

**In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

C.R.A. No.457 of 2019

**Sk. Dilkhush Alam @ Sk. Dilkhush Alam
Vs.
The State of West Bengal**

For the appellant	:	Mr. Kallol Mondal, Mr. Sanjib Dan, Mr. Krishan Ray, Ms. Amrita Chel, Mr. Souvik Das, Mr. Anamitra Banerjee
For the State	:	Mr. Tanmoy Kumar Ghosh, Mr. Arindam Sen
Hearing concluded on	:	17.09.2021
Judgment on	:	21.09.2021

Sabyasachi Bhattacharyya, J:-

1. The present appeal arises out of a conviction of the appellant under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (herein after referred to as "the POCSO Act"). Initially, charges were framed under Section 354B of the Indian Penal Code (IPC) as well under Sections 8 and 12 of the POCSO Act.
2. However, ultimately the appellant was convicted only under Section 8 of the POCSO Act.

- 3.** Learned counsel for the appellant contends that there is no credible evidence, sufficient to make out a plausible case against the appellant, even for the purpose of attracting the presumption under Section 29 and/or Section 30 of the POCSO Act. By taking the court through the depositions, learned counsel argues that it was not credible that the victim girl of ten years was left alone by the complainant, merely to fetch the AADHAR Cards of the victim's parents.
- 4.** Moreover, learned counsel contends that the complainant allegedly returned within half an hour of leaving the victim. However, from the deposition of the witnesses, it is evident that a journey from the place of occurrence to the residence of the victim's parents takes about 45 minutes each way on a bus.
- 5.** Moreover, the complainant alleged himself to be a maternal uncle of the victim, but admitted in his cross-examination that he did not know the name of the victim's father.
- 6.** Although CCTV camera footage was available, the same was not seized and was not exhibited or sent for forensic examination by the police authorities. That apart, none present at the place of occurrence, which is admittedly an extremely congested place, came forward to adduce evidence in support of the prosecution case. None of the employees of the Bank, where the incident allegedly occurred, was also produced as witness for the prosecution.
- 7.** Moreover, all the prosecution witnesses, who are allegedly independent witnesses, hail from the same village as the complainant.

The entire evidence is based on hearsay. It is contended, by placing reliance on the answer of the accused to question no.19 put to the accused in his statement under Section 313 of the Code of Criminal Procedure (CrPC), that the accused clearly stated that he was working at the AADHAR Card centre-in-question and saw the PW 8 (Jhuma) and her husband standing in the queue. It has further been stated by the accused that he also saw them on a second day and some people complained against them to the effect that Jhuma and her husband were selling forms for AADHAR Card at a price of Rs. 200/- (Two Hundred). The accused further stated that he raised objection but the couple repeated the same offence, which he reported to one Anjan Babu.

- 8.** It is, thus, clear, according to learned counsel for the appellant, that the case was concocted against the accused, in order to screen out and malign him, since the accused had protested against the illegal sale of AADHAR Card forms privately at the rate of Rs. 200/- (Two Hundred) each by the said Jhuma and her husband.
- 9.** Learned counsel for the State, controverting the submissions of the appellant, argues that the statement of the victim girl, which was clearly corroborated by other evidences of the prosecution witnesses, is, by itself, sufficient to convict the accused. It is well-settled, learned counsel for the State argues, that the sole testimony/statement of the victim girl itself may be sufficient to clinch the issue against the accused.

- 10.** Upon hearing learned counsel for the parties and going through the materials on record, it becomes clear that the entire evidence of the prosecution witnesses was not only hearsay, but the knowledge of the alleged incident was derived by all such witnesses from the complainant Raju Mal. Thus, the source of the information of all the witnesses was the complainant himself.
- 11.** PW 8, Jhuma Let, admitted in her cross-examination that the place of occurrence is a congested place having traffic police, many people and shops, fruit stalls, meat-chicken shop, doctor's chamber, utensil shop, sweet shop etc. in front of the State Bank, Bolpur branch, within which the AADHAR Card office (place of occurrence) is located. PW 8 admitted that she and her husband run their business of selling lottery tickets on the Government road, but failed to show any document in that regard on the pretext that their business was temporary in nature.
- 12.** Moreover, there is patent discrepancy in the evidence of the prosecution witnesses. At least three of the prosecution witnesses mentioned a lady being present at the spot of occurrence at the relevant time, who was never produced as witness.
- 13.** Surprisingly, no hue and cry was raised immediately after the discovery of the alleged incident, nor was any official of the Bank approached by the complainant with the allegation against the accused, although the accused worked in the AADHAR Card office which is situated within the precincts of the SBI, Bolpur Branch.

Admittedly, the locale is a congested one having several shops and the hour of the alleged occurrence was during full office hours, when the place is supposed to be crowded. Yet, for some unknown reason, neither the complainant approached the bank officials or any security personnel of the bank, nor was anybody present at the place of occurrence produced as prosecution witness to make out a positive case, at least regarding the accused having taken the victim girl inside the AADHAR Card office.

- 14.** The Investigating Officer, with surprising alacrity, reached the spot allegedly within 10 minutes from the incident; however, a formal complaint and First Information Report (FIR) was lodged as late at about 4:25 p.m. on the said date.
- 15.** Footage of the CCTV cameras installed in the bank, although available, was not obtained by the investigating officer on the mere pretext that the bank officials refused to hand over the same. The police, despite having ample power, showed utter callousness in failing to requisition and/or seize the relevant CCTV footage of the time of occurrence, which could have been vital to prove the prosecution case.
- 16.** Withholding such witnesses and the CCTV camera footage of the bank gives rise to adverse inference against the prosecution under Section 114, illustration (g) of the Evidence Act, 1872.
- 17.** Event apart from such peculiar features of the case, the complainant stated in evidence that he had returned to the place of occurrence,

after leaving the victim girl alone, within 30 minutes, which is well nigh impossible in view of the admission of the complainant himself that it took about 45 minutes each way to reach the house of the victim, which he allegedly did for procuring the AADHAR Cards of the victim's parent from the place of occurrence.

- 18.** The complainant, allegedly the maternal uncle of the victim, admitted in his cross-examination that he does not have a sister. To explain away such admission, a case was sought to be made out that the complainant is a distant relative of the victim. However, the complainant admits not to know even the name of the father of the victim child, which creates a cloud of suspicion on the prosecution case.
- 19.** It has not been explained at all, by the standard of a person of normal prudence, as to why the complainant left the victim girl alone in the AADHAR Card office, despite the tender years of the said minor, that too to fetch the AADHAR Cards of the parents of the victim, which did not require further presence of the victim in the place of occurrence when the complainant left her. The need to obtain the AADHAR Cards of the parents did not require the victim girl of 10 years to be left alone at the AADHAR Card office at all. The normal course of action for any prudent person would have been to take the victim girl back along with the complainant and leave her at her home while coming back with the AADHAR Cards of her parents, which the complainant alone could have done.

- 20.** The fact that almost all the witnesses were from the same village as the complainant, including some of his relatives, being produced as prosecution witnesses is peculiar, more so, since the source of information of all of them regarding the alleged incident was none other than the complainant himself.
- 21.** It remains unexplained as to why none saw the victim girl being taken by the accused inside the room where the incident allegedly occurred, even if the offence itself might not have been seen, in such a congested place as the main road where the place of occurrence was situated, during busy hours. The alleged presence of a lady/three ladies at the locale at about the time of occurrence would have made such lady/ladies, prime witness/witnesses for the prosecution. However, no such lady was ever produced as prosecution witness, leaving scope of doubt as to whether the entire incident was merely a figment of imagination of the complainant.
- 22.** As rightly contended by the learned counsel for the appellant, the clear statement of the accused in his statement under Section 313 of the CrPC as regards the illegalities committed by PW 8 Jhuma Let and her husband, against which the accused protested, was never rebutted by cogent evidence. Rather, PW8 clearly admitted in her cross-examination that she and her husband sell lottery tickets at the place of occurrence without any license, on a temporary basis. The question of the nexus between the complainant and Jhuma Let and her family, although remained unexplained, it is apparent that the

removal and/or maligning of the accused would definitely help PW 8, Jhuma, to continue her business which was fishy in view of PW 8 being not in possession of any permit/license to sell lottery tickets. Hence, PW 8, the only prosecution witness said to be at the locale at the relevant juncture, was clearly a witness interested in the accused being removed out of the way of such business of hers.

- 23.** Seen in conjunction, we cannot place reliance merely on the statement/evidence of the victim girl in the instant case, although under certain circumstances such sole testimony can be sufficient to incriminate the accused. It is so, because the incidents leading up to the alleged offence and/or the chain of events immediately preceding and succeeding the said offence leave huge gaps, which clearly indicates that the prosecution failed to make out a *prima facie* credible or plausible case for the burden to be shifted under Section 29 of the POCSO Act to the accused to prove his innocence. Even if such presumption is assumed to have been raised in the present case, there was sufficient rebuttal in the contradictions of the prosecution case itself, as discussed in detail above, to demolish the prosecution case.
- 24.** It appears from the impugned judgment that the learned Trial Judge proceeded more on gut feeling and vague legal principles than assessing the materials on record objectively, thereby convicting the accused and depriving him of his liberty and freedom.

- 25.** In the light of the above considerations, the impugned judgment and order of conviction were bad in law as well as on facts and ought to be set aside. Accordingly, the appeal succeeds.
- 26.** CRA 457 of 2019 is allowed, thereby setting aside the judgment and order of conviction dated July 17, 2019 passed by the Additional District and Sessions Judge-cum-Judge, Special Court (POCSO Act) at Bolpur, Birbhum in Sessions Trial No.18 (June) of 2019 arising out of Special (POCSO) Case no.12 of 2019 and the consequential sentence awarded against the appellant.
- 27.** The appellant is hereby acquitted honourably and shall be discharged from custody, if at present in incarceration, and stands discharged of all conditions and bail bonds, if furnished by the appellant for obtaining bail at any point of time.
- 28.** The parties and all concerned shall act on the server copy of this order without insisting upon prior production of a certified copy thereof.

(Sabyasachi Bhattacharyya, J.)