

**HIGH COURT OF TRIPURA
AGARTALA**

CRL. A.(J) 30 of 2018

Sri Joubansen Tripura,

son of Sri Ramcharan Tripura, resident of Manirampur,
Budhi Kumar Para, P.S. Belonia, District- South Tripura
(now undergoing imprisonment in Kendriya Sansodhanagar,
Bishalgarh, District- Sepahijala, Tripura)

----Appellant(s)

Versus

The State of Tripura

----Respondent(s)

For Appellant(s)	:	Mr. S. Bhattacharjee, Advocate
For Respondent(s)	:	Mr. S. Debnath, Addl. PP
Date of hearing	:	17.02.2021
Date of delivery of judgment & Order	:	01.04.2021
Whether fit for reporting	:	Yes

BEFORE

**HON'BLE THE CHIEF JUSTICE AKIL KURESHI
HON'BLE MR. JUSTICE ARINDAM LODH**

Judgment & Order

(Arindam Lodh, J.)

This appeal has been filed under Section 374 of the code of Civil Procedure, 1973 by the convict appellant against the judgment of sentence and order of conviction dated 21.12.2017 passed by the learned Special Judge, South Tripura, Belonia in case No. Special 07 (POCSO) of 2017 whereby and whereunder the appellant was sentenced to undergo rigorous imprisonment for LIFE which shall mean the remainder of his natural life and also shall pay a fine of Rs. 5,000/- for the offence punishable under Section 6 of the Protection of Children from Sexual Offences (for short POCSO) Act, 2012

2. Heard Mr. S. Bhattacharjee, learned counsel appearing for the appellant as well as Mr. S. Debnath, learned Additional PP appearing for the respondent.

3. The prosecution case, as depicted by the learned Special Judge, is reproduced here-in-below:

“Smt. Darbarani Tripura, the wife of Joubansen Tripura had withdrawn from the society of Joubansen Tripura two years back as per their social custom. But her victim daughter, aged 12 years used to reside with Joubansen Tripura and Joubansen started committing sexual intercourse with victim daughter and it continued for about three months. Because of threat of Joubansen initially her victim daughter did not divulge such fact to anybody, but ultimately divulged such fact to Darbarani. Now, Darbarani took up the matter with the local leading people.

On this factual matrix Darbarani Tripura lodged ejahar with O/C Belonia Women P.S. on 20.09.2016 which was registered as Belonia Women P.S. Case No. 64/16 under Section 376(2)(i)(n) and 506 of IPC and Section 4 of POCSO Act”.

4. During investigation the investigating officer examined as many as 21 witnesses, recorded the statement of the victim under Section 164(5) Cr.P.C. conducted medical examination of the victim, arrested the accused-appellant and collected various material objects and filed charge-sheet against the appellant under Section 376(2)(i)(n) and 506 of the IPC and under Section 6 of the POCSO Act, 2012. On receipt of the charge-sheet, charge was framed under section 376 (2)(f)(i)(n) of IPC and under Section 6(n) of the POCSO Act, 2012 to which the appellant pleaded not guilty and claimed to be tried.

5. To substantiate the charge, the prosecution had examined 13 witnesses including the victim and exhibited 10 documents. After completion of recording of prosecution evidences, the appellant was examined under Section 313 Cr.P.C. where he repeated the plea of his innocence and denied to adduce any evidence on his behalf. Argument was heard. The learned Special Judge

having considered the evidences and materials on record, convicted and sentenced the appellant, as aforesaid. Feeling aggrieved and dissatisfied with the judgment and order of conviction and sentence, the appellant has preferred the instant appeal before this court.

6. Mr. Bhattacharjee, learned counsel appearing for the appellant has contended that the prosecution case was doubtful. There were so many scopes for this court to form a different view as that of the view taken by the learned Special Judge. According to learned counsel for the appellant, the factum of rape was not proved. The informant-mother of the victim had lodged the complaint out of their marital dispute though the complainant after dissolution of marriage with the appellant had married another person. Further, according to Mr. Bhattacharjee, learned counsel, the informant (PW-2) lodged the complaint with the intention to malign her former husband i.e. the appellant herein. Mr. Bhattacharjee, has further argued that in the examination of the appellant under Section 313 Cr.P.C., the evidences regarding material objects was not brought to the notice of the accused-appellant and, thus, the appellant was denied of reasonable opportunity to explain the circumstance arising out of those material objects.

7. On the other hand, Mr. S. Debnath, learned Additional PP has defended the judgment of the learned Special Judge. Learned Additional PP has contended that apart from the oral testimony of the victim girl, the fact of penetrative sexual assault by the appellant had been substantially proved by medical evidence. According to learned Additional PP, there was no reason to disbelieve the ocular version of the prosecutrix which was substantially

supported by medical evidence and confirmed by the doctor who had examined her.

8. In view of the aforesaid rival submission, and in our quest to find out the merits of the present appeal viz-a-viz the sustainability of the judgment and order of conviction and sentence passed by the learned Special Judge, we have perused the evidences and materials brought on record by the prosecution.

8.1. The victim was examined as PW-1. At the time of examination, she was aged about 12 years. As such, the learned Special Judge tested her intelligence and found to be competent to testify. She deposed that her mother was withdrawn from the society of her father two years back. At that time, she used to live with her father. Her younger brother Punita Tripura also used to reside with her father. After separation of her mother she used to reside in the house of her uncle near to the house of her father. At night her father used to consume alcohol and thereafter he used to ask her to remove her panty. She expressed her fear, but, her father used to console her that nothing would happen to her as he would take care of everything. In that way, her father started committing sexual intercourse with her. She felt pain in her private parts. Her father threatened her not to divulge to anybody else, he would kill her. Out of fear, initially, she did not tell anybody. PW-1, further stated that her father committed sexual intercourse with her for about ten times. Ultimately, she disclosed the same to her mother. Her mother took up the issue with her maternal uncle and other local leading people. Finally, her mother lodged the case against her father. PW-1 was taken to a Magistrate before whom she gave her statement. She was also medically examined. During her cross-examination, she admitted that during the initial period of separation of her parents sometime, she used to stay with

her father and sometime with her mother. Her mother conducted a second marriage. She denied the suggestions put forth by the defence that the appellant did not commit any sexual intercourse with her.

8.2. PW-2, the mother of the victim, lodged the complaint. She deposed that out of her wedlock with the appellant, she gave birth of four daughters and one son including her victim daughter. After separation, she used to live in her paternal house when after about ten months, her victim daughter (PW-1) informed her that the appellant had committed sexual intercourse with her for about 15 days. The appellant also threatened her to kill and for that reason PW-1 did not inform the incident to her initially. She took up the issue with her brother Buddimohan Debbarma and also with the village leading people who advised her to lodge police case. The complaint was scribed by one of her relatives, namely, Umacharan. She put her signature which being identified was marked as Exhibit-2. She further deposed that she conducted second marriage before filing the complaint against the appellant. After the complaint, the victim has been living with her. PW-2 further deposed that she has handed over the school certificate of the victim to one police officer who seized the same by preparing seizure list whereupon she put her signature (Exhibit-3). Depositing further, PW-2, has stated that the victim was a student of Manirambari High School. She went to the said school for her admission in Class-I and at the time of her deposition, the victim was 12 years old. During her cross-examination, PW-2 has denied the suggestion put forth by the defence that her victim daughter was 19 years old. The defence failed to shake her evidence which she stated in her examination-in-chief.

8.3 PW-3, Shibcharan Tripura is the elected Chairman of Manirampur Village. He came to learn from one of his co-villagers that

the appellant used to commit sexual intercourse with his daughter. Nothing has been elicited from his cross-examination.

8.4. PW-4, Madhu Krishna Tripura, was the vice-Chairman of Manirampur ADC village. He deposed that about 11 months back PW-2 alongwith one ADC village member Munyabati approached him and informed that the appellant had committed sexual intercourse with his daughter. He informed the matter to the village Panchayat Pradhan who advised them to take shelter of law. He denied the suggestions that he was not informed that Munyabati did not accompany PW-2 to his house.

8.5. PW-5, Umacharan Tripura, had written the ejahar on the version of PW-2.

8.6. PW-6, Kirtiroy Tripura, deposed that he had no knowledge about the incident.

8.7. PW-7, Buddhi Mohan Tripura, had deposed that PW-2 used to stay in his house being his sister after separation with her husband i.e. the appellant. During that period, PW-2 informed him that the appellant had committed rape on the victim. He approached Panchayat Pradhan Munyabati Tripura who took them to the Chairman and Vice Chairman of their ADC village. Thereafter, PW-2 lodged the complaint. During cross-examination, PW-7 has denied the suggestions put forth by the defence that PW-2 did not tell him about the incident.

8.8. PW-8, Smt. Munyabati Tripura, deposed that being informed by PW-2 and PW-7, she took them to the Chairman and Vice Chairman of their ADC village. Nothing material has been elicited from her cross-examination.

8.9. PW-9, Smt. Parmita Saha deposed that on 29.06.2016 she was on duty as staff nurse when the doctor collected vaginal swab, blood sample of the victim.

8.10. PW-10, Smt. Aparajita Mallik, is the women police constable who was the witness of seizure of penial swab and blood sample.

8.11. PW-11, Smt. Ramabala Das, is the women police constable who was the witness of seizure of the medical reports of the appellant and the victim.

8.12. PW-12, Dr. Achintya Pal, deposed that he examined the victim when the victim and her mother disclosed that PW-1 was sexually assaulted by her father during the last one month and the last one being 15 days back from the date of examination. He has further deposed that during examination he detected one old scar mark 2 cm. in length below the left breast, vaginal orifice is healthy, hymen was old healed tear at 6 o'clock and 9 o'clock, which indicates that there was vaginal penetration. He advised investigation of vaginal swab, blood sample, USG of lower abdomen, X-ray of pelvis humerous. Ultimately, he opined that there was evidence of vaginal penetration. However, opinion regarding recent sexual intercourse would be given after receiving vaginal swab analysis report. He further deposed that on 04.01.2017, the report of SFSL was submitted to him and as per the report, no seminal stain of human origin was detected. However, blood stain of human origin was detected in the exhibits mark A(iv) and B(iii). Accordingly, PW-12 has further opined that there was evidence of vaginal penetration and recent sexual intercourse could not be ruled out. He has identified the entire report marked as Exhibit 7/1.

8.13. PW-13, Smt. Rubibala Baidya, was posed as women police Sub-Inspector. She has investigated the case and has submitted the charge-sheet.

9. We have given our anxious consideration to the entire evidences and materials on record.

10. Section 29 of the POCSO Act, 2012 mandates that, where the person is prosecuted for committing or abetting or attempting to commit any offence under Section 3,5,7 and 9, the Special Court shall presume that the person has committed or abetted or attempted to commit the offence, unless contrary is proved. This section is an exception to the general rule of criminal jurisprudence that the accused person shall be presumed innocent till he is found guilty. In fact, section 3,5,7 and 9 are definition sections and punishments have been prescribed in section 4,6,8 and 10 respectively.

11. Again the exception under Section 30 of the POCSO Act, has made it clear that mental state include intention, motive, knowledge, belief, reason to belief etc. Therefore, section 30 of the POCSO Act, is not applicable in the offences punishable under Section 4,6,8 and 10 of POCSO Act because when the physical facts in case of charge under Sections 4,6,8 and 10 will be proved there will be no scope for the accused to take the defence that he did not have the intention, knowledge etc. to commit penetrative sexual assault, aggravated sexual assault, sexual assault or aggravated sexual assault, but, such scope may be there for the accused, in case of charges, if framed, under Section 12 and 15 of the POCSO Act.

12. Upon meticulous reading of Section 29 and 30 of the POCSO Act, according to us, prosecution will commence the trial with an additional advantage that there will be presumption of guilt against the accused person, but, in our considered view, such presumption cannot form the basis of conviction, if that be so, it would offend Article 20(3) and 21 of the Constitution of India. Perhaps, it is not the object of the legislature to incorporate Sections 29 and 30 under the POCSO Act.

As we have said in the first part of this paragraph that prosecution will commence trial with an additional advantage of presumption against the accused but, prosecution is legally bound to establish foundational facts which sets the prosecution case in motion. If the prosecution succeeds to establish the foundational facts, then, it will be the obligation of the accused to prove his innocence, but, standard of proof again will be on the basis of preponderance of probabilities. Keeping in view the aforesaid principles, we shall proceed to decide as to whether the prosecution has been able to establish the foundational facts of the instant case. Foundational facts in POCSO Act include:-

- (i) the proof that the victim is a child;
- (ii) that alleged incident has taken place;
- (iii) that the accused has committed the offence; and
- (iv) whenever physical injury is caused, to establish it with supporting medical evidence.

13. *If the fundamental facts of the prosecution case are laid by the prosecution by leading legally admissible evidence, the duty of the accused is to rebut it, by establishing from the evidence on record that he has not committed the offence. This can be achieved by eliciting patent absurdities or inherent infirmities in the version of prosecution or in the oral testimony of witnesses or the existence of enmity between the accused and victim or bring out material contradictions and omissions in the evidence of witnesses, or to establish that the victim and witnesses are unreliable or that there is considerable and unexplained delay in lodging the complaint or that the victim is not a child. Accused may reach that end by discrediting and demolishing prosecution witnesses by effective cross-examination. Only if he is not fully able to do so, he needs only to rebut the presumption by leading*

defence evidence. Still, whether to offer himself as a witness is the choice of the accused. Fundamentally, the process of adducing evidence in a POCSO case does not substantially differ from any other criminal trial; except that in a trial under the POCSO Act, the prosecution is additionally armed with the presumptions and the corresponding obligation on the accused to rebut the presumption. It is imperative to mention that in POCSO cases, considering the gravity of sentence and the stringency of the provisions, an onerous duty is cast on the trial court to ensure a more careful scrutiny of evidence, especially, when the evidence let in is the nature of oral testimony of the victim alone and not corroborated by any other evidence—oral, documentary and medical.

(emphasis supplied)

14. Legally, the duty of the accused to rebut the presumption as arises only after the prosecution has established the foundational facts of the offence alleged against the accused. The yardstick for evaluating the rebuttable evidence is limited to the scale of preponderance of probability. Once the burden to rebut the presumption is discharged by the accused through effective cross-examination or by adducing defence evidence or by the accused himself tendering oral evidence, what remains is the appreciation of the evidence let in. *Though, it may appear that in the light of presumptions, the burden of proof oscillate between the prosecution and the accused, depending on the quality of evidence let in, in practice the process of adducing evidence in a POCSO case does not substantially differ from any other criminal case.* Once the recording of prosecution evidence starts, the cross-examination of the witnesses will have to be undertaken by the accused keeping in mind the duty of the accused to demolish the prosecution case by

an effective cross-examination and additionally to elicit facts to rebut the statutory presumption that may arise from the evidence of prosecution witnesses. Practically, the duty of prosecution to establish the foundational facts and the duty of accused to rebut presumption arise, with the commencement of trial, progresses forward along with the trial and establishment of one, extinguishes the other. To that extent, the presumptions and the duty to rebut presumptions are co-extensive.

(emphasis supplied)

15. If an accused is convicted only on the basis of presumption as contemplated in Sections 29 and 30 of the POCSO Act, then, it would definitely offend Articles 20(3) and 21 of the Constitution of India. In my opinion, it was not the object of the legislature. Presumption of innocence is a human right and cannot *per se* be equated with the fundamental right under Article 21 of the Constitution of India. The Supreme Court in various decisions has held that, provisions imposing reverse burden must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the Statute. [*See State of Bombay Versus Kathi Kalu Oghad, (1962) 3 SCR 10: AIR 1961 SC 1808: (1961) 2 Cri LJ 856*].

16. It may safely be said that presumptions under Sections 29 and 30 of the POCSO Act do not take away the primary duty of prosecution to establish the fundamental facts. This duty is always on the prosecution and never shifts to the accused. POCSO Act has no different connotations. Parliament is competent to place burden on certain aspects on the accused especially those which are within his exclusive knowledge. It is justified on the ground that,

prosecution cannot, in the very nature of things be expected to know the affairs of the accused. This is specifically so in the case of sexual offences, where there may not be any eye witness to the incident. Even the burden on accused is also a partial one and is justifiable on larger public interest. [*State of Bombay Versus Kathi Kalu Oghad, (1962) 3 SCR 10: AIR 1961 SC 1808: (1961) 2 Cri LJ 856; Noor Aga Vrs. State of Punjab & Anr.,(2008) 16 SCC 417; Abdul Rashid Ibrahim Vrs. State of Gujarat (2000) 2 SCC 513*]

17. In the case in hand, the victim (PW-1) has categorically stated that after separation of her parents, she used to stay with her father, the appellant herein. The prosecution will not get any benefit from her admission in cross-examination when she has stated that sometime she used to stay with her mother and sometime with her father. The fact remains that she also used to stay with her father-appellant, which is also evident from the deposition of other witnesses. This is one of the foundational fact which the prosecution has been able to establish and contrary thereto, the appellant has failed to controvert this established fact.

18. The version of the victim (PW-1), that the appellant used to consume alcohol at night has not been controverted by the appellant. Hence, this fact also has been established by the prosecution.

19. Next, the deposition of the victim that her father committed sexual intercourse with her atleast for ten times and the last one was about 15 days back has been substantiated by her medical examination confirmed by the doctor. Her hymen was old healed tear at 6 o'clock and 9 o'clock which indicates that there was vaginal penetration. After receipt of SFSL report, doctor (PW-12) finally has given his opinion that there was evidence of

vaginal penetration, and recent sexual intercourse could not be ruled out. Further, her statement during deposition that she was abused sexually by her father and threatened her not to divulge the incident, else, he would kill her, is found to be available in her statement recorded under Section 164(5) Cr.P.C. before the learned Magistrate.

20. In the natural course of normal life, the victim narrated the incident to her mother (PW-2) who informed the incident first to her brother, Buddhi Mohan Tripura (PW-7) who approached Munyabati Tripura (PW-8). They altogether informed the fact of this unfortunate incident to the Chairman of the ADC village (PW-3) and Vice Chairman of the ADC village (PW-4). All these witnesses have corroborated each other regarding each and every circumstance completing the entire chain of circumstances.

21. In the manner as narrated here-in-above, the prosecution has been able to establish the foundational facts to substantiate the charge leveled/framed against the appellant. Age of the victim has also been proved that at the time of commission of offence she was under the age of '16' years and within the age of 11/12 years. PW-2 has specifically stated in her deposition that at the time of adducing evidence, her victim daughter (PW-1) was 12 years old.

22. Following the principles, as laid down, in the case of *Madanmohan Singh and others versus Rajnikant and another*, reported in (2010) 9 SCC 209, wherein the apex court held that *for determining the age of a person the best evidence is of her parents supported by unimpeachable document. In case of Date of Birth depicted in her school certificate stands belied by unimpeachable evidence of reliable person and contemporaneous documents*

like Birth Register of Municipality, Government hospital, Nursing home, entry in the School Certificate stands discarded.

23. In the case in hand, the appellant has not demolished the statement of PW-2 regarding the age of the victim. Only a suggestion has been put forth by the defence at the time of her cross-examination, but, suggestion cannot form the basis of evidence. Hence, the prosecution has been able to prove the age of the victim being minor beyond reasonable doubt. Since, all the foundational facts have been established and the appellant has failed to rebut the presumption by way of rebuttable evidence, we cannot arrive at a different finding than that of the findings returned by the learned Special Judge in convicting the appellant.

24. Coming to the sentencing part, we notice that the learned Special Judge has provided that the convict would suffer rigorous imprisonment for life which shall mean the remainder of his natural life. It is well settled through series of judgments of the Supreme Court that the power to award fixed term sentences without remission is available only with the High Court and Supreme Court. It is not necessary to refer several judgments on the point. It would be sufficient to refer to a Constitution Bench judgment of Supreme Court in case of *Union of India vs. V. Sriharan alias Murugan and others*, reported in (2016) 7 SCC 1. In the present case, however, we notice that Section 6 of the POCSO Act under which the accused is convicted, itself provides for a punishment for aggravated penetrative sexual assault which shall be rigorous imprisonment for a term which shall not be less than 7 years but which may extend to imprisonment for life which shall mean imprisonment for the remainder of natural life of that person and would also

be liable to pay fine; or with death. Despite availability of such powers, we do not think the maximum imprisonment prescribed under the said Section would be warranted in the present case. The accused-convict has of course committed a serious offence and which must meet with punishment, which is commensurate with the nature of offence committed by him. The sentence in facts of the case is reduced to a period of 12 years which the convict shall serve without remissions. The sentence part of the judgment of the Special Court is modified to this extent.

25. In the result, the instant appeal stands partly allowed with the modification of total period of sentence, as indicated here-in-above.

Send down the LCRs.

(ARINDAM LODH,) J

(AKIL KURESHI), CJ



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