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CRA 747 of 2017
IA No: CRAN 1 of 2018
(Old No: CRAN 1927 of 2018)

In the matter of: Sahajan Ali @ Sahajahan Ali
... Appellant

Ms. Sreyashee Biswas
....for the appellant.

Mr. Narayan Prasad Agarwal
Ms. Subhasree Patel
Mr. Pratick Bose
....for the state.

Heard learned counsel for both the parties.

The conviction and sentence were awarded respectively under Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 and Section 376(2)(i) of the Indian Penal Code (IPC).

It appears from the evidence-on-record that, as rightly submitted by learned counsel for the appellant, there is no convincing evidence to prove, even *prima facie*, that the victim girl was a minor at the time of the alleged incident.

The incident allegedly occurred on July 2, 2015. However, it is clearly seen that the only '*proof*' of the date of birth of the victim girl was the photocopy of a birth certificate.

However, it is axiomatic in the law of evidence that secondary evidence can only be looked into by the court after

it is explained as to why primary evidence could not be produced. That apart, even the photocopy of the birth certificate was not proved by the issuing authority or any other competent witness. Hence, the court below could not look into the birth certificate as evidence at all.

Rather, although the mother of the victim girl, as PW-8, stated in her examination-in-chief that, at the time of incident, the victim girl was thirteen years of age, the very first few sentences of her cross-examination squarely demolishes such statement.

In her cross-examination, Saleha Khatun, the mother of the alleged victim, stated that one Jamsed married her about twenty years back from that date (the deposition was taken on February 6, 2017).

She next admitted that one Muslim married her ten years back *“from the date of marriage of mine with Jamsed”*. She specifically admitted that, after one year of her marriage with Muslim, her daughter Bilkis Khatun (the Victim Girl) was born.

The victim, in her evidence, admits that her father was the said Muslim.

In such view of the matter, the birth of the victim girl goes back to thirty years prior to the date of deposition, that is, approximately twenty-eight years prior to the alleged incident.

Hence, the natural corollary thereof is that the victim girl was about twenty-eight years old at the time of the alleged offence, as per her mother's own admission in cross-examination.

In view of such admission, no further proof was necessary to disprove the fact that the victim girl was not a minor at the relevant juncture, thereby precluding the presumption under Section 29 of the POCSO Act.

Although learned counsel appearing for the State seeks to contend that as the mother of the victim hails from a rural area, she might have had certain problems with calculations. However, the different time-intervals, as discussed above, were vividly stated by the PW-8.

That apart, such line of argument would vitiate the statement of the PW-8 in her examination-in-chief as well, where she states that her daughter was thirteen years of age.

As such, since Section 29 of the POCSO Act was not available, it was for the prosecution to prove the offence being committed beyond reasonable doubt. In the present case, the victim girl admitted that she had repeated sexual union with the accused previously.

It is evident from the statements of the victim girl herself that she was not only willing to marry the accused if the latter was agreeable, but also that the previous alleged incidents of sexual intercourse, if any, were entirely consensual.

Taken in conjunction, the factum of failure of the prosecution to prove the victim being minor at the relevant point of time, coupled with the fact that the consent of the victim girl on the previous occasions of her union with the accused was admitted, there is no scope of attracting Sections 5 or 6 of the POCSO Act to incriminate the accused.

That apart, the other count on which punishment was awarded was under Section 376(2)(i) of the IPC, which contemplates rape on a woman when she is under sixteen years of age. In the present case, as already discussed above, the age of the victim at the relevant juncture was not proved at all.

Hence, the question of the previous alleged instances of sexual intercourse being against the will of the victim and/or without her consent is ruled out.

The alleged “*promise to marry*” is not found within the four corners of Section 375 of the IPC to qualify penetration with the consent of the alleged victim as ‘rape’. That apart, it was never proved by any cogent evidence whatsoever, let alone beyond reasonable doubt, that the accused was the perpetrator of the previous incidents of sexual intercourse.

Although the medical report indicated that the victim had sexual intercourse previously, no present injury or mark came out from the report to indicate the alleged offence having been committed without the consent of the victim.

In such view of the matter, neither any ingredient of Section 5 and/or Section 29 of the POCSO Act, nor of Sections 375 and/or 376 are attracted to the present case.

It must be commented here that the prosecution was extremely callous in proceeding with the case, since neither any ossification test was taken of the victim girl, nor was any proper attempt made to prove the date of birth from the age certificate of the victim girl.

That apart, the prosecution, instead of ensuring that the vaginal swab test was taken within a reasonable time, waited for three days after the alleged incident to have such test.

Surprisingly, the result of such test, as given by the doctor, only indicates that the vaginal swabs, upon being labelled, were handed over to a lady constable, without the lady constable being ever produced as a witness and/or the samples of swab test being sent for forensic examination.

It is beyond imagination that the prosecution could take such an insensitive attitude while conducting a case, particularly under the POCSO Act.

However, despite such faults on the part of the prosecution, the evidence of the mother of the victim girl as well as the other evidence on record, taken in conjunction with the deposition of the victim girl, clearly failed to prove the offences alleged against the accused even on the anvil of

preponderance of probability, leave alone beyond reasonable doubt.

As such, the court below erred in law and in fact in awarding the conviction and sentence against the accused by the impugned judgment and orders dated December 7, 2017 and December 8, 2017.

Accordingly, CRA 747 of 2017 is allowed, thereby setting aside the judgment and orders of conviction and sentence dated December 7, 2017 and December 8, 2017 passed by the Additional Sessions Judge, Second Court at Raiganj, Uttar Dinajpur in Sessions Trial No. 03 (04) of 2016 in POCSO Case No. 67 of 2015.

The appellant is hereby honourably acquitted and, if in custody, shall be released at the earliest upon communication of a server copy of this order to the concerned correctional home authorities.

The appellant/accused stands discharged of all conditions and bail bond, if any, furnished by the appellant before any court in connection with the present offences.

That apart, the appellant is given the liberty to approach the appropriate forum for damages/compensation for the apparent injustice done to him at the instance of the alleged victim and her family.

The alleged victim is also given liberty to pray for appropriate compensation before a competent forum for the

lackadaisical attitude exhibited by the prosecution during the course of investigation and the trial of the case.

It is made clear that all parties, as well as the superintendent of the concerned correctional home, where the appellant is in custody, if at all, shall act on the server copy of this order without insisting upon prior production of a certified copy.

This direction is peremptory and, in the event of defiance, the superintendent of the concerned correctional home shall run the risk of committing contempt of court, since some such instances have come to the fore recently.

CRAN 1 of 2018 (Old No: CRAN 1927 of 2018) is accordingly disposed of.

Urgent website certified copies of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Sabyasachi Bhattacharyya, J.)