

AD. 5.  
September 8, 2021.  
MNS.

C.R.A. No. 268 of 2017

**(Via Video Conference)**

Taraman Bibi  
Vs.  
The State of West Bengal

Mr. Prabir Majunder,  
Mr. Snehashu Majumder

...for the appellant.

Mr. Narayan Prasad Agarwala,  
Ms. Subhasree Patel

...for the State.

The present challenge has been preferred against a conviction awarded against the appellant under Section 12 of the Protection of Children from Sexual Offences Act, 2012 (in short “the POCSO Act”).

Learned counsel for the appellant, at the outset, contends that there are gross differences and discrepancies between the versions of the several prosecution witnesses in respect of both the time and place of occurrence of the alleged incident.

That apart, the best possible witness, namely, Machhema Bibi, who was allegedly the ‘dadi’ of the alleged victim and rescued her, was not produced as witness, nor examined by the Investigating Officer, at any point of time. As such, it is argued, adverse inference ought to be drawn against the prosecution.

Thirdly, learned counsel for the appellant contends that the sketch map clearly shows that the place of occurrence, according to the victim herself, was the courtyard of one Ahannara Bibi, a neighbor of the victim. The said Ahannara adduced evidence as PW3 and was never declared hostile. The said neighbour clearly states in her

examination-in-chief that she knows nothing about the case. Rather, in her cross-examination, PW3 clearly specifies that, in her courtyard at about 10 a.m., Taraman Bibi (the appellant) was “making joke” with the alleged victim.

It is contended by learned counsel for the appellant that a mere glance at Section 11 of the POCSO Act clearly reveals that a person is said to commit sexual harassment upon a child when such person, with “sexual intent”, commits any of the acts specified thereafter. The Explanation of the said Section shows that any question which involves “sexual intent” shall be a question of fact.

On the other hand, by relying on the language of Section 29 of the POCSO Act, learned counsel submits that Section 12 does not fall within the said provision, so as to shift presumption of offence against the accused. Rather, Section 30 might be relevant in the present case, since the Special Court is to presume the existence of culpable mental state and it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

In the present case, the consistent statements of PW1, as well as PW2, in their cross-examinations, have been that criminal complaints were lodged against the husband of the accused by the father of the alleged victim. Regarding the issue of alleged non-payment to the husband of the accused for his work under the “100 days’ scheme” of the Government.

Learned counsel thus argues that the onus cast upon the defence under Section 30 of the POCSO Act was sufficiently discharged by the accused by indicating a clear case of prior enmity

between the families of the accused and the victim. Moreover, absence of sexual intent on the part of the accused was sufficiently indicated by the total ignorance of PW3 regarding the alleged incident, as stated categorically by her, in whose premise (courtyard) the occurrence allegedly took place, also strengthened by the specific statement of the said witness that the 'dadi' of the victim and Taraman, the accused, were cracking jokes with several children, including the victim, in the courtyard of the witness at about 10 a.m.

Learned counsel appearing for the State categorically submits that the medical report exhibited in the present case clearly indicates that there were scratch marks in the private parts of the victim which unerringly indicate towards the commission of the alleged offence. As such, it is argued by the State that the conviction awarded against the appellant was justified in view of the case against the accused having been proved beyond reasonable doubt.

Upon a consideration of the submissions of the parties as well as the materials on record, the submission of learned counsel for the appellant as regards patent discrepancies in the descriptions of the place of occurrence of the alleged incident and the time of the incident is substantiated. While the victim herself stated, both in her statement under Section 164 of the Code of Criminal Procedure and in her deposition, that the incident took place at 7 a.m. in the courtyard of PW3, PW4 stated that the incident occurred in a jute field, that too around 1 p.m.

On the other hand, the father of the victim girl stated in his evidence that the incident took place at around 10 a.m. The FIR

mentions the time of occurrence also as 10 a.m., which is further reflected in the charge-sheet.

It is seen from the sketch map prepared by the Investigating Officer that the places of occurrence alleged by the several prosecution witnesses differ from each other. As regards the time of occurrence as well, there are gross discrepancies between the times alleged by the different prosecution witnesses, ranging from the period between 7 a.m. in the morning and 1 p.m. in the afternoon.

That apart, the prosecution failed to examine Machhema Bibi, who had allegedly rescued the victim girl, as per the victim's own version, from the place of occurrence. Thus, the best evidence available in favour of the prosecution was withheld. Although it is well-settled that lapses in the prosecution cannot, *ipso facto*, be construed in favour of the accused, in the present case there is no reason not to draw adverse inference against the prosecution for having withheld Machhema as a witness in the proceeding.

That apart, Ahannara, PW3, in whose courtyard the offence allegedly took place as per the victim herself, clearly denied any knowledge of the alleged incident. Rather, PW3, in her cross-examination, categorically stated that the accused was one of the ladies who were playing with several children, including the alleged victim and they were joking with each other.

Such statement not only falsifies the allegation of the prosecution, but amounted to sufficient compliance with Section 30 insofar as the absence of culpable mental state of the accused was concerned. The defence sufficiently established that the mental state of the accused, at the relevant juncture, was not culpable, since the

cross-examination of PW3 clearly indicates fun and frolic between the accused in the presence of several other children and adults, at the relevant juncture. That apart, the criminal complaint lodged against the husband of the accused-appellant prior to the alleged offence in the present case is another clear indicator of there being enmity between the families of the victim and the accused.

In such scenario, if the medical report is seen in appropriate context, a mere scratch on the private parts of the victim merely does not, by itself, establish the alleged offence against the accused beyond reasonable doubt. In view of the accused having discharged her onus regarding her mental state at the relevant juncture on the scores of intention, motive, as well as knowledge of fact, as also borne out by the cross-examination of PW3, it was for the prosecution to prove beyond reasonable doubt that the accused had actually committed the offence-in-question.

The prosecution having failed to do so miserably, the Sessions Judge acted palpably without jurisdiction and erred in law in convicting and sentencing the accused under Section 12 of the POCSO Act.

Accordingly, C. R. A. 268 of 2017 is allowed, thereby setting aside the judgment and order of conviction and sentence dated March 24, 2017 and March 29, 2017 passed by the Additional Sessions Judge, Second Court at Krishnagar, District- Nadia, in Sessions Trial No. II (VIII) of 2016, arising out of Sessions Case No. 05 (06) of 2016 (Spl).

The appellant/accused is acquitted honourably from the charges brought against her in the present case. Accordingly, the appellant is discharged from the bail bonds and conditions of bail

imposed on her and shall not be arrested for the crime alleged in the instant case.

The department is directed to send down the lower court records immediately.

(Sabyasachi Bhattacharyya, J.)