

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

C.R.A. 713 of 2017

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**IA No. C.R.A.N. 2 of 2020
(Old No. C.R.A.N. 4673 of 2020)**

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**C.R.A.N. 3 of 2020
(Old No. C.R.A.N. 4674 of 2020)**

In the matter of : Biswajit Das @ Tuma.....appellant

Mr. Abhra Mukherjee,
Mr. Sudip Banerjee,
Mr. Souradeep Dutta

...for the appellant

Mr. Ranabir Roy Choudhury,
Mr. Sandip Chakraborty

...for the State

Learned counsel for the appellant argues that there were several contradictions in the deposition of the prosecution witnesses, which vitiate the prosecution case, even for the purpose of attracting the presumption under Section 29 of the Protection of Children from Sexual Offences Act, 2012 (in brief, “the POCSO Act”). It is contended that although the mother of the victim child, that is, P.W. 3 as well as the grandmother of victim, stated in their evidence that the mother of the victim was in her house on the date of occurrence, P.W. 5, the ‘Aaya’ of the victim child, did not corroborate such statement but stated

that the mother of the victim was in the school, where the mother teaches, at the relevant point of time.

It is further contended that the prosecution witnesses clearly established that the school examination of the victim was over by 11.00 A.M. although the 'Aaya' specifically stated that she returned with the child at about 11.30 A.M. to the victim's home. It has further been admitted in evidence that the distance between the school and the house of the victim child takes about ten minutes to cover. As such, it was improbable that the alleged offence could have been perpetrated within the very short interregnum in-between.

Learned counsel lays much stress on the point that although the principal of the school, in her evidence, clearly admitted that the school was under CCTV surveillance, the CCTV footage was never produced in evidence by the prosecution. The test of prejudice has not been satisfied in the present case, it is argued, since despite having seized the CCTV footage, the same was not sent for forensic examination and/or produced in evidence on the flimsy pretext that there was no CCTV camera installed in the washroom of the children. It is submitted that, even if no camera was installed in the washroom, it was the onus of the prosecution to show what transpired during the relevant period at the passage, between the classroom of the child and the washroom, to clinch the prosecution case beyond doubt. Such best evidence

having been withheld, it is argued, an adverse inference ought to be drawn against the prosecution. Thus, the prosecution failed to make out even a plausible case to draw the mischief of Section 29 of the POCSO Act.

It is further contended that the victim child, in her evidence, stated that she had only five classmates, whereas it has been established from the records that there were at least 29 students in the same class.

That apart, it is argued that the victim girl could not name any of her classmates. Moreover, learned counsel submits that although the victim stated in her evidence that there was no other male teacher than the accused in the school, there were at least three other male teachers, which vitiates the prosecution case further.

It is further argued that the victim's father (P.W. 2) admitted to have met the principal of the school on the very next date after the alleged incident at around 10.00 A.M., but the complaint was lodged as late as around 3.45 P.M. the same day. Such delay has not been explained by the prosecution at all, it is argued.

Even from the medical report, it is argued, no evidence of the alleged offence is borne out. Rather, the injuries on the person of the accused were the result of a mob attack, which also came out from the evidence of the Investigating Officer as well as the statement of the accused.

Learned counsel for the appellant submits that the appellate court has ample powers, under Section 391 of the Criminal Procedure Code, to take additional evidence, if necessary, for the purpose of complete adjudication. In the present case, since the CCTV footage was withheld, an inference ought to be drawn that, if produced, it could prove the prosecution case to be false, in the alternative, this Court can direct such footage to be produced for the purpose of ascertaining the veracity of the prosecution case.

Learned counsel appearing for the State argues that the CCTV footage, whether seized or not, might not have been relevant for the purpose of deciding the instant case, since there was no suggestion in the cross-examination of the prosecution witnesses as regards the existence of any CCTV camera in the passage leading from the classroom to the washroom.

That apart, learned counsel for the State also submits that the discrepancies sought to be pointed out are not only minor in nature but have no direct bearing on the commission of the alleged offence.

In reply, learned counsel for the appellant further points out that, in the present case, the test of prejudice was not met by the prosecution and the Court should also look into the vital evidence of the 'Aaya' of the victim (P.W. 5) that the child, who ought to have been in a trauma

immediately after the alleged offence, if committed, did not disclose anything to P.W. 5 on her way home from school.

Upon considering the submission of the parties and the materials-on-record, what catches the eye at the first instance is the adjacent location of the washrooms of the school with the classroom of the child. Immediately next to the classroom is the boys' washroom and immediately thereafter the girls' washroom, as it appears from the sketch map drawn by the Investigating Officer. In view of such scenario, the general statement of the Principal of the school, that the school is under CCTV surveillance, need not be construed to mean that CCTV cameras are installed at every nook and corner of the school. Hence, *ipso facto*, the non-production of the CCTV footage does not vitiate the prosecution case, as framed.

That apart, it is well-settled by not only the Supreme Court but also this Court that in such cases, the victim's statement under Section 164 of the Criminal Procedure Code, in conjunction with the deposition of the victim, are, by themselves, sufficient to prove the prosecution case, in the absence of better evidence.

As far as the alleged discrepancies in evidence are concerned, learned counsel for the State is justified in contending that those are not material or relevant with regard to the offence. Minor discrepancies in the statement of the child, in having failed to name her

classmates and the like, do not vitiate the credibility of the prosecution case.

As far as the time-lapse of only half-an-hour between the conclusion of the examination of the victim and the victim reaching her home, we cannot apply the test of mathematical precision, since the said statements are all based on the evidence of the witnesses, which, obviously, have a margin of error. The statement, for example, that it takes about ten minutes to reach the house of the victim from the school, need not be taken to be set in stone or absolute. Moreover, in view of the nature of offence committed, the same was impulsive and it does not require more than average prudence to estimate that there is a probability of the offence having been committed even within about half an hour, subject to marginal errors on the part of the witnesses in describing the chronological sequence of events and the time-gaps between the events.

It has not been suggested by the prosecution that the victim child was alone at any point of time in the classroom. What was stated by the prosecution is that the child was asked to stay back in the classroom by the accused and, thereafter, was taken to the washroom, which might well have happened during the pandemonium resulting from the hullabaloo caused when the children completed their examination and were eager to return home. The meagre distance and contiguity of the classroom and the washrooms are sufficient to lend credence to the

probability of commission of the offence within the period alleged. In a junior school, it is not always expected that each and every corner and corridor will be covered by cameras, neither did the Principal of the school say so in specific terms. No counter suggestion was put to the prosecution witnesses, including the Principal, to explore whether there were CCTV cameras at the corridor between the washroom and the classroom. The general statement of the Principal, that the school is under CCTV surveillance, is insufficient to dislodge the presumption raised under Section 29 of the POCSO Act.

That apart, in the present case, the statement of the 'Aaya, that the mother of the victim girl had gone to her own school, where she teaches, on the relevant date, at the time of return of the child, need not be taken as sacrosanct so as to disbelieve the corroborative evidence of the mother herself, who is a teacher, and the grandmother of the victim, that the victim's mother did not go the school and was at home on the said date. It is well within the limits of prudent conjecture to assume that the 'Aaya' might not have specific knowledge about whether the mother was somewhere in or around the house or had gone to her school. Hence, such discrepancy cannot have any material bearing on the prosecution case to disbelieve the same.

As regards the submission of learned counsel for the accused that, before casting a stigma on the accused, the court should also consider whether additional evidence

ought to be taken in respect of the CCTV cameras, I am of the clear opinion that, in view of the discussions above, there is no reason to waste further time by calling for such evidence at the stage of hearing of the appeal, since there was no suggestion anywhere in the entire deposition as regards the small passage between the almost adjacent wash room and class room, having any CCTV camera.

That apart, the other submission, regarding whether it could be considered by Court whether the conviction could be reduced to one under Section 8 of the POCSO Act, the same is not tenable in the eye of law in the facts and circumstances of the present case for the following reason.

Clause (f) of Section 9 of the POCSO Act clearly stipulates that whoever being on the management or staff of an educational institution, commits sexual assault on a child in that institution or, as provided in Clause (m) of the said section, whoever commits sexual assault on a child below 12 years of age (both of which criteria are satisfied in the instant case) shall be guilty of aggravated sexual assault under Section 9 of the POCSO Act. As such, even if it was held that the accused is merely guilty of sexual assault under Section 7 of the POCSO Act, the mischief of the above clauses of Section 9 could not be obviated, as such, attracting punishment under Section 10 of the POCSO Act. Since Section 29 of the Act also applies to Section 9, the onus was on the accused person to prove his innocence, particularly in view of the prosecution having

made out a strong credible case of perpetration of the offence, more so in view of the attendance of the accused in the school of the victim on the date of the alleged offence.

In such view of the matter, the court below cannot be said to have committed any error either of law or of fact, in convicting and sentencing the accused under Section 354(B) of the Indian Penal Code and Section 10 of the Protection of Children from Sexual Offences Act, 2012.

As such, C. R. A. No. 713 of 2017 is dismissed by affirming such conviction and sentence passed by the Additional District Judge, Second Special Court, Malda, in Sessions Trial No. 101 of 2017 arising out of POCSO Case No. 146 of 2017.

In view of dismissal of the appeal itself, all connected pending applications, if any, stand disposed of.

The concerned Section of this Court is directed to send down the lower court records to the Court of first instance immediately.

(Sabyasachi Bhattacharyya, J.)