

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

PRESENT:

THE HON'BLE DR.JUSTICE AJOY KUMAR MUKHERJEE

CRA (SB) 103 of 2024

**With
CRAN 2 of 2024
Sk. Mofizul Islam @ Saheb
Vs.
The State of West Bengal & anr.**

For the Appellant : Mr. S.K. Moinuddin

For the State : Mr. Anasuya Sinha
Ms. Trina Mitra

For the respondent no.2 : Ms. Jharna Biswas

Heard on : 01.05.2025

Judgment on : 04.07.2025

Dr. Ajoy Kumar Mukherjee, J.

1. This appeal is directed against the impugned judgment of conviction and order of sentence dated 09.08.2023 and 10.08.2023 respectively passed by learned ADJ 1st Court, Sealdah in Special Trial no. 02 (01) 2023, arising out of the special case no. 46 of 2022. By the impugned judgment learned Court below convicted the appellant herein under section 10 of the Protection of Children from Sexual offences Act 2013 (in short POCSO Act)

and also under section 354 A of the Indian Penal Code (in short IPC) and sentenced the appellant to suffer rigorous imprisonment for 5 years and to pay fine of Rs. 50,000/-

2. The prosecution case as appearing from the FIR is quoted below:-

“Yesterday (16/11/22) at 5 P.M. in the evening our next door neighbour Priyanka Ray told me that Saheb is doing some obscene work with my daughter. Then I asked my daughter what has happened, my daughter told me that Saheb uncle had yesterday (15/11/22) at 4 P.M. in the afternoon when she was playihg, called her and making her sit in the room he touched her on the head and back while talking, after that he touched his mouth with her mouth. He kept his head on her chest and opening his lungi told her to suck his penis, then someone made sound outside and Saheb uncle went out of the room and she also came out. After coming out he told her not to disclose anything to anyone. That is why she did not tell anything to anyone. Today during interaction with aunt she told her about the incident. After knowing about this I told my husband. When my husband went to talk about this at first he refused to accept it. after that he went away by pushing my husband, Saheb used to work with our next door neighbour Bappa Saha.”

3. During the trial prosecution has examined 13 witnesses including victim and on closure of recording of prosecution evidence, the appellant herein was examined under section 313 of Cr.P.C., where he stated that the allegation is false and defended himself by saying that on the same date of occurrence at about 11 a.m. the father of said child went to his stall in intoxicated condition and demanded so many articles from him and he refused and also slapped him and at that time he told Appellant that he would give him a lesson and the present case is the outcome of the same. Appellant has not examined any witness on his behalf.

4. Being aggrieved with the findings arrived at by the learned Sessions judge, Mr. Moinuddin learned Counsel appearing on behalf of the appellant submits that the FIR case is false and based on concocted story. The said FIR was lodged by PW1/mother of the victim girl but the entire complaint was written by PW13 Payel Das @ prity who is the paternal aunt of the

victim girl and surprisingly she wrote the name of complainant in the complaint as if complaint put her signature therein but the complainant is admittedly an illiterate lady. He further submits in this context that the evidence of PW6 Abhijit Das corroborates with the evidence of PW13 Payel Das that the FIR was neither written nor signed by PW-1/complaint.

5. He further submits that prosecution failed to bring any eye witness. The medical report and evidence of PW7 and PW9 do not support the prosecution case. PW-12 i.e. the investigating officer in his evidence admitted that he did not get any direct evidence from the local people, who had seen the victim to go to the house of appellant nor did he get any evidence about the movement of the victim to go to the bathroom situated close to his residential place. Infact the investigation discloses that the victim was playing outside as usual on the date and time of incident and there is nothing to show nor there is any direct evidence that on the date and time of alleged incident, the victim was with the accused.

6. He further argued that during examination under section 313 of Cr.P.C. the appellant explained under what circumstance the false allegation has been lodged against him. Infact the entire prosecution case is false and fabricated and on the basis of such materials the order of conviction or sentence is not sustainable in the eye of law. Prosecution side failed to bring any direct evidence and the evidence adduced by the prosecution witnesses are hearsay evidence, on the basis of which the court below erroneously awarded conviction against the appellant. He further submits that the age of the victim girl has not been adjudicated in the present case and though the conviction order was passed on the basis of circumstantial evidence but the

prosecution has miserably failed to link the chain of circumstances to prove the guilt of the accused.

7. In this context he relied upon the judgment of **P.Yuvaprakash Vs. State** which was decided by the Supreme Court on 18th July, 2023 and another judgment of **Bhim Singh and another Vs. State of Uttarakhand**, reported in **(2015) 4 SCC 281**.

8. Mr. Moinuddin further submits that in view of **Navin Dhaniram Baraiya Vs. State of Maharashtra** decided by Bombay High Court on 5th June 2018, the well settled principle of law is that foundational fact of the prosecution is to be proved and then only the presumption under section 29 of the POCSO Act will apply. In the present case in the absence of any eye witness or direct evidence the foundational fact could not be established by the prosecution, which the prosecution was obliged, under the law to prove first. In this context he also relied upon the judgment of **Arjun Baro Vs. State of Maharashtra**. Accordingly appellant has prayed for setting aside the judgment impugned

9. M/S Jharna Biswas and M/S Anusuya Sinha, learned counsel appearing on behalf of the defacto Complainant and the State respectively vehemently argued that the prosecution has successfully proved it's case. They further argued that even the sole testimony of the prosecutrix can be the basis for convicting the appellant and the court below correctly came to the conclusion in this case. Furthermore the evidence of victim and defacto complainant completely inspire confidence that the appellant himself has committed the offence and as such the Court below rightly passed the

impugned judgment of conviction and order of sentence and as such both of them prayed for upholding the same.

10. Before going to further details, let me go through the relevant portion of evidence as adduced by the prosecution witnesses to evaluate the findings of the learned Sessions Judge. PW1 is the mother of the victim, who has stated that she learnt from her daughter that the appellant kissed her daughter forcefully dragged her towards the toilet and asked her to remove her wearing apparel but she did not do it and at that time someone opened the gate and the appellant fled away by squeezing the breast of her daughter.

11. PW2 is the victim, who is a school going child, categorically stated before the court that the appellant forcefully took her inside his room and he embraced her and kissed her and then she was taken to the toilet and appellant after lifting his lungi had asked her to suck his organ, which she refused to do and then the appellant forced her to remove her pant which she also denied and then the appellant forcefully squeezed her breast and at that time she managed to escape from the spot.

12. PW-3 stated that when she asked the victim, she told her that the Appellant had called her and kissed her on 15.11.2022. PW4 also stated that on 15.11.2022 at about 5 P.M. while her granddaughter was playing, the accused called her and kissed her.

13. PW-6 is the father of the victim who stated that at the time of occurrence he was out of his residence and when he returned he had heard from his wife that the appellant has done some indecent activity with his daughter, who was aged about 6 years at that time.

14. The medical officer who examined the victim girl deposed as PW7 and she also stated that as per history of assault narrated by the, victim and her mother, while the victim went to play on 15th November, at 4 P.M. the appellant called her to his house and had assaulted her by kissing her lips asking her to suck his penis and pressed her breast and that said appellant also asked the victim to remove her pant but victim had refused and ran out of that place.

15. PW-9 is another medical officer who also stated victim's version as stated to her is that while she was playing with her friends, the appellant took her and forcibly dragged to the P.O. and kissed her and that when said accused anticipating someone outside the door had left the place

16. The PW-10 and PW-8 stated that they have heard from the father of the victim that the appellant had committed indecent act with the said victim.

17. PW-12 is the investigating officer and PW13 is the FIR writer who stated that as her boudi (*de facto* complainant) is illiterate she wrote down the said complaint at the police station and the signature of PW1/*de facto* complainant as found in the said complaint was written by her and it is not the signature of *de facto* complainant.

18. In this context it also needs to be mentioned that during investigation the victim was examined under section 164 Cr.P.C. on 17.11.2022 i.e. two days after the alleged occurrence, where she categorically stated that the appellant had kissed her on her lips and squeeze her breasts and then after lifting his lungi he asked the victim to suck but at that time hearing sound

from outside, he left the room and asked the victim not to disclose the incident to anyone.

19. After going through the evidence on record, it is seen that at the time of alleged occurrence the victim was only a girl of 5 years. The impugned judgment states that the birth certificate of the victim was seized by the IO from the mother of the victim namely PW1 under seizure list dated 17.11.2022 [exhibit P-15(12)] and during the course of argument the age of the victim was not challenged and for which it can be safely concluded that the victim was less than 12 years of age at the time of alleged occurrence.

20. The terms “sexual assault” has been defined in the POCSO Act as follows:-

7. Sexual assault:-

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.

21. The offence “aggravated sexual assault” has been defined in section 9 of the Act and explanation (m) of section 9 states that whoever commits “sexual assault” on a child below 12 years, shall be treated to have committed “aggravated sexual assault”.

22. In the present case as I have stated above that according to the FIR, on 15.11.2012 at 4 p.m. the appellant called the victim at his room and touched his mouth with her mouth and thereafter lifting his lungi told her to suck his penis and then anticipating someone’s presence out side the room, he went out of the room and the victim also came out from the room. Such statement has been fully corroborated by the victim during her statement

made under section 164 Cr.P.C. as well as during her evidence before the court. It is true that PW-3 and PW4 only stated that they have learnt from the victim that the appellant called her and kissed her on 15.11.2022. In the cross examination of PW3 even the accused put a suggestion to the witness that she did not hear any other allegation against the accused except the allegation of kissing her and thereby appellant has not disputed the incident of kissing her by the appellant. PW 7 and PW9 are the medical officer whose recording of history of assault corroborates with whatever the complainant and the victim has stated in their evidence and in the statement recorded under section 164 Cr.P.C. PW10 and PW8 only stated that they have heard that the appellant had committed indecent act with the victim. In such view of the matter all material witnesses including PW3 and PW4 have stated that they have learnt from victim that the appellant had kissed her. From the evidence of other witnesses specially from evidence of defacto complainant and victim it had been further established without any contradiction that the appellant called her in his room and he touched his mouth with her mouth and after lifting his lungi told her to suck his penis and he has also squeezed her breast and also attempted to disrobe her.

23. The definition of sexual assault as has been quoted above clearly states in section 7 that even *“any other act with sexual intent, which involves physical contact without penetration”* is also said to commit sexual assault. The victim at her little age categorically narrated before the court that appellant forcibly took her inside his room and embraced her and kissed her on her lips and then lifting his lungi asked her to suck his organ and also attempted to disrobe her forcefully. During cross examination of victim there

is no denial against such statements. The prosecution case has been sufficiently corroborated by the prosecution witnesses and they are in consonance with each other and during cross examination it has not been controverted or contradicted.

24. In *Raju and others Vs. State of M.P.* reported in (2008) 15 SCC 133

it was held by Apex court as follows:-

“.....Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.”

10. *The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.”*

25. In the instant case I find from victim's statement that she has pointed her finger at the accused and stated to her mother that appellant embraced the victim and kissed her and thereafter lifting her lungi asked her to suck his penis. During trial the victim identified the accused. If anything indecent to the victim girl had not been occurred, a child of 5 years would not have come to tell a lie against the appellant and not only that her statement has been substantially corroborated by the mother of the victim and the other witnesses before whom she narrated the incident. There is neither any denial of such incident during cross examination nor Appellant has made

minimum effort to establish that present proceeding is an outcome of any animosity in between the complainant and the appellant, as has been sought to be defended by the Appellant during his examination under section 313 Cr.P.C.

26. It is no more *res integra* that conviction can be based upon even on the testimony of solitary witness, if it is found to be trustworthy without any blemish and inspired the confidence of the court. In the instance case even only that part of her evidence that “Appellant embraced her and kissed her” sufficiently raised the foundational fact to attract section 7, which states “*any other act with sexual intent which involves physical contact without penetration*” and at the same time raises presumption under section 29 of the Act, that the Appellant has committed the offence of sexual assault and since nothing contrary to such presumption has been proved, presumption has not been rebutted and his guilt is established, even without taking into consideration the fact of corroboration by other witnesses.

27. The argument advance by learned Counsel appearing on behalf of the appellant that the FIR was written by PW13 who put the name of defacto complainant /PW1 in the FIR but she did not put her signature in the FIR as she is illiterate and aforesaid allegation falsify the FIR story which has been concocted forging someone’s signature. I don’t find any merit in such submission, since the said FIR ultimately culminated into a charge sheet and after recording evidence of prosecution witnesses, the court below found the appellant guilty. In fact once the investigation is over and the charge sheet is filed, the FIR pales into insignificance and as such who has written the same and by whose pen it was written, all becomes insignificant. This is

also true in view of the fact that the concept of locus standi is completely unknown in the case of lodging complaint in such criminal proceeding.

28. The submission of learned Counsel appearing for the appellant that the trial court recorded the conviction only based upon suspicion does not hold water since from her initial statement made under section 164(5) Cr.P.C. till her testimony during the course of trial, the victim was demonstrably found to be very consistent.

29. It is to be kept in mind that the victim in this case is a vulnerable child who fell prey to the lust of the appellant, who overpowered the victim by taking advantage of the fact that she was not with her guardian. Victim on 17.11.22 stated before Magistrate that on the previous date after the occurrence, Appellant threatened her not to disclose the incident to anyone and for which she has not stated anything but on the next day i.e. on 16.11.22 her aunt seeing her physical appearance had suspected that something wrong was done with her and on her query, the victim disclosed the occurrence to her aunt and prompt FIR was lodged on the very next date. In ***Jai Prakash Sing Vs. State of Bihar and another*** reported in **(2012) 4 SCC 379**, the Hon'ble Supreme Court observed that prompt lodging of an FIR is an assurance regarding truth of the informant's version and that a promptly lodged FIR reflects the first hand account of what has actually happened and who was responsible for the offence in question. Furthermore in the instant case the testimony of the victim girl is consistent and reliable. Further, during the cross examination there is no denial of sexual assault. In fact evidence of PW2 (victim) has not been impeached in any manner and based on her evidence alone conviction is sustainable.

30. In the above factual background of the case as stated above, I find no reason to disbelieve the credibility/and or trustworthiness of the victim and the defacto complainant, who are found to be reliable and liable to be accepted.

31. In view of above the present appeal fails.

32. CRA (SB) 103 of 2024 stands dismissed. The conviction and sentence awarded to the appellant herein by the learned Court below in connection with Special Case no. 46 of 2022 convicting the appellant under section 10 of POCSO Act read with section 354 A of the IPC is hereby confirmed.

33. Sent the trial court record at once along with a copy of this judgment, to the court below, wherefrom it was called for.

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.)