

**HIGH COURT OF TRIPURA
AGARTALA**

Crl. A. (J) 30/2023

Sri Krishnadhan Sarkar, son of late Manindra Sarkar, resident of Lankamura, Sharma Lunga, P.S. West Agartala, District- West Tripura.

----Appellant(s)

Versus

The State of Tripura, (to be represented by the Ld. Public Prosecutor, The Hon'ble High Court of Tripura).

----Respondent(s)

For Appellant (s)	:	Mr. Samarjit Bhattacharjee, Advocate
For Respondent(s)	:	Mr. S. Ghosh, Addl. PP
Date of hearing & delivery of Judgment & Order	:	16.05.2024
Whether fit for reporting	:	No

**HON'BLE MR. JUSTICE ARINDAM LODH
HON'BLE MR. JUSTICE S.D. PURKAYASTHA
Judgment & Order (Oral)**

(Arindam Lodh,J)

Heard Mr. Samarjit Bhattacharjee, learned counsel appearing for the appellant. Also heard Mr. S. Ghosh, learned PP appearing for the respondent-State.

2. The convict-appellant has preferred the instant appeal against the judgment of conviction and order of sentence dated 04.05.2023 passed by the learned Special Judge (POCSO), West Tripura, Agartala, in connection with case No. Special (POCSO) 25 of 2019 whereby and whereunder the appellant was convicted under Sections 376 AB/448/506 of the IPC and under Section 6 of the Protection of Children from Sexual Offences (for short 'POCSO') Act, 2012, and sentenced to suffer rigorous imprisonment for 20 (twenty) years and to pay a fine of Rs. 20,000/- for the offence punishable under Section 6 of the POCSO Act with default stipulation, and also to suffer rigorous imprisonment for 6 months and to pay a fine of Rs.500/- for the offence punishable under Section 448 of the IPC with default stipulation, and further sentenced to suffer rigorous

imprisonment for 1 year and to pay a fine of Rs.1,000/- for the offence punishable under Section 506 of the IPC with default stipulation with a further direction that all the sentences shall run concurrently.

3. The facts in brief, are that, one Swapna Debnath, mother of the victim (name not disclosed) lodged a complaint on 18.04.2019 to the Officer-in-Charge of West Agartala Women police station, stating *inter alia* that on 17.04.2019 she along with her husband went to bring some articles from the owner of the house where she used to work as maidservant. At that time, their 7 years old daughter i.e. the victim, was inside the room and they kept the front door of the said room under lock and key, but, the back door was kept open. During their such absence, the accused person entered into the room through the back door and asked her 7 years old daughter to put off her clothes and other wearing apparels which she initially tried to resist, but, thereafter, the accused threatened her and forced her to unrobe her wearing apparels. Thereafter, the accused first entered his fingers into the vagina and thereafter penetrated his penis into the vagina of the victim after taking off his lungi. When the informant and her husband came back to the house, the victim narrated the entire incident to them. Then, the parents of the victim informed the said incident to the wife of the accused, and other 2 persons, namely, Sri Prangopal Sarkar and Smt. Saraswati Sarkar. Prangopal Sarkar apprised them that he had seen the accused to enter into the room of the victim. Thereafter, they advised the parents of the victim to lodge a complaint with the police station.

4. Accordingly, FIR was registered. Investigation was carried out. During the course of investigation, the Investigating Officer recorded the statements of as many as 17 witnesses including the Doctor who medically examined the victim after the incident and the Forensic Expert. After

completion of investigation, having found *prima facie* evidence the Investigating Officer submitted charge-sheet. On receipt of the records i.e. police report, learned Special Judge took the cognizance of the alleged offence and framed charge under Sections 376(2)(i)/506 of the IPC and under Section 6 of the POCSO Act, 2012.

5. To substantiate the charge, prosecution examined as many as 17 witnesses including the informant and the victim. At the closure of recording prosecution evidences, the accused was examined under Section 313 Cr.P.C. wherein he denied all the incriminating materials surfaced in the evidence let in by the prosecution witnesses. Thereafter, the accused had adduced evidences on his behalf and produced DW-1 and DW-2 as defence witnesses.

6. Having heard argument of learned counsel appearing for the parties, learned Special Judge (POCSO), West Tripura, Agartala, held the accused guilty of committing the offence, and convicted and sentenced him under Sections 376(2)(i)/506 of the IPC and under Section 6 of the POCSO Act, 2012, as aforestated.

Being aggrieved and dis-satisfied with the said judgment of conviction and order of sentence, the accused-appellant has preferred the instant appeal before this court.

7. At the very outset, Mr. Bhattacharjee, learned counsel for the appellant has read over the complaint lodged before the Officer-in-Charge of the concerned police station. Mr. Bhattacharjee, learned counsel has also emphasized on the evidence of PW-2, Dr. Pamela Debbarma, who medically examined the victim after the incident. Mr. Bhattacharjee, has further relied upon the evidence of the informant (PW-8) and submits that the learned trial court did not consider the contradictions which are apparent in the evidence

of the prosecution witnesses. Proceeding further, Mr. Bhattacharjee, learned counsel appearing on behalf of the accused-appellant submits that from the prosecution case, it appears that after commission of the incident it was narrated to the informant as well as father of the victim and based on the statement of the victim, her parents informed the matter to the wife of the accused as well as to Sri Prangopal Sarkar (PW-12) and Smt. Saraswati Sarkar (PW-13). According to the prosecution case, Prangopal Sarkar, in his statement recorded under Section 161 Cr.P.C. has stated that he saw the accused to enter into the room of the victim. This fact was also stated by the informant during her examination-in-chief. PW-8, the informant-mother in her examination-in-chief has stated that *“After knowing the aforesaid incident from my victim daughter, I informed the entire incident to the wife of the accused and also to other neighbours, namely, Prangopal Sarkar and Smt. Saraswati Sarkar. At that time, my neighbour Prangopal Sarkar told me that he saw the accused Krishnadhan Sarkar entering into my house.”* Thereafter, attention of the witness was drawn to her statement recorded under Section 161 Cr.P.C. where PW-8 admitted that there was no such statement.

Learned counsel for the appellant further submits that neither Prangopal Sarkar (PW-12) nor Saraswati Sarkar (PW-13) had corroborated this statement of the informant in their evidences. None of the neighbours came forward to support the statement of PW-9 that the accused-appellant had entered into the house of the informant. On the basis of the aforesaid evidences, Mr. Bhattacharjee, learned counsel for the appellant has submitted that the present case is a fit case for acquittal because the prosecution has miserably failed to prove the guilt of the accused in connection with the crime, as alleged.

8. Opposing the submission of learned counsel for the appellant, Mr. Ghosh, learned Additional PP has submitted that the prosecution has been able to prove the case on the ground that the statement of the victim is found to be all along consistent with the statement she made in her statement recorded under Section 164(2) Cr.P.C. Furthermore, PW-8, the mother of the victim i.e. the informant, also corroborated the statement of the victim and according to learned Additional PP, learned Special Judge has not committed any wrong in coming to a conclusion that the accused-appellant is guilty of the offences, charged against him.

9. We have considered the rival submissions advanced by learned counsel appearing for the parties. We have also meticulously perused the evidence of the victim (PW-9), and the evidence of the informant (PW-8).

10. After careful perusal of the evidences of PW-8 and PW-9 coupled with the medical evidence, as adduced by the doctor (PW-2), in our opinion, the evidence of the victim and her mother does not appear to be inspiring. The victim (PW-9) has stated in her examination-in-chief that during the absence of her parents the appellant entered into her room and asked her to put off her wearing apparels including her panty. She tried to resist initially, but, she was forced to put off her wearing apparels being threatened by the appellant and thereafter he forced her to lie on the bed and the accused-appellant put off his lungi and thereafter inserted his finger in the private parts of the victim followed by penetration by his penis. It is further stated that the victim tried to resist the accused-appellant from doing such wrongful thing, but, she failed.

10.1. Thereafter, we have carefully perused the evidence of PW-8, the informant. She also supported the version of the victim (PW-9). However, she deposed that after such disclosure by her daughter, they went

to the house of the appellant and narrated the incident to the wife of the appellant. On the way they met with Prangopal Sarkar (PW-12) and Saraswati Sarkar (PW-13), when Prangopal Sarkar told them that he had seen the appellant to enter into the house of the victim at the relevant point of time.

11. After perusal of the evidences of PW-12 and PW-13, we find that none of them had corroborated the evidence of PW-8, the informant, and they appeared to be hearsay evidence. They have stated in their evidence that one day they heard from the father of the victim about the incident that the accused had committed some wrong with her daughter.

12. PW-8, the informant in her deposition has specifically deposed that the appellant had forcefully penetrated his fingers in the vagina of her daughter i.e. PW-9 after lying her on the bed and inserted his penis to the genital of the victim i.e. PW-9, and the version of PW-8 was corroborated by the evidence of PW-9. If that being the position, there might be some sign of flow of blood from the private parts of the victim. If we believe the statements of the victim and her mother(PWs 9 and 8 respectively) for a moment, then, it would not unreasonable to come to a finding that the penetration or fingering by the accused must leave some signs/marks of the said forceful acts of the accused in and around the vagina, the girl being aged only 7(seven) years. In furtherance thereof, there must be some marks of blood in the bed-sheet/bed-cover, where the girl was allegedly raped. On meticulous perusal of the case record, particularly, the seizure Memo.(Exbt.-2), this court finds that neither the wearing apparel of the victim nor the bed-sheet were either produced by the informant before the investigating agency or the investigating agency had seized any of those articles from the custody of the victim or the informant. In view of this, according to us, it is highly

doubtful regarding veracity of the offence, as alleged, in absence of any recovery/seizure and their non-production during the course of investigation.

13. It is true that injury in the private parts of a raped victim is not a *sine qua non*, but, the statements/evidence let in by the prosecutrix and her mother must appear to be trustworthy and inspiring to the court. Here, in the First Information Report(FIR) it is stated that the accused penetrated his fingers into her vagina and also inserted his penis(male organ) into her vagina. The informant i.e. PW-8 has further stated in her complaint that she found the panty of her daughter wet. In that case, she ought to have produced the said panty or police also should have seized it to make such statement credible.

14. We have also perused the SFSL report (Exhibit-2) where neither seminal stain nor foreign materials were found and the entire report is found to be negative. PW-2, doctor, deposed that during her medical examination she did not find any swelling or any kind of injury or force in the private parts of the victim. In her report, PW-2, has specifically stated that after examination of the victim, seminal stain, spermatozoa of human origin was not detected in the samples that were collected and finally opined that the act of rape cannot be confirmed. During cross-examination PW-2 had also deposed that there was no complain of suffering any pain or discomfort during walking, urination or defecation from the victim. As per deposition of PW-2 if there was any penetration by any means, the hymen of the victim would have been ruptured or tore but her hymen was intact.

15. We have consciously considered the aforesaid relevant evidences adduced by both the prosecution and the defence. The accused-appellant through producing two defence witnesses had tried to build up a

case that there was enmity between two families and the father of the victim had borrowed Rs.30,000/- out of loan from him for the treatment of his wife.

16. As we said earlier, the prosecution story as regards insertion of fingers and penetration in private parts of the victim appeared to be exaggerated. The way the prosecution had let in the story, according to us, had the incident occurred in that fashion, then, there must be some sign of force or injury in and around the private parts of the victim for the reason that at the time of incident the victim was only attaining the age of 7 years and she was medically examined just after a day of the incident. So, had there been any force or such type of penetration or fingering, then, there must be some sort of evidence to lead this court to believe the prosecution story that the appellant had raped the victim who was attaining the age of 7 years only at the time of commission of offence. Thus, the evidence of the victim and her mother does not inspire any confidence.

17. The learned Special Judge had strongly relied upon the evidence of the victim and her mother to pass the judgment of conviction and sentence. However, according to us, learned Special Judge did not consider the fact that if there was insertion of fingers followed by penetration by penis and that too by applying force, then, there must be some sort of marks in and around the private parts of the victim as because a story was also built up by the prosecution that the appellant had also touched the breast and other parts of the body of the victim and he applied enough force upon the victim to commit rape. So, according to us, the prosecution has miserably failed to prove the guilt of the accused-appellant.

18. What this court had analyzed that appellant had allegedly threatened the victim to take off her clothes and thereafter, after lying her on the bed had committed forceful penetration upon the victim (PW-9) by

inserting his finger and penis into the private parts of the victim. Later the victim disclosed the matter to PW-8, her mother who lodged an FIR against the appellant. Medical examination was conducted on the next day. The Medical report and the testimony of the Medical Officer demonstrate that there were no signs of external injury; the HYMEN was intact; there were no signs of lacerations on examination of the vagina. The Medical Officer has testified that her examination was thorough. None of these objects viz. the wearing apparels of the victim, the bed sheet, had been seized and produced before this Court nor any reason given for not doing so. Considering the above facts; materials and evidence of the Medical report & testimony of the Medical Officer that there was no external nor internal injury and the hymen being intact; it is difficult to establish the commitment of offences u/s 376 (2)(i) & Section 6 of POCSO Act. In the above circumstances, this Court is of the considered view that the prosecution has failed to prove the guilt of the accused u/s 376 (2)(i) & Section 6 of POCSO Act.

19. In the ultimate analysis of the entire episode and the facts and circumstances thereof, the instant appeal stands allowed. The appellant is acquitted and set at liberty forthwith. The judgment and order of conviction and sentence dated 04.05.2023 passed by the learned Special Judge (POCSO), West Tripura, Agartala, in connection with case No. Special (POCSO) 25 of 2019 is hereby set aside. Consequently, the appellant shall be released from custody forthwith, if not required in any other case.

Send down the LCRs.

JUDGE

JUDGE