

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

**The Hon'ble Justice Sabyasachi Bhattacharyya**

**C.R.A. No.458 of 2018  
IA No: CRAN 2 of 2020**

**Ranjit Rajbanshi  
Vs.  
The State of West Bengal and others**

|                      |   |                                                                         |
|----------------------|---|-------------------------------------------------------------------------|
| For the appellant    | : | Mr. Pratip Kr. Chatterjee<br>Ms. Aiswarjya Gupta                        |
| For the State        | : | Mr. S. G. Mukherjee, Id. PP,<br>Ms. Faria Hossain,<br>Ms. Baishali Basu |
| Hearing concluded on | : | 10.09.2021                                                              |
| Judgment on          | : | 17.09.2021                                                              |

**Sabyasachi Bhattacharyya, J:-**

1. The present appeal has been preferred against a conviction under Section 376(1) of the Indian Penal Code, 1860 (for short “the IPC”) and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act”) and sentence awarded under Section 376(1) of the IPC, since the quantum of

punishment in the said Section was higher, to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 50,000/- (fifty thousand), in default, to suffer rigorous imprisonment for one year for the offences punishable on both counts.

- 2.** Learned counsel appearing for the appellant argues that no evidence has been produced to connect the accused with the previous hymen injury of the victim, sufficient to convict the appellant on either of the charges.
- 3.** The age of the accused was 22 years and that of the victim was 16 ½ at the time of the First Information Report (FIR). It is argued that the time lapse of two days between the date of the incident (August 12, 2017) and lodging the FIR (August 14, 2017) also gives rise to a suspicion as regards the involvement of the accused.
- 4.** It is further argued by learned counsel for the appellant that the two Doctors' reports do not corroborate the prosecution case. For this purpose, apart from the said reports, learned counsel also places reliance on relevant portions of the depositions of PW3 (Dr. Anuva Dey) and PW4 (Dr. Avik Das). Referring to pages 15 and 16 of the Paper Book, learned counsel contends that PW3 clearly stated that the victim had admitted her prior relationship with the accused. Moreover, no instance of rape was alleged by the victim during medical examination. Pregnancy test yielded negative result. The medical examination only showed that there was an old and healed tear over the hymen.

5. At page 17 of the Paper Book, the PW4 stated that there was no injury or mark found on the body or private parts of the victim.
6. That apart, it is contended by the appellant that there were several discrepancies in the depositions of the prosecution witnesses.
7. The victim, as PW2, mentioned in her cross-examination that she had “shouted” during the incident. However, the area was admittedly a crowded one and, as revealed from the sketch map at page 3 of the Paper Book, the room (place of occurrence) was situated between two shops – one a pharmacy and the other a sweet shop. There was also a burial ground and a busy bus stand nearby. It was quite unlikely that none heard the cry of the victim, in the event she had shouted.
8. That apart, the complainant as PW1, in her cross-examination, mentioned about the victim’s father and brother having accompanied her during the complaint. However, none of them were produced as witnesses.
9. The victim, as PW2, mentioned the time of occurrence to be 2 p.m. on August 12, 2017, but the complaint was lodged only on August 16, 2017. The accused and his relatives allegedly had also gone at that time.
10. The cross-examination of the victim (PW2) shows that PW2 admitted that she mentioned the matter to her mother around 4 to 5 p.m. and at about 7.30 to 8 p.m. that same day, the victim’s brother, mother

and father allegedly asked the accused to marry the victim. However, such statements were not corroborated by PW1.

11. As such, learned counsel for the appellant argues that none of the ingredients required to be proved for either of the charges were established beyond reasonable doubt in the present case, even sufficient to raise a presumption under Section 29 of the POCSO Act.
12. Learned counsel for the State, at the outset, submits that the victim was proved to be a minor at the time of the offence and, even if the victim had consented to the offence, the same is not material at all.
13. Learned counsel for the State further contends that the delay between the alleged incident and the complaint was justified as there was an attempt to give the victim in marriage to the accused, which is perfectly credible considering the present social structure of rural India.
14. It is further contended that, as per the law, there is no option before the Court than either to uphold the punishment for the entire term of seven years, which was the minimum sentence for Section 376 of the IPC, or total acquittal, the latter being improbable in the circumstances of the case.
15. Learned counsel for the State cites a judgment of the Supreme Court, reported at, *AIR 2001 SC 2075 [State of Himachal Pradesh Vs. Gyanchand]* and submits that all propositions involved in the present case have been covered in the said judgment. It was held in

paragraph 14 of the said report that conviction of an offence of rape under Section 376 of the IPC can be based on the sole testimony of the prosecutrix, corroborated by medical evidence and other circumstances, such as the report of medical examination, etc., if the same is found to be natural, trustworthy and worth being relied on. If the evidence of the prosecutrix inspires confidence, the Supreme Court held, it must be relied upon without seeking corroboration of a statement in material particulars.

- 16.** In paragraph 15 of the said report, it was held that absence of marks of external injury on the person of the accused, who was grown up, is not fatal to prosecution under Section 376, IPC.
- 17.** In case of offences under Section 376, IPC, in the light of Section 154 of the Code of Civil Procedure, 1973 (CrPC), delay in lodging FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay, it was held by the Supreme Court, has the effect of putting the court on its guard to search if any explanation has been offered for the delay and, if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, by itself, the delay cannot be as a ground for disbelieving and discarding the entire prosecution case.

- 18.** It was further held that non-examination of a material witness is, again, not a mathematical formula for discarding the weight of the testimony available on record, howsoever natural, trustworthy and convincing it may be. Discovery of spermatozoa in the private part of the victim, it was held, is not a must to establish penetration.
- 19.** Learned counsel for the State thus contends that the propositions laid down in the cited judgment all go on to show beyond reasonable doubt that the accused was guilty of the offences he was charged with. That apart, in view of presumption under Section 29 of the POCSO Act having been sufficiently raised, the onus shifted on the accused to prove his innocence, which he failed to dispel by cogent evidence.
- 20.** Upon hearing learned counsel, certain salient features stand out in the present case.
- 21.** The report of neither of the two doctors who examined the victim, being Dr. Anuva Dey (PW3) and Dr. Avik Das (PW4), corroborates the allegation under Section 376(1) of the IPC.
- 22.** Although the victim has been reasonably proved to be a minor at the time of the alleged incident, her age was 16 years and six months, while that of the accused was 22 years.
- 23.** If we refer to the deposition of Dr. Anuva Dey, it is clearly seen that the victim admitted her prior relationship with the accused. Moreover, the victim did not allege any incident of rape to the doctor. Not only did the pregnancy test yield a negative result, there was

merely an old and healed tear over the hymen, as it appears from the medical report.

- 24.** PW4, both in his evidence and in his report, corroborated that no injury or mark was found on the body or the private parts of the victim, indicating the commission either of the offences alleged against the appellant.
- 25.** As far as the evidence of the prosecution witnesses is concerned, there is patent discrepancy *inter se* the depositions of the various witnesses, which leave major gaps in the chain of events leading to the offences alleged by the prosecution.
- 26.** The victim, as PW2, specifically mentioned that she had “shouted” at the time of the incident in her cross-examination. However, it has come out from the prosecution witnesses’ deposition that the place of occurrence was a crowded one. Even the sketch map prepared by the Investigating Officer corroborates such fact. In fact, the place of occurrence was situated between a pharmacy and a sweet shop. A burial ground was located near the room where the alleged incident took place, according the deposition of PW1, that is, the mother of the victim.
- 27.** PW1, in her cross-examination, mentioned about the victims’ father and brother having accompanied her when she lodged the complaint, but none of them were produced as prosecution witnesses. The time mentioned by the PW1 is 2:00 p.m. on August 12, 2017 but the

complaint was apparently lodged on August 16, 2017, when the accused and her relatives also went.

- 28.** The delay of four days in lodging the complaint itself might not have been fatal to the prosecution case, if there was no other evidence to create suspicion as regards the delay. Although the reason for delay might have been that the victim's family tried to reconcile the matter with the accused by eliciting a promise of marriage, as well as due to the delay in the complaint being written by a law-clerk as stated in the cross-examination of the PW1, the timings, as borne out by the cross-examination of the PW 2, are not commensurate with the assessment of a person of reasonable prudence. It is admitted in the complaint by the mother of the victim (who was the complainant) that from six months previous to the complaint being lodged, the accused "insisted" the victim in different ways and by "making her fool" he slept with her several times.
- 29.** The time of the alleged incident was stated by the victim (PW2) in her cross-examination to be around 1:00 p.m. to 1:30 p.m. on August 12, 2017.
- 30.** As per the same cross-examination, the victim claimed to have stated about the fact to her mother at about 4/5:00 p.m.
- 31.** However, the victim's mother called the accused later on during the same evening at around 7:30/8:00 p.m. when, the victim stated, her brother and parent told the accused to marry the victim. Such circumstances raise sufficient doubt as regards the reason for the

delay in lodging the complaint. It might very well have been that the complaint was lodged merely to create pressure on the accused to marry the victim, despite the serious crime of rape having been allegedly committed upon her.

- 32.** Moreover, PW1 admitted in her cross-examination that there is a bus-stand, which is a busy place, near the place of occurrence. The shop run by the family members of the victim, PW1 admits, is opened around 7:00 a.m. and closes around 2:00 p.m. and thereafter opened again. Hence, during the occurrence of the alleged incident as per the victim's version, the shop ought to have been open at 1-1:30 pm, which is the alleged time of occurrence. Although the victim, in her cross-examination, stated that she had disclosed the fact of the alleged incident to her mother at about 4/5:00 p.m., it was elicited in the cross-examination of the mother of the victim (PW1) that the victim told her about the incident at around 2:00 p.m.. Moreover, it was admitted by PW1 in her cross-examination that they went to the police station at around 2:30 p.m. on that date. Such admission is patently contrary to the admission of the PW2, the victim, in her cross-examination that she stated about the incident to her mother only at around 4/5:00 p.m., which is much after the victim's family went to the police station, according to PW1, to lodge the complaint. Hence, the version of the PW1 and PW2 regarding the timings of the chain of events do not tally at all.

- 33.** In the present case, both the PW1 and the PW2 admitted a previous relationship between the accused and the victim. Admittedly, the victim was a student of class XII, while the accused studied in the 2<sup>nd</sup> year of college at the time of the alleged incident.
- 34.** Such facts, taken in conjunction, clearly indicate that there were several previous occasions of consensual physical relationship between the parties. Thus, sufficient doubt, as regards any offence having been committed under Section 376(1), IPC, is raised, although a minor's consent is of no significance.
- 35.** The medical report of Dr. Anuva Dey, who examined the victim on August 17, 2017, clearly shows that, apart from an old and healed tear over the hymen, there was no external injury on her person, thereby ruling out any force having been applied on the victim at the relevant juncture. The healed tear, according to the said Doctor (PW3) in her cross-examination, might have been three months old. No external or internal injury was seen on the private parts of the victim or on her body, as a whole, by the said Doctor.
- 36.** Dr. Avik Das, who examined the accused on August 23, 2017, did not find any mark of injury on the victim's private parts or her body.
- 37.** As regards the allegations under Section 3 and 4 of the POCSO Act are concerned, technically the victim was a "child", as defined in Section 2(d) of the POCSO Act, which means any person below age of 18 years fulfils the definition of a child.

- 38.** However, in order to apply Section 29 of the POCSO Act, the prosecution has to make out a strong case which has to be natural, trustworthy and worth being relied upon. The evidence of the prosecutrix must inspire confidence.
- 39.** As held in *Ganesan Vs. State*, reported at (2020) 10 SCC 573, conviction can be granted on the sole testimony of the victim only where such testimony is found reliable and trustworthy and unblemished. The witness of the victim is reliable by itself if she is a “sterling” witness, being of very high quality and calibre, whose version is in unassailable, as per the cited report.
- 40.** Section 3 of the POCSO Act on the other hand, describes penetrative sexual assault as follows:

**“3. Penetrative sexual assault.**—A person is said to commit “penetrative sexual assault” if—

- (a) he penetrated his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

- 41.** The punishment for such offence is described in Section 4 of the POCSO Act.
- 42.** The pre-requisite of penetrative sexual assault is penetration which, in the present case, was of the penis of the accused, as per the prosecution case.
- 43.** The appropriate connotations of 'child' and 'penetration', as defined in the POCSO Act, have to be read in proper perspective. Since Section 29 casts a reverse liability on the accused to prove his innocence, which is contrary to the normal rule of evidence in criminal jurisprudence, the same has to be interpreted strictly and applied in the appropriate sense as intended by the Legislature.
- 44.** The POCSO Act was, rightly, introduced to offer protection to innocent children from several offences. However, a Draconian interpretation of the provisions thereof would merely convert it into a tool of abuse of the process of law, instead being a protective shield against defenceless minors.
- 45.** Keeping in view the definition of 'child' in Section 2(d) of the said Act, even a person who is aged 17 years and 364 days would qualify as a child, but her maturity would not be much different from another person, who was just one day older than her, that is, 18 years old.
- 46.** The court's interpretation of a statute cannot be with eyes closed to practical realities and have to be construed in proper perspective, keeping in view the objects and reasons of the Act. The stated object of the Act is to protect children from offences of sexual assault, sexual harassment and pornography and to provide for establishment of

Special Courts for trial of such offences for matters connected therewith or incidental thereto. As such, while construing the expression 'child' in appropriate perspective, the age, maturity and other circumstances also becomes relevant to clinch a case on the ground of penetrative sexual assault.

- 47.** In the present case, the victim girl was admittedly 16 ½ years old and studied in Class XII at the relevant point of time. She was not naïve enough not to know the implication of sexual intercourse; rather, the victim admittedly had a physical relationship with the accused, who was also of a very young age, on several occasions prior to the incident. Although the consent of a minor is not a good consent in law, and cannot be taken into account as 'consent' as such, the expression 'penetration' as envisaged in the POCSO Act has to be taken to mean a positive, unilateral act on the part of the accused. Consensual participatory intercourse, in view of the passion involved, need not always make penetration, by itself, an unilateral positive act of the accused but might also be a union between two persons out of their own volition. In the latter case, the expression 'penetrates', in Section 3(a) of the POCSO Act might not always connote mere voluntary juxtaposition of the sexual organs of two persons of different genders. If the union is participatory in nature, there is no reason to indict only the male just because of the peculiar nature of anatomy of the sexual organs of different genders. The psyche of the parties and the maturity level of the victim are also relevant factors to be taken into consideration to decide whether the penetration was a unilateral

and positive act on the part of the male. Hence, seen in proper perspective, the act alleged, even if proved, could not tantamount to penetration sufficient to attract Section 3 of the POCSO Act, keeping in view the admitted several prior occasions of physical union between the accused and the victim and the maturity of the victim.

- 48.** As such, it cannot be said that the accused was guilty of penetrative sexual assault, as such, since here the act of penetration, even if true, would have to be taken not as an unilateral act of the accused but a participatory moment of passion involving the participation of both the victim and the accused.
- 49.** Although the question of consent does not arise in case of a minor, in order to attract Section 376(1) of the IPC, it had to be established that the alleged offence was committed against the will of the victim. Read in conjunction, the provisions of Section 376 of the IPC and Section 3 of the POCSO Act ought to be construed on a similar footing and cannot incriminate the accused for a voluntary joint act of sexual union.
- 50.** That apart, in the present case, the prosecution failed to establish the chain of events leading to the alleged offence, which would raise a presumption under Section 29 of the POCSO Act. Not only were there gross discrepancies between the depositions of the witnesses, it was beyond credibility as to how the police could be approached by the victim's family at 2.30 p.m., when the victim admits to have disclosed the incident to her mother at only about 4/5 p.m., the same day.

- 51.** Moreover, the meeting of the victim's family with the accused on the same evening, not for a confrontation but with a proposal of marriage, is not compatible with the allegation of rape or penetrative sexual assault. The provisions of the POCSO Act should be given an appropriate construction, for the protection of children and not as a tool of abuse to compel a person to marry another.
- 52.** In the instant case, even if the prosecution case is taken into consideration, no strong preponderance of probability was established in support of the prosecution case, sufficient to raise a presumption under Section 29 of the POCSO Act and shifting the negative onus on the accused to prove his innocence.
- 53.** Even if it is deemed that Section 29 of the POCSO Act were to be applied, the defence has been able to show sufficient discrepancies and chinks in the chain of events sought to be established by the prosecution, thereby demolishing the prosecution case and discharging the onus of the accused as cast under Section 29 of the POCSO Act.
- 54.** Although not directly relevant to the offence, the Court cannot be blind to the practical realities of life. The accused as well as the victim are at present leading marital lives with strangers to the case separately. As such, the Court ought to be doubly cautious in putting a stigma on either the accused or the victim.
- 55.** The POCSO Act defines anyone under eighteen years of age as a 'child', but to convict a person for penetrative sexual assault, the psyche, maturity and previous conduct of the victim vis-à-vis the

accused also acquires relevance. In the present case, the previous relation between the victim and the accused and their physical union on several occasions raise a strong presumption of the alleged incriminating act being participatory at both ends, not a unilateral act of the accused.

- 56.** On a contextual interpretation of the expression 'penetration' as used in Section 3 of the POCSO Act and Section 376(1) of the IPC, no unilateral forcible act of penetration, solely on the part of the accused, was established on the basis of the evidence on record. On the contrary, a prior relationship between the two comparatively mature persons has been admitted in the present case, leading to the alleged incident.
- 57.** The four days' delay in lodging complaint ought to be taken with a pinch of salt to vitiate the prosecution case, since the same might have been only for the reason of compelling the accused to marry the victim. Such, attempt, in any event, has become redundant at least in view of the present marital status of both the victim and the accused. That apart, the sequence of events show that the police were approached by the victim's family on the day of the alleged offence itself, but the same night the family had met the accused and, only on refusal to marry the victim, the complaint was lodged four days later as a back-lash.
- 58.** Merely taking advantage of the literal definition of the term 'child', the accused/appellant cannot be proved to be guilty of an offence under

Section 3 of the POCSO Act or Section 376(1) of the IPC, sufficient to convict and sentence the petitioner on such counts.

- 59.** Although several judgments have been cited by counsel in support of the proposition that the conviction can be based solely on the oral evidence of the prosecutrix and her subsequent conduct, such qualification of subsequent conduct and the credibility of the prosecution case are necessary ingredients which are to accompany the evidence of the victim to attach sufficient weight to such evidence, which is missing in the present case in view of the several contradictions as well as the existence of several missing links in the chain of events sought to be made out by the prosecution.
- 60.** Hence, the judgments of conviction and sentence impugned in the present appeal are vitiated by errors of law as well as fact and based upon an erroneous interpretation of the provisions of the POCSO Act as well as the IPC.
- 61.** Accordingly, CRA No.458 of 2018 is allowed, thereby setting aside the judgment and orders of conviction and sentence dated July 25, 2018 and July 26, 2018 passed by the Additional Sessions Judge at Kandi, District-Murshidabad in Sessions Trial No.04(04)/2018 arising out of C. Spl. No.98 of 2017 (CIS Reg. No.88 of 2017). The appellant is thus acquitted and discharged from any condition or bond furnished by him in connection with bail, if granted by any court. In the event the appellant is in custody, he shall be immediately released.
- 62.** IA No: CRAN 2 of 2020 is disposed of accordingly.

- 63.** 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. )**