

**IN THE HIGH COURT AT CALCUTTA**  
**CRIMINAL APPELLATE JURISDICTION**

**Present:**

**THE HON'BLE JUSTICE JAY SENGUPTA**

**C.R.A. 715 Of 2017**  
**(I.A. No. CRAN 2 of 2020)**  
**Khusbur Rahaman**  
**Versus**  
**The State of West Bengal**

**For the petitioner** : Mr. Ajay Debnath  
Mr. Devranjan Das  
Mrs. Swagata Datta  
.....Advocates

**For the State** : Ms. Sukannya Bhattacharyya  
Mr. M.F.A. Begg  
..... Advocates

**Heard on** : 09.02.2021

**Judgment on** : 22.02.2021

**JAY SENGUPTA, J:**

1. This appeal is directed against a judgment and order of conviction dated 28.11.2017 and sentence dated 29.11.2017 passed by the Learned Additional Sessions Judge, 2<sup>nd</sup> Court, Raiganj, Uttar Dinajpur in POCSO Case No. 106 of 2016, thereby convicting the appellant under Section 6 of the POCSO Act, 2012 and sentencing him to suffer rigorous imprisonment for 4 years and to pay a fine of Rs. 20,000/-, in default to suffer rigorous imprisonment for 6 months. The fine, if recovered, was to be paid to the

victim. The appellant had already served out substantial part of the sentence and as per report filed by the Superintendent, Balurghat Central Correctional Home, the appellant would be released on 16.03.2021 if the fine is paid and on 16.09.2021 if the fine is not paid. The application for non prosecution of the appeal filed by the appellant was disposed of on 08.01.2021. Thereafter, the appeal was heard at length.

**2.** On 06.11.2015, PW 1, the elder brother of the victim girl lodged a First Information Report under Section 6 of the POCSO Act and Section 376 of the Penal Code alleging that on 19.10.2015 at about 11 a.m. the victim, who was aged about 16 years, had gone out from her house, but did not return till midnight. On 27.10.2015 at about 18.00 hours the victim girl returned home screaming. On enquiry, she deposed that the appellant had taken her to his residence luring her with marriage proposal. But, in spite of entering into a physical relationship more than once during her stay at his residence, he left her at a nearby place and disappeared from there. After registration of the First Information Report, investigation commenced. The victim and the appellant were medically examined and a statement of the victim was also recorded under Section 164 of the Code. After completion of investigation, a charge-sheet was submitted against the appellant.

**3.** On 28.06.2016, the learned Trial Court was pleased to frame a charge under Section 6 of the POCSO Act against the present appellant.

**4.** During trial, the prosecution examined ten witnesses to establish its case while the appellant relied on three defence witnesses.

**5.** It appears that PW 1 was the defacto complainant of the case and the elder brother of the victim girl. He supported the First Information Report lodged by him. P.W. 1 had communicated the incident of a panchayat member who assured a 'Salish'. This caused the delay in lodging the First Information Report. During cross-examination, a Nikahnama was shown to the witness, but he disputed the signature on the same. P.W. 2 was the victim girl. She deposed that she had given a statement under Section 164 of the Code. On 19.10.2015, the appellant took her to his house on the pretext of marriage and established physical relationship. However, on 27.10.2015 the appellant left her and thereafter, did not marry her. In her cross, she stated that she was taken in a Bolero car when she was returning home from a bank. She denied her signature on the Nikahnama. P.W. 3 was a neighbour of the victim. He heard the incident from PW 1. P.W. 4 was also a relative of the victim. He corroborated the prosecution case to the extent that P.W. 1 rang up after the victim lady went missing. He came to know about the incident of rape from P.Ws. 1 and 2. P.W. 5 was the doctor who examined the victim girl on 10.11.2015. He proved the medical report being Exhibit 3. Although Exhibit 3 did not reflect the causing of any injury on the victim, but the victim related to the doctor about the forceful intercourse. P.W. 6 was another co-villager of the victim lady. He had heard that the victim had gone missing. He came to know about the incident of rape from the victim girl and her father. In his cross-examination, he denied that the victim was married and was leading a happy married life. P.W. 7 was a co-villager of the victim girl. He heard about the incident. In fact, the victim as well as her father told him about the incident. P.W. 8 was the doctor who

examined the appellant and found him capable of sexual intercourse. P.W. 9 was the head teacher of the school where the victim girl studied. He produced the admission register where the date of birth of the girl was recorded as 07.05.1999. In his cross, he admitted that he did not verify the date of birth of the victim and that no birth certificate was produced at the time of admission. P.W. 10 was the Investigating Officer of the case. He had the victim girl and the appellant medically examined and had a statement of the victim girl recorded under Section 164 of the Code. He had also obtained a school certificate and an admit card of the victim girl, which were marked for identification. He arrested the accused on 10.12.2015. During his examination under Section 313 of the Code, the appellant denied all the allegations and wanted to adduce defence evidence. D.W. 1 was a Moulavi who claimed to have executed a Nikahnama between the victim and the appellant. D.W. 2 registered the said marriage. In his cross-examination, he admitted that he did not see or verify any document relating to the age of the victim girl. D.W. 2 was the Kazis who purportedly registered the marriage. But, in the cross-examination, he admitted that he was not a Kazi as per the Kazis Act and that he had no document to show that he had been appointed by the Government as per the Kazis Act. D.W. 3 deposed that he had filled up the Nikahnama as per the instruction of D.W. 2. He admitted in the cross that he had no personal knowledge except filling up the Nikahnama and had not seen any age proof document of the bride and the bridegroom.

**6.** Learned Counsel appearing on behalf of the appellant submitted as follows. First, there was an inordinate delay in lodging the First Information Report, which could not be properly explained by the informant. Although the victim girl had allegedly gone missing for so long, no missing diary was lodged by her family members in this regard. In her statement recorded under Section 164 of the Code, the victim admitted that she did not see other houses around the house of the accused. Medical evidence, especially pertaining to the medical examination of the victim girl, did not support the prosecution case. No injury was found in her private parts. No conclusive opinion could be given about the commission of the crime. Even the age of the victim girl could not be proved satisfactorily. P.W. 9, the school teacher admitted in his cross that he did not check any birth certificate to record the age of the victim in the school register. Quite commensurately, no witness was produced to prove the documents like the school certificate and the admit card of the victim girl. The evidence adduced by P.Ws. 3, 4, 6 and 7 were all hearsay in nature. No independent witness was examined to substantiate the prosecution case. Except for the statement of the victim girl, there is nothing to support the prosecution case. The prosecution failed to prove its case beyond reasonable doubt.

**7.** Learned Counsel appearing on behalf of the State submitted as follows. The delay in lodging the First Information Report was due to a proposed 'Salish', which, however, did not take place. The same has been explained by the defacto complainant, P.W.1. The version of the First Information Report is not at all contradictory with the evidence adduced by

the victim girl. It is the prosecution case that the victim girl was a minor and she was lured with a promise to marry by the present appellant. In spite of establishing a physical relationship, the appellant left her and only after that she came back home and reported the incident to her brother. One perhaps would have wondered more about the sequence of events had the victim been a major. But, the evidence of the school teacher, P.W.9 and the two other documents which were marked for identification clearly showed that the victim was aged about 16 years at the time of occurrence. Therefore, the application of the provisions of the POCSO Act was quite justified. As regards the medical evidence, it is true that the doctor, P.W. 4 who examined the victim could not come to a conclusive finding as to the question of rape. First, the offence was preceded by a promise to marry. Secondly, the victim was examined medically after quite a few days from the alleged incident. Marks of injury might not be present. However, the victim categorically stated before the doctor that she was subjected to forceful intercourse. The prosecution, therefore, has been able to prove its case beyond reasonable doubt.

**8.** I have heard the submissions of the learned Counsels appearing on behalf of the appellant and the State and have perused the impugned judgment and order, the petition of appeal, the evidence and the other materials on record.

**Delay in lodging the First Information Report:**

**9.** Although the victim girl went missing on 19.10.2015 and thereafter returned home on 27.10.2015, P.W. 1, the elder brother of the victim girl

lodged the First Information Report on 06.11.2015. It is indeed surprising that no missing diary was lodged between 19.10.2015 and 27.10.2015. However, from the version of the victim girl, as unfolded in her examination under Section 164 of the Code and during trial, it appears that the appellant had lured the girl with a promise of marriage. After going through the entire evidence of the prosecution witnesses, it appears that some kind of promise to marry was given by the appellant that made the girl go with him. The delay between 27.10.2015 and 06.11.2015 has been explained by the P.W. 1, the de-facto complainant, being due to a “Salish” that was contemplated, as discussed with a panchayat member. But, the same did not materialise. In any event, law in our country deals with such delay in lodging complaints in cases of sexual assaults against women and children in a rather lenient manner. In the facts of the present case, this Court is of the view that the purported delay in lodging the First Information Report is not at all fatal to the prosecution case.

**Age of the victim girl:**

**10.** From the very inception, it was the case of the prosecution that the victim girl was a minor. Although no medical examination was done on this, the doctor examining the victim girl, P.W. 5 had no hesitation in recording the age of the victim girl as 16 years during examination. More importantly, P.W. 9, the school teacher produced the admission register showing that the victim girl was a minor at the date of occurrence. It is true that the school teacher admitted in his cross that he did not check any birth certificate while recording the age of the victim girl in the school register. But, this

should not matter much as no one would contemplate at the time of recording a female candidate's age in a school register that she could derive some advantage by giving a lesser age if such student gets ravished subsequently. This Court is satisfied with the evidence available regarding minority of the victim girl at the material point.

**Medical evidence:**

**11.** Since there was a delay in lodging the First Information Report, it is quite understandable that the examination of the victim girl, aged about 16 years at the time of occurrence, took place after a lapse of time. Although no injury was found in her private parts, this should not directly militate against the prosecution case. The intercourse, albeit forcible, was preceded by a promise to marry. The doctor could not come to a conclusive finding regarding the commission of rape. However, the doctor did record the victim's version that she was subjected to forcible sexual intercourse.

**Evidence of the minor victim:**

**12.** The crux of the victim's evidence is that upon a promise of marriage given by the appellant, the victim went with him and stayed at his house for a few days. She was subjected to sexual intercourse on a few occasions by the appellant. However, some time later, the appellant took her out, left her at a place and refused to get married to her. The stand taken by the victim is quite consistent, right from her statement before the learned Magistrate recorded under Section 164 of the Code till the recording of her evidence during trial. She could not be shaken during cross-examination. As such, this Court finds no reason to disbelieve the testimony of the minor victim girl. Had the case been that of an adult victim, one would have been

compelled to explore the issue of giving promise to marry more and also about whether the said promise preceded the act of sexual intercourse. But, in case of a minor victim girl, such exploration need not be so strict. A minor is incapable of giving consent to such an act.

**Defence Evidence:**

**13.** D.W. 1 claimed to be a Moulavi, who officiated a marriage between the appellant and the victim. D.W. 2 tried to pass off as a Kazi registering the said marriage. However, in his cross-examination, he admitted that he was not a properly appointed Kazi. D.W. 3 was the assistant of D.W. 1. Except for filling up the form, he denied any knowledge. When the admission of the D.W. 2 in his cross is juxtaposed with the evidence of the victim, it becomes crystal clear that no marriage had taken place between the appellant and the victim. On the other hand, from the very fact that the appellant tried to make out a case that there was a marriage between him and the victim girl, it appears that he acknowledged some kind of a connection between the two.

**14.** In view of the cogent and convincing evidence adduced by the minor victim girl supporting her statement recorded under Section 164 of the Code, the medical evidence and the evidence as regards the victim's age, I do not find any illegality in the impugned judgment and order of conviction and sentence passed by learned Trial Court.

**15.** Accordingly, the appeal is dismissed and the impugned judgment and order of conviction and sentence is affirmed.

**16.** Appropriate steps shall be taken by the learned Trial Court to have the amount of fine, if realised, sent to the victim girl.

**17.** Let a copy of this judgment and order along with the Lower Court records be sent back to the learned Trial Court forthwith by a Special Messenger for information and necessary action.

**18.** Urgent photostat certified copies of this judgment may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

**(Jay Sengupta, J)**

P. Adak