

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

The Hon'ble Justice Sabyasachi Bhattacharyya

**C.R.A. No.581 of 2017
With
IA No. CRAN 1 of 2018
(Old No. CRAN 656 of 2018)**

**Chaitanya Barman
Vs.
The State of West Bengal and another**

For the appellant	:	Mr. Niladri Sekhar Ghosh, Mr. Jisan Hossain, Ms. Srimoyee Mukherjee
For the State	:	Mr. Saswata Gopal Mukherjee, Ms. Faria Hossain, Mr. Aniket Mitra
For the de facto complainant	:	Mr. Kaushik Gupta
Hearing concluded on	:	02.09.2021
Judgment on	:	07.09.2021

Sabyasachi Bhattacharyya, J:-

1. The present challenge is directed against a judgment dated August 1, 2017 and sentence dated August 2, 2017, whereby the appellant was convicted under Section 376 of the Indian Penal Code (I.P.C.) as well as under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act'). The sentence given was to suffer rigorous imprisonment for seven years and to pay

a fine of Rs. 50,000/- (Fifty Thousand), in default, to suffer simple imprisonment for one year for the offence punishable under Section 4 of the POCSO Act.

- 2.** The brief facts of the case are that, the accused/appellant was the private tutor of the victim girl. Allegedly, the accused committed penetrative sexual assault upon the victim girl, purportedly minor at that point of time, on several occasions by dishonestly inducing her to have relation with the accused on the promise of the accused to marry her.
- 3.** Learned counsel appearing for the appellant argues that the presumption contemplated under Section 29 of the POCSO Act, that the accused has committed the offence, unless the contrary is proved, is not applicable in the present case, since the victim merely was not a minor at the juncture of the alleged offence.
- 4.** Learned counsel contends that the birth certificate produced to prove the age of the victim was marked as an exhibit on verbal submission of the victim's father. The issuing authority did not prove the authenticity of the said certificate. Moreover, the certificate was issued after nine years of birth. As such, it is argued, the birth certificate could not be relied on to determine that the victim was a minor at the relevant point of time, thus, falling outside the purview of the POCSO Act itself.
- 5.** It is further contended that the victim girl was admittedly having an affair with a different person than the accused, namely one Ananda

Sinha, who married the victim subsequently. As such, the allegation that the accused was the father of the child born to the victim as a result of the alleged offence, is unsubstantiated, since a reasonable doubt is created as to the paternity of the child. Moreover, although the appellant sought for a DNA examination to determine the paternity of the child before this Court in appeal, the victim categorically disagreed. As such, an adverse inference ought to be drawn against the victim with regard to the paternity of the child.

- 6.** That apart, the complaint was lodged at a stage when the victim was pregnant for five months, although the alleged incident occurred much prior to that. Hence, an attempt to cast blame upon the accused to avoid social stigma cannot be ruled out.
- 7.** As regards the offence allegedly committed under Section 376 of the Indian Penal Code, it is argued that sufficient material evidence was not produced to establish the allegations against the accused beyond reasonable doubt. Even the doctors' certificates had not indicated any incriminating factor against the accused.
- 8.** Learned counsel appearing for the State contends that as many as ten witnesses were produced by the prosecution, who corroborated the case of the victim. That apart, the birth certificate produced created a sufficient presumption to hold that the victim girl was minor at the relevant juncture, which presumption could not be dislodged by any cogent evidence by the accused. That apart, only one of the witnesses stated about the alleged affair between the victim's present husband

and her at the relevant point of time, which cannot be relied on in the absence of further corroboration.

9. Learned counsel appearing for the de facto complainant contends on the limited aspect that this Court has ample power to grant victim compensation to the victim, commensurate with the offence committed against her.
10. Upon hearing learned counsel for the parties, this Court comes to the following conclusions:

DW 1 was one Basudev Basu, who, as per his evidence, knew the accused and the victim as well as their families. It was clearly stated by the said witness that he had come to know that Ananda Sinha, who was (still is) admittedly married with the victim, was having affairs with her “for last 3-4 years”. Such evidence was adduced on June 23, 2017, taking the period of such alleged affair back to 2014, which is the alleged period of occurrence of offence.

11. Hence, it cannot be ruled out that there was sufficient doubt as regards the paternity of the victim’s child. A more crucial factor is the victim’s specific denial of a DNA test to be held to determine the paternity of her child, which could be the best evidence available to clinch the issue in her favour. Hence, an adverse inference ought to be drawn against the prosecution, as contemplated in Section 114, *Illustration (g)* of the Indian Evidence Act, 1872. In the teeth of the specific denial of the accused regarding his paternity of the child and keeping in context the surrounding circumstances, that is, evidence of

DW 1 regarding the affair of the victim with her present husband at the relevant juncture as well as the fact that the husband married the victim, despite knowledge of her pregnancy, and has been living as spouse with the victim thereafter, go on to show that there was sufficient doubt cast on the prosecution case that the pregnancy of the victim was caused by the accused.

- 12.** That apart, since the girl was not proved by cogent evidence to have been a minor at the relevant period, the question of applicability of either Section 29 or Section 4 of the POCSO Act does not arise.
- 13.** In the absence of proof of minority of the girl at the relevant period, the acts of intercourse alleged assumed an entirely different complexion in so much as, even as admitted by the victim, such incident were consensual. If the victim girl was not a minor at the time of the alleged offence, the question of Section 376(2)(j) of the IPC, which is the only relevant provision, is not attracted at all. Thus, in view of the consensual relationship between the parties, the offence of rape under Section 376 of the I.P.C. is not proved at all.
- 14.** As regards the promise of marriage, there is no concrete evidence, apart from the hearsay evidence of some of the prosecution witnesses, to establish such fact beyond reasonable doubt.
- 15.** The time lapse between the alleged offence, which took place, according to the victim, in the month of January, 2014, and the complaint lodged on May 23, 2014, gives rise to the purpose behind filing such complaint. In the natural course of events, the victim was mature enough, even if she was studying in Class IX, to have

approached her parents and for the complaint to have been lodged soon after the alleged incidents. The delay is not only unexplained, but is vitiated by the fact that the complaint was lodged only after the victim became pregnant, which unerringly indicates that the accused was sought to be made a scapegoat for an offence which he might not have committed at all.

- 16.** In the evidence of the doctor (namely Dr. Arnab Majumder), who allegedly examined the victim girl in May, 2014, it is clearly mentioned that there was no sign of any abrasion or scratch mark over her body, although there was indication of pregnancy.
- 17.** Such medical examination was obviously intended to strengthen the complaint, since it was approximately contemporaneous with the lodging of the complaint.
- 18.** In his cross-examination, the said doctor admitted that he had noted the age of the victim girl on being stated by the victim herself, which denudes the veracity of such statement as evidence on the point of minority of the victim at the relevant juncture, being merely hearsay. It is also to be noted that the doctor, in his cross-examination, categorically admitted that the victim had not mentioned about the name of the person by whom she had conceived, which casts a cloud of suspicion on the offences alleged against the accused.
- 19.** PW 4, the father of the victim girl, clearly stated that he had learnt from his wife that his daughter was of “questionable character” and an incident had occurred. Hence, his evidence is also nothing more than hearsay and cannot be relied upon, particularly in view of the denial

of the said witness about any direct knowledge of the alleged love affair of his daughter (victim) with the accused.

- 20.** More importantly, in his cross-examination, PW 4 (father of the victim) admitted that he was illiterate and had no knowledge about what were the contents of the complaint submitted by him, which also casts a doubt on the veracity of the complaint, which was the basis of the FIR.
- 21.** In the further cross-examination of the PW 4 on November 18, 2015, the witness admitted that the date of birth of his daughter had been informed to the Anchal Office afterwards and such recording was on the verbal submission of the witness. It was stated that the “Daima” (mid-wife) was present at the time of the birth of the victim. It is neither suggested by the prosecution that the “Daima” had expired or was unavailable for being produced as a witness, nor had she been produced as a witness.
- 22.** The birth certificate of the alleged victim was sought to be proved by the father of the victim and not the authority issuing the same. Hence, no weight can be placed on such document (Exhibit 6), as its evidentiary value itself is in question. The Investigating Officer, namely Mantu Barman (PW 7), admitted in his cross-examination that he had not visited the office of the issuing authority of Exhibit 9 and did not examine the issuing authority issuing the certificate of birth of the victim girl, nor conducted any investigation relating to the birth place of the victim girl. That apart, the Investigating Officer admittedly did not collect any age-proof document from the school of the victim but seized the purported birth certificate from the possession of her

father, who had not disclosed the birth place of the victim. As per the admission of the Investigating Officer, the mother of the victim also did not tell him about the place of birth.

- 23.** One of the most crucial pieces of evidence is that of PW 8, a medical practitioner who examined the victim on the date of the FIR, that is, May 24, 2014, and categorically stated in his evidence that the victim was not willing for vaginal examination. In his cross-examination, the PW 8 (Dr. Dip Sarkar) admitted that the patient refused to get examined despite disclosing the factum of rape.
- 24.** Such consistent denial of the victim girl to have herself examined and to have a DNA test to ascertain the paternity of her child, are sufficient to draw strong adverse inference as contemplated in Section 114, *Illustration (g)* of the Indian Evidence Act, 1872. Such presumption, that the medical examination at the relevant period of the victim and a DNA test of the child would have gone against the victim, has not been rebutted by the prosecution by any means.
- 25.** Rather, the present husband of the victim, as per DW 1, told the said witness that the child was born of the wedlock between him and the victim. Although a suggestion was put to the said witness in cross-examination that the victim and her husband did not tell the witness about their marriage or that there was no love affair between the two as told by them, there is no specific counter suggestion put to the said witness (DW 1) as regards the veracity of his statement in examination-in-chief as to the husband of the victim, namely, Ananda

Sinha having told the witness that the son of the victim was born of the wedlock of the victim and Ananda.

- 26.** Hence, no ingredient of either Section 4 of the POCSO Act or Section 376 of the Indian Penal Code was established at all against the accused at any stage of the proceedings, let alone such allegations being proved beyond reasonable doubt, which is the yardstick in adjudicating criminal cases.
- 27.** In such view of the matter, the impugned judgment and order of conviction and sentence are palpably erroneous in law and in fact and ought to be set aside.
- 28.** Accordingly, the C.R.A. 581 of 2017 is allowed, thereby setting aside the judgment and orders dated August 1, 2017 and August 2, 2017 respectively, convicting the appellant under Section 376 of the I.P.C. and Section 4 of the POCSO Act, as well as the sentence awarded against the appellant under the latter provision. Accordingly, IA No: CRAN 1 of 2018 (Old No: CRAN 656 of 2018) is hereby disposed of.
- 29.** The appellant shall immediately be released from custody. The Correctional Home Authorities, where the appellant is in incarceration, shall act on the server copy of this order without insisting upon production of a certified copy. The Office of this Court shall communicate this Order to the appropriate authorities immediately to ensure due compliance of the same.
- 30.** The appellant is given the liberty to approach the appropriate forum for adequate compensation for the stigma unnecessarily cast on him due to the allegations made by the victim and her family against the

accused as well as the relevant authorities for the slipshod manner of investigation. If such a proceeding is initiated by the appellant, the adjudicating forum shall decide the same independently on its own merits without being influenced in any manner by any of the observations made herein.

(Sabyasachi Bhattacharyya, J.)