

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHITTA RANJAN DASH.

AND

HON'BLE JUSTICE PARTHA SARATHI SEN

CRA (DB) 29 of 2022

With

CRAN 2 of 2022

Prafulla Mura

Versus.

The State of West Bengal

For the Appellant : Mr. Amal Krishna Samanta, Adv.

For the State : Mr. Bibaswan Bhattacharya, Adv.

Last Heard on : **25.07.2023**

Judgment on : **03.08.2023**

PARTHA SARATHI SEN, J. : –

1. In this appeal the judgement of conviction dated 01.12.2021 and order of sentence dated 02.12.2021 as passed in ST 8 of 2021 arising out of SC 155 of 2020 by the Learned Additional Sessions Judge, 2nd Court, Tamluk, Purba Medinipur has been impugned. By the impugned judgement learned trial court found the present appellant guilty of offence under Section 6 of POCSO Act and thus sentenced him to suffer R.I for 20 years and also to pay fine of Rs.25,000/- i.d. to suffer further R.I for six months with a recommendation to pay Rs. 3 lacs to the victim girl as compensation by the State Government after adjusting the interim compensation of Rs.50,000/- . The convict felt aggrieved and thus preferred the instant appeal.

2. For effective disposal of the instant appeal the facts leading to initiation of the aforesaid trial is required to be dealt with in a nutshell.

3. On 29.11.2020 one Shri X (name and other details not disclosed to avoid identity) the father of the alleged victim girl lodged a written complaint with the O/C Tamluk P.S, District Purba Medinipur stating inter alia that on 28.11.2020 a Kali Puja was held at his village where his daughter Ms. Y (name and other details not disclosed to avoid identity) (hereinafter referred to as the 'victim girl') went to participate along with some of her friends. It has been alleged further in the said written complaint that the present appellant who was then aged about 40 years took the victim to a nearby arum field (Kochu Bon) at about 8:30 pm and thereafter inserted his finger in the vagina of the victim girl as a result whereof the victim girl suffered bleeding injury and thereafter the victim girl narrated the entire incident to the informant and at that time she was crying. It is the further version of the informant that thereafter she was taken to Tamluk District Hospital where the victim was admitted for her treatment as her injury was serious. On the basis of the aforesaid written complaint Tamluk P.S Case no. 678 of 2020 dated 29.11.2020 under Section 376 AB IPC and Section 6 of POCSO Act was started.

4. Investigation was taken up and after completion of the same charge sheet was submitted both under Section 376 AB IPC and Section 6 of the POCSO Act against the appellant.

5. Lower Court Record reveals that on 22.01.2021 learned trial court being the Special Court under the POCSO Act considered the charges against the present appellant and accordingly charges under Section 376 AB

IPC and Section 6 POCSO Act were framed against the present appellant. Since the present appellant pleaded his innocence before the learned trial court, the trial proceeded.

6. Trial Court Record reveals further that for bringing home the charges as framed against the appellant the prosecution has examined 14 witnesses in all and several documents have been exhibited on their behalf. It is however pertinent to mention herein that before the learned trial court no evidence was adduced on behalf of the defence. However, from the trend of cross-examination and from the answers as given by the present appellant in course of his examination under Section 313 Cr.P.C, it appears that the defence case is based on clear denial and false implication.

7. The prosecution witnesses before the learned trial court can be categorized in the following manner:-

Private witnesses	Court Officials	Police Officials
PW1-victim girl.	PW11- A doctor of Tamluk Hospital under whom treatment of the victim girl was done.	PW8- A lady constable
PW2-informant and father of the victim girl.	PW12- Another doctor of Tamluk Hospital who conducted medico-legal examination of the victim girl.	PW10- Another lady constable
PW3-Grandmother of the victim	PW14- The doctor who examined the appellant.	PW8- Another lady constable
PW4- A co-villager of the informant		PW13- I.O.
PW5 -A co-villager of the informant		

PW7- A co-villager of the informant		
PW6-A quack doctor of the locality.		
PW9- Driver of the vehicle by which the victim was taken to hospital.		

8. On appreciation of the evidence, both oral and documentary as adduced by the aforementioned prosecution witnesses learned trial court considered that the evidence of the victim who is a minor is convincing and trustworthy and is unaffected by any external factors. Learned trial court also found that the evidence of the doctor who treated the victim i.e. PW11 read with the evidence of PW2 and PW3 are indicative of the offence under Section 6 of the POCSO Act with which the appellant was charged and the learned trial court also came to a specific finding that the injuries suffered by the victim girl at her private parts has been caused on account of aggravated penetrative sexual assault committed by the appellant and thus convicted the present appellant in the said case.

9. In course of his argument learned advocate for the appellant submits before this Court that the learned trial court while passing the impugned judgement most wrongly considered the evidence of the victim girl i.e. PW1 as gospel truth and learned trial court has equally failed to visualize that PW1 is basically a tutored witness which is evident from the evidence as adduced by PW2 (informant) and PW3 (the grandmother of the victim girl). It is further argued that while passing the impugned judgement learned trial court failed to visualize that the incident alleged to have occurred with the

victim girl by the present appellant cannot happen since on the relevant day and hour the P.O and its surrounding area was thickly populated on account of village Kali Puja and there cannot be any occasion to commit crime by the present appellant upon the victim. Drawing attention to the evidence of PW3 vis-à-vis Exhibit 4/1 being the bed head ticket and discharge certificate of the victim it is argued that if the aforesaid oral evidence and documentary evidence are considered together, it would reveal that PW3 being the grandmother of the victim girl to whom the victim girl first narrated the incident had stated altogether a different story about the alleged incident which according to PW3 occurred on account of an accident but in the FIR an altogether different story has been stated implicating the present appellant since there lies a village rivalry between the present appellant and the family members of the victim girl which is also evident from the cross-examination of PW3. It is further argued on behalf of the present appellant that in the impugned judgement learned trial court has misinterpreted the provision of Section 29 of the POCSO Act in a completely wrong perspective for which the instant appeal may be allowed by setting aside the impugned judgement.

10. Per contra, learned advocate for the State however contends that the learned trial court is very much justified in passing the impugned judgement since he found the evidence of PW1 being the victim girl is not the outcome of any tutoring or influence and that both PW2 and PW3 being the father and grandmother of the victim girl also adduced corroborative evidence which may not be doubted. It is further submitted that the learned trial court has rightly found that there are sufficient materials on record to

draw a presumption of guilt under Section 29 of the POCSO Act as against the accused which cannot be disproved by the accused in the said case and therefore the learned trial court is very much justified in passing the impugned judgement. Learned advocate for the State thus submits that it is a fit case for dismissal of the instant appeal.

11. We have meticulously gone through the entire materials as placed before us including the evidence as adduced before the learned trial court, both oral and documentary. We have also gone through the impugned judgement as passed by the learned trial court. We have given our due consideration over the submissions of the learned advocates for the rival parties.

12. In order to come to a logical conclusion of the instant appeal we propose to deal with the evidence of those prosecution witnesses which in our considered view are necessary for effective disposal of the instant appeal. On perusal of the evidence of PW1 being the victim girl it reveals to us that in her examination-in-chief she has given vivid description as to how the alleged incident occurred with her at the instance of the present appellant and thereafter she narrated the entire alleged incident to her grandmother (PW3) and thereafter her grandmother intimated the alleged incident to her father (PW2) and thereafter both of them took her to Tamluk Hospital where she was taken to O.T and in the O.T stitches were given in her private parts and latter she narrated the entire incident to a lady judicial magistrate. It thus appears to us that the examination-in-chief of PW1 is almost similar to the facts as stated by the informant in his written complaint being Exhibit 3.

13. At his juncture if we look to the evidence of PW2 i.e. the informant and the father of the victim it reveals to us that in his examination-in-chief he testified that on the relevant day and hour the present appellant called the victim girl to the backside of the temple which was a dark place. However, if we look to the cross-examination of PW1 it appears that PW1 being the victim in her cross-examination categorically stated that the entire temple area was illuminated with so many lights on the occasion of Kali Puja vis-à-vis if we also look to the cross-examination of PW3 we find that on the relevant day and hour some village people were preparing offerings (bhog) in the backside of the said temple. Such being the position in our considered view it is difficult to accept that on the relevant day and hour the backside of the temple was dark and lying vacant.

14. At this juncture if we look to the sketch map of the P.O being Exhibit 13 as prepared by the I.O i.e. PW13 it reveals to us that the P.O being the Arum field (Kochu bon) is situated on the northern side of the kali temple i.e. backside of the kali temple. From the cross-examination of PW2 it reveals also that there is a metal road beside the said Kali Temple. It is pertinent to mention herein that PW1, PW2 and PW3 in their respective examination-in-chiefs categorically stated that on the relevant day and hour the victim was taken to P.O from the courtyard of the Kali Temple through its backside. It is also the deposition of the said PWs that on the relevant day on account of Kali Puja many people assembled there but from the cross-examination of PW13 being the I.O it reveals to us that none of the witnesses stated before him that on the relevant day and hour they found the accused at the P.O. In view of such contradictory evidence the presence

of the present appellant at the P.O on the relevant day and hour has become really doubtful.

15. We have noticed another inconsistency in the evidence of PW2 and PW3 which the learned advocate for the State could not explain in course of his argument. As discussed above from the evidence of PW1, PW2 and PW3 it comes out that immediately after the alleged incident PW1 , the victim girl reported the incident to her grandmother being PW3 and PW3 in turn reported the said matter to his son PW2 being the informant and father of the victim and thereafter both PW2 and PW3 took PW1 (victim girl) to Tamluk District Hospital where PW2 and PW3 stated before the attending doctor that the incident occurred on account of fall of the victim girl upon a bamboo stick. In her evidence PW2 made an attempt to explain such discrepancy by saying that she has been advised to tell such version by one Gobindo Burman on the pretext it would facilitate quick admission in the hospital. Astonishingly, the said Govindo Burman has not been cited as a prosecution witness and therefore the present appellant being the accused before the learned trial court got no opportunity to cross-examine the said Gobindo Burman in order to test the veracity of PW3 with regard to her such testimony. The evidence of PW3 with regard to her statement before the doctor regarding the accident of PW1 (which was changed while lodging the FIR) becomes more suspicious in view of the following cross-examination of PW3.

“i. It is fact that there is a concrete road in front of the said temple.

ii. It is fact that a dispute was cropped up in between our family and the other villagers, regarding the construction of the said concrete pathway.

iii. Prafulla Mura is in the front line among those villagers at the time of the said dispute.

iv. It is fact that since then I have a dispute with accused Prafulla Mura.”

16. We have also noticed that before the learned trial court PW13 was contradicted with regard to the deposition of PW3 to which the said PW 13 being I.O testified the following:-

“None of the witnesses stated before me that they saw accused Prafulla Mura at P.O on the date and time of incident.

PW2 did not state before me that at the relevant point of time accused Prafulla Mura@ Chuna Mura of their village called his daughter to the backside of the said temple which was a dark place.”

“She also did not state before me that at that time she was listening Kirtan song near that temple and after sometime her granddaughter came to her in an undressed condition and told her that accused Chuna Mura did something with her and then her granddaughter dragged her to their house by pulling her sari and showed her wearing apparels, stained with blood.”

17. In view of the aforesaid clinching testimony of PW13 we have no doubt that the omission on the part of PW3 regarding the actual state of affairs to PW13 is definitely a material omission which tantamounts to contradiction as per the provision of proviso clause of Section 162 of Cr.P.C read with Section 145 of the Evidence Act. In this regard we may safely rely upon the reported decision of **Sunil Kumar Sambhu Dayal vs. State of Maharashtra** reported in **(2010) 13 SCC 657: (2011) 1 CCrLR (SC) 373**

wherein the Hon'ble Apex Court while dealing with Section 162 Cr.P.C and Section 145 (c) of the Evidence Act clearly indicates what tantamounts to material contradiction and/or omission in the following manner:-

“30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons.

31. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence.

32. The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt.”

18. Since in the impugned judgement learned trial court has come to a finding that there are sufficient materials on record to raise a presumption under Section 29 of the POCSO Act as against the accused which the

accused could not rebut, we think it prudent to have a look to Section 29 of the POCSO Act which reads as under:-

“Presumption as to certain offences.

Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

19. In the celebrated book ‘R.P. Kataria commentary on the Protection of Children From Sexual Offences Act, 2012’ , the author has analyzed the provision of Section 29 in the following manner:-

“ A perusal of the provision of the Section 29 of the POCSO Act, 2012(32 of the 2012), does show that it is for the accused to prove the contrary and in case he fails to do so, the presumption would operate against him leading to his conviction under the provisions of the POCSO Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witnesses would have to be accepted as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a proposition of law or interpretation of the presumption under Section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law.”

20. Keeping in mind the proposition of law as enunciated in Section 29 of the POCSO Act and its authoritative analysis and on overall consideration of the entire materials as gathered from the LCR it reveals to us that before the learned trial court the prosecution has miserably failed to establish the facts beyond reasonable doubt to form the foundation for presumption against the accused on account of the aforementioned inconsistency and therefore in our considered view, no occasion arises on the part of the present appellant to rebut such presumption. Thus we are constrained to hold that the learned trial court while passing the impugned judgement has failed to consider the true implication of Section 29 of the POCSO Act in its proper perspective for which our interference are very much warranted.

21. At this juncture we propose to refer a reported decision of ***State of Rajasthan vs. Raja Ram*** reported in ***(2003) 8 SCC 180*** where the Hon'ble Apex Court expressed the following view:-

“ The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case , one pointing to the guilt of the accused and the other to his innocence , the view which is favourable to the accused should be adopted.”

22. In view of the discussion made hereinabove we thus find sufficient merit in the instant appeal and accordingly the instant appeal is hereby allowed.

23. Consequently the impugned judgement of conviction dated 01.12.2021 and order of sentence dated 02.12.2021 as passed in ST 8 of

2021 arising out of SC 155 of 2020 by the learned Additional Sessions Judge, 2nd Court, Tamluk, Purba Medinipur is hereby set aside.

24. The present appellant being Prafulla Mura is thus found not guilty under Section 6 of the POCSO Act and is thus acquitted from ST 8 of 2021 arising out of SC 155 of 2020 as disposed of by the learned Additional Sessions Judge, 2nd Court, Tamluk, Purba Medinipur.

25. The present appellant be set at liberty at once if not wanted in connection with any other case.

26. So far as the order of the learned Trial Court regarding compensation is concerned, that is also waived in view of the acquittal of the appellant. We, however, confirm the interim compensation if already given to the victim as any order for refund of that amount shall cause harassment to the victim whose family is otherwise stated to be impoverished.

27. Department is hereby directed to forward a copy of this judgement along with LCR to the learned trial court who in turn shall transmit the copy of this judgement to the superintendent of the correctional home where the present appellant is detained now for his immediate release.

28. Department is further directed to forward a copy of this order to the Secretary, District Legal Service Authority, Purba Medinipur with a direction to the Secretary, District Legal Service Authority, Purba Medinipur to forward a copy of this judgment to the Superintendent of Correctional Home where the present appellant is detained now to expedite his release, if he is not wanted in connection with any other case.

29. Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

I agree.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)