

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

The Hon'ble Justice Sabyasachi Bhattacharyya

C.R.A. No.555 of 2015

**Amit Roy
Vs.
The State of West Bengal**

For the appellant	:	Mr. Soubhik Mitter, Mr. Ranadeb Sengupta
For the State	:	Mr. Neguive Ahmed, Mr. Ranabir Roy Chowdhury
Hearing concluded on	:	16.09.2021
Judgment on	:	30.09.2021

Sabyasachi Bhattacharyya, J:-

1. The appeal has been preferred against a judgment and order of conviction under Section 12 of the Protection of Children from Sexual Offences Act, 2012 (herein after referred to as “the POCSO Act”).
2. Learned counsel for the appellant argues that the basic ingredients of Section 12 of the POCSO Act, were not fulfilled in the present case. The deposition of DW1, who was a defence witness (official superior of the victim) was considered by the court below to be of an independent witness. As such, the court gave more weightage to the evidence of such witness than would be given to a defence witness.

3. The initial charges were framed under Sections 376(2)(i)(j) of the Indian Penal Code (IPC) and Sections 4 and 6 of the POCSO Act.
4. It is further argued that, as admitted by PW2, the mother of the victim, PW2 was at the rear of her house but the accused allegedly took the child from the road in front of the house, thus, dislodging the credibility of the statement of PW2 that she had seen the victim to be taken by the accused.
5. Moreover, it is argued that no charge was framed against the appellant under Section 12 of the POCSO Act at any point of time, thereby depriving the opportunity to the appellant to controvert such charge. Without framing such charge, the conviction under Section 12 is bad in law, it is argued.
6. Learned counsel further contends that, in view of the inherent contradiction in the prosecution witnesses' depositions, no presumption could be drawn in the present case under Section 29 of the POCSO Act against the appellant. The circumstantial evidence, it is argued, would go on to demolish the credibility of the prosecution case.
7. Learned counsel for the appellant takes the court through relevant portions of the deposition of the witnesses to highlight the alleged instances of contradiction.
8. Learned counsel for the appellant next contends that although the incident allegedly took place on October 28, 2013, the written complaint was lodged only on October 31, 2013, that is after two clear days, without any reasonable explanation being offered by the

prosecution for such delay. By placing reliance on Section 221 of the Criminal Procedure Code (CrPC), learned counsel argues that, as per sub-Section (1) thereof, if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

- 9.** Sub-Section (2) of Section 221 provides that, if in such a case, the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-Section (1), he may convicted of the offences which he has shown to have committed, although he was not charged with it. Learned counsel contends that, in the present case, the charge under Section 12 of the POCSO Act, that is, of sexual harassment, was not covered by the provisions of Section 221. As such, without specifically framing a charge under Section 12 of the POCSO Act, the appellant could not have been convicted on such count.
- 10.** Learned counsel for the State submits that the corroborative evidence of the prosecution witnesses and the statement given by the victim before the Magistrate were sufficient to raise a presumption under Sections 29 and 30 of the POCSO Act. That apart, the statement of the victim under Section 164 of the CrPC was also corroborated by the evidence of the prosecution witnesses.

- 11.** The two days' delay in lodging the complaint after the incident, could be well explained by the fact that the child was under a trauma, it is argued.
- 12.** It is contended by the State that Section 11 of the POCSO Act defines the offence of sexual harassment, which is a lesser charge than those brought against the appellant. Section 222(1) of the CrPC, it is argued, specifically provides that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. Sub-section (2) of Section 222, it is argued, provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.
- 13.** In view of Section 222, since charges were already levelled under Sections 4 and 6 of the POCSO Act, which are respectively punishments for penetrative sexual assault and for aggravated sexual assault, sexual harassment, as defined in Section 11 of the Act, was a lesser offence, for which the appellant could very well have been convicted under Section 12 of the POCSO Act.
- 14.** It is further contended that the presumption of culpable mental state, as envisaged in Section 30 of the POCSO Act, was never rebutted in the present case by the defence. It is further argued by the State that the age of the minor victim was tender and her innocence could very

well be evidenced from her statement under Section 164 of the CrPC. However, the circumstances of the case as well as the corroborative evidence, including the pain of the child suffered on the night of the alleged incident, were sufficient to indicate unerringly the commission of the offence. Since a strong case was made out by the prosecution, the defence failed to rebut the presumption raised under Section 29 of the POCSO Act, it is submitted.

- 15.** One of the bases of the defence case is that no charge was framed against the appellant/accused under Section 12 of the POCSO Act. The initial charges framed were under Sections 4 and 6 of the said Act as well as under Section 376(2) of the IPC. Learned counsel for the appellant contends that, as per Section 221 of the CrPC, if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.
- 16.** If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed although he was not charged with it. However, in the present case, it is contended that the charge of sexual harassment, as defined in Section 11 of the POCSO Act, which led to the punishment under

Section 12 of the Act, constituted an entirely different set of ingredients than any of the offences with which the appellant was charged.

- 17.** Although, in the present case, there was no specific charge framed against the appellant under Section 12 of the POCSO Act, upon a consideration of the allegations made in the complaint against the appellant, it is seen that the ingredients of Clauses (i) and (ii) of Section 11 of the POCSO Act could be attracted to the instant case. Clause (i), insofar as it concerns making any gesture or exhibiting any object or part of body with the intention that the said gesture or object or part of body shall be seen by the child, if with sexual intent, and/or a child is made to exhibit his/her body or any part of his/her body so as it is seen by such person, also with sexual intent, are squarely attracted in the present case. The contents of the complaint, as well as the basis of the prosecution case, include ingredients which might have constituted an offence under Section 11 of the POCSO Act, attracting punishment under Section 12 thereof.
- 18.** As such, the provisions of Section 221 of the CrPC are attracted. Even if the appellant was not charged with Section 12 of the POCSO Act, he could have been convicted under the said provision since, in the present case, the series of acts was of such a nature that it is doubtful which of several offences the facts which could be proved would constitute. Thus, the conviction under Section 12 of the POCSO Act cannot be said to be vitiated due to non-framing of any specific charge under Section 12 of the POCSO Act.

- 19.** Section 222 of the CrPC provides that when a person is charged with an offence consisting of several particulars, the combination of some facts of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, although he was not charged with it. Under the said Section, when a person is charged with offence and facts are proved which reduces it to a minor offence, he may be convicted of the minor offence, although he was not charged with it. In the present case, Section 12 of the POCSO Act provides for a punishment of imprisonment of either description for a term which may extend to three years and also fine.
- 20.** All the sections under which the accused was charged, being Section 376(2) of the IPC and Sections 4 and 6 of the POCSO Act, provide for harsher punishments than Section 12 thereof. Hence, Section 222 of the CrPC is also attracted to the present case, justifying the conviction of the appellant under Section 12 despite no charge having been framed under the said provision.
- 21.** Even if the evidence of the witnesses for the prosecution is looked into, the 'non-corroboration' of PW1, the victim, as alleged by the appellant, is immaterial for several reasons. First, the age of the victim at the juncture when her evidence was taken was about three years. The Trial Judge specifically recorded while recording evidence, that the victim did not speak very clearly and demonstrated restlessness at the time of being examined. It was also recorded that the child was in a mood not to say anything; rather she was found to play with her

grandmother.

- 22.** It is well-settled that the Court can take into consideration the demeanour of a witness, which is also relevant for the purpose of weighing the probative value of such evidence. The tender years of the victim and the specific recording of her demeanour by the Trial Judge clinches beyond any doubt that the negative reply of the child to the question as to whether any mischief was played with her, did not mean anything. Moreover, the question was vague, since nothing was specified regarding the exact incident, for which the appellant was ultimately convicted.
- 23.** From the evidence of witness no.1 of the defence, who was posted as the Deputy Director of the Office where the accused is employed, it is found that the said witness merely relied on office records, as admitted by him, such as the Attendance Register, to state that the accused was in office for the entire duty hours on the relevant date. Thus, it is clearly indicated that DW1 did not have any direct knowledge as regards the presence of the accused in the Office at B.B.D. Bag at the relevant juncture. In reply to the question whether DW1 could definitely say that the accused was attending his duties, as reflected in the papers submitted by the said witness, DW1 replied that an employee "should" stay till the end of the duty hours and that he was saying so because there was no formal application for early departure. DW1 admitted that, accordingly, "it can be taken that" he was attending his duty till 6.30 p.m. Such examination is a clear indicator that the evidence of DW1, as regards the attendance of the accused at

his Office at B.B.D. Bag at the relevant point of time, was not based on any direct knowledge, but merely on conjecture and surmise.

- 24.** In his cross-examination, DW1 admitted that he had deposed on the basis of office records and could not make any comment regarding the accused having left the office or duty on the relevant date two to three hours earlier than the usual departure time, without seeking permission in writing.
- 25.** It is admitted by DW1 in his cross-examination that the audit party, as a team, goes to different offices as per scheduled programmes; however, as he was not the immediate superior officer of the accused, DW1 could not say what the schedule of that party was on the particular day of the incident. The said witness further admitted that he did not obtain any other information regarding the stay of the appellant in the office from his immediate superior, except placing reliance on the papers he had submitted.
- 26.** It is further admitted in cross-examination that, from the Attendance Register and ancillary papers exhibited, being Exhibits B and B/1, it is seen that no particular time of attendance and departure was noted therein. It was further admitted that, while doing audit work at the office, no attendance register is maintained at the client's office and the said office is only indicated ordinarily by the members of the Audit Party before leaving the place. DW1 further admits categorically that he could not comment if at the relevant date, the appellant left the place of audit much before scheduled time, though his Attendance Register shows that he attended duty on that date.

- 27.** PW2 is the mother of the victim. The defence has sought to make out a case that the said witness could not have seen the accused of having taken the victim from the road in front of her house, since PW2 was working at the rear of the house. It is seen from the cross-examination that PW2 specifically states that she was working "in the rear" which is situated by the side of the tubewell in the "back side of the house" and was cleaning utensils at the "kaltala" on the adjacent side of the tubewell. Although the tubewell was admitted by her to be on the southern side of her house, the house of the accused, which is the place of occurrence, is situated on the eastern side of the victim's house.
- 28.** The complaint of the offence is comprised of a chain of events, from the accused having taken the victim from the front of her house to his own house and returning the victim at around 6:30 p.m. It would not be impossible for PW2 to see the accused take her child to his house, which is not on the north but on the eastern side of the victim's house. That apart, the defence failed to establish by any evidence whatsoever that it was not possible for someone working in the room adjacent to the tubewell at the rear of the house to have a clear view of the front road. Without any materials being produced by the defence in support of the contention that no clear line of vision was available from the rear room to the front road, the appellant failed to rebut the presumption under Section 29 of the POCSO Act.
- 29.** The alleged delay of a few days in lodging the complaint is easily explained by the third paragraph of her cross-examination, which says

that, on the date of the incident, the parents of the victim took her to see a Doctor, which place was about 10 minutes' walk from their house, but the Doctor did not treat her. Only on the next day, the victim could be taken to Barasat hospital, where PW2 and her family narrated the incident to the doctors in the hospital and returned in the late afternoon. Only thereafter, PW2 went to lodge a complaint with the police with her husband.

- 30.** The statement of PW2, that the victim had an infection in her vagina and had a Dettol wash seven days prior to the incident, could not be material in any manner for the present allegation, since such minor infection could very well have healed in the meantime. However, the examining Doctor, in his report as well as in his deposition, stated that the examination was painful. Although it was stated in the examination-in-chief of the Doctor that the hymen may get torn if a finger is pushed inside the vagina, it was further stated in his cross-examination that the genital examination was painful even at the time of such examination. Although the Doctor admitted that any infection on the private part could also make the examination painful and that there may be rupture of hymen during bathing or cleaning, there is sufficient indication in the medical report as regards the examination being painful. The seven days' old infection could not have created such pain under normal circumstances, since the Doctor, in his evidence, also stated that while thighs are separated for internal examination, such an act would not cause any pain in the private part.

- 31.** It is clearly corroborated by the evidence of the prosecution witnesses that the victim child cried out of pain in the night of the incident, which could not have been due to an old infection.
- 32.** There is sufficient evidence on record to make out a probable case against the appellant, more so due to the fact that the witnesses stated that the appellant used to take the child to his home regularly, which, obviously, would have made the child familiar enough with the accused, to accompany him to his house on the fateful day as well.
- 33.** The innocence of the victim is amply demonstrated not only by her tender age at the time of offence, but also the extreme naivety borne out by her demeanour at the time of being examined before the Trial Judge, which was duly noted by the court below.
- 34.** Hence, a strong presumption of commission of the offence was made out, sufficient to cast the burden of proof of innocence on the accused, as envisaged under Section 29 of the POCSO Act.
- 35.** Since sexual intent is a necessary ingredient of ‘sexual harassment’ under Section 11 of the POCSO Act, on which charge the appellant was convicted, Section 30 of the POCSO Act comes into play.
- 36.** Sub-Section (1) of Section 30 provides that, in any prosecution for any offence under the POCSO Act, which requires a culpable mental state on the part of the accused to be established, the special court shall presume the existence of such mental state, but it shall be a valid defence for the accused to prove that he had no such mental state with respect to the act charged as an offence in that prosecution. For the purpose of the Section, a fact is said to be proved only when the

Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability. In the explanation to Sub-Section (2) of Section 30 of the POCSO Act, “culpable mental state” has been defined to include intention and motive. Thus, in the instant case, it was for the appellant to prove beyond reasonable doubt the absence of his sexual intent at the relevant juncture.

- 37.** Moreover, no iota of proof has been adduced on behalf of the defence to show that there was any motive behind the complainant falsely lodged a complaint against the appellant, that too involving her own minor child of about three years. Hence, the appellant failed to rebut the presumption, raised both under Section 29 and Section 30 of the POCSO Act, sufficiently.
- 38.** The appellant has relied on *Bibi Parwana Khatoon alias Parwana Khatoon and another Vs. State of Bihar*, reported at (2017) 6 SCC 792, in support of the proposition that circumstantial evidence, including public document, read with oral testimony, might create serious doubt in the prosecution’s story. However, the cited report was not in the context of any provision under the POCSO Act, thereby obviating Sections 29 and 30 of the said Act, which cast reverse burden on the accused to prove his innocence. The charges in the cited report were under Sections 304-B and 34 of the IPC. That apart, in the present case, the oral evidence adduced by the DW1, a senior colleague of the accused, clearly demolished whatever semblance of defence was sought to be put forward by the accused.

- 39.** In the next judgment cited by the appellant, reported at (1974) SCC (Cri) 179 [*Kaur Sain Vs. the State of Punjab*], the Supreme Court held that defence witnesses are often untrustworthy but it is not necessary for that reason to assume that they always lie and the prosecution witnesses are always trustworthy.
- 40.** However, such proposition is a double-edged sword and does not cut in favour of the appellant. Even if DW1, a defence witness, was taken in such capacity and not that of an independent witness, there is no reason to infer, from the tenor of such deposition, that the said witness was untrustworthy, more so, since the defence witness was not declared to be hostile. The specific admissions of DW1 in his examination-in-chief as well as cross-examination have to be lent credence even as a defence witness. Moreover, DW1 is a public servant and there was no reason why he could not be treated as an independent witness as well. However, either as a defence witness or as an independent witness, the deposition of DW1 clearly demolishes the defence case.
- 41.** In the present case, the deposition and Medical Report along with the statement given before the Magistrate clearly indict the accused on the charge of sexual harassment, as contemplated in Section 11. As such, the conviction and sentence under Section 12 of the POCSO Act, impugned herein, could not be faulted in any manner whatsoever.
- 42.** In such view of the matter, C.R.A. No.555 of 2015 is dismissed, thereby affirming the judgment and order of conviction dated August 14, 2015 passed by the Additional Sessions Judge, Second Court-cum-

Special Judge under the POCSO Act in Sessions Trial No.04(03)/2014, arising out of Special Case No.13/2014, as well as the consequent sentence awarded against the appellant.

- 43.** 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.)