

14.09.2021

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TN

CRA 132 of 2017

In the matter of: Asgar Ali

... appellant

Mr. Kaustav Das

.... *Amicus Curiae*

Ms. Faria Hossain,
Ms. Baisali Basu

.... for the State

The invaluable assistance provided by the learned *Amicus Curiae* as well as learned counsel for the State is appreciated at the outset.

The present challenge has been preferred against a conviction and sentence under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act”). The plinth of the appellant’s argument is that the age of the victim was never proved by cogent evidence.

It is contended by the learned *Amicus Curiae* that there is also discrepancy between the depositions of the parents of the victim girl regarding her age. The mother of the victim, deposing as P.W.2 in her cross-examination, admitted that since her marriage, they were residing for about twenty years in their house. She also said that, after one year of the marriage, her elder son took birth. It was further admitted in

her cross-examination that, after another year, the victim girl was born.

By simple Arithmetic, it is contended, the age of the victim girl comes to around 18 years at the time of the alleged incident.

However, the father of the victim, in his cross-examination, stated that the age of the victim at that juncture (in 2016) was about 16 years, thereby taking the age of the victim to 14 years at the relevant juncture, when the offence was allegedly committed. In view of such patent discrepancy, it is contended that the provisions of the POCSO Act, solely on the basis of which the conviction was awarded, are not applicable at all to the present case.

It is further contended that, although the Investigating Officer mentioned in his evidence that he had obtained a certificate from the Headmaster of the school where the victim studied, the said document was never proved in accordance with law nor exhibited. It is submitted that, in the absence of proper proof, the document cannot be looked into and has no evidentiary value whatsoever.

It is further submitted that no allegation under Section 354A of the Indian Penal Code was levelled against the accused, nor did the accused get any chance of controverting any charge on that score, which also screens out the applicability of the said section for convicting the accused.

Learned counsel appearing for the State lays stress on the statement of the victim herself, as corroborated by the evidence of the Doctor, to argue that the age of the victim at the relevant juncture was substantially proved, although might not be beyond reasonable doubt.

As such, since the charge against the accused was otherwise proved clearly by corroborative evidence, the accused failed to discharge his onus as cast under Section 29 of the POCSO Act in not being able to disprove the charges.

It is further contended that since the Investigating Officer specifically indicated the existence of a certificate in his possession, taken from the Headmaster of the school where the victim studied at the relevant juncture, it was the duty of the accused, particularly in the context of Section 29 of the POCSO Act, to disprove the said document and/or produce any specific document to rebut the presumption raised by such document.

Moreover, it is contended by the State that there was no specific suggestion as to the veracity of the age of the minor as alleged by her, in the entire cross-examination of all the prosecution witnesses conducted on behalf of the accused. As such, there is no scope of factually disbelieving the fact that the victim was a minor at the relevant point of time.

The law does not cast any mandate on the prosecution, under the POCSO Act or under any other Act, to prove the age of the victim by the strict standard of “beyond reasonable doubt”. It is well-settled that, to attract the presumption under

Section 29 of the POCSO Act, a credible and corroborated case has to be made out by the prosecution, which was done in the present case on the score of the age of the victim as well. It is well-settled that the duty of the prosecution to prove the case, sufficient to attract the rigour of Section 29 of the POCSO Act, has to be tested on the anvil of preponderance of probability.

As such, it is found from the corroborative evidence of the parties that the victim was shown to be a minor at the time of the alleged incident, thereby attracting the mischief of Section 29 of the POCSO Act.

Hence, the factual finding of the trial court, based on the evidence, even on the test of preponderance of probability, to the extent of a *prima facie* prosecution case being established, cannot be set aside by this court in appeal, merely because another view is possible on the basis of the materials on record.

As far as the alleged offence is concerned, all the prosecution witnesses have corroborated such act having been committed by the accused. Moreover, there is no question of looking into the medical report to prove the offence alleged, since the medical report would not prove anything to indicate the commission of the offence, keeping in view the nature of the offence. Thus medical evidence would be neither here nor there in the context of the present evidence.

It is also a settled tenet of Criminal Law that the sole witness and/or statement of the victim, by itself, can be taken

to be sufficient to convict the accused. Keeping in mind the particular circumstances of the case and the nature of the charge, it was very unlikely that any eye-witness would be available to corroborate the prosecution case. Hence, upon assessing the evidence, it is amply clear that the trial court did not commit any error of law or fact in holding that the accused was guilty under Section 8 of the POCSO Act. Hence, there is no scope of interference with the judgment and order impugned herein.

Accordingly, CRA 132 of 2017 is dismissed, thereby affirming the judgment and order of conviction dated November 29, 2016 and November 30, 2016 passed by the Additional Sessions Judge, Second Court at Hooghly in Sessions Trial (Spl) No.16/14 arising out of Sessions Case (Spl) No.39/14, convicting the appellant under Section 8 of the POCSO Act and the consequential award of sentence.

In the event the accused is enlarged on bail, the bail bond stands forfeited and the accused/appellant shall be taken in custody immediately, unless he has already undergone the entire period of sentence.

(Sabyasachi Bhattacharyya, J.)