

Form No. J(1)

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

Present :

**The Hon'ble Justice Rajasekhar Mantha
And
The Hon'ble Justice Rai Chattopadhyay**

CRA 246 of 2018

**Kishore Sharma
Versus
The State of West Bengal &Anr.**

For the Appellant : Mr. Swapan Kumar Mallick
Ms. Sudeshna Das

For the State : Ms. Amita Gaur
Mr. Asif Dewan

Heard concluded on : 7th May, 2026

Judgment on : 7th May, 2026

Rajasekhar Mantha, J.:

1. Mr. Asif Dewan submits today that he does not have any further instructions from the State and was desirous of retiring from the matter. This Court has requested Mr. Dewan to continue to assist since he was assisting this Court from the inception of the hearing. The State shall pay Mr. Dewan's fees, payable according his empanelled grade, for appearing and assisting this Court in this matter regardless of the absence of instructions from the State.

2. Notice sent to the victim/de facto complainant is filed by the learned counsel for the appellant and the same is taken on record. The endorsement of the postal envelope indicates that “no such person exists”.

3. The subject appeal is directed against judgment of conviction and order of sentence dated 4th May, 2018 passed by the Additional District & Sessions Judge, First Court, Sealdah, South 24-Parganas/Special Judge under the POCSO Act in Special Case No.8 of 2018. The appellant was convicted under Section 376(2)(n) of the Indian Penal Code read with Section 6 of the POCSO Act for imprisonment for twenty years and a fine of Rs.2,00,000/-. In default, the appellant was directed to suffer rigorous imprisonment for a year.

THE PROSECUTION CASE AND THE EVIDENCE ON RECORD

4. The victim girl aged between 14 to 17 years lodged a complaint dated 11th February, 2018 with the Phool bagan Police Station, Kolkata, against the appellant. The victim stated in the complaint that after Durga Puja (last day being 30th September, 2017) she had visited her native place along with her parents at Bihar. They returned back to Calcutta a week later. She started to visit the factory where her parents worked (Free India Laundry) situated at 176/1A Maniktala Main Road, Kolkata-700054.

5. The victim alleged in the complaint that the appellant has raped her as many as 6 times. The first incident of rape took place on the 3rd or 4th day in the said factory. It so happened that the victim received a call from her mother around 8:30 pm at the laundry to go home and prepare a meal.

6. On way home, outside the main entrance of the factory, the appellant, who worked as a driver thereat, grabbed her hand forcefully and took her into a room where he stayed. He closed the door, tied her mouth with a handkerchief, disrobed himself and the victim, and committed forceful sexual intercourse on her. The victim tried to shout but could not.

7. The appellant is stated to have threatened the victim against disclosing the same to any family member. If so disclosed, the appellant threatened to kill the victim and family. The victim did not inform anyone. The said offence was thereafter repeated as many as five times over several days in the month of October.

8. The victim complained of abdominal pain to her mother. She was taken on the preceding Saturday of 11th February, 2018 most likely on 10th February, 2018 to PW-6 who examined her and diagnosed her as pregnant and prescribed other medical tests. The victim or her mother had not disclosed any history of assault on the victim by the appellant to PW 6.

9. The victim returned home and upon enquiry, informed her mother that the appellant committed rape on her as many as six times. On 11th February, 2018, the appellant's mother went to the laundry and confronted the appellant and there was a commotion thereat.

10. Upon arrival of the Phool bagan police, her mother disclosed the incident and a lady constable sent the victim for medical examination. The statement of the victim was recorded by PW-15, Pradyut Dutta as dictated by PW-17, Rajib Prasad, the Investigation Officer in the presence of her mother and a lady police official.

11. Based on the said complaint, Phool bagan PS registered FIR being No. 20 of 2018 dated 11th February, 2018 against the appellant under Sections 342/352/376/506 and Sections 3 and 4 of the POCSO Act. Investigation was completed and charge sheet was filed.

12. Charges were framed against the appellant under Section 6 of the POCSO Act read with Section 376(2)(n) of the IPC on 9th March, 2018. The place of occurrence in the charge was mentioned as 176/1A, Maniktala Main Road, Kolkata- 700054.

13. **PW-1** was the victim girl. She has deposed that after the last *Durga Puja* of (2017), on a particular day, she was returning home to cook food at about 9.00 p.m. On the way home, the appellant stood on her way and thereupon took her to his house and tied her face with a rope and committed rape upon her. She deposed that she was 8-month pregnant

on the day of offence, i.e., 13th April, 2018. The same, however, stands contradicted by the statement recorded under Section 164 of the Cr. P.C. Before the learned Magistrate, namely, PW-16, Susama Rai, the victim stated that the incident occurred when she was making *chapatti* at home late in the evening. She further deposed that the appellant tied her hands to a window and committed rape upon her. This creates doubts as regards the actual place of occurrence.

14. There is yet another contradiction that emerges from the evidence of the victim girl. The victim girl claims to be a 8-month pregnant which would roughly place the date of conception sometime in September, 2017. This would indicate that the victim may have already conceived as on the date of incident alleged by her. That by itself, however, will not negate the allegation against the appellant as a whole.

15. It further transpires from the evidence that the exact date of the first offence by the appellant is not clearly mentioned or transpired from the evidence of PW-1. Admittedly, the victim girl resided with her parents at premises No. 40/41, Motilal Basak Lane, Kolkata- 700054, which is located at a distance from the place of occurrence mentioned in the complaint, i.e., the laundry premises itself.

16. **PW-2** was the mother of the victim girl who also deposed that the incident occurred at the laundry.

17. **PW-6** was Dr. Vibha Rani Gupta, who examined the victim first on 10th February, 2018. She was a private practitioner before whom neither the victim nor her mother indicated any history of the incident or the allegation against the appellant.

18. The victim was next examined by **PW-4**, Dr. Krishnendu Goswami on 11th February, 2018. He examined the victim on being referred to by the police. He deposed that the victim stated before him that the appellant committed sexual assault on her five times in the past four months and she did not disclose the incident until the previous day to her mother.

19. The victim stated to PW 4 that she informed her mother only when she felt pain in the lower abdomen. PW 4 advised USG and referred the patient for forensic and medico legal examination to determine her age. Swabs of the victim's private parts was taken and sent for medical examination.

20. The victim was subsequently examined by PW-5, Dr. Sudipta Basu at NRS Medical College and Hospital on 13th February, 2018. She performed USG test on the victim and found that the victim girl was pregnant.

21. On 19th February, 2018, PW-7, Dr. Suparna Dutta, examined the victim and found the victim's last LMP was 20 weeks ago. She opined that the age of the victim was below 17 years and above 14.

22. **PW-8** and **PW-9** are the relatives of the victim.
23. **PW-10**, Partha Roy, prepared a sketch map of the place of occurrence and **PW-11**, Biplabendu Dhar took the photographs of the place of occurrence.
24. **PW-12**, Rabin Halder, **PW-13**, Asit Sarkar and PW-14, Apurba Kumar Talukdar knew nothing about the incident.
25. **PW-15**, Pradyut Dutta, recorded the statement of the victim as per the dictation of the Investigating Officer and PW-16, Susama Rai was the Magistrate before whom the statement of the victim was recorded under Section 164 of the Cr. P.C.
26. **PW-17**, Rajib Prasad, was the Investigating Officer who narrated various stages of investigation conducted by him.
27. Most of the witnesses of the prosecution were cross-examined by learned counsel for the appellant. Suggestions were given to several witnesses that the victim had physical intimacy with 2 to 3 boys. The defense, however, did not examine or produce any witness.
28. The appellant was examined under Section 313 of the Cr. P.C. and denied all circumstances that had emerged in the evidence against him. The Trial Judge thereafter convicted the appellant and sentenced the appellant has already stated hereinabove.

ANALYSIS OF THIS COURT

29. This Court has carefully analyzed the evidence on record and has heard arguments advanced by the learned counsel for the appellant as well as the State, at length.

30. It is now well-settled that a conviction under Section 376 or Section 3, 4 and 6 of the POCSO Act can be based on the sole evidence of a victim/prosecutrix. The caveat attached to such dicta is, inter alia, that the evidence of the victim girl should be of sterling quality free from any contradiction and the guilt of the accused must be established beyond reasonable doubt.

31. The medical evidence may be used to corroborate the statement of the victim to a limited extent. However, when the version of the victim is proved to be contradictory or doubtful, Courts must be slow in ordering conviction. In ***Nirmal Premkumar & Anr. v. State Rep. By Inspector Of Police, reported in 2024 INSC 193***, it was held as follows:-

*15. What flows from the aforesaid decisions is that in cases where witnesses are neither wholly reliable nor wholly unreliable, the Court should strive to find out the true genesis of the incident. **The Court can rely on the victim as a “sterling witness” without further corroboration, but the quality and credibility must be exceptionally high. The statement of the prosecutrix ought to be consistent from the beginning to the end (minor inconsistencies excepted), from the initial statement to the oral testimony, without creating any doubt qua the prosecution’s case. While a victim’s testimony is usually enough for sexual offence cases, an unreliable or insufficient account from the prosecutrix, marked by identified flaws and gaps, could make it difficult for a conviction to be recorded.***

Emphasis applied

32. As already discussed hereinabove, the parents of the victim girl were working from morning to evening, if not for all the day, for a substantial period of the day at the laundry in question. There is no evidence on record to suggest that the brother of the victim who was about 20 years of age at the time of incident, would have been at home at all material times.

33. The likelihood of the victim girl developing intimacy with than one boy or man, cannot be ruled out. The victim, however, claims to have been assaulted by the appellant as many as on six occasions. It is difficult for this Court to accept that she would not have disclosed any forcible assault on her by the appellant to her parents or even her brother.

34. It is in the backdrop of the above, that defense version confronted to several witnesses that the victim may have been used to physical relations with the appellant and others cannot be ruled out. The aforesaid fact is further corroborated by the evidence on record that the victim was 8-month pregnant on the date of deposition.

35. The evidence of PW-7 who examined the victim on 19th February, 2018 that the victim had LMP 20 weeks earlier, lends credence to the fact that the victim may have been impregnated by persons other than the appellant.

36. As already stated hereinabove, this would not by itself negate the allegation of the victim against the appellant. It may be true that the victim girl had intimacy with more than one boy. This would not entitle the appellant to commit the offence of forcible physical intercourse with the victim. This all the more biologically relevant when the victim was a minor between the age of 14 and 17.

37. There is, however, substance in the argument of the learned counsel for the appellant that the contradiction between the statement made under Section 164 of the Cr. P.C. and her deposition in the Trial Court as regards the place of occurrence, throws up serious doubts on the sole evidence of the victim girl.

38. The evidence of PW-7 that the LMP of the victim was 20 weeks earlier is inconsistent with the evidence of the victim that she was 8-month pregnant.

39. Both in her complaint to the police on 11th February, 2018 and in her deposition before the Trial Court, the victim stated that the first offence by the appellant occurred at the residential room of the appellant at the laundry itself. This is directly contradicted by the statement of the victim under Section 164 of the Cr. P.C. before PW-16 that the appellant committed the first offence while she was preparing *chapatti* at home and after tying the hands of the victim to a window in her house at No 40/41,

Motilal Lane, Kolkata- 700054. This vital contradiction throws serious doubts on the evidence of PW-1, the victim girl.

40. Her evidence, therefore, cannot be the sole basis for convicting the appellant. It is in this light that the version of the defense duly confronted to several prosecution witnesses and particularly, the victim and her mother that she had physical relations with other boys cannot be lightly brushed aside.

41. Adding to the above is the factum of the conception of the victim occurred prior to the alleged date of incident. The DNA of the fetus of the victim has been matched with the appellant. No DNA evidence was at all brought on record by the prosecution.

42. In the light of the aforesaid discussion, this Court is of the clear and unequivocal view that the conviction of the appellant by the Trial Court based primarily on the evidence of the victim girl cannot be sustained. The medical evidence is inconclusive as regards participation of the appellant either in impregnating the victim or committing any offence on the victim as such.

43. The appellant is, therefore, entitled to the benefit of doubt. The prosecution has not been able to bring home the charges against the appellant beyond reasonable doubt.

44. In view of the aforesaid, the judgment of conviction and order of sentence shall stand set aside.

45. CRA 246 of 2018 is allowed and disposed of. Consequently, all connected applications, if any, shall stand disposed in terms of this judgment.

46. The appellant is set at liberty forthwith from the custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the Learned Trial Court, which shall remain in force for a period of six months under Section 437A of the Code of Criminal Procedure corresponding to Section 481 of the BNSS, 2023.

47. Let a copy of this judgment be sent down to the Court below for information.

48. Let the T.C.R. be returned to the Court below at once.

49. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.

I agree.

(Rajasekhar Mantha, J.)

(Rai Chattopadhyay, J.)