

**THE HIGH COURT OF TRIPURA
AGARTALA**

CRL A(J) 48 OF 2019

Sri Manik Bhakti,
S/o Lt. Dinesh Bhakti, resident of Sanichara, Ward No.4,
P.S. Churaibari, District- North Tripura.

.... **Appellant**

– Vs –

The State of Tripura,

.... **Respondent**

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

For the appellant : Mrs. S. Chakraborty, Advocate.

For the respondent : Mr. S. Debnath.
Addl. Public Prosecutor.

Date of hearing : 07.04.2021

**Date of delivery of
Judgment & Order : 13.04.2021**

Whether fit for reporting : **NO**

JUDGMENT & ORDER

(Arindam Lodh,J)

This is an appeal filed by the appellant against the judgment and order of conviction and sentence dated 09.11.2017, passed by the learned Special Judge (POCSO), North Tripura, Dharmanagar in Case No. POCSO ACT 02 of 2017 whereby and whereunder the appellant has been convicted under Section 6 of Protection of Children from Sexual Offences (POCSO)

Act and sentenced to suffer R.I. for life which shall mean remainder part of his life and to pay a fine of ₹10,000/- with default stipulation.

3. Briefly stated that the mother of the victim, Smt. Sumitra Bhakti lodged a written complaint on 08.09.2017 to the Officer-in-Charge of Churaibari Police Station, Dharmanagar, inter alia, stating that on 05.09.2015 when she, her other sons and daughters were not at home, her husband namely Manik Bhakti at noon made an attempt to commit rape upon her victim daughter while she was alone at her home. Hearing the cry of her daughter, Namita Chanda and her husband Binay Chanda rushed to her house and saved her. It was further stated that at the time of lodging of that complaint her victim daughter was suffering from physical pain. Explaining the delay in lodging the complaint, the complainant stated that the incident was discussed within her family and for that purpose a considerable time was consumed to lodge the complaint.

4. On the basis of the said complaint dated 08.09.2015, the OC, Churaibari PS registered a case being FIR No.CRB 036 under Section 354B of the Indian Penal Code and under Section 6 of POCSO Act. Investigation was carried out. During investigation, police seized the wearing apparels of the victim, arranged to record the statement of the victim under Section 164(5) of CrPC, arranged for medical examination of the victim as well as

the accused, sample of vaginal swab was sent to the State Forensic Science Laboratory, arranged for ossification test to determine the age of the victim, examined and recorded the statements of the available witnesses. Thereafter, being satisfied that a prima facie case was established, IO submitted charge sheet against the accused-appellant.

5. On being committed the case, learned Special Judge framed charges against the accused under Section 6 of the POCSO Act, 2012 as well as under Section 376(1) of the Indian Penal Code.

6. In order to substantiate the charges, prosecution examined as many as 12 witnesses and introduced 11 documents which were exhibited on proof.

7. At the closure of recording prosecution evidence, accused-appellant was examined under Section 313, CrPC to which he pleaded his innocence and also expressed his desire to adduce evidence on his behalf. Accordingly, he adduced two witnesses including him.

8. Having heard the learned counsels appearing for the parties and on consideration of the evidence and materials brought on record, the learned Special Judge recorded the finding of guilt against the accused and convicted and sentenced him as aforestated.

9. Being aggrieved by the said judgment and order of conviction and sentence, the appellant has preferred the instant appeal and prayed for acquittal.

10. In course of hearing of this appeal, we have heard Mrs. S.Chakraborty, learned counsel appearing for the appellant. Also heard Mr. S. Debnath, learned Additional Public Prosecutor appearing on behalf of the State-respondent.

11. Mrs. Chakraborty, learned counsel for the appellant submitted that the prosecution has miserably failed to substantiate the charges levelled against the accused-appellant. According to her, the version of the victim was not found to be trustworthy. Learned counsel for the appellant tried to persuade us that the prosecution has failed to produce the complainant, the mother of the victim to adduce evidence before the court though her name was shown as one of the witnesses to the case. Mrs. Chakraborty, learned counsel further contended that there were material contradictions between the statements made in the FIR and the testimonies of PW-1, PW-2 and PW-3 (victim). Learned counsel had drawn our attention that the complainant in her complaint stated that in her absence, the accused had made an attempt to rape the victim daughter. But in course of evidence, PW-1, PW-2 and PW-3 (victim) deposed that victim (PW-3) was raped by her father, the appellant

herein. Learned counsel for the appellant further argued that learned Special Judge has committed an error of law and facts in believing the age of the prosecutrix below 18 years.

12. On the other hand, Mr. S. Debnath, learned Additional Public Prosecutor would contend that the prosecution has been able to prove the case beyond reasonable doubt. The discrepancies as surfaced in the evidence of the prosecution witnesses were to be treated in minor in nature but the factum of rape had been proved beyond reasonable doubt. According to learned Addl. P.P., the medical report clearly suggested that the victim was raped by the accused. Further, it was contended that the fact that at the time of commission of offence, the victim was below 18 years had been proved beyond reasonable doubt. Learned Addl. P.P. strongly defended the judgment and order of conviction and sentence as recorded by learned Special Judge.

13. In view of the submissions advanced by the learned counsels appearing for the parties, we have perused the evidence brought out by the prosecution witnesses.

14. PW-1, Smt. Namita Chanda who was a neighbour of the complainant as well as PW-3 (the victim) deposed that on the fateful day at about 4:00 pm, the victim went to her house and reported her that on that day

at noon her father forcefully committed rape upon her at their hut. She further deposed that the victim also reported that her mother and younger brothers and sisters at that time went to the 'Loknath Mandir' and getting her alone, her father committed the offence.

Nothing material was elicited from her cross-examination by the defence regarding the statements she made in her examination-in-chief.

15. PW-2, Sri Binay Chanda being the husband of PW-1 also deposed in the same tune as that of his wife (PW-1).

16. PW-3 is the victim. Learned Special Judge at the very outset having a look to her appearance had considered her age as 13 years. The victim in her examination-in-chief deposed that on the fateful date and time, her step mother, mother, other brothers and sisters were not at the house as they went to the 'Loknath' temple. Every time her father prevented her from going outside with her brothers and sisters. She deposed that at about 3 pm her father physically removed her dresses and her father also removed his wearing apparels. The accused-father placed her down on the ground inside hut and first he touched different parts of her body and then he placed a pillow at her waist. The accused pushed his private parts to her private parts. She felt pain and cried out, but, could not raise alarm. On being released she rushed to the neighbouring house of PW-1 and PW-2 before whom she

disclosed the incident. After a few while, her mother returned when she told her mother about the incident. Thereafter her mother lodged the case. PW-3 further deposed that it was the first time her father committed that kind of offence against her. After a case was lodged, she was taken to the court by the police and her statement was recorded by the Magistrate. She identified her signature [Exbt.1]. PW-3 identified her father at the dock.

In her cross-examination she denied the fact that since she did not concentrate on her study, her father used to scold her and for that reason, she lodged the complaint against her father.

17. PW-4 is the woman constable who collected the samples and escorted the victim to the hospital.

18. PW-5 was posted as staff nurse on 09.09.2015 at Kadamtala PHC when SI, Biplab Debbarma seized some samples marked as A/1, A/2, A/3 and A/4 which were kept on glass vial and she identified her signature in the seizure list[Exbt.2/A].

19. PW-6, Monoj Kr. Chanda was posted at Churaibari PS on 08.09.2015 as Sub-inspector of Police. He deposed that in the written complaint it was only stated by the complainant that the father of the victim

tried to outrage her modesty and it was not disclosed that rape was committed by the accused.

20. PW-7, Lalit Mohan Malakar is a hearsay witness who heard the incident from the complainant.

21. PW-8, Biplab Debbarma was endorsed to investigate the case. He deposed that he visited the place of occurrence, arranged for medical examination of the victim girl as well as the accused, arranged for recording the statements of the victim girl under Section 164(5) of CrPC, sent the vaginal swab to SFSL for examination and report and also arranged for ossification test of the victim girl to determine her age.

22. PW-9, Debabrata Datta deposed that he also investigated the case after PW-8. He collected the reports of medical examination and ossification test. He deposed that on 22.11.2016 the Medical Officer after examining the victim submitted his report and opined that the victim was about 15 years old, but, below 18 years. He specifically stated that he relied on the medical report regarding the age of the victim girl.

23. PW-10, Dr. Sandip Deb who deposed that on 09.09.2015 at about 10:00 am, he being the Medical Officer at Kadamtala CHC examined the victim. During examination, he did not find any external injury.

However, he found that her vagina permits two fingers. PW-10 further deposed that in the findings Column he only mentioned the following words- “*suggestive of repeated sexual intercourse*”. Clarifying the terminologies he deposed that the words “*suggestive of repeated sexual intercourse*” mean that she was subjected to repeated sexual intercourse.

24. PW-11, Dr. Mriganka Datta who medically examined the accused opined that the accused was capable of performing sexual intercourse. He identified his report [Exbt.10].

25. PW-12, Dr. Avishek Majumder deposed that on 22.11.2016 he examined the victim. According to his examination, the victim at the time of commission of offence was aged about 15 years, but, below 18 years. He specifically stated that in the given case, there was no possibility that the age of the victim was beyond 18 years.

26. The accused-appellant appearing as DW-1 deposed that he used to scold the victim daughter and due to his torture upon her, she lodged the false complaint of rape against him.

In cross-examination he denied that he committed rape upon her daughter.

27. DW-2, Asit Das deposing before the court stated that he had no knowledge whether the accused committed the offence or not. The accused was well acquainted with him and it was his belief that the accused could not commit such offence.

28. On close scrutiny of the evidence and materials on record, it transpires that at the time of commission of offence, the victim was below 18 years. PW-12, Dr. Abhishek Majumder after thorough examination of the dentures of the victim has arrived at a definite finding that at the time of commission of the offence, the age of the victim cannot be beyond 18 years. As such, we are in agreement with the finding of learned Special Judge that the prosecution has been able to establish the fact that the victim was a minor at the time of commission of offence. The accused has been convicted under Section 6 of the POCSO Act. Section 6 of the POCSO Act speaks as under:

“6.Punishment for aggravated penetrative sexual assault.-- (1) Whoever commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

29. The term “*aggravated penetrative assault*” has been defined under Section 2(1)(a) of the POCSO Act,2012 which is as under:

“2(1)(a) “*aggravated penetrative assault*” has the same meaning as assigned to it in Section 5”.

30. Now, for the purpose of the case in hand, Sub-section (n) of Section 5 of the POCSO Act is relevant which reads as under:-

“5(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child.”

31. In the instant case, the victim is the minor daughter of the accused being her biological father. So, the accused being the father committed rape upon his minor daughter which comes within the definition of *aggravated penetrative sexual assault* and attracts the definition of Section 5(n) of the POCSO Act, 2012. Now, let us discreetly examine whether the prosecution has been able to prove the charges levelled against the accused beyond reasonable doubt.

32. The complainant being the mother of the victim who lodged the complaint and on the basis of which FIR was registered, has not come forward to testify herself to support her contention which she made in the complaint, but, the victim as PW-3 has categorically deposed that when she was alone in the house, her father committed rape upon her. At the very outset while she was in the hut, her father came and undressed her and the

accused after removing her wearing apparels entered his private parts into the private parts of the victim. She could not raise alarm as her mouth was being pressed by the accused. After her release, she rushed to the house of PW-1 and PW-2 where she disclosed the incident. PW-1 and PW-2 also supported the version of the victim in respect of the circumstance that after the incident she rushed to their house. The statements of PWs 1 and 2 are relevant under Section 3 of the Evidence Act because the factum of rape has been disclosed to them immediately after the incident and their evidences are to be treated as the evidence of *res gestae* and are admissible in evidence in view of the Section 6 of the Evidence Act. True it is, that the accused has tried to establish his defence that since he used to scold his daughter for her not being serious to her study is found to be a weak piece of evidence since he has failed to rebut the evidence of PW-3, PW-1 and PW-2 by cogent evidence as contemplated under Section 29 of the POCSO Act, 2012 that the special court shall presume, that such person has committed or abetted or attempted to commit the offence as the case may be unless, the contrary is proved.

33. Though not argued, but, we have taken note of the statements made by the victim girl recorded under Section 164(5) of CrPC. We find that she did not say in course of her evidence before the court that her father

asked her to massage his hand and legs and suddenly he hugged her. However, the material part that her father put the pillow underneath of her waist and committed rape upon her are found to be stated and corroborated her statement she has made in her examination-in-chief. We are not oblivious of the well-neigh principle that the court is to separate the wheat from the chaff considering the totality of the circumstances. According to us, the accused has failed to establish the fact that he did not commit rape upon her daughter.

34. Considering the overall evidence and materials on record, we find no reason to dislodge the finding of guilt of the accused recorded by the learned Special Judge in convicting the accused-appellant. However, it is revealed from the examination of the accused under Section 313, CrPC that at the time of his examination, the accused was aged about 58 years. Considering the age of the accused, we are of the opinion that reasonable justice will be rendered if the accused-appellant is sentenced to suffer rigorous imprisonment for 14 years.

35. Accordingly, we have interfered with the sentence to suffer rigorous imprisonment for life which shall mean for remainder of life. The sentence shall stand modified to the extent that the accused-appellant shall suffer rigorous imprisonment for 14 (fourteen) years. However, the fine with

default stipulation imposed upon the accused-appellant by the learned Special Judge is not interfered with.

The appeal, accordingly, stands partly allowed and disposed.

Send down the LCRs.

(ARINDAM LODH), J

(AKIL KURESHI),CJ.

HIGH COURT OF TRIPURA



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