

HIGH COURT OF TRIPURA

A_G_A_R_T_A_L_A

Crl. A(J) No. 54 of 2023

1. Smti. Kurona Chakraborty, wife of Sri Shyamal Chakraborty, mother of Sri Sourav Chakraborty (convict in jail), of Kishoreganj, P.S. Kakraban, District: Gomati Tripura.

.....Appellant

2. Sri Sourav Chakraborty, son of Sri Shyamal Chakraborty of Kishoreganj, P.S. Kakraban, District: Gomati Tripura, presently residing at Lankamura Bhumihin Colony, P.S. West Agartala, Tripura.

.....Convict in jail.

-VERSUS-

1. The State of Tripura, represented by the learned Public Prosecutor, High Court of Tripura.

..... Respondent.

B_E_F_O_R_E

HON'BLE MR. JUSTICE T. AMARNATH GOUD

HON'BLE MR. JUSTICE BISWAJIT PALIT

For Appellant(s)	:	Mr. D. J. Saha, Advocate.
For Respondent(s)	:	Mr. Raju Datta, P.P.
Date of hearing & delivery of		
Judgment and order	:	<i>10.09.2024</i>
Whether fit for reporting	:	<i>YES/NO</i>

JUDGMENT & ORDER

[T. Amarnath Goud, JJ]

Heard Mr. D. J. Saha, learned counsel appearing for the appellant also heard Mr. Raju Datta, learned Public Prosecutor appearing for the respondent-State.

[2] The present appeal is directed against the judgment and order of conviction and sentence dated 17.10.2023 passed by the learned Special Judge (POCSO), Additional District and Sessions Judge, Court No.3, Agartala, West Tripura in connection with case No. Special

(POCSO) 12 of 2022, whereby and whereunder the appellant convicted and sentenced to suffer rigorous imprisonment for 20 years along with fine of Rs.20,000/- under Section-4 (2) of the POCSO Act and in default of payment of fine to suffer simple imprisonment for a further period of four months.

[3] The factual background of the prosecution case is that the informant-mother lodged a written complaint on 04.12.2021 before the West Agartala Women P.S. numbered as WAW 85 of 2021 stating inter-alia that she used to live in her mother's house along with her minor victim daughter. Informant is a worker in the Pantaloons a private establishment and her mother also used to work as a cook in several houses and in relation to their works, most of the times they both had remain out of their dwelling house. According to the informant, her only daughter [name withheld] aged about 15 years, was student of Class-IX at Tulshibati Girl's School. The convict-appellant being a tenant of the mother of informant in that house, in absence of informant and her mother on the false assurance of marriage, tried to establish physical relationship with the victim.

[4] On 29.11.2021, in absence of informant and her mother, accused person called the victim girl in his room on the pretext to have a talk with her and thereupon, victim went to the room of the aforesaid accused, when he forcefully committed rape upon her. The victim raised alarm and then the other accused persons namely, Krishna Sarkar, Ghatak, Parikhrit Chakraborty, Prasenjit Das, Harendra Das came to the spot and out of them, one accused video recorded that scene. According to the informant her victim daughter sought help when these accused persons also gave ill proposal to the victim for making physical relation with them also, otherwise, they outspread the recorded video in the social media. It is also reflected from the ejahar that on the denial of their proposal by her victim daughter and also when she tried to flee away

from the spot, the accused persons tried to outrage the modesty of the victim and also snatched away her wearing gold ornaments.

[5] During trial, the learned trial Court framed charges under Section-376(3) of the IPC and Section-4 of the POCSO Act against the accused person namely, Sourav Chakraborty @ Sagar and after completion, the judgment and sentence dated 17.10.2023 passed by the Special Judge (POCSO), Additional District and Sessions Judge, Court No.3, Agartala, West Tripura in connection with case No. Special (POCSO) 12 of 2022 whereby the son of the appellant i.e. the convict herein convicted as indicated above.

[6] Based on the written complaint of the informant, a case was lodged at West Agartala Women P.S. and accordingly, the investigation started. During investigation, the IO on 04.12.2021 and on other dates examined the victim informant and other available witnesses and recorded their statements under Section-161 of Cr. P.C. On the same date, I.O. arranged for medical examination of the victim from the IGM Hospital, Agartala, seized the original birth certificate of the victim girl, seized some samples of the victim girl in connection with this case and also arranged for recording of the statement of the victim under Section-164(5) of Cr. P.C. before the learned Judicial Magistrate, Agartala.

[7] In course of investigation, the IO visited the place of occurrence, prepared hand sketch map with separate index, sent the victim girl to the Abhoynagar Home for her stay over there. On 17.12.2021, I.O of the case arrested the accused person namely, Sourav Chakraborty and forwarded him to the learned Court on the same day and seized some samples of the accused Sourav Chakraborty @ Sagar in connection with this case. I.O. also arranged for potency test of the accused person and collected the report of the same from AGMC & GBP Hospital.

[8] On 27.12.2021, she arranged for sending of the samples in this case to the SFSL Narsingarh. On 22.01.2022 accused persons surrendered before the PS as per the order of the Hon'ble high Court and thereafter, they were released on bail from the PS itself.

[9] On 25.01.2022, IO of the case received the SFSL report of this case and on 10.02.2022 she received the medical report of the victim from IGM Hospital. Thus, after completion of investigation IO laid charge sheet against the accused person in this case namely Sourav Chakraborty @ Sagar under Section-376(3) of IPC and Section-6 of the POCSO Act and against the accused persons namely, Prasenjit Das, Krishna Sarkar, Harendra Das, Dharendra Debnatha dn Parikshit Chakraborty under Sections-341/342/354B/506 of IPC vide West Agartala Women P.S. case No.05 of 2022 dated 25.02.2022 as a prima facie case was well established against the accused persons for facing trial in the open Court of law.

[10] During trial, upon hearing submission of parties and taking into consideration the record and documents submitted therewith, charges were framed under Section-376(3) of the IPC and Section-4 of the POCSO Act against the accused person namely, Sourav Chakraborty @ Sagar and under Sections-354(A)/(1)(ii)(iv)/506 of IPC and Section-8 of the POCSO Act against the other accused persons as named above. Thereafter, the contents of charges were read over and explained to the accused persons respectively to which they pleaded not guilty and claimed to be tried.

[11] To substantiate the charge, prosecution has adduced as many as 13 witnesses including the complainant of this case mentioned in the appendix attached herewith. The prosecution also relied upon some documentary evidence as well as material object which were also marked as exhibits in connection with the present case as reflected in the attached appendix. The defence case was that of total denial of the allegation of

the prosecution and as such the convict-appellant during his examination under Section-313 of Cr. P.C, pleaded his innocence.

[12] After hearing both the parties and having gone through the material evidence on record, the learned Court below has observed as under:

“In view of the aforesaid discussion, the obvious conclusion which can be arrived at is that the prosecution side has brought home the alleged guilt of the accused person namely, Sourav Chakraborty @ Swarup @ Sagar for the offence punishable U/S 376(3) of IPC and also U/S 4 of the POCSO Act.

But the prosecution side could not at all bring home the alleged guilt of the other accused persons namely, Harendra Das, Dharendra Debnath, Parikhith Chakraborty, Krishna Sarkar and Prasenjit Das for the offence punishable U/S354(A)(1)(ii)(iv) of IPC and also U/S 506 of IPC and also U/S 8 of the POCSO Act.

Hence, though points for determination Nos.4), 5) and 6) are answered in the negative but the points for determination Nos. 1), 2) and 3) are answered in the affirmative and also in favour of the prosecution.

Having regard to the discussion as herein before, i am of the opinion that the prosecution has proved the charge punishable U/S 376(3) of IPC and U/S 4(2) of the POCSO Act against the accused Sourav Chakraborty.

Accordingly, the accused Sourav Chakraborty stands convicted for the offence punishable U/S 376(3) of IPC and U/S 4(2) OF THE POCSO Act.

However, the other accused persons namely, Harendra Das, Dharendra Debnath, Parikhith Chakraborty, Krishna Sarkar and Prasenjit Das are acquitted from the liability of the offence punishable U/S354(A) (1)(ii) (iv) of IPC and also U/S 506 of IPC and also U/S 8 of the POCSO Act.

As the sections prescribe imprisonment up to life, the benefit of the Probation of Offenders Act cannot be extended to the convict namely Sourav Chakraborty.”

[13] Being aggrieved by and dissatisfied with the impugned judgment and order of conviction dated 17.10.2023, the present appeal has been preferred before this Court for ends of justice.

[14] Mr. D. J. Saha, learned support of his case has submitted that the learned Court below has passed the judgment on the inference that the act of the convict in jail i.e. son of the appellant fulfils all the ingredients of causing POCSO. It is the duty of the prosecution to prove

the case against the accused beyond any reasonable doubt and in the present case, the prosecution has failed to do the same.

[15] It is has been further submitted that the learned Court below did not consider the fact that the prosecution has not examined the key witness in the present case. PW-1 i.e. the informant nowhere in her chief or cross-examination, nor in the re-cross examination uttered the incident of forceful rape of her daughter by the convict. The learned Court below has failed to appreciate the fact that the informant has identified the convict namely, Sourav Chakraborty.

[16] The alleged incident occurred on 04.12.2021 but the FIR was lodged after 6 days and there is no explanation as to the fact of such delay though the FIR was already prepared. There was no eye witness to the incident. All are the hearsay witnesses or witnesses who have only allegedly found the convict in jail inside the house. Even the immediate neighbours of the house of victim girl were not cited as witness nor examined, but according to prosecution story when the victim girl raised hue and cry, the neighbours came to rescue her.

[17] The learned trial Court failed to appreciate the fact that the victim girl, in her 164 statement has no where stated before the learned Magistrate that the convict in jail custody has committed rape or sexual intercourse with her will or consent. PW-12 in her deposition clearly stated that the child helpline did not take any step to rescue the victim nor did they inform the police. Even they do not when and from which place police rescued the victim.

[18] The victim girl identified the convict in jail as Swarup Chakraborty, but the name of the convict in jail is Sourav Chakraborty, so Swarup Chakraborty and Sourav Chakraborty are not same persons. How the learned trial Court came to the conclusion that Sourav Chakraborty and Swarup Chakraborty @ Sagar are same and identical person. Even IO did not arranged for conducting TIP of the principal

accused person but he victim of this case nor did he seized any document of the accused to show that Sourav Chakraborty is Swarup Chakraborty.

[19] Learned counsel appearing for the convict has argued that the IO (PW-13) has not collected any School Certificate of the victim girl from the Tulshibati School, where she was studying at that time. PW-13 has confirmed Exbt. MO1 and has identified the seizure list for seizure of the original birth certificate of the victim girl and her signature over the same. But, mere production and making of a document cannot be held to be a due proof of its contents.

[20] In the recross-examination the victim has stated that she had a love affair with the one person [name withheld] and there were some objectionable videos/photos concerning her and her partner were available in the mobile phones and also that those videos/photos were shown to her by the accused persons herein. In support of his contentions, has relied upon a decision of the Hon'ble Apex Court in ***P. Yuvaprakash v. State Rep. by Inspector of Police in Criminal Appeal No(s).1898 of 2023*** wherein, the Hon'ble Court has expressed as under:

“21. In her statement under Section-164 of the Cr. P.C., the victim M had deposed that she was in love with the appellant, had consumed poison, and had even been hospitalized because she was adamant to live with the appellant. No doubt, she resiled from her statement. Yet, the medical evidence (deposition of PW-11 Dr. Kavitha) indicated that the victim had a ruptured hymen; there was no external injury at her private parts, and that according to her “48 hours before medical examination there was no evidence to show that she had sexual assault is the opinion given by me.” This witness also produced her notes of examination (Ex.P-11). In view of these facts, this court is of the opinion that the prosecution was not able to establish that there was any penetrative sexual assault as a result of coercion or compulsion on the part of the appellant. Even the High Court recognized this, albeit while reducing the sentence (since, in its opinion, M was a minor at the time), observing that “P.W.3 had gone to the extent of taking poison to commit suicide out of love failure, under enormous pressure, he had accompanied PW.3 married her and had sexual intercourse with her, both before the marriage as well after the marriage.” From these facts ,and the definitions under POCSO Act, especially the definitions of “sexual assault, Section 5 and 6 read with Sections 350 and 351 IPC, it can be seen that it is only when there is penetrative sexual assault, which implies sexual contact with or without consent of the minor victim, that the offences under the POCSO Act are committed.

22. All the facts proved in this case clearly indicate M's willingness to accompany the appellant and even celebrate their marriage. However, she did not support the statement under Section 164 Cr. P.C. To entirely discard that statement, the trial court observed that:

"In this case, on the orders of the Inspector of PW-16 had produced the girl M before the Judicial Magistrate Court, Erode and she had given a statement voluntarily u/s 164 Cr. P.C. To prove that the aforesaid statement was not given on any compulsion, no evidences have been put forth before this Court."

The above surmise by the trial court is untenable. The prosecution did not concededly produce the Judicial Magistrate who recorded the statement; however, that officer was available and was stationed at Erode. She deposed during the trial, as DW-1 and importantly affirmed the veracity of the victim's statement (Ex.P-4) by stating as follows:

"It is a true statement given by the said girl wilfully. The said statement was not given on compulsion. It is correct if it is stated that, (M), in her statement, had told me that, i and my neighbour who was in the nearby house, by name Yuvaprakash are in love for the past 1 1/2 years, we used to talk to each other frequently over phone, my grand-mother on seeing me speaking over the phone had told my father about it, I took pesticide for ants and attempted to commit suicide."

The prosecution did not even cross examine the witness. Having regard to these overall factors, the court is of the opinion that M's statement under Section 164 of the Cr. P.C. contained a truthful narration of the events. This, in other words, meant that there was no penetrative sexual assault on her. Therefore, the provisions of the POCSO Act will not be applicable in this case. The impugned judgment set aside the charge under Section 366 IPC against the appellant. The charges against him, under Section 6 of the POCSO Act as well as Section 10 of the Prohibition of Child Marriage Act, cannot be sustained; the findings of the courts below i.e. conviction and sentences imposed are, therefore, set aside.

23. In view of the foregoing analysis and conclusions, this court is of the opinion that the appellant is not guilty of the offences he was charged with; he is hereby acquitted. The impugned judgment and order is hereby set aside; the appellant shall be set at liberty forthwith unless required in connection with any other case. The appeal is allowed, but without order on costs."

[21] Mr. R. Datta, learned Public Prosecutor appearing for the state has vehemently opposes the contentions made by the counsel for the appellant and has submitted that the depositions of the victim and her mother i.e. the complainant is sufficient to affirm the conviction as observed by the learned Court below. According to him the medical report clearly establishes the guilt of the accused person and prayed for dismiss the present appeal.

[22] In view of above discussion, for coming to a definite conclusion, let us discuss the relevant factors of the present case. School Certificate of the victim girl was not procured from the school where she was studying. Mere production of birth certificate cannot establish the age of the victim as we come across from various cases where it is seen that the birth certificate is not authentic.

[23] The medical officer of the present case in her report has clearly stated that seminal stain/spermatozoa/blood stain of human origin could not be detected in the exhibits marked as E, F, G and H. For the purpose of reference, the results of examinations may be reproduced herein below:

“11. Results of examinations: The above described exhibits were subjected to visual examination under different light sources, chemical tests and microscopic examination. The results based on the tests are:

- i. Human spermatozoa were detected in the exhibits marked as A, B and C.
- ii. Blood stain of human origin could not be detected in the exhibits marked as A, B and C.
- iii. Seminal stain/spermatozoa/blood stain of human origin could not be detected in the exhibits marked as E, F, G and H.
- iv. No opinion could be given regarding presence of any foreign hair in the exhibits marked as F and G.”

[24] It is seen from the record that prior to the alleged incident, the victim had a love affair with one person and there were some objectionable videos/photos concerning her and the said person were available in the mobile phones and also those videos/photos were shown to her. At present she is married with someone of that locality where the accused person is residing. It can also be possible that the victim is under apprehension that if all these electronic footages are disclosed to her matrimonial home which can destroy her peaceful married life and has to live with a social stigma, upon which a complaint could be filed by the victim. The sexual assault has also not been proved properly according to the medical examination as there is no sign of injuries on her private

parts or anywhere, if there is any consent, there would not be any sign of injury.

[25] The learned Court below ought to have held that the prosecution miserably failed to bring home the charge framed against the accused appellant and consequently, ought to have acquitted the appellant herein, from the charge levelled against him. As such, there is no convincing evidence such as school certificate and the medical examination report to rely so as to convict the appellant. The person who issued the proof of age certificate has not been examined as witness.

[26] Before awarding conviction against accused, the Courts should be mindful of fact that there should be no room to suspect evidence of key prosecution witnesses based on whose evidence conviction is being awarded. As a general rule, while appreciating evidence in a criminal case, Court should bear in mind, that it is not quantity, but quality of evidence that is material. It is the duty of Court to consider the trustworthiness of witness and evidence adduced on record and to assess the same in a prudent manner, whether the same inspires confidence, so as to accept and act upon, before convicting accused.

[27] The way the prosecution has projected the case and being found contradictions and inconsistencies in the statements in course of trial. It is settled proposition of law that the charge framed against the accused person has to be established and proved beyond any shadow of doubt. Suspicions, however, grave in nature, should not amount to prove. The discrepancies which are found in this case as analyzed above, appeared to be abnormal in nature which is not expected from a normal person. After cautious scrutiny of the evidence we find it difficult to arrive at a finding to draw the hypothesis of guilt against the accused person.

[28] In that view of the matter in regard to the conviction of the appellant, the instant appeal stands allowed and thus, disposed of.

Consequently, he is acquitted from the charge as levelled against him and thus, the conviction as observed by the learned Court below stands set aside. As a sequel, miscellaneous applications pending, if any, shall stand closed. Send down the LCRs.

B. PALIT, J

T. AMARNATH GOUD, J

A.Ghash

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