

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

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

CRA 300 of 2021

Rahul Ram

VS.

The State of West Bengal & Anr.

For the Appellant : Ms. Sreyashee Biswas,
Ms. Puja Goswami, Advocates

For the State : Mr. Saswata Gopal Mukherji, Id. PP
Mr. Partha Pratim Das,
Mrs. Manasi Roy, Advocates

Heard on : **August 3, 2022 and August 5, 2022**

Judgment on : **August 5, 2022**

DEBANGSU BASAK, J.:-

1. The appeal is against the judgment of conviction dated August 24, 2021 and the order of sentence passed by the learned Special Judge, POCSO Court, Sealdah, South 24 Parganas in Sessions Trial no. 02(12) of 2020 arising out of

Special Case no. 23 of 2020 convicting the appellant under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Section 363 of the Indian Penal Code, 1860.

2. The appellant was convicted for a period of 10 years under Section 4 of the POCSO Act, 2012 and for a period of 7 years under Section 363 of the Indian Penal Code, 1860. A fine was also imposed upon the appellant. In default, the appellant was directed to suffer further rigorous imprisonment. Both the sentences were directed to run concurrently.

3. The case of the prosecution is that, on January 22, 2020 at around 3 PM, the de facto complainant found that his minor daughter was missing. On inquiry, the de facto complainant learnt that his daughter went to tuition. Since she did not return, he lodged the police complaint against the appellant believing that the appellant kidnapped his minor daughter as the appellant was having previous affection in respect of his daughter.

4. A missing diary was lodged on January 24, 2020 by the father of the victim. On the basis of such missing diary, a

formal First Information Report no. 24 dated January 24, 2020 was registered with the Tangra police station under Sections 363/34 of the Indian Penal Code, 1860 with Section 4 of the POCSO Act, 2012 being added subsequently. After completion of the investigation, Charge Sheet no. 130 dated November 19, 2020 was submitted by the Investigating Officer against two persons namely the appellant herein and his friend under Sections 363/34 of the IPC and under Section 4 of the POCSO Act, 2012. Primarily, charges were framed against the two accuseds including the appellant under Sections 363/34 of the IPC and under Section 4 of the POCSO Act, 2012. Both the accuseds namely, the appellant and his friend, claimed not guilty and pleaded to be tried. They were tried before the learned Trial Judge.

5. The prosecution examined 10 witnesses at the trial. The prosecution also relied upon various documents which were marked Exhibits at the trial.

6. The prosecution examined the victim as the first prosecution witness. She, in her examination-in-chief, claimed that there was a love affair between her and the

appellant for the last two years. She did not want to continue with such relationship. Despite that, the appellant forced her to marry him. Then the appellant took her to Delhi where they stayed in the house of the friend of the appellant. During their stay at Delhi, the appellant assaulted her several times when she expressed her wish for returning to her paternal home. Appellant assaulted her on flimsy grounds. She tried to escape from there but the appellant resisted her. One day, she got a chance to talk to her parents over telephone and informed them about such facts.

7. In her evidence prosecution witness no. 1, the victim, claimed that despite objections, the appellant committed physical relation with her forcibly. She claimed that the Delhi police rescued her. She told that initially she was kept in the Home of Prayas. Thereafter, she was handed over to her parents.

8. With regard to a suggestion given on behalf of the appellant as to her age, the prosecution witness no. 1, the victim, claimed that her age was not more than 17 years old.

9. The Doctor examining the appellant for potency deposed as the prosecution witness no. 2. He proved the potency report of the appellant which was marked as Exhibit-3. The appellant had declined to cross-examine the prosecution witness no.2.

10. The mother of the victim deposed as prosecution witness no. 3. She stated in her evidence that, the house of the appellant was adjacent to their house. Previously, the appellant told her husband that he wished to marry her daughter. Her husband, however, refused to accept such proposal. She stated that her daughter sent messages to her husband that they were in Delhi whereupon, she and her husband went to Delhi and rescued their daughter. In cross-examination, she stated that, they were searching for bridegroom for her daughter.

11. The father of the victim deposed as prosecution witnesses no. 4. In his examination-in-chief, he stated that, about two weeks prior to the incident, the appellant talked to him over telephone where the appellant expressed his desire to marry his daughter. He refused such proposal. For such reason, he

suspected that the appellant took her daughter away. So far as the age of the daughter is concerned, he stated that she was 17 years and 2 months at the time of lodgment of the missing diary. He stated that, the police seized the Aadhar Card of his daughter, the discharge certificate of the mother of the daughter, polio card issued by the Health Department and one photocopy of the Aadhar Card of her daughter. At the trial, photocopies of such four documents were tendered in evidence which were marked as Exhibits subject to objection.

12. In cross-examination, the father of the victim as prosecution witness no. 4 denied the suggestion that the seized documents were manufactured and that the age of his daughter was more than 19 years.

13. A neighbour of the victim was examined as prosecution witness no. 5. There is nothing material so far as his evidence is concerned in the facts of the present case.

14. The Doctor who examined the victim at Delhi was examined as prosecution witness no. 6. She examined the victim on April 19, 2020. She stated in her examination-in-chief that the victim told her that the victim got married to the

appellant on January 22, 2020 at Metropolitan Durga Mandir at Kolkata. They did not register the marriage. Only proof with regard to the marriage was in the mobile phone of the appellant. They were living together in Okhla, Delhi and they started consensual sex. Their last contact was on April 15, 2020 at around 09.00 pm. Prosecution witness no. 6 as the Doctor produced the medical examination report of the victim which was marked as Exhibit-13 subject to objections. In the cross-examination, she stated that all the medical examination papers were photocopies of the original.

15. The sub-Inspector of Delhi Police who arrested the appellant was examined as prosecution witness no. 7. He arrested the accused on April 20, 2020. He produced the accused before the jurisdictional Court whereupon the learned Court sent the appellant to jail custody at Tihar Jail, New Delhi. He stated that the appellant and the victim were in a rented house situated in Tekhkhand Villa, New Delhi. In cross examination, prosecution witness no. 7 stated that the victim confided in him that she was a friend of the appellant. He also stated that her father went along with her to drop her at the

school and she married to the appellant at Calcutta Metropolitan Durga Mandir. She also stated that the appellant did not apply force upon her.

16. Another police personnel of Delhi Police was examined as prosecution witness no.9 who produced the seizure list. He also produced the medial examination papers of the accused and the victim and other papers which were seized by preparing a seizure list. Such documents were marked as Exhibits-10 to 13.

17. The Sub-Inspector of Police conducting the investigation was examined as prosecution witness no.10. He narrated how the First Information Report was made. After conclusion of the investigations, he submitted charge sheet under Section 363/34 of the Indian Penal code read with Section 4 of the POCSO Act, 2012. He also narrated the police obtaining assistance of the Delhi Police for the purpose of rescuing the victim. He stated that on June 15, 2020, he seized Aadhar Card of the victim, discharge certificate of Gouri Devi, Polio Card and one photocopy of the Admit Card of the victim also.

He stated that such seizure was made by preparing the seizure list which was marked as Exhibit-5.

18. The appellant had been examined under Section 313 of the Code of Criminal Procedure where he had denied his involvement. He had claimed that the victim had told him that she was more than 20 years of age.

19. Learned Advocate appearing for the appellant submits that the prosecution failed to prove the charges against the appellant beyond all reasonable doubts. She submits that the age of the victim was not established conclusively. She refers to the examination-in-chief and cross-examination of the victim as also the various witnesses produced by the prosecution. She submits that there was no recovery of any obscene photo or video. She refers to the time of recovery of the victim. She also refers to the submission of the appellant recorded under Section 313 of the Code of Criminal Procedure.

20. With regard to the age of the victim, she submits that her age was not conclusively established for the learned Trial Judge to invoke the provisions of Section 4 of the POCSO

against the appellant. She submits that the prosecution sought to rely upon four documents for the purpose of establishing the age. Photocopies of such documents were sought to be tendered as evidence and they were marked exhibits being Exhibits-6 to 9 with objection. The learned Trial Judge did not decide on the objection raised by the appellant prior to relying upon such documents in the impugned judgment of conviction. She submits that the learned Trial Judge erred in not deciding the objection as to the documents sought to be marked as Exhibits on behalf of the prosecution in particular the Exhibits-6 to 9.

21. Learned Advocate for the appellant relies upon (2001) 3 SCC 1 (Bipin Shantilal Panchal vs. State of Gujarat & Anr.), (2003) 8 SCC 752 (R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and Anr, (2010) 8 SCC 423 (Shalimar Chemical Works Limited vs. Surendra Oil and Dal Mills (Refineries) & Ors. and (2013) 2 SCC 114 (U. Sree vs. U. Srinivas) in support of her contention that exhibits 6 to 9 cannot be looked into and considered by the learned Trial Judge to convict the appellant.

22. So far as the age of the victim is concerned, she submits that leaving aside the documentary evidence which should not be looked into, the parents of the victim claimed that the victim was 17 years of age and 2 months old. She submits that even such claim of the parents of the victim are unreliable. The appellant in his statement under Section 313 of the Code of Criminal Procedure stated that he was informed by the victim during their relationship that the victim was 20 years of age. She points out to the evidence of the prosecution witness no.2, the mother of the victim, who stated in her deposition that the family of the victim was looking out for the bridegroom of the victim. She submits that such action presumes the fact that the victim was an adult. She submits that the prosecution did not undertake ossification test of the victim in order to establish her age.

23. Learned Advocate appearing for the appellant submits that in absence of the age of the victim being conclusively established, the provisions of the Act of 2012 cannot be invoked as against the appellant.

24. So far as the charge of Section 363/34 of the Indian Penal Code, 1860 is concerned, she submits that the co-accused was acquitted. She refers to the evidence of the prosecution witnesses and submits that the victim at various places confided with various independent witnesses that the prosecution examined, that she went voluntarily with the appellant. Consequently, according to her, the charge under Section 363 of the Indian Penal Code, 1860 was not established as against the appellant. In any event, she submits that since the prosecution failed to establish the age of the victim, the question of invocation of Section 363 of the Indian Penal Code, 1860 as against the appellant does not arise. She refers to Section 363 of the Indian Penal Code, 1860 and submits that the same can be invoked only and only if the person concerned is a minor and that the accused takes away such minor from the custody of lawful guardian under which the minor was at the material point of time. She submits that since none of the ingredients under Section 363 of the Indian Penal Code, 1860 was established, the appellant should be acquitted of such charge also.

25. Learned Advocate appearing for the State submits that the prosecution was able to prove the charges beyond all reasonable doubt. He submits that the victim was a minor daughter when she was abducted. Therefore, the provisions of Section 363 of the Indian Penal Code, 1860 stands attracted. Since the victim was a minor and there was a physical relationship between the appellant and victim so also the provisions of Section 4 of the Act of 2012 stands attracted.

26. The central issue in the present case is the age of the victim. Determination of the age of the victim is crucial in view of the nature of charges levelled as against the appellant. The charges are under Section 363/34 of the Indian Penal Code, 1860 and under Section 4 of the Act of 2012.

27. Section 363 of the Indian Penal Code, 1860 stands attracted when a person is kidnapped from India or from lawful guardianship. Kidnapping from lawful guardianship has been defined in Section 361 of the Indian Penal Code. It involves taking away or enticing a minor. Section 4 of the Act of 2012 also will stand attracted when the victim is a minor.

To bring home the charges under Section 363 of the Indian Penal Code, 1860 and Section 4 of the Act of 2012 the prosecution, therefore, needs to prove beyond all reasonable doubt the age of the victim.

28. In the facts of the present case, the prosecution relied upon documents as well as oral testimony to establish the age of the victim. Four documents which were marked as Exhibits-6 to 9 were the documents that the prosecution relied upon to establish the age of the victim. Exhibits-6 to 9 were tendered by prosecution witness no.4, who is the father of the victim in his testimony. At the trial, Exhibits-6 to 9 were marked with objection.

29. Exhibits-6 to 9 are photocopies of the Aadhar Card, the discharge certificate of Gouri Devi, Polio Card issued by the NRS NC & H and photocopy of the West Bengal Board of Secondary Education Admit Card of the victim.

30. Section 64 of the Indian Evidence Act, 1872 requires documents to be proved by primary evidence except in the cases mentioned in the Act of 1872. Section 65 of the Act of 1872

specifies the cases in which secondary evidence relating to documents may be given. Section 65 of the Act of 1872 is as follows:

65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

(a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence; [India] to be given in evidence;"

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

31. The prosecution did not lead any evidence at the trial to establish any of the circumstances enumerated under Section 65 of the Act of 1972 to be attracted so as to allow the

prosecution to tender the documents marked Exhibits 6 to 9 in evidence. The learned Judge also did not decide the question of admissibility of secondary evidence particularly in relation to Exhibits 6 to 9 at any stage of trial or while directing the case finally.

32. Bipin Shantilal Panchal (Supra) deals with Sections 3 and 5 of the Indian Evidence Act, 1872 and issues certain practice directions with regard thereto. It is of the following view:

“14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the

objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

15. The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence-taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witness. The witness need not wait for long hours, if not days. Second is that the superior court, when the same objection is re-canvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding that objection, without bothering to remit the case to the trial court against for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.”

33.R.V.E. Venkatachala Gounder (Supra) deals with Section 65 of the Indian Evidence Act, 1872 and secondary evidence. It however does not take note of **Bipin Shantilal Panchal (Supra)**. It is of the following view:

“ 20. *The learned counsel for the defendants-respondent has relied on Roman Catholic Mission v. State of Madras in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, in the present one is a case which called for the correct proposition of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging document has been marked as “an exhibit”, an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document is admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as*

an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enable the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitle to object allows the party tendering the evidence to act as an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the parity tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objection, referred to hereinabove, in the latter case failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case,

acquiescence would be no bar to raising the objection in a superior court.”

34. In **Shalimar Chemical Works Limited (Supra)** while dealing with the admissibility of documentary evidence and taking note of **R.V.E. Venkatachala Gounder (Supra)** makes the following observations:

“15. On a careful consideration of the whole matter, we feel that serious mistakes were committed in the case at all stage. The trial court should not have “marked” as exhibits the xerox copies of the certificates of registration of trade mark in face of the objection raised by the defendants. It should have declined to take them on record as evidence and left the plaintiff to support its case by whatever means it proposed rather than leaving the issue of admissibility of those copies open and hanging. By making them as exhibits subject to objection of proof and admissibility. The appellant, therefore, had a legitimate grievance in appeal about the way the trial proceeded.”

35. Similarly, **U. Sree (Supra)** also deals with the admissibility of secondary evidence. It is of the view that mere admission of a document in evidence does not amount to its proof.

36. All the four documents on the basis of which age of the victim was sought to be proved by the prosecution being Exhibits 6 to 9 are photocopies. Photocopies are secondary evidence. The prosecution did not lead any evidence at the trial to establish the factual foundational basis as why the primary evidence was not being produced and why secondary evidence should be admitted at the trial. Till the prosecution establishes the photocopies of primary documents to be within Section 65 of the Act of 1872 secondary evidence cannot be looked into. In the facts of the present, given the nature of the documents of which secondary evidence was sought to be adduced, until the prosecution accounts for the non-production of the original documents, photocopies thereof cannot be admitted into evidence as exhibits. The learned Trial Judge erred in sustaining the objection raised by the appellant at the trial for marking the photocopies as Exhibits.

37. In absence of the prosecution leading evidence to account for the absence of primary evidence so as to lead secondary evidence thereon, the documents being marked Exhibits 6 to 9 cannot be treated as being validly exhibited at the trial.

Therefore, they cannot be considered as part of the evidence of the prosecution.

38. Age of the victim cannot be determined on the basis of such documents. The learned Trial Judge erred in not sustaining the objections, the appellant, at the trial, regarding marking of the photocopies as Exhibits. Once the documents being exhibits 6 to 9 goes out of the zone of consideration, then, the oral testimony of the prosecution witnesses remain so as to establish the age of the victim.

39. The oral testimony of the prosecution witnesses are not consistent with regard to the age of the victim. The mother of the victim does not speak of the age of the victim. Rather, she speaks of the family of the victim including her trying to find a bribe groom for the victim at the material point of time and prior to the incident. The provisions of the Prohibition of Child Marriage Act, 2006 allows one to infer that the victim was an adult at the material point of time as her family was in search of a bridegroom for her.

40. The father of the victim in his evidence claim that the victim was 17 years 2 months at the time of the incident. Such

claim is not backed up by any other evidence. The statement of the appellant recorded under Section 313 of the Code of Criminal Procedure shows that the appellant claimed that the victim confided in him that she was 20 years of age. In the facts of the present case, the oral testimony of the witnesses and the statement of the appellant recorded under Section 313 of the Criminal Procedure Code places the age of the victim anywhere between 17 years and 20 years.

41. In absence of conclusive evidence being led by the prosecution as to the age of the victim, it cannot be said that the prosecution was able to establish the age of the victim. The prosecution failed to establish that the victim was a minor. Since the age of the victim cannot be established conclusively, and more since it cannot be said conclusively that the victim was a minor, the question of invocations of the provisions of Section 363 of the Indian Penal Code, 1860 as against the appellant does not arise. On the parity of the same reasoning the invocation of Section 4 of the Act of 2012 also does not arise.

42. The learned Judge in the impugned judgment of conviction in paragraph 11 thereof proceeded on the basis of photocopies of documents being Exhibits 6 to 9 in order to determine the age of the victim. We cannot agree with such finding as was returned by the learned Judge for the reasoning as enumerated hereinabove.

43. The learned Judge also relied upon Section 29 of the Act of 2012 to state that the appellant failed to rebut the presumptions of the age of the victim. With the deepest of respect, we are unable to agree with such a view being taken by the learned trial Judge.

44. The appellant in his statement recorded under Section 313 of the Code of Criminal Procedure claimed that the victim confided in him that she was above 20 years old. Moreover the question of rebuttal of the presumption under Section 29 of the Act of 2012 will arise after the prosecution was able to prove the age of the victim beyond all reasonable doubt. In the facts of the present case, the prosecution failed to establish the age of the victim and consequently of the victim being a minor on the date of the incident beyond all reasonable doubt.

In such circumstances, we set aside the judgment of conviction and the order of sentence both dated August 24, 2021. The appellant is acquitted from all charges.

45. The Court is informed that the appellant is presently on bail. In view of Section 437A of the Code of Criminal Procedure, bond furnished by the appellant will continue to remain in force for a period of six months from date.

46. CRA 300 of 2021 along with all applications, if any, are disposed of.

47. Trial Court Records be returned to the appropriate Court forthwith.

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

(Debangsu Basak,J.)

49. I agree.

(Bibhas Ranjan De, J.)