

**In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

**C.R.A. No.209 of 2017
Sushanka Ghosh
Vs.
The State of West Bengal**

For the appellant	:	Mr. Arindam Jana, Mr. Sumanta Das
For the State	:	Mr. Bidyut Kumar Ray, Ms. Rita Dutta
Hearing concluded on	:	14.09.2021
Judgment on	:	21.09.2021

Sabyasachi Bhattacharyya, J:-

1. This appeal has been preferred against the conviction of the appellant under Sections 417 and 376 of the Indian Penal Code (IPC) and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act).
2. Learned counsel for the appellant submits that the prosecution did not produce any document in evidence to show that the victim was a minor at the relevant date. Learned counsel contends that the trial Court relied on an Admit Card, which was never exhibited at all.
3. By placing reliance on *Mahadeo S/o KerbaMaske Vs. State of Maharashtra and another*, reported at (2013) 4 SCC 637, learned

counsel submits that the Supreme Court categorically held that the yardsticks for ascertaining the age of a juvenile can also be followed by courts for the purpose of ascertaining the age of a victim. It was held in the said judgment that the statutory provision contained in the Juvenile Justice (Care and Protection Children) Rules, 2007 (in short, 'the Rules'), under Rule 12, clearly provides the mode of proving the age. In order of priority, the documents are : (i) the Matriculation or equivalent certificate, if available, (ii) the Birth Certificate from the School (other than a play school) first attended and (iii) the Birth Certificate given by Corporation or a Municipality or a Panchayat. The said documents, in the above order, should be given precedence. In the event none of such alternative methods is available, only then medical information can be sought for to determine the age.

4. Learned counsel further cites *Jarnail Singh Vs. State of Haryana*, reported at (2013) 7 SCC 263, in support of the same proposition, that the ascertainment of age, both of a child in conflict with law and who is a victim of crime, should be on the yardsticks based on the Rules, in particular, Rule 12 thereof.
5. Learned counsel for the appellant contends that the said judgment, read in conjunction with Section 94 of the Juvenile Justice (Care and Protection) Act, 2000 (for short, 'the JJ Act') clearly mandate the court to follow the said yardsticks in ascertaining the age of the victim, which was not done in the present case.

6. Learned counsel further argues that there is patent discrepancy inherent in the deposition of the prosecution witnesses. PW1, the alleged victim, stated her age to be 17 years and 10 months on the date of her deposition of April 12, 2016. The alleged incident occurred between October 31, 2015 and November 9, 2015. Hence, the victim, even admittedly, was 17 years 5 months old at the relevant juncture and was studying in Class XII.
7. The victim alleged in her evidence that the incident took place about six months back, when the accused refused to marry her. She further admitted that the accused offered to marry her and cohabited with the victim one or two times, after which she allegedly narrated the incident to her mother. However, PW2, the mother of the victim, stated in her statement under Section 164 of the Code of Criminal Procedure (CrPC) that she had learnt of the incident about a month prior to the date of giving such statement, that is, November 12, 2015.
8. From the FIR, the alleged date of occurrence has been mentioned as between October 31, 2015 and November 9, 2015 and the information received by the police station was on November 10, 2015.
9. Hence, it is submitted that there is inherent discrepancy between the versions of PW1 and PW2 as far as the date of knowledge of PW2 regarding the incident is concerned.
10. Learned counsel for the appellant further places reliance on *Ravinder Singh Gorkhi Vs. State of U.P.*, reported at (2006) 5 SCC 584, to contend that the yardsticks of the JJ Act were also applicable in case of

complaints, along with Section 35 of the Evidence Act, 1872. It is contended that certain conditions are to be fulfilled before a document is held to be admissible under Section 35 of the Evidence Act. It is submitted that the criteria as stipulated in Section 35 have not been fulfilled at all in the present case, thereby leaving altogether no scope of applicability of the POCSO Act, let alone Section 29 of the said Act, to cast the burden of proving his innocence on the accused.

- 11.** Learned counsel next contends that, admittedly, there was an affair going on between the accused, who was aged about 20 years, and the victim, who was allegedly 17 years 5 months old at the relevant point of time, as corroborated both by PW1 and PW2.
- 12.** By placing reliance on the evidence of PW15, the doctor, it is pointed out that the doctor specifically stated that vaginal swab was taken and handed over to escort party and that no injury mark was noted in the private part or other parts of the victim's body, nor was any foreign body found in her private part. However, it appears from Exhibit 7, the report, that no vaginal swab could be collected due to delay. Such statements are contradictory to each other and demolish the prosecution case on the counts of Section 376 of the IPC as well as Section 4 of the POCSO Act. In the event such swab was collected, the same should have been produced before the Court, which was not done in the present case.
- 13.** Learned counsel goes on to argue, by placing reliance on the judgment rendered by a Division Bench of the Sikkim High Court, reported at

2018 SCC OnLineSikk 215 [Mangala Mishra @ DawaTamang @ Jack Vs. State of Sikkim], that the test under Section 35 of the Evidence Act was also relied on in the said case while discussing the probative value of public documents in evidence.

- 14.** It is further argued on behalf of the appellant that PW13, who accompanied the victim to the hospital for her medical examination on November 10, 2015, did not state anything in her evidence regarding having collected any vaginal swab.
- 15.** Thus, it is evident that the evidence of the doctor, the medical report and the evidence of PW13, the escort of the victim of the hospital, militate against each other.
- 16.** In view of the above circumstances, it is contended that sufficient doubt is cast on the prosecution case, which hits at the root of its plausibility.
- 17.** Learned counsel for the appellant submits that in the cross-examination of DW1, the father of the victim, a clear suggestion was put to the DW1 that a hot altercation had taken place between the daughter (the victim) and the accused regarding “*Denapaona*” of marriage. It was admitted by DW1 that, after the hot altercation, the victim and her mother lodged written complaint before the police station as per instruction of villagers.
- 18.** Thus, it is clear that the belated lodging of complaint was merely an afterthought, as a back-lash of the admitted altercation which had

taken place between the victim and the accused regarding the conditions of marriage, which also vitiates the prosecution case.

- 19.** Learned counsel appearing for the State contends that the Trial Judge, in the impugned judgment, clearly indicated that the Admit Card of the victim was shown to the Court, which reflected that the date of birth of the victim was May 30, 1998. Hence, a presumption under Section 29 can easily be attached to the accused, shifting the burden on the accused to prove his innocence. The statement of the victim under Section 164, CrPC also shows that the victim was 17 years 10 months on the date of such statement, that is, April 12, 2016 and was a minor at the time of the alleged incident. By placing reliance on the evidence adduced by PW10 and PW12, the doctors, learned counsel for the States argues both indicate that the victim was aged about 17 years at the time when she was taken to the hospital for medical examinations.
- 20.** As such, there cannot be any doubt that the Trial Judge was justified in applying the provisions of the POCSO Act to the victim, who was a 'child' within the definition of said Act.
- 21.** Learned counsel for the State submits that there is sufficient corroborative evidence on record to prove the prosecution case.
- 22.** Upon hearing learned counsel for both sides as well as on going through the materials-on-record, the yardsticks of the JJ Act and the Rules, which are, according to the Supreme Court, as per the judgments cited by the appellant, applicable even for ascertainment of

the age of victims, were not satisfied in the instant case. Not only any document regarding the age of the victim was produced in evidence in accordance with law, no ossification test was conducted to ascertain the age of the victim. The finding of the learned Trial Judge that the date of birth of the victim was May 30, 1998, is not borne out by any of the materials-on-record. Although it is mentioned by the learned trial Judge that the victim had an Admit Card to show her date of birth, no such document has been marked as exhibit in the present case. Moreover, the yardsticks of Section 35 of the Evidence Act were not complied at all in the present case. Unless proved in accordance with law, no document, including the purported Admit Card, could even be looked into by the Trial Judge, since there was no probative value of such document, even if handed over during trial to the court below. The findings of the doctors regarding the age of the victim were cursory mentions, in all probability on the basis of the victim's own submission, and not based on any valid medical examination to ascertain the age.

- 23.** Hence, since the age of the victim was, in any event, above 17 years at the relevant juncture, it is doubtful as to whether the provisions of the POCSO Act could at all be attracted in the present case, since there was no formal proof on record to indicate that the victim was a minor at the relevant juncture. The age of 17 and above, based on assumptions and bereft of supporting documents, gives rise to sufficient doubt as to whether the victim had already attained majority

at the relevant juncture, thereby obviating the applicability of the POCSO Act itself, and not only Sections 29 and 30 thereof.

- 24.** As far as the allegations under Section 376 of the IPC and Section 4 of the POCSO Act are concerned, both Section 375, IPC which defines 'rape' and Section 3 of the POCSO Act, which defines "penetrative sexual assault" make it a prerequisite for the accused to have "penetrated" the vagina or any other part of the body of the victim.
- 25.** However, the expression "penetrates" as used in both Section 375(a) of the IPC and Section 3(a) of the POCSO Act, has to be construed as a unilateral act on the part of the accused. The psyche and mental maturity of the victim at the relevant point of time ought also to be looked into to ascertain as to whether the alleged act of sexual intercourse between the accused and the victim, if true, was participatory from both ends, or a unilateral assertive act of the accused, sufficient to be an offence of the accused alone under the aforementioned provisions of law.
- 26.** The mere contours of the anatomy of the sexual organs of a male and a female cannot be sufficient to presume that any sexual union between two sufficiently mature persons was a unilateral act of the accused and not participatory.
- 27.** In the present case, the victim was aged more than 17 years (17 years 5 months as per the assumptions of the prosecution witnesses) and studied in Class XII, while the accused was only 20 years old. Such factor, in conjunction with the admitted position that there was a

romantic affair between the accused and the victim for over two and a half years, which resulted in several occasions of sexual intercourse, negate the presumption of any unilateral act of penetration in the private part of the accused, for which the accused should be held guilty.

- 28.** Any other interpretation of the expression 'penetrates', as used in Section 375 (a) of the IPC and Section 39 (a) of the POCSO Act, would lead to the absurd presumption that, even if the sexual union between two persons of sufficient maturity was participatory in nature, only the male should be held guilty of such offence.
- 29.** Modern concepts of penology discard the retributive aspect of punishment and highlight the deterrent factor, which is evident from the evolution of 'jails'/'prisons' into "Correctional Homes". Thus, mere refusal to marry, that too at a stage subsequent to the alleged incident, cannot be a handle to incriminate the appellant on the charges clamped against him, particularly keeping in view the antecedents of the accused and admitted previous physical and romantic relationship between the alleged victim and the accused. This would frustrate the purpose of the POCSO Act as well as the jurisprudence behind the IPC and lead to unscrupulous abuse of the said statutes at the drop of a hat.
- 30.** Undoubtedly, the said proposition has to be taken with a pinch of salt, as is the cut-off mark of 18 years to come within the purview of "child" as defined in the POCSO Act. To ascertain whether the act was

unilateral or participatory is essential, along with the level of maturity and psyche of the victim as well as the accused, before convicting the accused under such serious allegations of rape and penetrative sexual assault, which might ruin an otherwise bright career at the bud.

- 31.** It is evident from the depositions of the mother of the victim as well as the victim herself, as corroborated by the father of the victim, that the complaint was a mere backlash due to the altercation regarding the conditions of marriage and could not be construed to have convincingly prove commission of offences under Section 376 of the IPC or Section 4 of the POCSO Act.
- 32.** As far as Section 417 of the CrPC is concerned, the same provides for punishment for 'cheating', which term has been defined in Section 415 of the IPC. However, it is well-settled that the prosecution has to establish any intention of cheating on the part of the accused at the juncture when the alleged offence was committed. Subsequent refusal to marry cannot be come within the purview of cheating on the premise that the accused resiled from his previous intention to marry subsequently. There is no evidence on record at all to show that the accused had unilaterally perpetrated the offences alleged, with the deliberate intention to deceive the alleged victim, at the relevant point of time when the alleged offence took place. Hence, the conviction of the accused under Section 417 of the IPC also fails.
- 33.** In such view of the matter, CRA No.209 of 2017 is allowed, thereby setting aside the judgment and orders of conviction and sentence

dated February 7, 2017 and February 8, 2017 passed by the Additional District and Sessions Judge, Second Court at Krishnanagar, District-Nadia in Sessions Trial No.IX(III)/2016. The appellant is hereby acquitted of all the charges and shall immediately be released, if in custody. The appellant is further discharged from any condition or bond, if furnished by the appellant in connection with any order of bail obtained by the appellant at any point of time.

- 34.** The parties as well as all concerned shall act on the server copy of this order, without insisting upon prior production of a certified copy thereof.

(Sabyasachi Bhattacharyya, J.)