

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

The Hon'ble Justice Sabyasachi Bhattacharyya

C.R.A. No.407 of 2016

**Paban Kumar Tarafdar
Vs.
The State of West Bengal**

For the appellant	:	Mr. Devojoyoti Barman
For the State-respondents	:	Mr. Imran Ali, Mr. Mirza Firoj Ahmed Begg
Hearing concluded on	:	01.09.2021
Judgment on	:	06.09.2021

Sabyasachi Bhattacharyya, J:-

1. The instant appeal has been preferred against a judgment and order of conviction against the appellant under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act'), whereby the appellant was sentenced to imprisonment for three years and a fine of Rupees Ten Thousand (Rs.10,000/-), in default of payment, rigorous imprisonment (R.I.) for three months more.
2. Learned counsel for the appellant argues that there were several discrepancies in the prosecution case. Whereas Mamata Saha, the mother of the alleged victim stated in her complaint lodged with the

police that the victim went to the house of the accused with one Unnati Tarafdar at 7:30 p.m., she stated in her statement recorded under Section 164 of the Code of Criminal Procedure (Cr.P.C.) that the victim went with Mala Saha, which she corroborated in her deposition.

- 3.** On the other hand, the victim was silent about such incident in her statement under Section 164, Cr.P.C. but deposed in evidence that she had gone with Pritanshu Tarafdar to the house of the accused.
- 4.** Further, Mamata Saha (mother of the victim) made contradictory statements, by complaining before the police that Unnati Tarafdar had told the victim to return home and study, whereas in her statement under Section 164, Cr.P.C., she stated that the mother of the child Pritanshu asked the accused to drop her home. The victim, in her statement under Section 164, Cr.P.C., was silent on such aspect, but stated in her deposition that her aunt, Unnati told her to return to her house with the accused, whereas Mamata Saha contradicted such statement in her deposition by saying that it was Mala Saha who asked her daughter to return home.
- 5.** That apart, Mamata, in her police complaint, stated that the victim told Paban (the accused) to take her home, whereas, in her statement under Section 164, Cr.P.C., Mamata Saha said that Unnati Tarafdar asked Paban to take the victim home.
- 6.** It is next contended that, whereas the consistent statement of Mamata Saha in her complaint and statement under Section 164, Cr.P.C., corroborated the stand taken by the victim in her statement under

Section 164, Cr.P.C., and her deposition, Mamata added in her deposition that the accused 'forcibly' took the victim to his room.

7. Even regarding the factual details, it is submitted that there are several discrepancies between the statements made by the victim child and her mother in their statements made in deposition as well as in their statements under Section 164, Cr.P.C.
8. Learned counsel further argues that the reason for the delay of more than 24 hours in lodging the complaint after the alleged incident was never explained either by the witnesses or discovered during investigation.
9. Although the immediate neighbours or persons mentioned in the sketch map were never arrayed as charge-sheet witnesses, the Trial Court convicted the appellant without any material evidence.
10. Mamata allegedly rushed on the night of the incident to talk to the accused. While doing so, she was admittedly not accompanied by any member of her family, including her husband, or any person from the neighbourhood. That apart, none of the several family members of the accused witnessed the alleged incident, which is unusual since, at 7:30 p.m. in the evening, at least some of the family members of the accused ought to have been present in the house of the accused, particularly in view of the incident having taken place in a rural area.
11. The husband of the *de facto* complainant, who is admittedly the head of the family, was neither examined by the police nor produced as a

witness in court. Despite there being seven rooms in the house of the accused, as extracted in evidence, the exact room where the alleged incident occurred was not identified by the police or the witnesses.

- 12.** Above all, it is argued that the medical examination of the victim girl by two doctors ruled out any case of the assault on the victim's private parts or anywhere else in her body. The medical examination of the accused described him to be devoid of normal erectile function.
- 13.** Moreover, there was no eye-witness to the alleged incident and the evidence of all the prosecution witnesses were at best hearsay and could not be said to be supportive or corroborative evidence in favour of the prosecution case.
- 14.** Mala Saha, PW 6, with whom the victim girl allegedly went to the house of the accused, denied the incident.
- 15.** The said Mala Saha also stated about a family feud between the families of the accused and the victim. It has also come out in evidence that the illegal activities of the *de facto* complainant led to the neighbourhood people having strained relationship with the mother of the victim, which could have led, as an aftermath, to the complaint. Learned counsel highlights the fact that the victim admitted in her cross-examination that she had been 'tutored' by her mother to give her statements under Section 164, Cr. P.C.
- 16.** It is further argued that the circumstances of the case do not lead to any presumption that the offence was committed by the accused, who

is a 74 years old retired school teacher. The wearing apparel of the victim girl was handed over to police only after being washed. There is no mention of the accused person being sexually potent in Exhibit No.8. Vital witnesses like the child Pritanshu or his mother were never produced as witnesses, thereby giving rise to an adverse inference against the victim.

17. Learned counsel for the appellant next relied on certain judgments in support of his contentions.
18. The first of such judgment is *Narender Kumar Vs. State (NCT of Delhi)*, reported at (2012) 7 SCC 171, for the proposition that suspicion, however strong, cannot be the basis of conviction. The prosecution has to establish its case beyond reasonable doubt and if the story of the prosecution is improbable and not corroborated, the accused is entitled to benefit of doubt.
19. Learned counsel next places reliance on *Harbeer Singh and another Vs. Sheeshpal and others*, reported at AIR 2016 SC 4958, for the proposition that the burden of proving the case beyond all reasonable doubt lies on the prosecution and it never shifts. If two views are possible, one pointing to the guilt of the accused and the other to his innocence, the view favourable to the accused should be adopted.
20. Learned counsel next relies upon *Upendra Pradhan Vs. State of Orissa*, reported at AIR 2015 (Supp.) SC 1265, in support of the same proposition, that the view favouring the accused should be accepted.

21. Learned counsel then relies on *Gulu Santra @ Ghunu Santra Vs. The State of West Bengal*, reported at 2020 Supreme (Cal) 491, to strengthen his argument that the oral testimony of the victim, claiming to have been violated, not being supported by the two doctors upon their medical examination, would render her testimony improbable. The credibility of such witness, being thus tainted with doubt in view of the medical evidence of two doctors, will hardly pave the way for attracting the presumption available under Section 29 of the POCSO Act.
22. Learned counsel for the appellant then cites *Litan Sarkar Vs. State of West Bengal*, reported at 2020 Supreme (Cal) 97, where a Division Bench of this Court had recorded the findings of the same Trial Judge, against whose judgment the present appeal has been preferred. By placing particular reliance on portions of the Paragraph Nos.6 and 7 of the report, where the findings of the Trial Judge were quoted, learned counsel submits that the language therein was exactly similar to the language used in the present judgment. It is argued that the Learned Trial Judge is in the habit of relying on such clichés and pre-conceived notions, without any objective consideration of the materials on record. The said case also involved an offence under the POCSO Act.
23. Learned counsel next relies on *Amol Vs. State of Maharashtra*, reported at (2018) Supreme (Mah) 2023, wherein the Nagpur Bench of the Bombay High Court held that the statutory presumption under

Section 29 of the POCSO Act must be understood and tested on the anvil of the golden thread which runs through the web of the criminal jurisprudence system in this country that an accused is presumed to be innocent till the guilt is conclusively established beyond reasonable doubt. It was held that it is trite law that suspicion is not a substitute of proof.

- 24.** Learned counsel next cites the judgment rendered in *Sahid Hossain Biswas Vs. State of west Bengal*, reported at (2017) 3 CalLT 243, wherein it was observed by the learned Single Judge that a conjoint reading of the statutory provisions in the light of the definitions of certain expressions as mentioned therein would show that in a prosecution under the POCSO Act an accused is to prove 'the contrary', that is, he has to prove that he has not committed the offence and he is innocent. It is, therefore, an essential pre-requisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary. The presumption does not take away the essential duty of the court, it was held, to analyse the evidence on record in the light of the special features of a particular case, e.g. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and victim giving rise to an irresistible inference of falsehood in the prosecution case while

determining whether the accused has discharged his onus and established his innocence in the given facts of a case.

25. Next relying on an unreported judgment of the Nagpur Bench of Bombay High Court, in the case of *Sadhu S/O Motilal Turra (In Jail) vs. State of Maharashtra Thr. Police*, delivered on June 27, 2018 learned counsel for the appellant argues that, although a presumption under Section 29 of the POCSO Act arises, such a presumption cannot be absolute. There can be no doubt about the proposition that no presumption is absolute and that every presumption is rebuttable, it was held in the report.
26. While controverting such submissions, learned counsel for the State contends that it was held in *Harbeer Singh and another* (supra), itself that Section 161 of the Cr.P.C. provides that delay in recording the statement of a witnesses is not fatal if duly explained, although delay would cast a doubt upon the prosecution case if witnesses were available but statements were not recorded.
27. Learned counsel for the State next places reliance on the judgment of *Yogesh Singh vs. Mahabeer Singh & Ors.*, reported at (2017) 11 SCC 195, in support of his submission that it is well-settled law that evidence of a child witness must find adequate corroboration before it is relied upon, as the rule of corroboration is of practical wisdom than of law. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that the evidence of a child witness must be evaluated more carefully and

with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

- 28.** It is submitted by learned counsel for the State that the evidence on record and the statement of the victim were sufficient, read in conjunction, to indict the convict.
- 29.** Upon considering the submissions of the parties, it is seen that the alleged discrepancies in evidence, relied on by the appellant, are minor in nature and cannot be said to have vitiated the credibility of the witness of the victim child and her mother.
- 30.** The statements made by the victim and her mother in their respective statements before the police as well as in their depositions do not carry contradictions which are mutually destructive. The factum of the present case, accompanying the victim to the house of the accused, differed only in respect of the victim having stated that she visited the house of the accused with her friend, another child, while her mother said that she had gone with one Mala Saha. At other places, the name of Unnati was mentioned as one of the persons accompanying the victim. There could have been minor lapses in memory of the witnesses, which fall within the normal margin of error, bringing all the more the credibility of the witnesses, who are but humans having imperfect memories, and shows that the witnesses were not tutored to corroborate each other's versions.

- 31.** One of the primary arguments of the accused was that the doctors' evidence regarding 'sexual assault' having not been established. The expression 'sexual assault', as used in Section 7 of the POCSO Act, is wide in nature and includes a touch with sexual intent to the private parts of a child or making the child touch the private parts of the accused and also encompasses "any other act with sexual intent which involves physical contact without penetration". Hence, the medical practitioners, being laymen in law, might very well have used the expression 'sexual assault' in the general connotation of the term and not in the wider sense as envisaged in Section 7 of the POCSO Act.
- 32.** The mere statement in the doctors' evidence that the reddish hue on the vagina of the victim could have been the result of an itch does not absolve the accused from the liability, as cast under Section 29 of the POCSO Act, to dispel any doubt as regards the probability of such 'itch' having been a result of sexual assault within the purview of Section 7 of the POCSO Act.
- 33.** In the present case, the evidence of the prosecution witnesses as well as the initial statement given by the victim child under Section 164 of the Cr.P.C. substantially corroborate each other and it cannot, by any stretch of imagination, be said that the prosecution case was improbable or not credible from the perspective of a prudent person.
- 34.** Considering the tender age of the victim at the relevant juncture, that is, seven years, it would not be improbable that she could not resist the indecent attempts of the accused to such an extent so as to leave

serious abrasions or injury on the body of the victim. The veracity of the prosecution case is further strengthened by the fact that the victim and her family were well-acquainted with the accused, thereby preempting the scope of prior suspicion in the mind of the victim or her parents regarding the accused.

- 35.** The absence of recent nail scratch marks of the accused over any part of the body of the victim, *ipso facto*, does not vitiate the probability of the prosecution case being true, without any specific evidence regarding the length of the nail of the accused.
- 36.** Moreover, the circumstances alleged, coupled with the tender age of the minor victim, clearly raise a presumption under Section 29 of the POCSO Act, so as to cast the burden of proving innocence on the accused.
- 37.** The mere argument that it was improbable for the other family members of the accused not to be aware of the alleged offences at 7:30 p.m. is neither here nor there and can only exist in the realm of conjecture. Hence, in the absence of any cogent rebuttal to such presumption on the part of the accused, the presumption attains finality, justifying conviction.
- 38.** The number of rooms being seven in the house of the accused is totally irrelevant, since the victim child clearly indicated that she went to the room of the accused, thereby specifically designating a single room out of the available rooms in the house. Thus, no doubt or suspicion can be cast on the prosecution case for non-mention of the

exact location of the room to displace the presumption under Section 29 of the POCSO Act.

39. In such view of the matter, the Trial Judge committed no error of law and or fact in holding the accused person to be guilty of the offences punishable under Section 8 of the POCSO Act and in convicting the accused as well as subsequently sentencing the accused to imprisonment for three years as well as fine of Rupees Ten Thousand (Rs.10,000/-), in default of payment of which the convict will have to undergo rigorous imprisonment (R.I.) for three months more. The Trial Judge, correctly, set off and dove-tailed the period of detention already undergone by the convict against the sentence of imprisonment.
40. As such, there is no merit whatsoever in the appeal.
41. Accordingly, C.R.A. No.407 of 2016 is dismissed on contest, thereby affirming the conviction and sentence handed over to the appellant *vide* the impugned judgment and order, respectively dated May 5 and May 6 of 2016 passed by the Additional District and Sessions Judge, Second Court at Krishnagar, District- Nadia in Sessions Trial No. V(XII) of 2015, arising out of Sessions Case No. 02(09) of 2015 (Spl).

(**Sabyasachi Bhattacharyya, J.**)

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On the prayer of learned counsel for the appellant and keeping in view the fact that the appellant is an octogenarian and is at present

enlarged on bail, the operation of the judgment and order is stayed till October 5, 2021.

(Sabyasachi Bhattacharyya, J.)