

Form J(2)

In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side

Present : **The Hon'ble Mr. Justice Bibek Chaudhuri**

CRA 317 of 2019

Satyajit Roy
-Vs.-
State of West Bengal & Anr.

For the appellant : Mr. Milon Mukherjee, Sr. Adv.,
Mr. Biswajit Manna, Adv.,
Mr. Santanu Talukdar, Adv.

For the respondents : Mr. Saswata Gopal Mukherjee, Adv.,
Ms. Faria Hossain, Adv.,
Mr. Sandip Chakraborty, Adv.

Heard & Judgment on : 24.11.2021.

Bibek Chaudhuri, J.:

The appellant was convicted and sentenced to rigorous imprisonment for a term of five years and also to pay fine of Rs.50,000/-, in default, to undergo simple imprisonment for a term of nine months for committing offence under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (hereafter described as POCSO Act).

The instant appeal is directed against the judgment and order of conviction as mentioned above passed by the learned Additional Sessions Judge, 2nd Court at Bankura in Special Case No. 2 of 2018 corresponding to Sessions Trial No. 1(3) of 2018.

Indisputably, the appellant is a teacher of English imparting private tuition. The victim girl was a student of class XII on the alleged date of occurrence. It is not clear whether she attained majority or not which I propose to deal with elaborately at the subsequent stage. She stated her age to be of 17 years on the date of alleged incident. The incident took place on 23rd December, 2017 and on 9th January, 2018, the victim girl herself lodged a complaint of aggravated penetrative sexual assault committed upon her by her teacher on 23rd December, 2017 at about 6.15 p.m., when she went to him to take private tuition. An explanation of delay was made out in the written complaint which was treated as FIR that she could not state the incident to anybody out of fear but subsequently, she while pondering the matter, gained mental strength to make a complaint in the local police station against the accused.

The said complaint gave rise to Bankura Women Police Station Case No. 2 of 2018 under Section 376(2)(f)(i) read with Sections 4 and 6 of the POCSO Act. Police took up the case for investigation and on completion of investigation charge-sheet was submitted against the

accused/appellant. During trial, the learned Trial Judge framed charge under Section 376(2)(f) of the Indian Penal Code and Section 6 of the POCSO Act. In order to bring home the charge, prosecution examined as many as 12 witnesses. It is sufficient to state that in the instant case the *de facto* complainant/victim, her mother (P.W. 2), her father (P.W. 3), P.W. 4, P.W. 5, P.W. 7, P.W. 8, P.W. 10 and P.W. 11 did not support the prosecution case and were declared hostile by the prosecution.

After examination of the witnesses on behalf of the prosecution, the accused was examined under Section 313 of the Code of Criminal Procedure where he pleaded innocence and took a specific plea that on the date of occurrence the victim girl did not do her home work and for this reason he rebuked her and also assaulted her. He vehemently denied the charge of committing rape or aggravated penetrative sexual assault upon the victim.

The learned Trial Judge convicted the accused under Section 10 of the POCSO Act and sentenced him accordingly relying on the medical evidence on record which suggested rupture of hymen of the victim girl. He also took note of the fact the statement made by the victim girl under Section 164 of the Code of Criminal Procedure where she stated about commission of aggravated penetrative sexual assault upon her and thirdly, it is observed by the learned Trial Judge that

POCSO Act contains a specific provision of reverse burden under Section 29 of the Act and the Court can also presume culpable mental state of the accused under Section 30 of the said Act and reverse burden is always upon the accused to prove the contrary which the accused had failed. These are, in short, the reasons for holding the accused guilty for committing offence under Section 10 of the said Act.

It is submitted by Mr. Milon Mukherjee, learned senior counsel for the appellant that Section 2(d) of the POCSO Act defines child as a person below the age of 18 years. In the instant case, the *de facto* complainant/victim stated that she was 17 years of age at the time of the alleged occurrence. It is the foremost duty of the prosecution to prove the age of the victim girl for application of the POCSO Act against an accused. Mr. Mukherjee draws my attention to the seizure list (exhibit 6) and zimmanama (exhibit 7) wherefrom it appears that the Investigating Officer seized one original admit card of West Bengal Board of Secondary Education in the name of the victim girl on 10th January, 2018. The said admit card was kept under the custody of the father of the victim girl after seizure. During trial the said admit card was not produced before the Trial Court to show that the victim girl was under the age of 18 years on the date of commission of offence. Non-production of such admit card amounts to suppression of material fact as to the age of the victim girl and in such a case the appellant

was entitled to get reverse presumption under Section 114(g) of the Indian Evidence Act and the Trial Court ought to have held that had the admit card been produced before the Court of trial it would have been seen that the age of the victim was above 18 years on the date of commission of offence.

Secondly, it is urged by Mr. Mukherjee that ossification test of the victim girl was not done to ascertain her age.

Thirdly, Section 53(A) of the Code of Criminal Procedure which delineates detailed procedure of examination of a person accused of rape was also not complied with. The accused was not examined by any Medical Officer to prove that he was not incapable of committing sexual act in normal course of nature.

It is also pointed out by the learned senior counsel on behalf of the appellant that the learned Magistrate who recorded the statement under Section 164 of the Code of Criminal Procedure of the victim girl was not examined during trial. The contents of Section 164 was admitted any evidence without examination of the learned Magistrate.

On factual aspect it is submitted by the learned senior counsel on behalf of the appellant that when all the witnesses except P.W. 6, P.W. 9 and P.W. 12 turned hostile and did not support the prosecution case it was not proper for the learned Trial Judge to hold the accused

guilty for committing an offence even under Section 10 of the POCSO Act. It is further submitted by Mr. Mukherjee that in reply to Question No. 3 under Section 313 of the Code of Criminal Procedure the accused candidly admitted that he rebuked and assaulted the victim girl as she did not do her home work during private tuition. The same fact was stated by the victim girl in her evidence on oath. Therefore, the accused had no sexual intent to commit any offence and even the offence of sexual assault as described in Section 7 of the POCSO Act was not proved in course of evidence by the prosecution.

Learned Public Prosecutor, on the other hand, draws my attention to the evidence of P.W. 7 while cross-examined by the prosecution after the said witness having been declared hostile P.W. 7 stated that another student of their Madrasah and her parents and other villagers made a complaint to him against the appellant for his improper behaviour to the said student. The said incident was amicably settled in presence of respectable persons of the village and the appellant took apology for his misdeeds.

Thus, it is urged by the learned Public Prosecutor that the accused was a habitual offender of making improper behaviour with the girl students, then he draws my attention to the medical report and the evidence of the Medical Officer (P.W. 6) who stated on oath as

well as in her report that she medically examined the victim girl and found her hymen ruptured.

According to the learned Public Prosecutor, the above stated facts are the two circumstances which led the Court to hold that something had happened on the date of occurrence with the victim girl and, therefore, the accused was held guilty.

It is no longer *res integra* that in an offence of sexual assault the evidence of the victim girl can be the sole basis to hold the accused guilty for committing such offence because a victim of sexual assault is not an accomplice and no corroboration is necessary. The evidence of the victim girl is to be equated with the evidence of an injured witness. The Hon'ble Supreme Court went further to state that the evidence of the victim girl/prosecutrix should be accepted at higher pedestal than that of an injured witness because she not only suffers physical injury but also went on mental and emotional trauma due to such incident. The Hon'ble Supreme Court, however, echoed a voice of caution while accepting the evidence of a victim girl putting a caveat that the evidence of the victim girl must be trustworthy, cogent, truthful, unblemished and on sterling quality. In ***Ganesan – Vs.- State Represented by its Inspector of Police*** reported in ***(2020) 10 SCC 573***, the Hon'ble Supreme Court defined relying on its previous decision in the case of ***Rai Sandeep –Vs.- State (NCT of***

Delhi) reported in **(2012) 8 SCC 21** as to who should be treated as a sterling witness. The observation of the Hon'ble Supreme Court is quoted below:-

"In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific

evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

In the instant case, the victim girl did not support the prosecution case. She did not support the contents of the FIR on the basis of which a case under Section 376(2)(f)(i) of the Indian Penal Code and Sections 4/6 of the POCSO Act was registered.

Therefore, she was declared hostile by the prosecution. It is true that the law on acceptance of evidence of a hostile witness is that

the evidence of hostile witness may also be taken into consideration if it lends support of the prosecution case in some way or other. In the instant case no such circumstance is found from the evidence of P.W.1. I am surprised to note that the learned trial Judge found sexual intent of the appellant in the act of abusing his student and assaulting her when such evidence is conspicuously absent in the record. It is needless to say that the presumption of reverse burden as described in Sections 29 and 30 of the POCSO Act is not automatic. It is duty of the prosecution to prove the foundational fact of the prosecution case beyond any shadow of doubt. Only then the question of taking presumption on reverse burden will arise. In the case of ***Subrata Biswas & Anr. vs. The State*** reported in ***(2019) 3 Cr. L. R. (Cal) 331***. This Court had the opportunity to discuss the principle of reverse burden in the following words:-

“The concept of reverse burden of proof can only be made applicable in a case, where prosecution has already led substantial evidence, as regards the offence complained of. There is hardly any scope for direct application of Section 29 of the POCSO Act, even in a case where there is no foundational evidence being led by the prosecution”.

Therefore, the learned trial Judge erred in placing reliance on Sections 29 and 30 of the POCSO Act in holding the accused guilty for

committing offence under Section 10 of the POCSO Act. When the victim girl on oath did not state that the appellant committed any act of sexual intent which involves physical contact, question of commission of sexual assault or aggravated sexual assault does not arise at all.

I have no other alternative but to hold that the learned trial Judge committed gross illegality in convicting the appellant under Section 10 of the POCSO Act.

For the reasons stated above, the instant appeal is **allowed** on contest, however, without costs. The appellant is acquitted from the charge and discharged from the bail bond.

Since the charge was not proved and the appellant was acquitted, the victim girl is directed to make refund of the entire compensation money if already paid to her by the District Legal Services Authority, Bankura.

Let a copy of this order be sent to the learned Court below forthwith along with the lower Court record.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties on usual undertakings.

(Bibek Chaudhuri, J.)

Srimanta/Suman
A.Rs. (Court)