

**IN THE HIGH COURT OF TRIPURA
AGARTALA**

CRL.A. (J) No.60 of 2023

Sri Sanjit Debbarma (Laskar),
son of late Kshitish Debbarma of village-
Kaiyadepa, P.S. Madhupur, District-
Sepahijala Tripura [now undergoing
sentences at Kendriya Sansodhanagar,
Bishalgarh, Sepahijala]

..... **Appellant**

- Versus -

The State of Tripura,

..... **Respondent**

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|--------------------------------------|----|---|-----|----|--|---|
| For the Appellant(s) | : | Mr. S. Bhattacharjee, Legal Aid Counsel | | | | |
| For the Respondent(s) | : | Mr. S. Ghosh, Addl. PP | | | | |
| Date of hearing | : | 12.01.20224 | | | | |
| Date of delivery of Judgment & order | : | 17.01.2024 | | | | |
| Whether fit for reporting | : | <table border="1" style="display: inline-table; vertical-align: middle;"><tr><td style="padding: 2px 10px;">YES</td><td style="padding: 2px 10px;">NO</td></tr><tr><td style="padding: 2px 10px;"></td><td style="padding: 2px 10px; text-align: center;">√</td></tr></table> | YES | NO | | √ |
| YES | NO | | | | | |
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HON'BLE MR. JUSTICE S. DATTA PURKAYASTHA

JUDGMENT & ORDER

The appeal arises from the judgment and sentence dated 10.02.2020 passed by the Special Judge (POCSO), Sepahijala, Bishalgarh in case no. Special (POCSO) 09 of 2016 whereby the appellant was convicted and sentenced under Sections 342,354, IPC and also under Section 10 of POCSO Act and was sentenced to suffer rigorous imprisonment for 5 years and to pay fine of Rs.5,000/- and in default of payment of fine to suffer further imprisonment for 3[three] months both under Section 10 of POCSO Act and under Section 354, IPC and was also sentenced to suffer imprisonment for 1[one] year and to pay a fine of Rs.500/- under Section 342 of the IPC and in

default of payment of fine to suffer further imprisonment for 15 days. All the sentences were directed to run concurrently.

[2] The investigation was carried out on the basis of an FIR submitted by the mother of the victim on 10.9.2013 at Bishalgarh PS that on the previous day at about 1 pm in absence of herself and her husband, the accused called the victim [age- 9 years] and her brother [age-10 years] in his house and asked the brother to bring biscuits for him from the shop by paying him Rs.20/- and engaged the victim to wash his platters. Thereafter, he took the victim on his lap and committed unwanted behaviours with her. The victim somehow got her freed, fled to her house and informed the matter to her mother at about 3 pm on her return.

[3] The charges were framed by the Special Judge under 3[three] counts viz. under Section 342 of the IPC, under Section 354 of the IPC and under Section 10 of the POCSO Act for committed offence under Section 9(m) of the POCSO Act.

On denial the charge, the prosecution examined total 8[eight] witnesses. Out of them, PW-4 [the victim], PW-5 [mother of the victim] and PW-7 [brother of the victim] are the key witnesses.

[4] PW-1, Smt. Sarathi Bala Das and PW-3, Sri Radha Mohan Das became cipher in their evidence as they simply stated that they did not know anything about the alleged incident. PW-2 is the Judicial Officer who recorded the statement of the victim under Section 164 of the Cr.P.C. and PW.6, Smt. Jhunu Begam was declared hostile as she

did not support the prosecution. The last witness PW-8 is the investigating officer of the case.

[5] Mr. S. Bhattacharjee, learned legal aid counsel appearing for the appellant argued that the allegation of touching of breast of the victim as deposed by her was absent in her previous statement recorded by the investigating officer and also by the Judicial Officer and it was the statement divulged first time in the court. He also referred to the cross-examination of the brother of the victim that he went to the shop for purchase of household articles at the asking of the appellant but was delayed in his return due to rain. Said episode of rain and delayed return were absent in his previous statement. Mr. Bhattacharjee also tried to bring to the notice of the court some omission in the evidence of mother of the victim and submitted that even there was no proof that at the time of alleged incident the victim was below 12 years to justify conviction under Section 10 of the POCSO Act for violation of Section 9(m) of the Act. According to Mr. Bhattacharjee, the charge under Section 342 of the IPC could also not be proved by the prosecution. Finally, Mr. Bhattacharjee, learned legal aid counsel submits that the appellant is in custody continuously from 10.06.2019 till date and therefore, even if the conviction is upheld some leniency may be shown in the matter of sentence.

[6] In reply, Mr. S. Ghosh, learned Addl. PP strongly argued that the victim was throughout consistent in her statement before the Magistrate and also before the court and there was nothing to disbelieve her. Therefore, on the basis of the sole testimony of the

victim herself, conviction can sustain. Regarding the age of the victim, Mr. Ghosh, learned Addl. PP submits there was no denial from the side of the defence during trial that the victim was below 12 years and therefore, the trial court was completely justified in convicting the appellant.

[7] As already discussed above, the key witnesses of the case are PW-4, PW-5 & PW-7.

PW-4 [the victim] in her evidence stated that one day at about 1 pm when she and her brother PW-7 went to the field nearby their house for grazing their cows, the appellant arriving there took both of them to his house and thereafter, sent her brother to the nearby shop to purchase biscuits. Thereafter, he took the victim on his lap, kissed her and tried to open her pant and also touched her breast. She cried for help and somehow managed to leave the house of the appellant and came to her house. She thereafter, narrated the incident to her mother and on the next date, the FIR was lodged.

In her cross-examination, she admitted that she could not remember the date and time of the incident and there were some houses namely, houses of one Ballav Jethu, Radha Mohan Kaku and Madhabi and the house of the appellant adjacent to their house. According to her, her father used to work in the paddy field nearby their house and the locals would also bring cows in that field for grazing purpose, moreover, the young boys and girls would also play in that field. She also admitted that the parents, brother and sister-in-

law of the appellant were alive on the date of incident and there was some boundary disputes between her family and the appellant because their cows would enter into his land. She also stated that there were some shops which were situated 3/4 mile from their house and there were no shop near their village. Her statement that the appellant touched her breast was omitted in her statement recorded under Section 161 of the Cr.P.C and under Section 164 of the Cr.P.C.

[8] PW-5 [the mother of the victim] stated in her evidence that one day in the year 2013 at about 3 pm when she returned to her home after finishing her work, she found the victim in the house and she (victim) locked the door from inside. Thereafter the victim told her that when she and her brother went to the nearby field for grazing the cows, the accused called them and sent her brother to the nearby shop to bring biscuits and asked the victim to wash some utensils. When the brother of the victim went to bring the biscuits, the appellant called the victim inside his house and started kissing her and also tried to remove her pant. The victim thereafter managed to escape and returned to her house. According to her, at that time her daughter was probably studying in Class-I and on the following day of the incident, she lodged the ejahar at Kamalasagar outpost.

In her cross-examination, she stated that the Kamalasagar outpost [now Madhupur P.S.] was approximately 3/4 kilometre from their house and her husband was alive on the date of incident who died about 2 years prior to the date of recording of her evidence. Her evidence that the appellant had kissed her daughter and tried to

remove her pant were omitted in the FIR. However, she denied any sort of dispute in between their family and the appellant regarding any boundary issue. She also admitted that in the FIR she did not mention the reason of delay of lodging of the same and that they had purchased their land from the father of the appellant. According to her, it takes approximately 1/2 hour on foot to reach the nearest shop from their house.

[9] PW-7 [the brother of the victim] deposed that one day at about 10 am when he along with his younger sister took their cows for grazing to nearby jungle, the appellant called both of them to his house and gave some money and asked him to bring household articles from the nearby shop and at that time, he was a student of Class-VI. According to PW-7, the appellant also asked the victim to wash his used utensils. Thereafter, he left for the shop to bring such household articles and due to rain he became late in returning to the house of the appellant and after giving the household articles to the appellant, he came back to his home. According to him, he heard from his mother that the victim came back crying from the house of the appellant and told something to his mother but he could not say what was stated by the victim to her mother.

In the cross-examination, he admitted that he did not state to the I.O. that it was raining when he went to the shop to bring such household articles, or that he had heard from his mother that the victim came back home crying from the house of the appellant and told something to his mother.

[10] On appreciation of such evidences in entirety, it is found that in the FIR, time of the alleged incident was mentioned at 1 pm on 09.09.2013 whereas the brother of victim stated in his evidence that the incident occurred sometime at around 10 am or so. The charge as was framed about the incident reflects the alleged time of incident to be 1 pm on that day. The victim deposed about outrage of her modesty by the appellant by lifting her on his lap and kissing her and also with an attempt to open her pant but surprisingly, her brother stated nothing about the incident and even in his evidence, he stated that he did not know what was stated to her mother by her sister, which appears to be very much unusual. He did not utter a single sentence regarding the alleged incident. There is also omission in the evidence of the mother of the victim that she did not mention in her ejahar about kissing and removal of pant of the victim by the appellant. According to her, the distance of Kamalasagar outpost is 3/4 km. from their house but the FIR was lodged by her at about 3 pm on the next day of the incident without any sort of explanation about such delay. Though the father of the victim was alive but the investigating officer did not examine him and thereby withhold him without any explanation. The neighbouring people, such as PW-1 and PW-3 also did not say anything about the incident. All these aspects create serious doubt about the veracity of the case. The investigating officer did not feel any necessity to collect the evidence regarding age of the victim and even did not think it necessary to lay the charge sheet under the provisions of POCSO Act. The investigating officer did

not seize any wearing apparels of the victim and also did not arrange for medical examination of the victim during the investigation but the charge sheet was submitted by her under Sections 342 and 376 of the IPC. The way how the investigation of the case was done was also not satisfactory. However, all these aspects missed the attention of the Trial Court.

[11] In view of the above discussion, it appears that the Special Judge (POCSO) has failed to appreciate all the materials available in the record and came to an erroneous finding. The presumption under Section 29 of the POCSO Act therefore also cannot justify the conviction of the appellant.

[12] In the result, the judgment and sentence dated 10.02.2020 passed by the Special Judge (POCSO), Sepahijala, Bishalgarh in case No. Special (POCSO) 09 of 2016 is hereby set aside. The appellant be set at liberty forthwith.

Accordingly, the appeal is allowed and disposed of.

Issue release warrant at once.

Send down the LCRs forthwith with copy of this judgment.

Pending application(s), if any, also stands disposed of.

JUDGE

Sujay