

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

The Hon'ble Justice Sabyasachi Bhattacharyya

C.R.A. No.598 of 2016

**Sariyat Sk.
Vs.
The State of West Bengal**

For the appellant	:	Mr. D. Mukherjee, Mr. Manas Kumar Das, Mr. Asraf Mandal
For the State	:	Mr. Ranabir Ray Chowdhury, Mr. Mainak Gupta
Hearing concluded on	:	07.09.2021
Judgment on	:	09.09.2021

Sabyasachi Bhattacharyya, J:-

1. The present appeal has been preferred against a judgment and order of conviction against the appellant, sentencing the appellant to rigorous imprisonment for five years for an offence punishable under Section 8 of the Protection of Children from Sexual Assault Act, 2012 (hereinafter referred to as 'the POCSO Act') as well as to pay fine of Rs. 5,000/- (five thousand), in default of payment, rigorous imprisonment (R.I.) for six months more.
2. The initial charges levelled against the appellant included Section 376 of the Indian Penal Code (I.P.C.) and the Section 4 of the POCSO Act.

However, the conviction was ultimately on the ground of the offence of sexual assault, punishable under Section 8 of the POCSO Act. Since the appellant was held not guilty in respect of Section 376(2)(i) of the I.P.C. or Section 4 of the POCSO Act, the Additional District and Sessions Judge acted beyond jurisdiction in convicting the appellant under Section 8 of the POCSO Act, without affording any opportunity to the appellant to meet such case.

3. That apart, it is argued that there is patent contradiction between the deposition of the victim, as PW-1, as borne out by her statement under Section 164 of the Code of Criminal Procedure (Cr.P.C.) and the evidence of all the other witnesses for the prosecution, as far as the place of occurrence is concerned, which vitiates the credibility of the allegations.
4. It is argued that, although the victim herself constantly stated that the alleged offence took place in the house of the victim, the grandmother of the victim, that is, the complainant, categorically stated that the offence was committed behind a wall by the house of one Chhedan. It was also mentioned by some of the other witnesses that the offence took place near a pond. Moreover, there was an admission on the part of the complainant, in her deposition, that the distance between the houses of the victim and Chhedan takes about ten minutes to be covered. Hence, the prosecution failed to make out even a *prima facie* case in support of the allegations against the appellant, thus obviating the presumption under Section 29 of the POCSO Act. In the instant

case, it is argued, the presumption under Section 29 of the POCSO Act did not arise at all, in view of the prosecution having miserably failed to substantiate the alleged offences against the appellant. By placing reliance on a Division Bench judgment of this Court in *Subrata Biswas Vs. State*, reported at (2019) SCC Online Cal 1815, learned counsel for the appellant argues that, on a proper interpretation of Section 29 of the POCSO Act, in case a person is prosecuted under Sections 5 and 9 of the said Act, the prosecution is absolved of the responsibility of proving its case beyond reasonable doubt. On the contrary, it was held, it is only required to lead evidence to establish the foundation of its case by leading cogent and reliable evidence (which does not fall foul of patent absurdities or inherent probabilities). It was further observed by the Division Bench that the expression “is prosecuted” under Section 29 of the POCSO Act does not mean that the prosecution has no role to play in establishing and/or probablising primary facts constituting the offence. If that were so, then the prosecution would be absolved of the responsibility of leading any evidence whatsoever and the court would be required to call upon the accused to disprove the case without the prosecution laying firm contours by leading reliable and admissible evidence.

5. Learned counsel for the appellant next places reliance on an apparently unreported judgment rendered by a Division Bench of the Tripura High Court, where it was laid down that if an accused is

convicted only on the basis of presumption as contemplated under Sections 29 and 30 of the POCSO Act, then it would definitely offend Articles 20(3) and 21 of the Constitution of India. In the opinion of the Court, it was not the object of the legislature. Presumption of innocence is a human right and cannot *per se* be equated with the fundamental right under Article 21 of the Constitution of India. The Supreme court in various decisions has held that, provisions imposing reverse burden must not only be required to be strictly complied with but also may be subject to prove of some basic facts as envisaged under the statute.

6. It is contended by the appellant that in the present case the basic facts constituting the alleged offence were not proved at all by the prosecution. On the contrary, it is argued, there were patent discrepancies between the stands taken by the different witnesses for the prosecution.
7. That apart, it is argued, the victim, as PW-1, in her cross-examination, specifically admitted that she was tutored by her 'Nani' (grandmother) both before her deposition and her statement before the learned Magistrate.
8. Laying stress on such admission, it is argued that, admittedly, the evidence led by the victim herself was not spontaneous, but the victim was tutored by her grandmother, the latter being the complainant herself. The scope of personal enmity between the grandmother and the accused cannot be ruled out in the present case.

- 9.** That apart, it is contended by learned Counsel for the appellant that the medical report of a gynaecologist was also exhibited in the case, which clearly indicated that there was no bruise or abrasion in the genitalia of the victim. The report further suggested that there was no injury in the private parts of the victim, although it was stated in the report that her hymen was partially ruptured. The doctor, during his cross-examination, categorically stated that the hymen may be partially ruptured due to various causes. The gynaecologist further stated in his cross-examination that, if there were reddish or bruise marks seen on the body of the victim, he would have written the same in his report. However, any such mention is missing in the exhibited medical report. Thus, it is submitted that the allegations made against the appellant were not substantiated at all by material evidence.
- 10.** Learned counsel appearing for the State contends that, although no specific charge might have been framed under Section 8 of the POCSO Act, Section 216 of the Cr.P.C. clearly provides that the Court may alter or add to any charge at any time before the judgment is pronounced. That apart, it is argued that Section 215 of the Cr.P.C. clearly provides that no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

- 11.** In the present case, the offence on which the appellant was convicted was punishable with a lesser term than that of the initial charges against him.
- 12.** By placing reliance on Section 222 of the Cr.P.C., learned counsel for the State argues 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 although he was not charged with it.
- 13.** Moreover, learned counsel argues, Section 464 of the Cr.P.C. clearly provides the effect of omission to frame, or absence of, or error in, charge. Sub-section (1) of the said Section clearly indicates that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge, including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.
- 14.** Learned counsel next submits that the alleged discrepancies in the deposition were of a minor nature and could not vitiate the conviction and sentence.
- 15.** Moreover, the victim gave the statement under Section 164 of the Cr.P.C. at least one year before appearing in the witness box as PW-1. Hence, minor differences in her testimony and original statement fall

within the normal margin of error befitting a minor girl of tender years.

16. It is further pointed out from the medical report of the gynaecologist that partial rupture of hymen is indicated in the said report, thereby bringing the offence committed by the appellant within the purview of Section 8 of the POCSO Act, justifying the conviction and sentence on the said provision.
17. Section 29 of the POCSO Act, it is argued by the State, is applicable in full force and, in view of the appellant having failed to rebut the presumption of commission of offence, was rightly convicted.
18. Upon considering the submissions of learned counsel for both the parties as well as the materials-on-record, it is evident that the first argument of the appellant cannot stand in the eye of law, on a composite reading of Sections 215, 216, 222 and 464 of the Cr.P.C. Not only were the components of the sexual assault proved in the present case, the offence on which the appellant was convicted was the minor offence as compared to Section 376 of the IPC and/or Section 4 of the POCSO Act.
19. Section 4 speaks of punishment for penetrative sexual assault. However, Section 8 provides for punishment for 'sexual assault'. The expression "sexual assault" has been defined in Section 7 of the POCSO Act as follows:-

"7.Sexual assault.- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or

does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

- 20.** Hence, even in the absence of total rupture of the victim’s hymen, the evidence of the prosecution, together with the medical report, were sufficient to lay a strong foundation for the allegation of sexual assault, making the appellant liable for punishment of sexual assault under Section 8 of the POCSO Act.
- 21.** Hence, the presumption under Section 29 of the POCSO Act is clearly applicable. The accused/appellant miserably failed to rebut such presumption. Although an enmity between the complainant and the accused has been hinted from the Bar during arguments, there is no mention of such enmity anywhere in the records or in the depositions.
- 22.** Read in conjunction, it is clearly seen that the victim girl, in her statement under Section 164, Cr.P.C., clearly stated that after the accused came to the victim’s home, he took her away and perpetrated the alleged offence. Such statement was given soon after the alleged incident and has to be relied upon in preference to her deposition, which was given about one year thereafter. Even from the deposition, it is seen that the conjunction “thereafter” has been used in several places to punctuate the relevant chain of events, which leaves ample scope of a strong presumption being raised of the offence having taken place elsewhere than the house of the victim.
- 23.** As regards the adjudication of the “admission” of the victim girl regarding her being tutored by her grandmother, it is unfortunate that, in the prevalent system of recording evidence, most of the

nuances of the exact expressions used by the witnesses are lost in translation. Although the English translation of the cross-examination of the victim girl, which was originally in Bengali vernacular, shows that she was ‘tutored’ by her ‘Nani’ (grandmother). The expression “tutored”, during translation, might have entirely missed out the actual connotation of the expression used by the victim.

- 24.** That, taken in conjunction with the tender years of the victim, who was between 8 to 10 years old at the time of the alleged incident, leaves sufficient scope of presuming that the expression ‘tutored’ need not necessarily have meant that the exact words she uttered in her statement before the Magistrate and/or her deposition were taught to her by her grandmother. It is but natural that a minor of such a young age, prior to facing the gruelling and traumatic experience of undergoing examination-in-chief and cross-examination, would be given minimum guidelines for conducting herself by her local guardian (in the present case, the victim’s grandmother, with whom the victim has been living at the time of the offence). Hence, the mere use of the expression ‘tutored’ by the minor in her cross-examination does not, *ipso facto*, demolish the veracity of the victim’s statement and/or deposition.
- 25.** As far as the place of occurrence is concerned, the sketch map provided by the Investigating Officer clearly lends credibility to the allegations against the accused. The victim’s house is only 150 meters away from a football field, the boundary of which continues towards the area adjacent to the house of Chhedan. Hence, the

deposition of the prosecution witnesses, read as a whole, unerringly indicates that the victim was offered a biscuit and Rs.10/- (Rupees Ten), which was lucrative enough to an innocent minor girl of 8 to 10 years in order to lure her to the place of occurrence. The statement of the complainant in her deposition regarding the distance between the house of Chhedan and the victim's house being 10 minutes becomes irrelevant in view of the specific statement given under Section 164, Cr.P.C., by the victim that she was taken away from her home by the accused. The time taken between the commission of the offence and the luring out of the victim from her home by the accused is not as material as sought to be made out by the appellant.

- 26.** In the present case, no case of animosity between the family of the victim and the accused was ever made out at any stage of the proceeding. Rather, the medical report authored by the gynaecologist clearly shows that the hymen of the child was partially ruptured. In cross-examination, the doctor merely expressed a doubt as regards the probability of such rupture being restricted only to penetration. However, the scope of sexual assault, as defined under Section 7 of the POCSO Act, is of wide amplitude and could easily be presumed from such medical report. The undue stress placed by the appellant on the factum of absence of any mention of bruise or abrasion in the genitalia of the victim and/or injury in her private parts, does not vitiate the veracity of the prosecution evidence at all, keeping in view the tender age of the victim at the time of the alleged incident. A minor girl of about 8 to 10 years of age is not expected to put up

sufficient resistance to leave any bruise or abrasion on her person or any injury to her private parts, particularly if inflicted by a previous acquaintance. Thus, the absence of any bruise or abrasion mark on the victim's person is not enough to rebut the presumption of sexual assault under Section 7 of the POCSO Act.

- 27.** The fact that the child could be lured out merely by showing a biscuit and/or a note of Rs.10/- (Rupees Ten) is sufficient to prove the innocence of the minor at the time of commission of the offence. Hence, such an innocent victim might very well have suffered sexual assault as defined under the POCSO Act without any serious bruise or abrasion on any part of her person. In any event, the hymen was partially ruptured, which, seen with the other materials on record, was sufficient to raise a presumption under Section 29 of the POCSO Act.
- 28.** The accused/appellant miserably failed to rebut such presumption by any cogent evidence and/or to demolish the foundation of the case made out by the prosecution.
- 29.** In view of a composite reading of Sections 215, 216, 222 and 464 of the Cr.P.C., the Additional Sessions Judge was perfectly within his jurisdiction to convict and sentence the petitioner under Section 8 of the POCSO Act.
- 30.** As such, there is no merit in the appeal.
- 31.** Accordingly, CRA No.598 of 2016 is dismissed on contest, thereby affirming the conviction and sentence awarded against the appellant by the Additional District and Sessions Judge, Second Court at

Krishnanagar, District-Nadia by his Judgment and Orders dated July 25, 2016 and July 26, 2016 in Sessions Trial No.X(11) of 2016 (Spl).

- 32.** The victim girl will be at liberty to claim victim compensation from the West Bengal State Legal Services Authorities in accordance with law in view of the affirmation of the conviction and sentence by this Court.

(Sabyasachi Bhattacharyya, J.)