

Form No.J(1)

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

Present:

The Hon'ble Justice Tirthankar Ghosh

C.R.A. 312 of 2021

With

CRAN 2 of 2022

Sudarshan Maji

versus

The State of West Bengal and Another

For the Appellant : Mr. Amal Krishna Samanta,
Mr. Subhas Jana.

For the State : Mr. S. G. Mukherjee, Ld. P.P.,
Mr. Sandip Chakraborty,
Mr. Saryati Datta.

For the Respondent No.2 : Mr. Apalak Basu,
Ms. Snehal Seth.

Heard On : 15.03.2023, 17.03.2023, 20.03.2023 and 23.03.2023.

Judgement On : 23-03-2023.

Tirthankar Ghosh, J. :

The present appeal has been preferred against the judgement and order of conviction and sentence dated 20.09.2021 and 21.09.2021 passed by learned Additional Sessions Judge, 2nd Court, Tamluk, Purba

Medinipur in connection with Sessions Trial No. 4(12)16 arising out of Sessions Case No. 43(6)16 wherein the learned trial court was pleased to convict the appellant for commission of offence under Section 10 of the POCSO Act and sentenced him to suffer rigorous imprisonment for five years and to pay fine of Rs.10,000/- in default, to suffer further rigorous imprisonment for six months.

The genesis of the case relates to Nandigram Police Station Case No. 174 of 2016 dated 17.04.2016 under Sections 354(B)/506 of the Indian Penal Code and Section 8 of the POCSO Act which was set into motion pursuant to a complaint lodged by 'Y' with the Officer-in-Charge, Nandigram Police Station. The complainant 'Y' alleged that her minor daughter 'X' aged about 10 years was a student of Class-IV in Tengua Ramkrishna Mission Pathabhavan. The accused Sudarshan Maji aged about 72 years used to teach her daughter as a private tutor at her brother-in-law's house. Her daughter used to go to study in that house and on 15.04.2016 i.e. on Friday at around 8 p.m. while studying, the teacher Sudarshan Maji tempted her daughter by offering chocolate and picked her on his lap in that room. The teacher Sudarshan Maji took off the dress of the minor which she wore at that time and then pressed her chest and scratched with his nails. Consequently the child felt acute pain over her chest and the complainant's sister-in-law watched the

incident. Her daughter reported to her about the incident and she took her to a local doctor for treatment as she was suffering from chest pain. The minor also complained that the accused threatened, if the information was divulged to anyone, she would be killed. However, the complainant informed the incident to the local people, although it was late and the same was due to fear of embarrassment and public shame. The complainant, therefore, prayed for taking necessary action against the accused.

On the basis of the aforesaid complaint, Nandigram Police Station Case No. 174 of 2016 commenced and the police authorities on conclusion of investigation, submitted charge-sheet No. 133 of 2016 dated 31.05.2016 under Sections 354(B)/506 of the Indian Penal Code and Section 8 of the POCSO Act against the accused Sudarshan Maji.

The learned trial court, on or about 23.12.2016, after consideration of the materials appearing in the records framed charges under Sections 354B/376(2)(f)(i)(n) of the Indian Penal Code and Sections 6 and 8 of the POCSO Act. The contents of the charges were read over to the accused person to which he pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 9 witnesses. PW-1 'X' is victim girl; PW-2 is Dr. Sudip Gole who examined

the victim girl; PW-3 'Y' is mother of the victim girl; PW-4 'Z' is aunt of the victim girl; PW-5 'S' is uncle of the victim girl; PW-6 'R' is another aunt of the victim girl; PW-7 Chitta Ranjan Jana is a villager/neighbour of the victim girl; PW-8 Dr. Pradip Kumar Acharyya is a Homoeopathic Doctor who treated the victim; PW-9 S.I. Vivekananda Haldar is Investigating Officer of the case.

The prosecution also relied upon number of documents which included - Exhibit-1, four signatures of P.W.-1 ('X'), the victim girl, on her statement recorded under Section 164 of the Code of Criminal Procedure; Exhibit-2, medical examination report of the victim girl; Exhibit-3, entire written complaint; Exhibit-3/1, endorsement with signature of SI Kashinath Chowdhury on the written complaint; Exhibit-4, signature of P.W.-3 ('Y'), mother of the victim girl, on the seizure list dated 17.04.2016; Exhibit-4/1, signature of P.W.-4 ('Z') on the seizure list dated 17.04.2016; Exhibit-4/2, signature of P.W.-6 ('R') on the seizure list dated 17.04.2016; Exhibit-4/3, entire seizure list dated 17.04.2016; Exhibit-5, signature of P.W.-3 ('Y') on the carbon process of zimmanama; Exhibit 5/1, entire zimmanama; Exhibit-6, prescription of PW-8 Dr. Pradip Kumar Acharyya; Exhibit-7, formal FIR; Exhibits-8 & 8/1, rough sketch map with index and Exhibit-9, photo copy of birth certificate (with objection).

PW-1 'X', the victim girl, in her deposition before the court stated that she was a student of Class-VII and her mother lodged a written complaint with Nandigram P.S. against her private tutor viz. Sudarshan Maji in the year 2016. The incident, according to her, took place on 15.04.2016 at the evening hours when she went for private tuition to Sudarshan Maji. She stated that she addressed the accused as 'Dadu' as he was a co-villager. She also stated that the accused used to teach her at the house of her cousin brother who was also a student. The teacher Sudarshan Maji used to take her from her house to the house of her cousin brother and when he used to take her from her house, he used to press her breast and did the same thing during the private tuition. She stated that the accused used to insert his penis in her vagina almost everyday during private tuition and at that time, he used to send her cousin brother to the ground floor. The accused teacher also threatened her that if she disclosed such facts to her parents or anybody else, he would kill her younger brother. The accused also represented that he would hand over some medicines to her for reducing her breast and also advised her to press a pillow on her breast. On the relevant date, it was 'Nabami of Durgapuja' when the accused, Sudarshan Maji pressed her breast, her aunt 'Z' saw the same. Her aunt 'Z' thereafter reported the incident to her mother 'Y'. Her mother 'Y' and uncle 'S' thereafter came

to the house of her cousin brother when the accused fled away. She was thereafter asked by her mother and uncle regarding the incident when she narrated the same from inception. Next day morning, they had been to the police station. She was taken inside the room at the police station where she narrated the incident to a lady. Her mother lodged a written complaint. She was also taken to Tamluk Hospital for medical examination and doctor examined her. She was also produced before the learned Magistrate where she narrated the incident which was recorded by the learned Magistrate. She thereafter signed the statement. She identified her signatures in the statement which were collectively marked as 'Exhibit-1'. She identified the accused in Court.

P.W.-2 is Dr. Sudip Gole who deposed that he was Medical Officer at Purba Medinipur District Hospital and on 17.04.2016, a girl aged about 9 years was produced before him by a lady Constable in connection with Nandigram Police Station Case No.174/2016 dated 17.04.2016. On examination, he found abrasion injury over nape of neck about half inch away from mid line. There was no other external injury on her person. He was not allowed to examine the private parts of the victim girl as the mother of the victim girl refused to give consent to examine the private parts of the victim. He identified the Medical Examination Report which was prepared by his own handwriting and

also contains his signature and official seal. The Medical Examination Report of the victim girl was marked as Exhibit-2.

P.W.-3, 'Y' is the mother of the victim girl. She deposed that she lodged a written complaint with Nandigram Police Station against the accused, Sudarshan Maji. She identified the written complaint which was drafted as per her instruction and she signed the same after reading the contents thereof. She identified the accused in court. She deposed that at the time of the incident, her daughter 'X' used to go to the house of her brother-in-law for private tuition and after completion of private tuition, the accused used to drop her daughter at her house. At the relevant time, her daughter was a student of Class-IV, aged about 9 years. She also informed the court that the son of her brother-in-law used to go for private tuition with the accused along with her daughter. On 15.04.2016 at about 8:30 p.m. when the cousin brother of the victim was not present and there were ongoing Puja festival, the accused, taking such opportunity, took her daughter on his own lap and pressed her breast and inserted his finger into the vagina of her daughter. Somehow her sister-in-law ('Z') saw the same and informed her about the incident. Then and there, she went to the house of her brother-in-law, but she did not find the accused there. She also asked her daughter about the incident when her daughter reported that often the accused misbehaved

with her and did not waste any opportunity. She deposed that her daughter complained that the accused pressed her breast and also did such misbehaviour for several occasions previously. Her daughter also reported that the accused used to insert his finger into the vagina of her daughter by putting her in fear. On 17.04.2016, witness called the accused, Sudarshan Maji to her house and asked him about the incident. Initially, he refused to say anything, but subsequently confessed his guilt in presence of others. After knowing such incident she reported to the police station and her daughter was taken to the Medical Officer for examination. In course of examination on 17.04.2016, police seized the original birth certificate of her daughter 'X', original medical prescription of the victim and the wearing apparels of her daughter. She signed the seizure list dated 17.04.2016 and identified her signature in court which was marked as Exhibit-4. The original medical prescription and original birth certificate were kept at the zimmanama of the complainant. However, she identified her signature in the carbon copies which were marked as Exhibit-5.

P.W.-4, 'Z' is the aunt of the victim 'X'. She deposed that P.W.-3 'Y' lodged a written complaint with Nandigram Police Station against Sudarshan Maji regarding an incident which happened with her daughter. She was interrogated by the police authorities. She narrated

that the accused Sudarshan Maji was a private tutor who taught the victim as well as her cousin and at the time of incident, the accused used to come to her house for teaching. On 15.04.2016 at about 8.30 p.m., the accused was teaching her niece/victim at the first floor of her house. At the relevant point of time, she was at the ground floor and could not hear any noise of reading from the upstairs like any other day. So, she went to first floor and surprisingly saw that the accused took the victim on her lap and pressed her breast after removing her dress and also inserted his finger at the vagina of the victim. After seeing the incident, she quickly got down from upstairs and became unconscious and when she regained her sense, she informed the incident to the mother of the victim. The mother of the victim, 'Y', reached her house when the accused fled away. The victim girl was questioned regarding the incident by her, along with the mother of the victim when the victim reported that the accused often used to misbehave with her by putting her in fear and he has also earlier committed such misdeed by sending her cousin brother downstairs. The victim was taken by her mother to their house and in course of investigation, on 17.04.2016, the police authorities seized the original birth certificate of the victim, the original medical prescription of the victim and the wearing apparels of the victim. A seizure list was prepared in reference to the said seizure on

17.04.2016. She signed the said seizure list and identified the same in court which was marked as Exhibit-4/1. The witness also identified the accused in court.

P.W.-5, 'S' is the uncle of the victim. He deposed that 'Y', mother of 'X', lodged a complaint with the Nandigram Police Station against the accused in respect of the incident which happened to her. The witness was examined by the police authorities. However, he candidly said that he was not present in the house at the time of the incident and the incident took place at about 08.30 p.m./09.00 p.m. on 15.04.2016. He was informed about the incident over mobile phone by his sister-in-law ('Y').

P.W.-6, 'R' is the aunt of the victim who deposed that 'Y' lodged a written complaint with Nandigram Police Station against the appellant Sudarshan Maji regarding an incident which happened with her ('Y's') daughter. The witness identified the accused in court and continued to state that he was the private tutor of her son as also the victim who used to teach at their house. The incident, according to her, took place on 15.04.2006 at about 08.30 p.m. On the said date at about 07.45 p.m., she took her son for watching 'Basanti Puja' at the house of a neighbour when the victim and the accused were present at their house. At about 08.30 p.m., when 'Z' went to the study room at first floor of the house,

she found that the victim was sitting on the lap of the accused and the accused was pressing her breast by removing her clothes. After watching such misdeed, 'Z' came down from upstairs and the accused having suspected that 'Z' has seen the incident, fled away. 'Z' informed both the witness and the mother of the victim regarding the incident. When the witness returned to her house, she found that the victim and her sister-in-law 'Z' both were crying. On the next day morning, some people went to the house of the accused Sudarshan Maji, but at the relevant time, he was not present and on 17.04.2016, the accused was called at the house of 'Y', when the accused denied whole of the incident, but subsequently confessed his guilt. Thereafter, all of them went to the police station. The witness also signed the seizure list on 17.04.2016 and identified her signature in the seizure list which was marked as Exhibit-4/2.

P.W.-7 is one Chitta Ranjan Jana who deposed that he knew the victim as well as the accused. The accused is a private tutor and taught the victim. The witness deposed that he heard one day accused Sudarshan Maji outraged the modesty of 'X' while teaching her.

P.W.-8, Dr. Pradip Kumar Acharyya, is a Homeopathic Doctor who deposed that he had a chamber at Bhekutia village which is under Nandigram Police Station and on 07.01.2016, a girl aged about 9 years was brought before him by her mother for treatment of her tenderness

and development of her breasts. The patient and her mother did not narrate the history of trauma. The witness also deposed that he did not physically examine the patient. However, after examination with his stethoscope, he found mild tenderness on her breasts. Certain homeopathic medicines were prescribed to the patient and thereafter, the said patient again visited at his chamber on 28.01.2016 and 04.02.2016 for follow up treatment. On 25.02.2016, the said patient again visited his chamber for foul smell in her mouth. Lastly, the said patient visited his chamber on 03.03.2016. He identified his prescription which he prepared in his own handwriting and the same was marked as Exhibit-6.

P.W.9, Vivekananda Haldar is the Sub-Inspector of Police and the Investigating Officer of the case who deposed that after he was endorsed with the investigation of the case by the Officer-in-Charge, Nandigram Police Station, he collected evidence which included recording of statement of the vital witnesses, medical examination of the victim girl, collection of documents relating to the proof of age of the victim as well as the statement before the learned Magistrate. After conducting the investigation by collecting relevant materials and on arriving at an opinion regarding *prima facie* guilt of the accused/appellant, he

submitted charge-sheet before the learned Special Court against the accused/appellant.

Mr. Samanta, learned advocate appearing for the appellant, submitted that the appellant is presently 77 years old and at the relevant time, he was in his early seventies when he was falsely implicated in connection with the instant case. According to the learned advocate, there has been consistent improvement in the version of the witnesses and the same would be dangerous to rely upon for arriving at a conclusion of guilt considering the fact that child was aged about 9 years and the scope of she being tutored cannot be ruled out. Learned advocate also submitted that there is hardly any independent witness in this case who has been examined by the prosecution to prove its case. Additionally, the learned advocate submitted that the learned trial court exceeded its authority and forcefully convicted the appellant on vague surmises and conjectures.

Mr. Apalak Basu, learned advocate appearing for the complainant/respondent no.2, submitted that in this case the victim, from the inception, had been consistent in her version relating to the incident of sexual assault and the same being inflicted by the accused/appellant. It has further been submitted that nowhere in the evidence of the case, there is any material to show that there was

inimical relationship between the family of the complainant with that of the accused person. According to the learned advocate, Sections 29 and 30 of the POCSO Act refer to presumptions which weigh heavily against the accused person and until and unless there are overwhelming materials produced by the accused before a trial court at the relevant stage it would not be fit and proper to interfere with the order of conviction and sentence so passed by the learned trial court.

Mr. Saryati Datta, learned advocate appearing for the State, opposes the contention of Mr. Samanta, learned advocate for the appellant and submits that in this case, the prosecution has relied upon the best possible evidence and the learned trial court has already dealt with the matter and there are no factual errors which call for interference by this Court. The learned advocate prays for confirming the order of conviction and sentence so passed by the learned trial court in respect of the present appellant.

I have considered the submissions advanced by the learned advocates appearing for the appellant, complainant/respondent no.2 as well as the State. I have also taken into account the statements of the witnesses which include not only the depositions but also the statement of the victim girl recorded under Section 164 of the Code of Criminal Procedure being Exhibit-1 and the injury report prepared by PW-2 Dr.

Sudip Gole as also the deposition and the prescription of PW-8 Dr. Pradip Kumar Acharyya. In a case of such nature, the evidence of the victim assumes absolute importance in view of the settled proposition of law that a victim of sexual assault or rape is to be treated as an injured witness. However, I find that in this case, the victim, who is aged about nine years, in her statement has exaggerated her deposition in court from her earlier version which was narrated to the police authorities as well as the learned Magistrate. In fact, in the contradiction taken from the Investigating Officer, PW-9, from the case, it is reflected that the Investigating Officer categorically stated that the victim did not state before him that the accused Sudarshan Maji inserted his penis in her vagina almost everyday after private tuition. The Investigating Officer in his cross-examination also answered that PW-4 did not state before him that she saw the accused inserting his finger into the vagina of the victim. There are other contradictions, but the aforesaid two contradictions assume significance in view of the fact that the victim happens to be a child aged about nine years and it is difficult to ascertain regarding her capacity to understand the version relating to sexual assault which she had been narrating before two different authorities. In fact, in her version recorded under Section 164 of the

Code of Criminal Procedure, she did not refer to the accused having inserted his penis in her vagina, but such fact was introduced in court.

So far as the injury on the chest is concerned, there is no reflection of the same in the injury report prepared by PW-2 and marked as Exhibit-2. The only external injury is seen at the back side which is at the nape of the neck and the same has got nothing to do with any sexual assault. A Division Bench of this Hon'ble Court in **Ganesh Orang Vs. State of West Bengal and Another** reported in **2022 SCC OnLine Cal. 255**, by relying upon an earlier judgement, was pleased to deal with the provisions of Section 29 of the POCSO Act in the factual foundation of a particular case. **Paragraph 21** of the said judgement is relevant for the purpose of the present case which is set out as follows :

“21. In order to attract the statutory presumption under Section 29 of the POCSO Act the factual foundations with regard to the ingredients of the offence under Section 6 of the said Act require to be established in the first place. In the present case, nothing has been placed on record on behalf of the prosecution to show that the victim was a minor at the time of occurrence. In her deposition PW 1 has not stated the age of the victim though the same is disclosed in the FIR. It is trite law that the FIR is not substantive evidence and may at its best be used to corroborate or contradict the maker. The only piece of evidence which is relied upon by the prosecution with regard to age of the victim is that she is a student. However, neither birth certificate nor the school records endorsing the age of the victim has been proved in the present case. No ossification test was also conducted with regard to the age of the victim in order to establish that she is a minor. If it is presumed that the victim was a

minor, the inherent weakness and/or patent contradictions in the prosecution case itself render the statutory presumption inapplicable. In *Sahid Hossain Biswas v. State of West Bengal*¹ interpreting the aforesaid presumption, this Court held as follows:

“..... in a prosecution under the POCSO Act an accused is to prove ‘the contrary’, that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see *Sait Tarajee Khimchand v. Yelamarti Satyam*, (1972) 4 SCC 562]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.

Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross-examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case eg. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has

discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to mechanically accept mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution, however, patently absurd or inherently improbable it may be.”

I have also considered the evidence of PW-4 who happens to be the aunt of the victim girl and claims to be an eyewitness of the incident which occurred. Her reaction, as narrated after the incident, is uncharacteristic of normal human behaviour as it would have been probable for any relation to scream instead of coming down from the upstairs after watching such incident. The said witness, who happens to be the starting point of disclosure of sexual assault, is questionable and as such, cannot be relied upon. The settled proposition of law is that the sole testimony of a victim, in cases of sexual assault, is sufficient to arrive at a finding of guilt and conviction can be based upon such testimony or version provided the same inspires confidence and is trustworthy or is unblemished. In this case, the victim having altered her version and her relation PW-4 having behaved uncharacteristically, do not inspire confidence of this Court to accept the finding of guilt arrived at by the learned trial court.

Having regard to the aforesaid reasons so assigned, I am of the opinion that the judgement and/or order of conviction and sentence

awarded by the learned Additional Sessions Judge, 2nd Court, Tamluk, Purba Medinipur passed in connection with Sessions Trial No. 4(12)16 calls for interference and requires to be set aside. Thus, the judgement and order of conviction and sentence dated 20.09.2021 and 21.09.2021 passed by the learned Additional Sessions Judge, 2nd Court, Tamluk, Purba Medinipur in connection with Sessions Trial No. 4(12)16 arising out of Sessions Case No. 43(6)16 are hereby set aside.

The appellant is acquitted of the charges levelled against him. If the appellant is not wanted in any other case, he should be released forthwith.

Accordingly, the criminal appeal being CRA 312 of 2021 is allowed.

Pending connected application is consequently disposed of.

Department is directed to send back the lower court records along with a copy of this judgement immediately to the learned trial court.

All parties shall act on the server copy of this judgement duly downloaded from the official *website* of this Court.

Urgent photostat certified copy of this judgement, if applied for, be given to the parties upon compliance with all requisite formalities.

(Tirthankar Ghosh, J.)