Debnath and PW-9, the victim were present to the PO at the time of alleged occurrence of offence because except those three girls, no other witnesses were present to the PO at the time of alleged occurrence. The other witnesses like PW-2, the mother of Sima Debnath, PW-3, the mother of Miss Reshmi Debnath, PW-4, Smti. Basumati Debnath in whose residence Reshmi Debnath entered soon after the occurrence, PW-5, Smti. Prativa Nath in whose residence the witness Sima Debnath i.e. the first victim entered soon after the occurrence, PW-6, Smti. Aparna Nath who is the neighbouring lady who was also present to the house of Prative Nath when the first victim Sima Debnath entered soon after the occurrence and PW-11, Smti. Sabita Nath i.e. the informant the mother of the victim. They are all hearsay witnesses because after the occurrence of offence, these three girls narrated the entire episode to them regarding commission of offence by the alleged accused-appellant. The victim and her two friends out of them, one is her cousin who has very categorically stated that on the alleged day when they were collecting firewood inside the jungle that time, the appellant suddenly came out from the back side of a bush and first of all caught hold Sima Debnath and when she managed to escape along with Reshmi Debnath, that time, the victim came forward to rescue her and immediately thereafter the appellant caught hold her and dragged her inside his house and outraged her modesty. Those three witnesses were thoroughly cross-examined by the accused-appellant. But their evidences could not be demolished by the accused-appellant in this case. Admittedly, these three witnesses are all minors so it is quite natural that there may be some

contradictions for omissions in their evidence but for those contradictions their evidences cannot be brush aside because the appellant by the trend of cross-examination could not raise any circumstance to disbelieve their evidence. Other witnesses all though they were not present to the PO just at the time of occurrence of offence but they narrated the incident after hearing the same from those three girls including the victim who are present to the PO at the time of alleged occurrence. The appellant also could not raise any doubt to disbelieve their evidence. It is also on record that after the occurrence at the instance of Sima Debnath and Reshmi Debnath some villagers rushed to the residence of the appellant when after hearing the shouting of the villagers the appellant released the victim. Admittedly, as already stated the neighbouring house owners of the appellant were not produced by the prosecution before the Learned Trial Court but for their non-production before the Court, it cannot be said that the said prosecution case was doubtful.

[10] From the record it appears that there was some delay in lodging the FIR by the informant but in a case of this nature where the chastity of the victim is concerned, in a country like India it is often found that parents of the victim in a case of this nature always feel insecured or due to social stigma they always try to avoid to report the matter to the nearby police station. So, here in the given case, it may so happen that due to such social stigma, the delay occurred in lodging the FIR. Although, the prosecution before the Learned Trial Court could not give any proper explanation of delay in lodging the ejahar at Police Station. In the FIR which was remain un-rebutted by the appellant it appears that in the ejahar it was also stated that the appellant also committed illegal acts in future and for that, so many conciliation meetings took place and there was case pending against him, although no such explanation was given.

[11] In course of examination under Section 313 of Cr.P.C., the appellant only denied the allegation of the prosecution, there was no such

explanation from the side of the appellant regarding the allegation leveled against him by the prosecution before the Learned Court below. Even, the victim and her niece before the Court of Learned Judicial Magistrate also narrated the same incident and they identified their signatures on the statement recorded by Learned Magistrate. The appellant in course of cross-examination of the victim and her niece also could not make any effort to disbelieve the statement on record of the victim and her niece recorded by the Learned Judicial Magistrate under Section 164(5) of Cr.P.C. Admittedly in this case, the prosecution did not adduce the Learned Magistrate who recorded the statement of the victim and it is also the settled position of law that for proving the statements the presence of Magistrate who recorded the statement of the victim or other witnesses is not required to be examined. Here in the given case, since the victim and her niece admitted that they were produced before the Learned Court and their statements were recorded and they identified their signatures which remain unchallenged by the appellant. So, for non-examination of the Learned Magistrate, there is no scope to disbelieve the statements on record of the victim and his niece.

[12] Furthermore, regarding minority of the victim and her niece there was no contradictory evidence from the side of the appellant on record to substantiate that the relevant provision of POCSO Act would not attract in this case. Admittedly, there was some delay in lodging the FIR because the alleged incident according to IO took place on 26.11.2020 at about 1.30 p.m. and the case was registered on 27.11.2020 at about 18.30 hrs. and the IO herself admitted that there was no explanation regarding delay in lodging the FIR. With regard to that, Hon'ble the Supreme Court of India in **Tulshidas Kanolkar versus State of Goa** reported in **(2003) 8 SCC 590** the said Apex Court in para Nos.5 & 6 observed as under :

"5. We shall first deal with the question of delay. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of

rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so, the mere delay in lodging of first information report does not in any way render prosecution version brittle.

6. Non-examination of some persons per se does not corrode vitality of prosecution version, particularly when the prosecutrix has, notwithstanding her mental deficiencies, withstood incisive cross-examination pointed to the appellant as the perpetrator of the crime. The plea of consent is too shallow to even need detailed analysis or consideration. A mentally challenged girl cannot legally give a consent which would necessarily involve understanding of the effect of such consent. It has to be a conscious and voluntary act. There is gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency cannot be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act. A girl whose mental faculties are undeveloped, cannot be said in law, to have suffered sexual intercourse with consent."

In **State of Himachal Pradesh versus Prem Singh** reported in **(2009) 1 SCC 420** the said Apex Court in para No.6 observed as under :

"6. So far as the delay in lodging the FIR question is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR. In that score, learned counsel for the appellant is right that the High Court has lost sight of this vital distinction."

[13] So, after hearing both the sides at length and also after going through the principles of law laid down by the Hon'ble Supreme Court in aforementioned cases it appears that the Learned Court below after elaborate discussions of the evidence on record of the prosecution rightly and reasonably found the appellant to be guilty and convicted him accordingly and as such,

being an appellate forum this Court does not find any scope to interfere with the judgment delivered by the Learned Special Judge (POCSO) in the given case and the arguments raised by Learned counsel appearing for the appellant does not create any confidence to the mind of the Court to acquit the accused-appellant from the charge of the case.

[14] Further, on perusal of the judgment of the Learned Court below it appears that in the given case Learned Court below found the appellant guilty for the commission of offence punishable under Section 354 of IPC and also under Section 8 of POCSO Act and considered him in both the sections which in my considered view was not proper. In view of Section 42 of the POCSO Act considering the nature of the offence here in the given case the Learned Court below could convict the appellant on either of any of the offences. Since the victim was minor and the ingredients of Section 7 of the POCSO Act was duly proved against him. So, in my considered view Learned Court below only could convict the appellant under Section 8 of the POCSO Act without imposing any punishment under Section 354 of IPC. For the sake of convenience, I would like to refer herein below the relevant provision of Section 7 & Section 8 of the POCSO Act which provides as under :

"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.

8. Punishment for sexual assault.-Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine."

From the aforesaid provisions of law and also after going through the evidence on record it appears that in the given case the prosecution has been rightly and reasonably has been able to prove the charge leveled against the appellant under Section 8 of the POCSO Act which the Learned Court below awarded against him and this Court concurs the said finding of the Learned Court below accordingly.

[15] In the result, the appeal filed by the appellant is hereby dismissed on contest.

The judgment and order of sentence and conviction delivered by Learned Special Judge (POCSO) dated 27.07.2023 delivered by Learned Special Judge (POCSO), North Tripura, Dharmanagar in connection with Case No.Special (POCSO)03 of 2021 is hereby upheld and modified to the extent that the appellant would be convicted only under Section 8 of the POCSO Act to suffer RI for period of three years and to pay fine of Rs.1000/- id to suffer further RI for a period of one month. The convict be hereby acquitted from the charge and punishment imposed under Section 354 of IPC. Fine money, if realized, be given to the victim and said Sima Debnath equally by the Learned Trial Court on recovery. The convict is on bail, so he should surrender before the Learned Court below immediately to suffer the sentence awarded by this Court.

The case is thus disposed of accordingly.

Send down the LCR along with a copy of the judgment.

JUDGE

SABYASACHI
BHATTACHARJ
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Date: 2024.10.07 13:26:53
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