

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 253 of 2021

Smt. Asha Das

Vs.

Akash Balmiki & Anr.

For the Appellant	: Md. Sabir Ahmed, Adv. Md. Abdur Rakib, Adv. Mr. Biswajit Sarkar, Adv. Miss. Suman Biswas, Adv. Mr. Dhiman Banerjee, Adv.
For the State	: Mr. Iqbal Kabir, Adv.
For the Private Respondent	: Mr. Tapan Duta Gupta, Adv. Mr. Sourodeep Singha, Adv. Mr. Amit Bikram Mahato, Adv.
Hearing Concluded on	: February 10, 2023
Judgement on	: February 10, 2023

DEBANGSU BASAK, J.:-

1. The appeal is directed against the judgement and order of acquittal dated March 22, 2021 passed by the learned Additional Sessions Judge first Court Special Judge POCSO Court, Sealdah, South 24 Parganas in Special Trial No. 10 (12) 2020 arising out of Special Case No. 41 of 2020 acquitting the respondents from the charge under Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012.

2. Learned advocate appearing for the appellant submits that, the learned judge failed to take into account the provisions of Section 29 of the POCSO Act. The learned judge failed to take into consideration that the private respondent failed to discharge his onus and burden of proof under Section 29 of the POCSO Act.

3. Learned advocate appearing for the appellant submits that, the incident happened on September 15, 2020 at around 630/7 PM. The complaint was lodged by the mother of the victim on September 19, 2020. The written complaint was registered as a First Information Report on September 23, 2020.

4. Learned advocate appearing for the appellant refers to the medical report which was tendered in evidence and marked as Exhibit 1 at the trial, by a doctor who deposed as PW 3. He submits that, the victim was examined by PW 3 at the relevant point of time. He refers to the contents of Exhibit 1. He submits that, such medical report being Exhibit 1 established that, the victim was subjected to penetrative sexual assault. In such view, he submits that, the prosecution as well as the learned trial Judge misdirected themselves with the regard to the evidence placed on record.

5. Learned advocate appearing for the appellant submits that, in view of Exhibit 1, the first respondent should be held guilty of penetrative sexual assault of a minor. The learned judge therefore, erred in convicting the first respondent.

6. Learned advocate appearing for the appellant relies upon **2022 Volume 5 Supreme Court Cases 545 (Attorney General for India Vs. Satish and Another)** and submits that, the private respondent failing to discharge his burden of proof under Sections 29 and 30 of the POCSO Act, he should be held guilty of the offence of penetrative sexual assault against a minor and appropriate punishment be awarded.

7. Learned advocate appearing for the first respondent submits that, there are material contradictions in the evidence of the prosecution. He highlights the same. He submits that, on the basis of such evidence placed by the prosecution, the first respondent cannot be convicted.

8. Learned advocate appearing for the first respondent relies upon **2019 Volume 3 Calcutta Criminal Law Reporter (Calcutta) 331 (Subrata Biswas & Anr. Vs. The State)** and submits that, the onus and the burden of proof under Sections 29 and 30 of the POCSO Act will arise only after the prosecution proves the case at least on the basis of

balance of probabilities as against the first respondent. In the facts of the present case, the prosecution failed to prove any of the charges as against the first respondent. Therefore, the question of the first respondent failing to discharge his onus under Sections 29 and 30 of the POCSO Act does not arise.

9. Learned advocate appearing for the state draws the attention of the Court to the evidence placed on record. He submits that to his knowledge, the State did not prefer an appeal from the impugned judgement of acquittal.

10. The mother of the victim lodged a written complaint with the police on September 19, 2020. In such a complaint, she stated that, the first respondent daunted and compelled her son to perform oral sex. She stated that, her son was told not to disclose such fact to anyone else otherwise the first respondent would kill her son. After the incident, her son fell ill. She brought her son to the police station so as to ensure that the first respondent received legitimate punishment.

11. The written complaint of PW 1 was registered as a First Information Report by the police on September 23, 2020. The police submitted a charge sheet in respect of such police case. The Court framed charges as against the first respondent on December 24, 2020. The first respondent was charged under

Section 6 of the POCSO Act. It was stated in the charge framed that the first respondent on September 15, 2020 at about 5 P.M. committed aggravated penetrative sexual assault upon the minor at the house of the first respondent.

12. The first respondent pleaded not guilty at the trial and claimed to be tried. The prosecution examined 9 witnesses at the trial. The prosecution relied upon various documentary and material exhibits. After conclusion of the evidence of the prosecution, the first respondent was examined under Section 313 of the Criminal Procedure Code where, the first respondent pleaded innocence and to be falsely implicated.

13. PW 1 is the victim. He stated that on September 15, 2020 at about 6/7 PM he and his friend were sitting at a place near the local tap water from where his mother collects water. At that time, the first respondent told them to play carrom and to go with him to do so. Then the first respondent took him and his friend to the house of the first respondent. The first respondent gave his mobile phone to the friend of the victim for playing game. The first respondent then took the victim to another room. After entering into such a room, the first respondent shut the door keeping the victim inside. The first respondent after removing his pant told the victim to take

the penis in his mouth. The victim denied to do so and asked the first respondent to let him go. The first respondent threatened the victim and told the victim that if the victim disclosed the matter to anyone he would kill the victim. Then, the victim went away from the room. The victim returned to his house and stated all the facts to his mother whereupon, her mother lodged the police complaint.

14. PW 1 stated that, he was produced before the hospital for medical examination. The medical examination report of the victim was tendered in evidence and marked as Exhibit 1. The consent form was marked as Exhibit 2. The statement of the victim recorded under Section 164 of the Criminal Procedure Code was marked as Exhibit 3.

15. In cross-examination, PW 1 stated that, he told the facts to his mother upon returning to his house.

16. PW 2 is the doctor who examined the first respondent on December 12, 2020. He stated that on examination he did not find any injury either over external genital area or over external genital body parts. He stated that, there is nothing to suggest that the first respondent was incapable of performing sexual intercourse in ordinary course of nature at the time of the examination. The report was tendered and marked as

Exhibit 4. The consent form of the first respondent was marked as Exhibit 5.

17. The Doctor who examined the victim on September 26, 2020 deposed as PW 3. The medical examination report of the victim was tendered in evidence which was marked as Exhibit 1. In cross-examination, he stated that, no injury was detected in and around the mouth of the victim. He also stated that, demonstrable bodily injury was seen on the anus of the victim. Moreover, he went on to say that, in case of constipation injury can be seen over anal orifice but the type of injury noted on the victim and as mentioned in Exhibit 1 cannot be found in case of constipation.

18. The police personnel who took photographs of the place of occurrence and its surroundings deposed as PW 4. 6 photographs taken by him were tendered in evidence and marked as Exhibit 6 to 6/5. The microchip in connection of those photographs was tendered in evidence and marked as Exhibit 7.

19. The police personnel who drew the rough sketch map of the place of occurrence and its surroundings deposed as PW 5. The rough sketch map was tendered in evidence and

marked as Exhibit 8. The final map was tendered in evidence and marked as Exhibit 8/1.

20. The mother of the victim deposed as PW 6. She stated that on September 15, 2020 at about 630/7 PM the incident took place. On September 15, 2020 at about 8 PM, the victim came to the house and was sitting silently. She rebuked the victim and asked him why the victim delayed in coming home. Then she provided the victim with food. She went to the bathroom. After returning from the bathroom she saw the victim crying. The victim took little quantity of food and was rebuked again. She noticed that on the next morning the victim was not leaving the bed. The victim was taken to a doctor. Thereafter, on September 19, 2020, the victim confided in her that the first respondent did bad things with him. The victim told her about the incident. The victim told her that, the first respondent told the victim to take the penis into the mouth of the victim. The victim refused to take the penis of the first respondent into his mouth. Then the first respondent threatened the victim and told the victim that if he does not obey the instruction of the first respondent and discloses the matter to anyone the victim would be killed.

Then the victim was compelled to comply with the instructions of the victim and took the penis in his mouth.

21. PW 6 stated that, after hearing the incident from the victim, she could not say anything to anybody. Then on September 20, 2020, she and the victim went to the police station and lodged the written complaint. The written complaint was tendered and marked as Exhibit 9. The First Information Report was tendered in evidence and marked as Exhibit 10. She narrated that, the victim was taken for medical examination and was examined. The birth certificate of the victim was tendered in evidence and marked as Exhibit 12. The statement of PW 6 recorded under Section 164 of the Criminal Procedure Code was tendered in evidence and marked as Exhibit 14. She identified the first respondent in Court. She was cross-examined at great length on behalf of the first respondent.

22. The brother of the victim deposed as PW 7. He stated that on September 22, 2020, he came to know from PW 6 that in September 15, 2020, the first respondent committed the offence of aggravated sexual assault on the victim. He corroborated the statements of PW 6.

23. The friend of the victim who was present at the time of occurrence of the incident deposed as PW 8. He stated that, on September 15, 2020, he and the victim were playing on the ground beside the shop near the water tap. At that time, the first respondent called the victim and him and took them to the room of the mother of the first respondent. The first respondent gave them a mobile with which they were playing. Then the victim came and he returned with the victim from there. He did not know anything more. He recorded a statement under Section 164 of the Criminal Procedure Code which was tendered in evidence and marked as Exhibit 15. He identified the first respondent in Court.

24. PW 8 was cross-examined on behalf of the first respondent. In such cross-examination, he stated that, the door of the room in which he and the victim were present, was kept open. He also stated that, mother and sister of the first respondent were also present in such room. He admitted that, he gave the statement before the judicial Magistrate as per tutoring of the police.

25. The Investigating Officer deposed as PW 9. He narrated about the course of the investigations. He stated that, the first respondent surrendered before the Court on December 10,

2020. He submitted a charge sheet against the first respondent on December 17, 2020 under Section 4 of the POCSO Act. He was cross-examined at the behest of the first respondent.

26. On conclusion of the evidence of the prosecution, the first respondent was examined under Section 313 of the Criminal Procedure Code. In such examination, he claimed to be innocent and falsely implicated. He declined to adduce any evidence at the trial.

27. Exhibit 1 which is the written complaint submitted by PW 6 contained allegations relating to penetrative sexual assault by the first respondent over the victim. PW 6 is the mother of the victim.

28. In his deposition, PW 1, the victim, did not speak of any penetrative sexual assault being committed by the first respondent against him. His oral testimony is that, the first respondent asked him to take the penis of the first respondent in his mouth (victim). Performance of oral or anal sex or any demand for the same was not alluded to at all by the victim.

29. In his oral testimony, PW 1, the victim, stated that, on returning to his house on September 15, 2020, he stated all

the facts to his mother, PW 6 herein, and that, PW 6, the complainant went to the police station to lodge the complaint.

30. The incident is said to occur on September 15, 2020. The police complaint was lodged on September 19, 2020. PW 6, the mother of PW 1, the victim, does not corroborate the victim when the victim claimed that he confided about the incident to her on September 15, 2020 itself on returning to his home. PW 6 in her testimony stated that, on September 19, 2020 the victim told her that the first respondent did bad things to him. Here, the version of the incident changes from what PW 1, the victim stated in his oral testimony to what, PW 6, the mother of the victim stated in her oral testimony and the police complaint. While PW 1, the victim stated that, the first respondent asked the victim to take the penis in the mouth, the mother of the victim, PW 6 stated that, the first respondent inserted the penis in the mouth of the victim.

31. The mother of the victim, PW 6, is not an eyewitness to the incident. She made the claims as appearing in the written complaint as also in the oral testimony on the basis of the statements made by the victim to her. As noted above, the two versions are materially and substantially divergent.

32. The medical examination report of the victim being Exhibit 1 does not speak of any injury on the mouth or in the region of the mouth of the victim. It however speaks of injuries in the anal region of the victim.

33. The doctor who examined the victim on September 26, 2020, being PW3, deposed on behalf of the prosecution on January 15, 2020. The medical examination report of the victim was introduced in evidence and marked as exhibit on the strength of the testimony of PW 1 himself on January 14, 2021. Charge as against the first respondent was framed on December 24, 2020. The charge is one of commission of aggravated penetrative sexual assault.

34. The case of the prosecution at the trial was that, the first respondent took the victim to his house and asked to the victim to perform oral sex. Medical evidence did not corroborate such a claim. There are embellishments and discrepancies between the versions of the incident narrated by the victim and his mother.

35. The victim stated in his oral testimony that one more friend was with him when he was taken by the first respondent to his house. Such friend of the victim deposed as PW 8. In cross-examination, PW 8 stated that, the door of the

room in which, the first respondent and the victim were spending their time was kept open and that, mother and sister of the first respondent were also present in the room in which the victim was present. The 2 rooms spoken of by PW 8 are adjacent to each other as will appear from the final map of the place of occurrence which was tendered in evidence and marked as Exhibit 8/1.

36. The police complaint was lodged on September 19, 2020 with the First Information Report being registered on September 23, 2020 in respect of the incident of September 15, 2020. Although the victim, PW 1 claimed that he confided about the incident to his mother on September 15, 2020, his mother, PW 6 stated that, the victim told her about the incident on September 19, 2020 when the complaint was lodged.

37. There is a delay in the lodgement of the complaint. The incident, as noted above, is of September 15, 2020 with the complaint being lodged on September 19, 2020. The explanation with regard to the delay is that the PW 6 came to know of the incident only on such date from PW 1. However, PW1 claimed in his oral testimony that he told PW 6 of the incident on September 15, 2020 itself. Such irreconcilable

disparity of the prosecution witness regarding the date of knowledge of the complainant regarding the incident generates reasonable doubt regarding the case of the prosecution.

38. The entire prosecution case as against the first respondent was based on oral sex. The medical examination was also primarily towards such purpose. However, on examination of PW 1, the victim, PW 3, the doctor examining the victim, in his report being Exhibit 1, identified that the victim was subjected to penetrative sexual assault in the anal region. The first respondent was not called upon to answer a charge of penetrative sexual assault on the anal region on the victim.

39. *Satish and another (supra)* deals with the provisions of the POCSO Act. It explains the meaning of sexual assault appearing in Section 7 of the POCSO Act. It analyses what ‘touch’ with regard to a victim remains in the context of the POCSO Act. It is of the view that, the expression “assault” in Section 7 of POCSO Act is entirely removed from the definition of assault in Section 351 of the Indian Penal Code, 1860. Ingredients of offences under Section 351 and 349 of the Indian Penal Code, 1860 are not all necessary to constitute an

offence of sexual assault defined in Section 7 of the POCSO Act.

40. *Satish and another (supra)* deals with Section 30 of the POCSO Act also. It is of the view that once the basic facts constituting an offence under the POCSO Act was proved by the prosecution, the Court was entitled to raise the statutory presumption about the culpable mental state of the accused as permitted to be raised under Section 30 of the POCSO Act.

41. *Subra Biswas and another (supra)* is of the view that the common statutory presumption under Section 29 of the POCSO Act applies when a person is prosecuted for committing offences under Sections 5 and 9 of the POCSO Act and a reverse burden of proof is imposed on the accused to prove to the contrary. It is of the view that the words “is prosecuted” in Section 29 of the POCSO Act does not mean that the prosecution is absolved of the duty to establish the primary facts constituting the offence. Once the foundational facts were established the onus shifts to the accused to prove to the contrary. In the facts of that case, the Court found that the versions of the victim and her mother, of the incidents did not inspire confidence.

42. In the facts and circumstances of the present case, there are contradictions, embellishments and improvements in the case of the prosecution between the narration of events of the victim, his mother and other prosecution witnesses. All the prosecution witnesses spoke about an incident of September 15, 2020. The versions of the same incident are different and do not corroborate each other. In the version of the victim penetrative sexual assault is absent, while the mother speaks of the same. The friend of the victim, PW 8, claimed that he was in the adjacent room when the incident was happening with the mother and sister of the first respondent and the door of the room open. He did not corroborate the victim about the incident, excepting that they were called by the first respondent to his house to play carrom.

43. The divergence in the narration of the events accommodates justifiable grounds of reasonable doubt. Therefore, the prosecution failed to establish facts constituting a sexual offence under the POCSO Act as against the first respondent far to speak of beyond reasonable doubt.

44. Essentially, the appellant is relying upon reverse burden to contend that the first respondent should be

convicted. Reverse burden under Section 29 of POCSO Act operates when foundational facts were established at least on balance of probabilities platform and under Section 30 when they were established beyond reasonable doubt. In this case, the foundational facts constituting an offence under the POCSO Act could not be established by the prosecution on the balance of probabilities level far to speak of beyond reasonable doubt. Therefore, the question of failure of the first respondent to discharge his onus under Section 29 of the POCSO Act did not arise, in the facts and circumstances of the present case.

45. It is trite law that, a judgement of acquittal can be reversed by the appeal Court, if, on appreciation of the evidence afresh, the appeal Court finds compelling reasons to do so. The appeal Court must find that, the judgement of acquittal to be perverse, palpably incorrect and that, the view of the learned trial judge was incompatible with the innocence of the accused. The appeal Court must find that, the view of the learned trial judge was not a plausible view emanating out of the facts proved at the trial. In the event, the appeal Court finds that the view expressed by the trial Court, on the basis of the facts proved at the trial, is plausible, then, the appeal Court should be slow to interfere with such view of the trial

Court. The appeal Court should take into consideration the fact that, the demeanour of the witnesses was assessed by the trial Court while evaluating the evidence, a privilege which the appeal Court was deprived of.

46. The learned trial judge on evaluating the evidence placed before it, found that, neither the victim nor the elder brother of the victim claimed about any insertion of penis or finger by the first respondent into the anus of the victim. The learned trial judge noted that the offences related to one around the mouth of the victim. The learned trial judge therefore proceeded not to place any reliance on Exhibit 1, which was the medical examination report of the victim.

47. Opinions of experts or medical examination reports are pieces of evidence which may assist a Court in arriving at a particular conclusion. By itself, opinion of the expert or the medical examination report may not point to the commission of an offence. The Court may look into the same and consider them as corroborative materials. Usually, the oral testimony of a prosecution witness is sought to be corroborated by the medical evidence of the expert opinion.

48. In the facts of the present case, there was no allegation with regard to a penetrative sexual assault being committed

by the first respondent on the victim at the anal region of the victim.

49. In such circumstances, we are not in a position to hold that the view expressed by the learned trial judge in acquitting the first respondent was not plausible.

50. In view of the discussions above, we find no merit in the present appeal. CRA to 253 of 2021 is dismissed.

51. The trial court records along with a copy of this judgement and order be sent to the appropriate Court forthwith for necessary action.

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

[DEBANGSU BASAK, J.]

53. I agree.

[MD. SHABBAR RASHIDI, J]