

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRA 757 of 2014

Matiur Rahaman

-Vs-

The State of West Bengal

For the Appellant: Mr. Imtiaz Ahmed, Adv.,
 Mr. Gazala Firdaus, Adv.,
 Md. Zeeshan Uddin, Adv.,
 Mr. Amrin Khatoon Adv.,
 Md. S. Uddin, Adv.,

For the State: Mr. S.G Mukhopadhyay.,
 Ms. Faria Hossain

Heard on: April 9, 2021.

Judgment on: July 15, 2021.

BIBEK CHAUDHURI, J. : –

1. The instant appeal is directed against the judgment and order of conviction and sentence dated 29th November, 2014 and 1st December, 2014 respectively passed by the learned Additional Sessions Judge, 2nd Court at Krishnanagar in Session Trial No.III(VIII) of 2014 corresponding to Sessions Case No.7(12) of 2013 (Spl.). By the impugned judgment of conviction and order of sentence. The appellant was convicted and

sentenced to suffer imprisonment for five years and also to pay fine of Rs.5000/- in default imprisonment for a further period of three months for committing offence under Section 8 of the Protection of Children from Sexual Offences Act (hereafter described as POCSO Act for short).

2. Kaliganj P.S Case No.572 of 2013 dated 31st August, 2013 was registered under Section 376(2)(I) of the Indian Penal Code (IPC) on the basis of a written complaint submitted by one Ikbali Hossain. The defacto complainant has alleged that on 30th August, 2013 at about 6 pm, a neighbour of the defacto complainant, namely Matiur Rahaman allured his 7 year old daughter to give some chocolate and took her to the back side of his shop. Then the accused committed rape upon her. The daughter of the defacto complainant returned home weeping and reported the matter to the defacto complainant and other relatives and also complained of feeling pain at her vagina. She further told that the appellant committed such act also previously with her for several times.

3. Investigation of the above mentioned police case ended in filing charge-sheet under Section 376 of the IPC against the accused.

4. After commitment, the case was transferred to the 2nd Court of the learned Additional Sessions Judge at Krishnanagar. The learned trial judge framed charge against the accused under Section 8 of the POCSO Act. The charge so framed was read over and explained to the accused to which he pleaded not guilty and accordingly trial of the case commenced.

5. The lower court record shows that in order to establish the charge prosecution examined in all nine witnesses. Some documents were

marked exhibits which I propose to refer subsequently in the body of the judgment.

6. The accused was examined under Section 313 of the Code of Criminal Procedure. However he did not examine any witness in support of his defence. He only filed a handicapped certificate issued by the Superintendent, District Hospital, Nadia to prove that he is 65% orthopedically handicapped. The said document was marked Exhibit-A during trial as a public document.

7. The learned trial judge on consideration of evidence on record held the accused person guilty for committing offence under Section 8 of the POCSO Act and convicted him. The accused was sentenced to suffer imprisonment for five years for the offence punishable under Section 8 of the POCSO Act and also to pay fine of Rs.5000/-, in default, to undergo imprisonment for three months more. The appellant has challenged the impugned judgment and order of conviction and sentence in the instant appeal.

8. It is submitted at the outset by the learned Advocate for the appellant that the learned trial judge convicted the appellant without proper material on record. In order to substantiate his contention he first refers to contents of the FIR filed by the father of the victim. In the FIR, it is clearly alleged that the victim was raped by the accused/appellant. Not only this, the accused/appellant committed similar offence upon the victim previously on several occasions. However from the evidence of the victim who on the date of examination was aged about eight years, it is

ascertained that on the date and time of occurrence the appellant allegedly pushed her back (buttock) as a result of which she sustained pain on her buttock. She informed the matter to her mother and then she was taken to Kaliganj Hospital. The Medical Officer examined her medically. It is also stated by the victim in her evidence that she previously made a statement before the learned Magistrate under Section 164 of the Code of Criminal Procedure. Her signatures on her statement were marked Exhibit-1 and 1/1 respectively. In her cross examination she admitted that she made statement before the learned Magistrate as per instruction of her mother on the date of occurrence. She went to the shop of the appellant on being told by somebody which she cannot recollect.

9. PW2 is the mother of the victim who stated on oath that on 30th August, 2013 at about 5.30 to 6.00 pm she sent her daughter to purchase egg. After sometime, her daughter returned her house weeping. She told her mother that appellant called her saying that he would give her some chocolate. When the victim went to him, the appellant put off her pant and pushed his penis on the vagina of her daughter. The victim was suffering burning sensation on her vagina. PW2 informed the said fact to her family members then trouble started between the accused and the family members of the defacto complainant.

10. PW3, Morjina Bibi is the sister-in-law of PW2. She corroborated the evidence of PW2 in her evidence. It is also stated by her that the victim narrated the fact to her. PW6 is the defacto complainant. He also stated

that he heard from her daughter that the appellant took her to a narrow lane near a bathroom and committed rape upon her.

11. It is vehemently argued by the learned Advocate for the appellant that while the victim narrated that she was allegedly pushed from behind by the accused and sustained pain on her buttock, her parents and other relative exaggerated the incident and alleged that the victim was raped by the appellant. Not only this they also came to know from the victim that the appellant committed similar offence with her previously.

12. Learned Advocate for the appellant next draws my attention to the evidence of PW5. PW5 who is a gynecologist and posted to Nadia District Hospital, Krishnanagar on 31st August, 2013. On that day, he examined the victim but did not find any evidence of forceful intercourse. No external injury was also found on her private part. The medical examination report was marked as Exhibit-4. Learned Advocate for the appellant also refers to the statement of the victim recorded under Section 164 of the Code of Criminal Procedure. In the said statement the victim stated that one day when she was going to purchase egg and surf, the appellant put off her pant and pushed her back. Then she returned her house crying and narrated everything to her mother.

13. It is pointed out by the learned Advocate for the appellant that the mother of the victim (PW2) stated in her evidence that her daughter was raped by the accused. If the evidence of PW2 and the victim (PW1) are read together, it would be found that either of them had exaggerated the incident. Therefore, evidence of both the victim and her mother cannot be

accepted. The learned trial judge committed gross error in evaluating the evidence of the victim by placing reliance when her parents had given an exaggerated account of the alleged incident.

14. Thus, it is submitted by Mr. Ahmed, learned Advocate for the appellant that the learned trial judge wrongly held the accused guilty for committing offence under Section 8 of the POCSO Act on the basis of the principle of reverse burden contained in Section 29 of the POCSO Act.

15. The words appearing in Section 29 of the POCSO Act "Where a person is prosecuted..." embraces a complete exercise on the part of the prosecution to prove the prime allegation set out in F.I.R. corresponding to the charge framed against the accused person during the course of trial, which is of course rebuttable subject to developing a strong case, contrary to that established by prosecution during cross-examination by defence. When a different story is developed during trial by the victim, contrary to the story of prosecution, and that developed story received ratification from the near relatives of the victim, in the given facts situation, it stands to reasons that despite having been provided with sufficient opportunity to prove the case, prosecution failed to establish incident complained of in the F.I.R. In support of his contention Mr. Ahmed refers to a decision of the Division Bench of this Court in **Subrata Biswas & Anr. Vs. The State** reported in **(2019) SCC OnLine (Cal) 1815**.

16. Learned P.P-in-Charge, on the other hand submits that the appellant was convicted and sentenced to imprisonment for committing

offence of sexual assault upon the victim under Section 8 of the POCSO Act.

17. Section 7 of the POCSO Act defines sexual assault as hereunder:-

“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.”

18. Learned P.P-in-Charge draws my attention to the statement of the victim recorded under Section 164 of the Code of Criminal Procedure. It is submitted by him referring to the said statement of the victim which was recorded by the learned Judicial Magistrate immediately after occurrence that the victim did not state any incident of penetrative sexual assault committed upon her by the appellant. On the other hand it is the statement of the victim that the appellant pushed on her buttock. She also did not state anything about the object with the help of which the appellant allegedly pushed the victim on her buttock.

19. Thus, the victim and her parents gave two different accounts of the story. According to the FIR the victim was subjected to penetrative sexual assault and she was feeling pain and burning sensation at her vagina after the incident. The FIR narrates the same story as stated by the parents of the victim but the victim on the contrary, stated that she was pushed from behind.

20. It is needless to say that statutory presumption under Section 29 of the POCSO Act applies when a person is prosecuted for committing offence under Section 5 and 9 of the Act and a reverse burden is imposed on the accused to prove the contrary. The word “is prosecuted” in 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 a case without the prosecution laying the firm contours thereof by leading reliable and admissible evidence. Such an interpretation of the said provision is that in a case where the person is prosecuted under Section 5 and 9 of the POCSO Act, the prosecution is absolved of the responsibility of proving its case beyond reasonable doubt. On the contrary, it is only required to lead evidence to establish the ingredients of the offence on a preponderance of probability. Upon laying the foundation of its case by leading cogent and reliable evidence which does not fall foul of patent absurdities or inherent probabilities, the onus shifts upon the accused to prove the contrary.

21. Plain reading of Section 29 of the POCSO Act shows that the statutory presumption under Section 29 of the POCSO Act is not available in case of an offence punishable under Section 8 of the said Act.

22. In the instant case the prosecution has failed to establish its own case narrated in the FIR. Moreover, it is found from the evidence on record that there remains a long standing dispute over the landed

properties between the defacto complainant and his family members and the accused over landed property.

23. In view of such circumstances, false implication of the accused cannot be ruled out.

24. For the reasons stated the instant appeal is allowed on contest.

25. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 2nd Court at Krishnanagar in Session Trial No.III(VIII) of 2014 corresponding to Sessions Case No.7(12) of 2013 (Spl.) is set aside.

26. The appellant is acquitted from the charge, set at liberty and released from bail bond.

27. Let a copy of this judgment be supplied to the appellant free of cost.

28. Let a copy of this judgment be sent to the trial court along with lower court record forthwith.

(Bibek Chaudhuri, J.)