

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

PRESENT:
THE HON'BLE JUSTICE TIRTHANKAR GHOSH

C.R.A. 121 of 2021

Rajib Das.
versus
The State of West Bengal

For the Appellant : Mr. Kallol Kumar Basu,
Mr. Biswajit Hazra,
Ms. Md. Jannat-ul-Firdous.

For the State : Mr. Ranabir Roy Chowdhury,
Mr. Mainak Gupta,

Reserved On : 13.08.2024

Judgement On : **16.08.2024.**

Tirthankar Ghosh, J. :

The present appeal has been preferred against the judgment and order of conviction and sentence dated 24.02.2021 and 26.02.2021 passed by the learned Additional Sessions Judge, Bolpur, Birbhum, in Special (POCSO) Case No. 23/18 arising out of Bolpur PS case No. 224 of 2018, wherein the learned Appellate Court after holding the appellant guilty of the offence under Section 8 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act") was pleased to sentence him for Simple Imprisonment for five years and fine of Rs.5000/- i.d. to suffer further SI for three months.

Bolpur PS case No. 224/2018 dated 09.08.2018 was registered for investigation on the basis of an information/complaint submitted by the victim 'X' wherein she alleged that she being a Class XI student and a resident of Village-Bahiri, Dist- Birbhum, went to tuition at I.T.E. Coaching Center at Lodge More (Bolpur), opposite to H.P. Gas on 09.08.2018 at about 4.45 pm in the afternoon. Rajib Das who was responsible for admission at the coaching Center hugged her forcefully and kissed her, thereby intending to rape her. The complainant as such requested the Inspector-in-charge, Bolpur Police Station to take steps and punish the said Rajib Das for his heinous act.

On receipt of such complaint the Inspector-in-charge, Bolpur Police Station entrusted Sub-Inspector Kasturi Gupta (PW9) for investigation of the case. Immediately on being assigned the charge of investigation, the investigating officer visited the place of occurrence i.e. the tuition Center, prepared rough sketch map with index, examined the available witnesses and recorded their statement, arranged for medical examination of the victim who declined to be examined. After collection of all documents and materials the investigating officer submitted charge-sheet on or about 21.09.2018.

On receipt of the charge-sheet the learned Special Court was pleased to take cognizance of the offence and fixed date for consideration of charges. Accordingly charge was framed by the learned Special Court on 03.01.2019 under Section 8 of the POCSO Act. The contents of the charge 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 which included PW1 'X', the victim girl; PW2, 'Y' elder sister of the victim girl; PW3, 'M', father of the victim girl; PW4, Tarak Banerjee, owner of ITE Coaching Center; PW5, Tulu Das, another employee of the Coaching Center; PW6, Sridip Ballav, Judicial Magistrate who recorded the statement of the victim under Section 164 Cr.P.C.; PW7, 'Z' mother of the victim girl; PW8, Dr. Sourav Das, before whom the victim was taken for medical examination; PW9, S.I. Kasturi Gupta, Sub-Inspector of police attached to Bolpur Police Station and the Investigating Officer of the case.

PW1, 'X' the victim girl was examined wherein she stated that she got admission at ITE Coaching Center at Lodge More, Bolpur on 30.07.2018 and on 09.08.2018 as usual at about 4.45 pm when she went to the coaching center she found that it was closed and the staff of ITE Coaching Center namely, Rajib Das came there and opened the door. She entered the coaching center when Rajib Das was collecting water from tap, it was at the ground floor wherein the official works were usually done and cycles, shoes etc. were kept there. Victim requested the accused whether she could use the bathroom which was permitted by the accused and after she came out from the bathroom the accused suddenly caught hold of her tightly from the front side when she was perplexed and the accused kissed her on her two cheeks. She pushed the accused, raised protest and started weeping. She called her elder sister 'Y'. The complaint was written by her elder sister as per her version in her presence and after going through the contents of the same, she signed it.

She identified her signature which was marked as Ext.1 and on the next date she went to Court and the learned Magistrate recorded her statement. She identified her signature in the said statement which were marked as Ext.2, Ext.2/1 and Ext.2/2. In cross-examination, she stated that when she went upstairs there were some friends who also came there for coaching. Head of the Institution or any other teacher was not present at that time and she informed the incident to the head of the institution but he did not pay any heed and stated that he could not do anything and she was at liberty to do whatever she wanted. She empathetically denied regarding the incident not having taken place and also stated that there was another employee namely, Tulu Das.

PW2, 'Y' is the elder sister of the victim, who deposed that she wrote the complaint as per version of her sister and after writing the same she read it over to PW1 who signed it. The witness identified whole of the complaint with her signature on the side of the complaint which was marked as Ext.1/1. She further deposed that she was a student of Geography Honours. On that day she had an examination at Bolpur College scheduled from 2.00 pm to 05.00 pm and after completing her examination at about 05.00 pm she found in her mobile that her sister called her several times which were reflected as missed calls. As such she called back her sister when she told her that she was carrying the disputed phone charger and the same should be collected from ITE Institution. She went to the institution and found that Rajib Das was standing at the ground floor and on being asked about her sister he told that

her sister was at the first floor. When she went at the first floor, she found that PW1 was weeping and heard that Rajib Das pulled and kissed her and intended to do something wrong but she managed to escape. She took her downstairs where there were two friends of her sister and when the accused Rajib Das was questioned regarding the incident he stated that he did nothing and when she started screaming many people gathered there and one of their acquaintance namely, Tuhin Biswas scolded Rajib Das when he apologized. Thereafter a complaint was lodged at Bolpur Police Station. She identified the accused Rajib Das in Court. On cross-examination however she stated that she did not state to the police that her sister called her in the evening and she was weeping and called her at the tuition center immediately. Further she stated that she informed the matter to the Head of the Institution and she was still taking coaching at the said institution. She also stated that the accused and Tulu Das are both working at the institution and denied of any such incident not having taken place.

PW3, is 'M', father of the victim girl who identified his signature in the seizure list and in cross-examination stated that police seized the Aadhar Card of his daughter where he signed as a seizure witness in the seizure list.

PW4, is Tarak Banerjee, who deposed that he has a teaching institution namely ITE Coaching Center at Bhubandanga, Tourist Lodge More, Bolpur. He stated that teaching is done in two phases, the first phase starts at 7.00 am till 9.30 am and second phase started on 5.30 pm and continues till 9.00 pm. He

also stated that there are four permanent teachers along with some guest lecturers in his institution and there are two non-teaching staffs. About 300 students are there in the institution and in respect of the incident which occurred on 09.08.2018 he deposed that at the relevant point of time he was in his house at Jambuni and he was informed by one of the non-teaching staff Tulu Das over phone at about 5.20 pm, when he came to the institution and found that four persons were assaulting Rajib Das and Tulu Das was present there. He also deposed that the first floor is used for class rooms and the ground floor is used for office and for keeping cycles and shoes etc. There is also a toilet, garage and a water tap available at the ground floor. Out of the four persons whom he found were assaulting Rajib Das one of them was likely to be the brother of PW2 but subsequently on inquiry he came to know that there is no such brother of the said witness. When he was present there he found that the said person was trying to extract confession from the accused Rajib Das and he snatched away the mobile phone of the accused. Before the police authorities he stated that Rajib Das is his employee and he registers the admission of students and does some extra work. However, he denied that the victim was a student of the institution when the prosecution declared him to be hostile. In cross-examination he stated that although PW2, sister of the victim is a student of the institution but the victim PW1 is not a student of the institution and it was a practice that many students wait at the office room before their classes and they go to their classes with their teachers only.

PW5, is Tulu Das who deposed that he is a permanent employee of ITE Coaching Center. He deposed that the coaching center retain the keys with him. He also stated that PW4 Tarak Banerjee is the owner of the coaching Center who resided at Jambuni as well as the upper floor of the coaching center. In the morning the witness used to open the coaching center at about 6.00 - 6.30 am and closed it around 11.00 am and in the evening it is opened at 05.15 pm and closed at 9.30 pm. He admitted that there is an Office at ground floor and a place for keeping cycles. He further deposed that there are 10 rooms in the first floor and the second floor and there are another set of keys which remains with the owner. He also admitted that he was working for about 9 years in the institution. He heard about the commission of the offence of Rajib Das and denied that the police interrogated him. At this stage the prosecution declared him as hostile. In his cross-examination he denied to know the victim.

PW6, Sridip Ballav, learned Judicial Magistrate who recorded the statement of the victim under Section 164 of Cr.P.C. Deposed that he obtained the victim's signature on each and every page of the statement and also issued necessary certificate after recording her statement. He identified his signature in the statement which was marked as Ext.2/3.

PW7 is 'Z', mother of the victim girl who deposed that her daughter came for tuition at ITE Coaching Center in the evening at about 4.45 pm to 5.00 pm. She received a phone call from her daughter wherein it was reiterated to her that one of the employee namely, Rajib Das embraced her daughter from

backside and kissed her. Her elder daughter went at the coaching center and she herself sent her to hospital at about 8.00/9.00 pm when her daughter was examined there and thereafter she returned home from hospital. On the next day she along with her husband and daughters had been to Bolpur Police Station. She identified her signature in the seizure list and stated that her daughter did not attain majority. In cross-examination she narrated the incident as was stated to her, by her daughters.

PW8 is Dr. Sourav Das, attached to Bolpur Sub-divisional Hospital who deposed that on 09.08.2018 the victim girl was brought to him in connection with the Bolpur Police Station case no. 224 of 2018 dated 09.08.2018, however, the victim girl refused to undergo medical examination. He identified the medical report which was marked as Ext.4.

PW9, is Sub-Inspector Kasturi Gupta, who was endorsed to investigate the case by the Inspector-in-charge, Bolpur Police Station. She narrated the chronology of events of carrying out the investigation till the submission of charge-sheet as has been stated earlier. In her cross-examination she stated that she did not seize the admission register of the said coaching center and she did not also examine any teacher of the said coaching center. She further deposed in her cross-examination that PW2 did not state to her that she was informed over phone and she came down to the coaching Center after recharging her mobile phone.

Mr. Kallol Basu, learned advocate appearing on behalf of the appellant submitted that the prosecution has failed to establish or prove the case and there are serious illegality committed by the prosecution which in fact, has led to a situation where no person of ordinary prudence can come to a conclusion by any stretch of imagination that the offence at all could have been committed. Learned advocate also emphasized on certain specific issues which according to him is necessary for arriving at a just decision. It was pointed out that the written complaint when read along with the statement of the victim under Section 164 of Cr.P.C., portray a different story which was never taken into account. Emphasis was made on the fact that the age of the victim has not been proved by any documentary evidence and it is only on the basis of Aadhar Card which was placed on record, the age was ascertained and the victim was held to be a minor. No motive has been shown from the evidence and which has surfaced and from the medical examination report of the victim it transpired that the victim refused to undergo any medical examination which is also corroborated by the doctor, PW8. Learned advocate further submitted that there were 300 students in the institution, there was admission register, however, the investigating agency neither examined any other student and also did not seize the admission register of the coaching institution/coaching center. According to the learned Advocate the foundational facts had to be build up by the prosecution in order to establish the case which the prosecution has miserably failed. In order to substantiate his argument learned advocate relied upon the judgment of Subrata Biswas

and Anr. –Vs. – State reported in 2019 SCC OnLine Cal 1815 and Sitaram Das –Vs. – State of West Bengal reported in 2020 SCC OnLine Cal 522.

I have considered both the judgments relied upon by the appellant, in Subrata Biswas (supra) it is reflected that the accused examined two witnesses in support of its case and exhibited the master role maintained in the ordinary course of business. Further the Hon'ble Court while deciding the appeal from the factual circumstances came to the conclusion that the victim was staying continuously at her maternal uncle's home and so the possibility of the appellant having any access to the victim was remote and thereafter proceeded to acquit the appellant therein. In Sitaram Das (supra) at paragraph 30 the learned Court on an appreciation of the evidence came to the conclusion that the victim has been constantly changing her stand in the FIR, at the time of Section 164 Cr.P.C. and in her deposition before the Court. Further according to the Hon'ble Court, the victim girl herself stated that she herself went in a van rickshaw and fell down from there. As such the Court did not rely on the medical evidence and acquitted the appellant who was 55 years old.

Learned Advocate appearing for the State opposed the contentions of the learned advocate appearing for the appellant and submitted that the prosecution has proved the case as is required under the relevant provisions. Further according to the prosecution the victim has been consistent in her version at all the stages, particularly, at the time of initiating the case by way of filing of the complaint, her statement under Section 164 of Cr.P.C. and also

her deposition before the Court. According to the prosecution repeatedly the accused person by way of cross-examination tried to shake her version but, the victim and other prosecution witnesses were firm in their version and at no point of time the factual circumstances relating to the factum of sexual assault could be dislodged. It was also submitted that the emphasis on medical examination is unwarranted in view of the facts of the case wherein the allegations are that the victim was pulled or embraced and the accused kissed her two cheeks. It was evident that the victim was aged about 17 years and to that effect there was no challenge from the side of the accused. As such the provisions of Sections 29 & 30 of the POCSO Act are attracted in the present case and there is no scope of the accused escaping from the rigors of the Section for which offence has been committed.

I have considered the submissions of the learned advocate appearing for the appellant as well as the State and on appreciation of the same I am of the view that offences of such nature which have been complained of do not occur in public places where number of persons would be normally available. To this effect Explanation of Section 11 of the POCSO Act is important wherein it is stated "Any question which involves "sexual intent" shall be a question of fact". The consistent version of the victim in the instant case is that when she came out of the bathroom all on a sudden the accused gripped/embraced/hugged her and kissed her on her two cheeks and also was intending to do something otherwise. Such version of the victim is available in the letter of complaint addressed to the Inspector-in-charge, her statement under Section 164 of

Cr.P.C. before the learned Judicial Magistrate as also in her deposition in Court. There is no deviation or variation to such facts. Once such fact is found to be consistent, the Court has to draw the presumption relating to the offence being committed until and unless the contrary is proved. Needless to state that the legislature has used the words 'shall presume' in Section 29 of the POCSO Act. Thus at this stage it would be for the accused to overcome and/or rebut the culpable mental state by way of establishing facts which are beyond reasonable doubt. In the present case there was no requirement for medical examination as the nature of the offence complained of do not require medical examination. The only emphasis which has been made is the other two witnesses who have turned hostile. Both these witnesses are closely associated with the accused one being Tarak Banerjee, PW4 who is the owner of the ITE Coaching Center but he was never present at the spot when the incident occurred as also Tulu Das, PW5 who was a colleague of the accused. It is also settled principal of law that whole of the evidence of a hostile witness should not be discarded and to the extent it supports the prosecution case, the same can be taken aid of. In the instant case although these two witnesses of ITE Coaching Center attempted to shield the accused but what is staring is that the victim gave description regarding the place of occurrence as vividly narrated in her deposition which had corroboration with the version of hostile witnesses i.e. the ground floor, the office room, the time when the coaching center is opened during the evening hours, the water tap, the bathroom, the space for keeping cycles and shoes. It would not be possible for one to narrate

each of the above features until and unless one is regularly visiting the said place.

In the instant case the accused has not taken a specific defence and rather attempted to point out certain minor discrepancies. During his examination under Section 313 of Cr.P.C. the appellant took up plea of 'no', 'I am innocent' and 'I do not know'.

Having considered the parameters under which an accused is to be tried and an offence is to be established by the prosecution, I am of the view that the prosecution has been successful in making out a case under Section 7 of the POCSO Act which is punishable under Section 8 of POCSO Act.

Having regard to the same, I am of the considered opinion that no interference is called for in respect of the finding of guilt arrived at by the learned Additional Sessions Judge, Bolpur, Birbhum and Special Court in connection with Bolpur Police Station case no. 224/18, giving rise to Special (POCSO) Case No. 23 of 2018.

However, there is no evidence to the effect that there are any antecedents of the present appellant which has been brought on record. Taking into account the same, I am of the view that it is needless to impose maximum punishment upon the appellant and as such his sentence is modified to the extent that the accused/appellant shall suffer Simple

Imprisonment for 3 (three) years along with fine of Rs.5,000/- i.d. to suffer further SI for a period of 3 (three) months.

Accordingly, CRA 121 of 2021 is disposed of.

The appellant is on bail his bail bond stands cancelled and he is directed to surrender immediately before the learned Court below to serve out rest of the sentence.

Pending connected applications, if any, are also disposed of.

Department is directed to send back the LCR immediately. A copy of the judgment be forwarded to the learned Trial court immediately for compliance regarding the directions given above.

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

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

(Tirthankar Ghosh, J.)