

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

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRA (SB) 72 of 2023

**Babulal Sardar
Vs
The State of West Bengal & Anr.**

For the Petitioner : Mr. Debajyoti Deb
Mrs. Somdyuti Parekh

For the Respondent no. 2/Victim : Ms. Jharna Biswas

For the State : Mr. Debasish Roy
Mrs. Amita Gaur
Mrs. Sujata Das

Heard on : 27.02.2025

Judgment on : 22.04.2025

Dr. Ajoy Kumar Mukherjee , J.:

1. Being aggrieved by the judgment of conviction and order of sentence dated 15.02.2023 and 17.02.2023 passed by Additional Session Judge, 2nd court Alipore, in Special Trial no. 13(03) 2022, the present appeal has been preferred. By the judgment impugned, learned Court below convicted appellant Babulal Sardar and sentenced him to suffer rigorous impressment for four years and to pay fine for committing offence

punishable under section 354B of Indian Penal Code (IPC) and court below also sentenced the appellant to suffer rigorous impressment for six years and to pay fine for committing offence punishable under section 10 of The Protection of Children from Sexual Offences Act 2012 (in short POCSO Act 2012).

2. It is alleged in the FIR that on 12th September, 2021 at about 1:00 P.M the appellant took minor daughter of the complainant, aged about seven years in his house and closed the door, put off her pant and committed rape upon her. As per FIR immediate after coming out from appellant's house, victim started weeping and on being asked the victim informed the matter to her neighbours namely Jyotsna Haldar (P.W-4) and Srabanti Sardar (P.W-3) and when some other villagers went to the house of appellant, he fled away. Instant complain was lodged on the same day and the investigation started and after completion of investigation charge sheet submitted against the accused/appellant under section 376AB of the IPC read with section 6 of the POCSO Act 2012. Thereafter, charge was framed against accused person under section 376AB of IPC and section 6 of the POSCO Act 2012. During trial, prosecution examined victim girl as P.W-1, complainant who is the father of victim girl as P.W-2, aforesaid neighbour Srabanti Sardar and Jystna Halder as P.W-3 and 4, mother of the victim girl as P.W-5, scribe of the written complain as P.W-6, the Investigating Officer as P.W-7 and the Doctor who examined the victim girl as P.W-8.

3. After completion of the trial, the court below held that allegation under section 354B of IPC and sections 10 of the POCSO Act 2012 has

been established against the appellant herein and accordingly Court below convicted him under those provision of law.

4. Being aggrieved by that judgment, learned counsel appearing for the appellant during hearing before this court has taken the following grounds filing short written notes of argument:-

(a) There is not a single corroborative evidence in support of the victim's statement, which was inconsistent right from the very outset (from the time of recording 164 to recording of evidence).

(b) Neighbours being PW-3 and PW-4 had never seen the victim either entering into or exiting the house of the Appellant. It would transpire from the evidence of the I.O (PW-7) that the victim girl never told the I.O that she was called by the Appellant while she was playing. There was long standing property dispute between the Appellant & the victim's father, for which present proceeding has been initiated

(c) The doctor (PW-8) conducting the medical examination on the same day (of alleged offence) did not find any sort of injury in any manner whatsoever on the victim's person or her private parts.

(d) The learned Judge blindly relied on the evidence of the PW-3 and PW-4, although none of them saw the victim entering or exiting the house of the Appellant.

(e) There was major variance in the statements made by the victim in her statement recorded under section 164 Cr.P.C. with that of her evidence recorded during trial. The Trial judge rightly recorded that there has been exaggeration by the victim during evidence.

(f) The Magistrate who recorded the statements of the victim was not called to adduce evidence. Incriminating materials which came up in 164 statement of the victim recorded under section 164 Cr.P.C. were not put to the Appellant during his examination under section 313 Cr.P.C. and as such, the Appellant did not have a chance to explain the incriminating materials going against him. Hence, the trial Judge could not have relied on the statements of the victim recorded under section 164 to be that of gospel truth.

(g) The evidence of the I.O would reveal that the birth certificate of the victim was not verified and as such, the age of the victim could not be ascertained.

(h) Although Section 29 of the Act of 2012 casts a presumption against the Accused/Appellant, but such presumption is always rebuttable. As regards Section 30 of the Act of 2012, the Trial Court could not come to a clear finding as to what could have happened and came to a vague finding that 'something must have happened'. There is a clear inference that the Court had reasonable amount of doubt in its mind as to the commission of the alleged offences.

Decision with reason

5. On perusal of contents of FIR it appears that it was lodged on 12.09.2021 alleging that on that day around 1:00 P.M, the appellant had taken the victim girl in his house and had closed the door of his room and

had removed her pant. Thereafter accused allegedly committed rape. The victim girl made statement before the Judicial Magistrate four days after the incident i.e. on 16.09.2021, where she has stated that the appellant called her and when she entered into the room, appellant closed the door and disrobed her and also lying upon her touched her private parts. Said victim had also faced the dock as P.W-1 where she has stated while she was playing in front of the house of the appellant Babulal, he called her in his house and after that he bolted the door from inside, put off her pant and then committed penetrative sexual assault. However she has not stated about committing penetrative sexual assault upon her, when she was examined first under section 164 of the Cr.P.C i.e. four days after the occurrence. Trial Court in this context held that the allegation regarding penetrative sexual assault cannot be believed, if such statement is considered in the context of evidence given by PW-4 and PW-3 along with the evidence of the doctor who opined that though hymen was found to be ruptured but no other injury was found during examination of the victim girl. Thus the Trial Court came to a finding that it might be a fact that the victim girl had made some exaggerated statement when she faced the dock, as she might have heard many things from her guardian in the meantime. Accordingly court below did not agree that the present offence attracts section 376 AB of the IPC. However facts remain that there exists full corroboration of the statement in the FIR, with that of the statement made under section 164 Cr.P.C. by the victim and also with the evidence adduced by the victim that the appellant took her to his room, closed the door and disrobed her.

6. As has been stated in the FIR that the victim immediately after her exit from Appellant's room started weeping and on being asked she first stated the incident to her neighbour Jyotsna Halder and Srabanti Sardar and said Jyotsna during examination under section 164 Cr.P.C stated before the magistrate that on being asked victim told her that appellant Babulal called her in his room and closed the door and also disrobed her. Said Jyotsna Halder has not stated that victim at that point of time made any allegation of committing penetrative sexual assault upon her. Said Jyotsna also faced the dock as P.W-4 and in her deposition she has stated that the victim on being asked told her that appellant called her in his room, made her lying on the bed, disrobed her and pushed her in the bed forcefully and nothing further. The other neighbour Srabanti Sardar while examined under section 164 stated before the magistrate that victim on being asked told her that appellant called her inside his room, closed the door and disrobed her and she has also stated that victim narrated the said incident in presence of her and also in presence of Jyotsna Halder. Said neighbour also did not say anything about committing penetrative sexual assault by the Appellant.

7. So from the aforesaid evidence of said two neighbours and the victim girl, I find sufficient corroboration along with the FIR story as well as statements made by each of them before magistrate that the appellant had called the victim in his room, closed the door and disrobed her. There appears to be no contradiction either in the statement of the two neighbours before whom victim narrated the incident first with that of the victim's own statement and also with the statement as narrated in the FIR

so far as the incident of disrobing victim by the Appellant, within a closed room is concerned. P.W-8 is the doctor who examined the victim girl and found that the Hymen is ruptured but opined that in case of penetrative sexual assault, upon a victim girl of such age, it is very much probable that there must be other injuries in the genital area, though he did not find any other injuries except rupture of hymen.

8. Section 354B of IPC deals with assault or use of criminal force to women with intent to disrobe and the essential ingredients of the offence are:-

i) accused assaulted or used criminal force to a women

ii) he did it intentionally for disrobing or compelling that women to be necked

9. Section 7 of the Act of 2012 defines **“sexual assault”** as follows :-

“Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

10. Section 9 which deals with aggravated sexual assault states in 9 section (m) of the Act that whoever commits sexual assault on a child below 12 years, shall be called as “aggravated sexual assault”.

11. Now section 10 of the Act of 2012 prescribed punishment for “aggravated sexual assault”, which shall not be less than five years but which may extend to seven years and shall also be liable to pay fine.

12. Form the aforesaid facts and circumstances of the case and in view of full corroboration found form the statements made by the victim and P.W-3 and 4, in the context of FIR that appellant disrobed the victim who is aged

about seven years, and as such the Trial court was quite justified in convicting the appellant for committing offence punishable under section 354B IPC and section 10 of the POCSO Act of 2012. Since the allegation of penetrative sexual assault has not been corroborated either in the statements made by the neighbours to whom victim first disclosed the incident nor in the statement of the victim who made her statement before the magistrate four days after the occurrence. Though hymen was found to be ruptured but there is no mention in the medical report or in the evidence of PW-8 that the rupture was recent, though PW8 examined her on the same day immediate after occurrence and as such the court below has not committed any wrong in not convicting the accused under section 376 AB of the IPC as the allegation of committing rape upon victim has not been proved beyond reasonable doubt.

13. Now the Appellant, as I have stated above taken the ground in the appeal that the Magistrate before whom the witnesses have made statements was not examined and for which he did not get the opportunity to cross examine the witnesses. I do not find any substance in the said submission firstly because such recording of statement by Magistrate without formal proof is admissible in evidence in view of section 80 of the Evidence Act and secondly if it is the case of appellant that the aforesaid witnesses have not made any such statements before the Magistrate or the magistrate did not at all examine such witnesses, what prevented the appellant to call such magistrate as witness before the trial court. His further contention that the birth certificate of victim girl was not verified also does not make any sense in view of the fact that the birth certificate of

the victim is marked as exhibit 4 in the present case and the appellant could not produce any document contrary to the same. Similarly, in absence of making out a case of causing prejudice, there is hardly any substance in other grounds of appeal taken by the appellant.

14. Above all section 29 of the Act of 2012 creates a presumption as to such offence which provides that where a person is prosecuted for committing offence under section 3, 5, 7 and 9 of that Act, the courts shall presume such person had committed the offence, unless contrary is proved. In the present case the appellant has not made minimum efforts to prove anything contrary to such presumption nor made any attempt to establish that present proceeding is an outcome of property dispute. Though the appellant mentioned about some minor contradiction in the evidence of the vital witnesses but the same are irrelevant and insignificant to rebut the presumption as stated above.

15. Considering all these, I find nothing to interfere with the judgment of conviction and order of sentence passed by the court below and as such the impugned judgment and order of conviction dated 15.02.2023 and 17.02.2023 passed in special trial no. 13(3) 2022 stands affirmed

16. CRA (SB) 72 of 2023 stands dismissed. Trial court records be returned immediately.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Dr. AJOY KUMAR MUKHERJEE, J.)