

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

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

**C.R.A. 325 of 2019
with
CRAN 3 of 2021**

**Sonu Gupta @ Sonua
-Vs-
State of West Bengal & Anr.**

For the Appellant : Mr. Anshuman Chakraborty, Adv.

For the State : Ms. Zareen. N. Khan, Adv.
Mr. Arup Sarkar, Adv.

Heard on : 5th August, 2022

Judgment on : 5th August, 2022

Joymalya Bagchi, J. :-

Appellant has assailed against judgment and order dated 14.09.2018 passed by learned Additional District & Sessions Judge, First Court, Sealdah, South 24 Parganas-cum-Special Judge under POCSO Act in Special Case No. 03 of 2018 convicting the appellant for commission of offence punishable under Section 6 of the POCSO Act and sentencing him to suffer imprisonment for ten years and to pay a fine of Rs.1,00,000/-, with further direction 90 per cent of the fine

amount, if realized, shall be awarded to the victim as compensation under Section 357 of the Code of Criminal Procedure, in default to suffer rigorous imprisonment for one year more.

Prosecution case as alleged against the appellant is to the effect is as follows:

Appellant was a neighbour of the victim girl. He tried to seduce her in various ways. When mother of the victim went out to work, appellant had sexual relationship with the victim by seducing her. On 30.12.2017 at 10 P.M. mother of the victim returned home and found the appellant had gagged the victim and was raping her. Seeing her, appellant fled away. Written complainant was lodged by mother of the victim (PW5) resulting in registration of Narkeldanga P.S. Case No. 1 of 2018 under Sections 4/6 of the POCSO Act. On that day, victim was treated at NRS Medical College and Hospital by PW 3. She was also medically examined by PW 2. She made statement before learned Magistrate. Appellant was arrested and charge-sheet was filed against him. Charge was framed under Section 6 of POCSO Act and under Section 376(2)(n)(i) of the Indian Penal Code. Appellant pleaded not guilty and claimed to be tried. Prosecution examined 14 witnesses to prove its case. Defence of the appellant is one of innocence and false implication.

In conclusion of trial, learned Trial Judge by the impugned judgment and order dated 14.09.2018 convicted and sentenced the appellant, as aforesaid.

Mr. Chakraborty, learned Counsel for the appellant submits allegation of forcible rape is out and out false. History of rape noted by the medical officers PWs 2 and 3 state there was consensual relationship between the parties. Date of occurrence is doubtful. Victim (PW 1) was unable to state the date of the incident. While in FIR it is alleged incident occurred on 30.12.2017, de-facto complainant and mother of the victim (PW 5) deposed incident occurred on 25th December. Birth certificate of the victim shows she was above 12 years in December, 2017. Hence, conviction under Section 6 of the POCSO Act is not maintainable.

Ms. Khan, learned Counsel for the State submits evidence of the minor (PW.1) read in the light of First Information Report and medical documents would establish, beyond doubt, that incident occurred on 30.12.2017. Inadvertently mother of the victim (PW.5) deposed in court that incident occurred on 25th December. Ocular version of the witnesses is corroborated by medical evidence and prosecution case has been proved beyond doubt.

PW1 is the minor victim. She deposed incident occurred one year ago at 10 P.M. Appellant had gagged her mouth and committed penetrative sexual assault. Her mother came to the spot. She assaulted

the appellant. On the next day she lodged written complainant. Victim was medically examined. She put her signature on the medical document and also made statement before police.

PW3 (Dr. Doyel Pradhan) examined the victim on 01.01.2018 at NRS Medical College and Hospital. She recorded the history from the victim who stated there was sexual relationship between her and appellant for the last two years. On 30.12.2017 appellant entered the room and committed penetrative sexual assault when her mother came to the spot and caught the appellant. On examination, she found the victim's hymen was ruptured. She proved the report marked as Ext. 4.

PW2 (Dr. Molly Banerjee) another medical officer made similar entry with regard to the history of the case in the medical report (Ext. 1/1). She examined the victim on 10.01.2018. Upon examination she found victim's hymen was fimbriated, enlarged, thickened with an old healed tear at 6 O'clock position extrusion hymen through the vaginal orifice. She opined victim was subjected to sexual intercourse on repeated occasions.

PW5, mother of the victim, proved the birth certificate of the victim girl marked as Ext.6. She deposed on 25th December, she came to the house and saw the appellant had gagged her daughter and was lying down on her body. She shouted and the appellant fled away. Her statement was recorded by darogababu of Narkeldanga police station. She made statement before Magistrate.

PW 14 (Prasenjit Koley) is the investigating officer. He recorded the statement of PW5. He drew up First Information Report. He went to the place of occurrence. He recorded statement of the witnesses. He sent the victim girl for medical examination. He forwarded the victim girl for recording statement under Section 164 Code of Criminal Procedure. He seized birth certificate and Aadhaar Card of the victim under seizure list. Wearing apparels of the victim were also seized. He sent the wearing apparels for FSL examination. He arrested the accused and submitted charge-sheet.

Birth certificate of the victim was produced in court marked as Ext. 6. In the birth certificate date of birth of the victim is recorded as 22.10.2005. Hence, the victim was above 12 years and two months at the time of the incident.

Mr. Chakraborty, learned Counsel argued date of occurrence is doubtful. Though in the FIR it is alleged appellant raped the victim on 30.12.2017, mother of the victim and de-facto complainant (PW.5) in court deposed incident occurred on 25th December. Victim did not specifically state the date of occurrence. Victim was a 12 year old girl at the time of occurrence. In court she was examined in May, 2018 and deposed incident occurred one year ago. She also deposed her mother came to the spot and lodged FIR on the next day. Evidence on record shows FIR was lodged on 01.01.2018. On the same day, victim was medically examined by PW3. In these documents it is unequivocally

alleged appellant had sexually intercourse with the victim on 30.12.2017. Though in the FIR, PW 5 alleged incident occurred on 30.11.2017, in Court, she stated incident occurred on 25th December. This appears to be an inadvertent error on her part.

In view of the overwhelming evidence on record including the First Information Report as well as recording in the history of the case in the medical records marked as Ext.4 as well as Ext.1, I have no doubt in my mind that the victim had been subjected to penetrative sexual assault on 30.11.2017.

Mr. Chakraborty, learned Counsel further argued that allegation of forcible rape is out and out false. This version is contrary to the history of the case as narrated in the medical papers marked as Exts. 3 and 1/1. History of the case in the medical papers disclose free mixing and sexual relationship between the parties for last two years. It is also noted on 30.12.2017 when appellant was involved in penetrative sexual assault mother of the victim (P.W. 5) came to the spot and caught him. From the tenor of the narration of the history before the medical officers, I have serious doubt whether appellant had forcibly raped the victim. However, it is undeniable the victim was 12 years and two months old at the time of the incident and her consent to the sexual intercourse was immaterial. Hence, the appellant is guilty of statutory rape. In Court, victim and her mother were silent with regard to previous sexual intercourse between the parties. As discussed earlier,

victim was above 12 years at the time of occurrence. Hence, I am inclined to convert the conviction of the appellant from the offence punishable under section 6 to section 4 of POCSO Act.

However, in view of Section 42 of POCSO Act sentence imposed on the appellant shall remain unaltered.

Appeal is accordingly allowed to the aforesaid extent.

In view of disposal of the appeal, connected application being CRAN 3 of 2021 is disposed of.

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon him in terms of section 428 of the Code of Criminal Procedure.

Lower court records along with copies of this judgment be sent down at once to the learned trial Court.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)

cm/sdas/PA