

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

The Hon'ble Justice Sabyasachi Bhattacharyya

C.R.A. No.531 of 2018

**Sanatan Barman
Vs.
State of West Bengal and another**

For the appellant	:	Mr. Kushal Paul
For the State	:	Ms. Sreyashee Biswas
Hearing concluded on	:	17.09.2021
Judgment on	:	30.09.2021

Sabyasachi Bhattacharyya, J:-

1. The present appeal is directed against the judgment and orders of conviction and sentence dated June 27, 2018 and June 28, 2018 passed by the Additional Dist. & Sessions Judge Gangarampur, at Buniadpur, District-Dakshin Dinajpur, in Special Case No. 11/17 (Regn. No. 01/17), whereby the appellant was convicted under Sections 341 and 354 of the Indian Penal Code (IPC) and under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act).
2. Learned counsel for the appellant submits that the foundation of the prosecution case was not sufficient to attract the presumption under Section 29 of the POCSO Act. It is contended that there were several

flaws in the prosecution case. It is argued that the prosecution witnesses contradicted each other.

3. The *de facto* complainant Usman Ali, the father of the victim, adduced evidence as PW1. It is argued that PW1 improved his version of allegation in his deposition before the Court from that as given in the complaint. In the complaint, learned counsel contends, PW1 omitted to state that his elder daughter ran near the pond after hearing the hue and cry of the victim or that he heard about the incident from his wife and daughter after returning from work at around 5.00 p.m. and/or that the appellant ran away from the *salish*.
4. That apart, in his deposition, PW1 did not corroborate that neighbourhood women rushed to the place of occurrence (the pond) after hearing the hue and cry of the victim.
5. Moreover, the evidence of PW1 should be discarded as hearsay because his entire knowledge about the alleged incident was admittedly derived from his wife and daughter.
6. PW2, the victim girl also contradicted her own statements in her evidence. She specifically stated that the name of her school is Kushkari K V B S Uchcha Vidyalaya, where she is a student of Class V. The name of her earlier school was stated to be Kushkari Amar Saishab Sishu Siksha Niketan, where the PW1 admittedly used to leave for school at 10.00 a.m. However, during the summer, she left for school at 7.00 a.m. and came out at 10.00 a.m., when the morning session ended. After returning to her house, PW2 allegedly used to go

for a bath at the pond, which is the place of occurrence. She further stated that her present high school starts from Class V onwards. Such evidence was adduced on January 11, 2018. On June 16, 2017, that is, two days after the alleged incident took place, PW2 stated before the learned Magistrate under Section 164 of the Code of Criminal Procedure (CrPC) that she studied in Class IV at her primary school. Thus, the allegation of PW2, that she had gone on the date of the incident to take a bath on 3.00 p.m. after returning from school, is not credible. At the relevant point of time, when it was summer and morning sessions must have been going on, PW2 used to return from her primary school after 10.00 a.m. and take her bath thereafter. Such version does not tally with the allegation that the offence took place at 3.00 p.m., which was much later than she was returned from school.

7. Learned counsel for the appellant further argues that, in her cross-examination, PW2 mentioned the name of some of her friends, none of whom was examined at any point of time by the prosecution.
8. PW2 categorically stated in her deposition that one Anjura Khatun had come near the place of occurrence at the time of alleged incident and, after seeing the incident, went to call the elder sister of PW2. The said Anjura Khatun, despite being a vital witness for the prosecution, was neither examined by the Investigating Officer (IO) nor produced as a witness for the prosecution before the Court. PW10,

the IO, categorically stated in his deposition that he had seen Anjura but did not take her statement or produce her as witness in Court.

9. The only alleged eye-witness, namely, Anjura Khatun, who could have been the best witness, was withheld; hence, an adverse inference ought to be drawn against the prosecution. The uncorroborated statement of the victim girl, who is still a child, was relied upon solely.
10. In this context, learned counsel for the appellant cites *Hamza Vs. Muhammadkutti and others*, reported at AIR 2013 SC 3173, to elaborate the evidentiary value of a child witness.
11. PW2 had also improved her statement before the Court, it is submitted, since there was sufficient contradiction between her statement before the Magistrate under Section 164 of the CrPC and her deposition in Court.
12. Learned counsel contends that PW3, the mother of the victim girl (PW2), also heard about the incident from PW2 and her evidence ought also to be discarded as mere hearsay. PW3 had also improved upon her statement, made before the police, in her deposition, which can be gathered from the deposition of PW10.
13. That apart, the deposition of PW3 regarding the alleged incident is contradictory to the deposition of PW1 and PW2, learned counsel submits.

- 14.** Learned counsel for the appellant further argues that PW4 and PW5 were not eye-witnesses and their evidence should also be discarded as hearsay.
- 15.** PW10, the IO, in his cross-examination, stated that the name of the victim Aleknur Khatun was erroneously misspelt as “Aklema Khatun”. However, such discrepancy casts a doubt on whether the offence was committed at all on the victim.
- 16.** PW6, the medical officer who examined the victim girl, specifically stated that the victim did not name the accused during her examination. Moreover, since the mother of the victim did not give consent for examining the victim, the latter was only examined externally, which refusal should also prompt the court to draw adverse inference against the prosecution.
- 17.** PW7, the elder sister of the victim, was also not an eye-witness to the alleged incident and her evidence was also hearsay and should be discarded. PW7 was examined by the police on June 29, 2017, that is, after a gap of two weeks from the date of the alleged incident, that is, June 14, 2017. PW7 gave her statement under Section 164 of CrPC only on July 10, 2017. The IO, as PW10, did not explain the reason for the delay in taking the statement of PW7 under Section 161 of the CrPC, which ought to have been recorded on June 15, 2017, when the First Information Report (FIR) was lodged.
- 18.** The Judicial Magistrate who recorded the statement of PW2 and PW6 under Section 164 of CrPC adduced evidence as PW8. Learned

counsel for the appellant submits that PW8 admitted in cross-examination that she did not put any question to PW2 as to whether the PW2 was tutored before giving a statement before the Magistrate. PW8 further admitted that she did not ask PW2 as to whether her statement was voluntarily made.

19. PW10, the IO, had allegedly seized the Birth Certificated of the victim girl which was never proved in evidence by any competent authority.
20. PW10 further deposed that he had examined PW2, PW3, PW4, PW5 and PW7 as well as Rafiqul Sekh, Aklema Bewa and Chano Bibi, none of whom was produced as prosecution witness. PW10 had admittedly gone, during investigation, to the house of one Santosh Debnath, but such person was never summoned as witness. PW10 had also found out during investigation that the houses of Jadu Soren and Ram Soren were on the eastern bank of the pond, which was the place of occurrence. However, such persons were also not produced as prosecution witnesses.
21. Learned counsel contends that there were serious contradictions between the statements made by the prosecution witnesses in deposition before the Court and those given before the Police Authority under Section 161 of the CrPC, which is evident from the deposition of PW10 himself. Such discrepancy is major and cannot be brushed aside as minor in nature, it is argued.
22. While giving her statement under Section 164 of the CrPC on June 16, 2017 (Exhibit 6) the learned Magistrate categorically asked the

victim as to what happened “yesterday”, meaning thereby that the incident occurred on June 15, 2017, the previous day, and not on June 15, 2017, as alleged. The victim girl did not state the date and time of the alleged incident or even the name of the pond, namely Munshadighi Pukur, before the Magistrate.

- 23.** PW7, the elder sister of the victim, also gave statement under Section 164 of the CrPC (Exhibit 8) on July 10, 2017. She also omitted to state the date, time and place of occurrence of the alleged incident. Learned counsel contends that such discrepancies are fatal to the prosecution case.
- 24.** Learned counsel for the appellant reiterates that material facts of the criminal case, that is, the time and place of occurrence of the alleged incident were not clearly stated. As such, the prosecution failed to establish its case, sufficient to form a foundational basis of the case to attract the presumption under Section 29 of the POCSO Act. In support of the proposition, that the presumption under Section 29 does not arise in the absence of a foundational basis of the prosecution case, learned counsel cites a co-ordinate Bench judgment of this court rendered in *Sahid Hossain Biswas Vs State of West Bengal*, reported at (2017) SCC Online Cal 5023.
- 25.** As such, learned counsel for the appellant argues that the conviction of the appellant was patently erroneous and illegal.
- 26.** Learned counsel for the State, on the other hand, submits that each and every detail of the case need not have been stated in the

complaint. There may be certain differences between the exact language of the complaint and the answers given by the PW1/complainant in his deposition. Learned counsel argues that it is well-settled that the “FIR is not the Encyclopaedia which must disclose all facts and details”. Thus, it is argued that even non-disclosure of some material facts in the FIR cannot be sufficient for acquittal.

- 27.** The sole eye-witness to the incident, namely, Anjura Khatun, who was only 5 to 6 years of age at the relevant time, as evident from the deposition of PW1. Thus, the obvious trauma she had suffered justifies the non-recording of her statement by the IO.
- 28.** In cases under the POCSO Act, learned counsel submits, the statement of the prosecutrix itself is sufficient to prove a case. In the present case, the victim, as PW2, corroborated her statement under Section 164, CrPCon each and every aspect in her evidence.
- 29.** PW3, the mother of the victim, also corroborated the deposition of the victim, that is, PW2 and the version of the complainant, PW1.
- 30.** Learned counsel for the State next contends that, from the deposition of the doctor (PW6), who examined the victim girl, it is revealed that the mother of the victim did not give her consent for medical examination. Learned counsel argues that in cases punishable under Section 20 of the POCSO Act, mere touch with sexual intent is enough to convict a person. Section 9(m) of the POCSO Act provides that whoever commits sexual assault on a child below 12 years, is said to

commit “aggravated sexual assault”. The victim was only 10 years at the relevant juncture and, as such, the said provision squarely applies.

31. Non-examination of the friends of the victim, who were named in her cross-examination, is irrelevant for the purpose of demeaning the veracity of the victim girl’s statement. No case of village rivalry was made out by the prosecution, which could have justified the allegation that the appellant was falsely entangled in the case by the complainant and his family. PW7, namely, Taslima Khatun, who is the elder sister of the victim, having not stated the date, time and place of incident in her statement under Section 164 of the CrPC, is also a minor discrepancy, which cannot be a ground for acquittal.
32. The deposition of PW1, it is submitted, does not reveal any intent to claim money or to arrange for marriage of their daughter, which might have been credible reasons for lodging a false complaint. Rather, the deposition of PW1 clearly shows that the victim’s family called for a *salish* only for the reconciliation of the dispute at hand in a civil manner.
33. The Magistrate who recorded the statement of the victim girl and her sister under Section 164 of the CrPC, who deposed as PW8, might not have put the suggestion to the victim that the victim was tutored, but the statement of the victim recorded under Section 164, CrPC corroborates the her deposition.

- 34.** That apart, the version of the victim girl, it is argued, ought to be read in the light of the statutory presumption under Section 29 of the POCSO Act, since the victim's version was also corroborated by other witnesses, including medical evidence.
- 35.** The evidence of the victim girl in a POCSO Act case ought to be given due credence and assessed with due care and sensitivity as is given to an injured witness, it is contended by the State. Minor contradictions and/or inconsistencies in her version of sexual assault, even if any, ought not to be a ground to discard the evidence of the victim as a whole.
- 36.** Although the family members of the victim were present at the time of *salish*, which was called by them on the very day of the incident, the *salish* was deferred till next morning. The appellant did not appear in either of the occasions for the *salish*.
- 37.** Two witnesses were examined on behalf of the defence. DW1 was neither examined by the IO nor by the Magistrate and whatever he deposed, was stated for the first time during trial.
- 38.** In the above circumstances, learned counsel for the State argues, the appeal should be dismissed, affirming the conviction and sentence awarded against the appellant.
- 39.** Upon hearing submissions of the parties and perusal of the materials on record, this court has arrived at the following decision.

- 40.** It is well-settled that the sole evidence of the victim can be sufficient to indict an accused. The ratio laid down in *Hamza* (supra) by the Supreme Court has to be taken in appropriate perspective, looking into the facts of the particular case. The proposition, that as a rule of practical wisdom, evidence of a child witness must find adequate corroboration, is not applicable to the present case.
- 41.** Taking into account the maturity and age of the child (10 years at the time of the alleged offence), it is absurd to say that she was not credible enough to be relied upon as a witness. Merely because the victim was a minor, her evidence, which was corroborated by other witnesses as well, could not be discarded. In fact, in cases under the POCSO Act, the statement of the victim can itself be sufficient to convict the accused if the same is otherwise credible.
- 42.** In the present case, not only was the statement given under Section 164 by the victim plausible, the same was corroborated by the victim in her deposition as well.
- 43.** That apart, the version of the victim was substantially corroborated by the deposition of other witnesses as well as by circumstantial evidence. Hence, there is no reason why the statement of the victim could not be relied on in not only raising a presumption under Sections 29 and 30 of the POCSO Act, but also to convict the accused.
- 44.** The moot components of the allegations were substantially corroborated by all the prosecution witnesses. Although hearsay evidence, by itself, cannot clinch an issue against the accused, in the

present case, the circumstances brought to light by the evidence of the prosecution witnesses even apart from the victim girl, were enough to lend credence to the complaint against the accused.

- 45.** The non-examination of the only eye-witness, namely, Anjura Khatun, cannot denigrate the veracity of the prosecution case, keeping in view that she was merely 5 to 6 years old. The IO showed sufficient sensitivity in not producing the said child as a witness and/or taking any statement from her, since the attending circumstances, in the present case, fully corroborate the allegations of the victim.
- 46.** The minor omissions and discrepancies pointed out by learned counsel for the appellant cannot be elevated to the plane of major discrepancies, sufficient to disbelieve the prosecution case and the corroborative evidence.
- 47.** As rightly contended by learned counsel for the State, minor variations between the contents of the initial complaint and the deposition of the complainant, taken after a time-gap are but natural and the F.I.R. is not pleadings in a court of law, which should contain all details.
- 48.** As regards the timing of the school, although the victim had stated that she used to take a bath in the pond after school, it cannot be stated with mathematical precision that, on the fateful day, she had gone to the place of occurrence immediately after returning from school. The statement of the victim that the alleged offence took place around 3 p.m. could not have been verified by the standards of

mathematical precision only on the ground that she usually took a bath after returning from school.

- 49.** That apart, the Court could not resort to conjecture or surmise in concluding that only morning sessions were being taken at the relevant point of time, that is, June 14, 2017, on the presumption that the summer sessions of the school was still continuing at that juncture. No evidence to that effect has been produced by the defence to dislodge the presumption under Sections 29 and 30 of the POCSO Act.
- 50.** The erroneous spelling of the name of the victim is entirely irrelevant and inconspicuous and does not, in any way, hit the credibility of the prosecution case.
- 51.** On the cardinal issues of fact involved in the trial, no discrepancy can be found between the deposition of the prosecution witnesses, so much so it could tantamount to demolishing the plausibility of the foundational basis of the prosecution case. Hence, the proposition laid down by the Hon'ble co-ordinate Bench in *Sahid Hossain Biswas* (supra) does not help the appellant in any manner in respect of the present case.
- 52.** The prosecution clearly established its case by corroborative evidence, which passed the test of plausibility. The defence, however, failed to rebut the presumption of guilt attributed under Section 29 of the POCSO Act by any cogent evidence.

- 53.** In such view of the matter, the Additional Sessions Judge acted perfectly in accordance with law in convicting and sentencing the appellant under Section 10 of the POCSO Act. No substantial argument has been advanced with regard to the conviction under Section 341 and 354 of the IPC. Yet, for the sake of complete justice, even if those acquisitions are taken into account, the circumstantial evidence, the corroborative evidence of the prosecution witnesses and the materials-on-record are sufficient to establish such charges, which were but a natural build-up leading to the commission of aggravated sexual assault as envisaged in Sections 9 and 10 of the POCSO Act.
- 54.** In such view of the matter, there is no merit in the appeal. Accordingly, CRA 531 of 2018 is dismissed on contest.
- 55.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)