

**HIGH COURT OF TRIPURA
AGARTALA**

CRL.A(J) 08 of 2017

Selim Uddin
son of Kamar Uddin
resident of East Fulbari, Khadimpur,
PS: Choraibari
District: North Tripura

---- Convict Appellant(s)

Versus

The State of Tripura

---- Respondent(s)

For Petitioner(s)	: MR. A. Acharjee, Adv.
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For Respondent(s)	: Mr. S. Ghosh, Addl. PP
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Date of hearing & delivery of judgment and order	: 27.05.2020
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Whether fit for reporting	: NO
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**HON'BLE MR. JUSTICE S. TALAPATRA
HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY**

Judgment & Order (Oral)

Heard Mr. Acharjee, learned counsel appearing for the appellant as well as Mr. S. Ghosh, learned Addl. PP appearing for the respondent.

[2] The appellant was charged under Section 451 and 366 of the IPC for committing house trespass and kidnapping the victim or forced or seduced to illicit intercourse. That

apart, the appellant was charged under Section 4 of the Protection of Children from Sexual Offence, 2012 (hereinafter referred to as POCSO Act) for committing penetrative sexual assault on the victim.

[3] After due trial by the judgment dated 14.03.2016 delivered in Special (POCSO) 0000001 of 2016 by the Special Judge, Dharmangar, North Tripura. The appellant was convicted under Section 451 and 366 of the IPC and also under Section 4 of the POCSO Act. Pursuant to the said judgment and order of conviction, the appellant has been sentenced (1) to suffer rigorous imprisonment for 10 years and to pay fine of Rs.10,000/- with default stipulation for committing offence punishable under Section 4 of the POCSO Act. (2) to suffer rigorous imprisonment for 10 years and pay fine of Rs.5000/- with default stipulation under Section 366 of the IPC (3) to suffer rigorous imprisonment for 2 years and to pay fine of Rs.2000/- for the offence punishable under Section 451 of the IPC with default stipulation. It has been observed that all the sentences shall run concurrently and the detention that has been suffered by the appellant, shall be set off. The

appellant has filed this appeal by challenging the said judgment and order.

[4] The case of the prosecution is rooted in the complaint filed by one Salim Uddin alias Safai Miah (PW-1) revealing that his daughter, whose name is held for protecting her identity, was found missing from home on 04.03.2015 in the evening. At that time, he was in the shop. She could not be located even after rigorous search. On the following day, however, he could locate her and came to know at about 7pm in the evening of 04.03.2015, the appellant came to their neighbourhood by riding motor bike and it was noticed by some neighborhoods. At that time, his daughter was alone at home. Taking the advantage of the daughter, the appellant lift her away by force. According to the complainant, his daughter is a simple nature girl. The delay has been explained as they were busy in searching the girl. Based on the said complaint (Exbt-1) Churaibari PS case No.2005CRB010 of 2015 was registered under Section 366(A) and taken up for investigation. After the investigation was complete, the final police report under Section 373(2) of the CrPC was filed sending up the appellant to face the trial under Section 451

and 366 of the IPC and also under Section 4 of the POCSO. The Special Judge, having received the charge sheet took cognizance to the said offence as noted above. The appellant denied the charge and claimed to be tried in accordance with law.

[5] In order to substantiate the charge, as many as 13 witnesses and 13 documentary evidence were adduced by the prosecution in the form of documentary evidence medical examination report (Exbt-13) and the School Transfer Certificate (Exbit-3), Exbt- 6 and 9 have also been admitted. After recording the prosecution's evidence, the appellant was examined under Section 313(i)(b) of the CrPC. During that examination, the appellant has categorically stated that the allegation brought against him are all false and thus he raised the plea of innocence and he had admitted that motor bike bearing No. TR-02-6630 belonged to him. Even though, he proposed to adduced evidence, but it appears from the record, the appellant had not adduced any evidence during the instant examination of one Patharun Nessa (PW-6). Her statement as recorded under Section 161 of the CrPC was

admitted as (Exbt-13). Having evaluated the evidence, the trial judge returned the finding of conviction as noted above.

[6] From the scrutiny of the said judgment of conviction, it appears to us that the evidence of PW-4 (the victim) was relied for committing to the finding OF conviction culminating to a report but there had been examination to prove that the appellant had committed "penetrative sexual assault" within the meaning of Section 3 of the POCSO Act. Mr. Acharjee, learned counsel appearing for the appellant has quite strenuously argued that there is no evidence of the 'penetrative sexual assault' inasmuch neither from the testimony of the victim nor by any other evidence, it has been proved that the prosecution could establish there was penetration or penetration by the appellant.

[7] According to Mr. Acharjee, learned counsel, the victim has stated that the vehicle was parked in the jungle-path which was running through the northern side of their house and thereafter "he removed her salwar and also removed his pant and he did bad work." She did not resist the act as she was assured that the appellant would marry her. She has also stated that 'the bad work' continued at about 9

pm and thereafter, he took her with his bike to her maternal aunt's house at the place called Laxminagar. There she was asked by the appellant to come out from that house in the early morning. The victim had not stated anything to the said aunt nor to any other relatives of that house. The next morning, by riding the bike, they reached to one of her cousin's house and thereafter, reached Churaibari to her nana's house (the grandfather's house). From there, she was located by the relatives, namely Sunara Begam (PW-3) and her brother Abdul Amid (PW-2).

[8] Mr. Acharjee, learned counsel appearing for the appellant has submitted that there is no evidence in respect of the house trespass. However, from the evidence of PW-4 what has been gathered is that there is no ingredients of the offence punishable under Section 366 of the IPC. Particularly, there is evidence that the victim had gone out on her over own volition.

[9] From the other side, Mr. S. Ghosh, learned Addl. PP in order to repel the submission made by Mr. Acharjee, learned counsel has submitted that the evidence of PW-4 is completely reliable inasmuch what she had stated to the

relatives and to the Magistrate while her statement was recorded under Section 164 of the CrPC is consistent to her testimony and as such is fully reliable. According to Mr. Ghosh, learned Addl. PP 'doing bad things' can be understood as the penetrative sexual assault and the trial judge has rightly come to the conclusion that the appellant committed penetrative sexual assault on the victim.

[10] Mr. Ghosh, learned Addl. PP has taken us to Exbt-7 (the statement recorded under Section 164 of the CrPC) where the victim has stated that the appellant raped her by force against her will thereafter he took her on bike to her uncle's house. From there, she went to his maternal uncle's house. According to him, the word 'rape' is quite categorical and this court may read this fact from the statement as recorded under Section 164 of the CrPC.

[11] In support of his contention, Mr. Ghosh, learned Addl. PP has relied on a decision of the apex court in **State of Rajasthan vs. Kartar Singh** reported in **1970 (2) SCC 61**, where it has been held as under:

"It may be pointed out that these two witnesses also made a statement under S. 164 of the Code of Criminal Procedure. These statements were, of course, not evidence but were corroborative of what had been stated earlier in the Committal

Court. The attention of the witnesses was drawn to passages from those statements also and their explanation only was that they were made under 'police pressure'. In our judgment the High Court was in error in not reading the statement of Ranjeet Singh made before the Committal Court and considering it as part of the evidence in the case."

[Emphasis added]

[12] Mr. Ghosh, learned Addl. G.A has further submitted that the age of the victim has not been challenged by Mr. Acharjee, learned counsel appearing for the appellant. PW-1, the father of the victim has categorically stated that at the time of occurrence of the offence, his daughter was 15 years of age and that statement has found corroboration from the content of the transfer certificate (Exbt-3) which has been introduced in the evidence. The transfer certificate and the admission registrar was produced in the evidence by PW-10, In-charge, Headmaster of the school namely, D.P. Nadiapur JB School.

[13] Mr. Ghosh, learned Addl. G.A has quite robustly submitted that if the evidences are evaluated properly, they would not lead to any occasion for interfering with the judgment of conviction, inasmuch as kidnapping the victim was done clearly with intention to seduce illicit intercourse. Taking the minor victim out of the local guardianship by

causing house trespass and committing penetrative sexual assault have been proved beyond reasonable doubt.

It would be apposite to carry out a meaningful survey of the evidence as recorded during the trial for purpose of appreciating the rival contentions projected by the counsel for the parties.

[14] PW-1, Salim Uddin alias Safai Miah has stated in the trial that when he was at his tea stall, at that time, the appellant had taken his daughter away from his house at a place called Khadimpara and had sexual intercourse with his daughter and thereafter, the appellant took his daughter to her nana's house and left. After two days, she could be located and after her recovery, he filed the complaint. At that time, the victim was 15 years of age. During the investigation, the police seized the bike used by the appellant and PW-1 stood witness to the said seizure and put his signature on the seizure list which has been marked as Exbt-2. He has admitted in the evidence the original copy of the school certificate (Exbt-3) as seized by the seizure list (Exbt-5). In the cross-examination, he has stated that he did not give the missing information to the police station and that he did not

state to the police office the victim was brought at her nana's house. He has denied the suggestions made contrary to the statements in the examination-in-chief.

[15] PW-2, Abdul Hamid is one of the brothers of the victim who at the time of occurrence was away from the house and he was at Agartala. Having received the information from his father (PW-1), he returned from Agartala and reached home. He has stated in the trial that *"My sister fled with Selim Uddin. I did not see the face of Selim Uddin before."* On the following day of the occurrence, he went to his nana's house at Kurti. There he met with his sister. At that time, police was also present. On being asked, his sister (the victim) reported him that *"she was first taken to Chanpur and there is a tower, and in front of the tower Selim Uddin committed bad deeds with her and thereafter she was taken to my maternal uncle's house namely Mastu Miah at Laxminagar and she was threatened not to divulge the matter to anybody."*

But in the cross-examination, he had admitted that he did not state to the investigating officer regarding where his sister was taken or any bad work done to her. Even the

police officer did not ask him regarding the matter. No other material evidence can be extracted during the cross-examination.

[16] PW-3, Sunara Begam is one of the aunts of the victim who resides in the close proximity of the victim's house. She has stated that the victim lacked sufficient understanding. Her mother has been suffering from mental disorder. One evening, one year back from the day of deposition, the victim was found missing from her hut at about 7 pm. She heard that she was taken by one Selim Uddin (the appellant) by his bike. The victim and the appellant were known to each other. After two days, the victim was recovered from a place called Kurti, from her nana's house. When she was recovered, she was taken to Kurti along with police and she had disclosed that Selim Uddin (the appellant) had taken her by his bike, after availing another road situated in the northern side through jungle path. She was first taken to Chanpur area and there the appellant committed bad deeds with her and then she was taken to Khadimpara (Laxminagar) in the house of her maternal uncle and on the following morning she was given some cash by the appellant and was

to go to her nana's house. Thus, she reached there. She had also confirmed the age of the victim at the time of occurrence as 15 years.

In the cross-examination, when she was asked whether the fact that she had disclosed in the trial was stated to the police, she did admit the absence of such statement, but she had claimed that such statement was made by her to the police.

[17] PW-4, the victim is the most important witness for the prosecution. She was examined at the beginning by the trial judge to test her capacity to understand the responsibility of telling truth. Later on, having observed that she did not understand the consequence of oath, her statement was recorded without administering oath. She made the statement that when her father was at his shop in the evening at 7 pm, that occurrence took place. She has stated as follows:

My father has a shop. The incident took place 1 year back at about 7 pm. Salim Uddin was known to me from earlier and I was introduced with him in stone quarry where I used to work. In absence of elderly persons and also my younger brother Salim Uddin visited my house at 7 pm and asked me to go with him. He stated to me that he had no wife and he would marry me. So I relied him and started to proceed with him. He took me availing a jungle path situated in the northern side of our house near Chanpur Tower where he

parked his bike, and there he removed my salour, he also removed his pant and then he did bad works with me. I did not resist very much as he already assured me to marry saying that he had no wife. And that bad work continued at about 9 pm and thereafter he took me with his bike to Laxminagar near my maternal aunt's house and left asking me to come out from that house in the early morning. I spent the night at my maternal uncle's house. In the morning my maternal aunt informed me that they would go for an invitation so, I should leave that house. She also provided some money to me for my journey. At that time Salma Begam my cousin through my maternal aunt accompanied me as she would be leaving out coming to the road. I meet with Salim Uddin and he dropped me and my cousin with his bike in Churaibari gate and from Churaibari gate I and Salma Begam went to my Nana's house. I did not disclose to any member in my maternal uncle's house or to the inmate of my Nana's house that the accused committed bad works with me. The day I went to my Nana's house on that very date police of Churaibari went there, my elder brother and my chachi Sunara Begam also went there. When I was interrogated my brother and my chichi I disclose entire facts thereafter I was taken to Churaibari P.S then police took me to Kadamtala PHC and after examining myself and in the night I was taken to my house by a police vehicle. Subsequently, on another day police took me to court and one female Judicial Officer recorded my statement.

Further, she had admitted the statement as recorded under Section 164 of the CrPC [Exbt-7].

In the cross-examination, she has made the following statement which may have certain impact on her examination-in-chief

"I could not recollect where (sic) I state to the police that on foot accused taken to me to the Tower of Chanpur and it was the particular place Chandpur where she (sic) committed bad works."

She had denied the suggestions that the appellant did not take her from the house.

[18] PW-5, Makai Miah has stated in the trial that he saw the appellant travelling with the victim by his bike. He had tried to call the victim from behind, but the call could not reach the victim.

No effective cross-examination was carried out.

[19] PW-6, Patharun Nessa is the maternal aunt in whose house on the day of occurrence, the victim went at the advice of the appellant. She has stated that at about 9 pm, the victim came to their house and on the following morning *"without informing anybody she went out along with her daughter Salma Begam. They went to Kurti to her Nana's house."*

In the cross-examination, she has stated that the victim stayed in her house for two days. Her previous statement as recorded under Section 161 of the CrPC (Exbt-A) was admitted.

[20] PW-7, Burun Uddin has also stated that the appellant was proceeding towards Churaibari with one female by his motor bike. He had called him, but the appellant did not respond. He could identify the victim on his bike. But in the trial, he could not give the name of the victim even though he has stated that the girl was his cousin's daughter.

No effective cross-examination was carried out.

[21] PW-8, Mst. Kulchuma Begam is a young girl of fifteen years of age stated in the trial that she was also working with the victim in a stone quarry. On the very day of occurrence, she found Selim Uddin gossiping with the victim parking his bike in the road side. He had seen the appellant and the victim talking to each other on earlier occasions also. The victim is her cousin sister. The victim was recovered on the following day.

[22] PW-9, Chaitanya Reang, a medical officer who was posted in the Dharmangar Hospital had carried out the potency test of the appellant and found he was capable of performing sexual intercourse.

[23] PW-10, Ramendu Purkayastha, a teacher of DP Nadiapur JB School has stated in the trial that the victim was

a student in that school and after passing the annual examination for promotion to class-VI, the transfer certificate was issued on 31.12.2012 itself. He admitted that certificate (Exbt-9) which one is the same certificate admitted in the evidence as Exbt-3.

[24] PW-11, Biplab Debbarma, a Sub-Inspector of Police, was entrusted with the investigation. PW-11 has stated how he had investigated after receipt of the complaint. But he had failed to draw a site map as the exact location could not be identified by 'anyone'. He has also stated how he had seized the motor bike of the appellant. He had arrested the appellant. He has stated that that the appellant "committed bad works". He had recorded the statements of the witnesses and caused seizures wherever required. He had made arrangement for medical examination of the victim and from the medical report, he could find that the hymen was torn from all directions and it was loose. He had collected the vial containing the vaginal swab, mouth swab, anus swab. According to him, the report submitted by the medical officer who conducted the examination of the victim did observe that, there was no sign of forceful intercourse. He stated in

the trial that he did not arrange any test for determining the age of the victim. He did not complete the investigation. He has denied the allegation of conducting a faulty investigation.

[25] PW-12, Titan Paul, is the other investigating officer, who having completed the investigation filed the charge sheet. He has admitted that during the investigation, he did not prepare the hand sketch map showing the place of occurrence and he did not take further steps to determine the age of the victim. From the school certificate, according to him, the age of the victim has been established. According to him, the medical officer clearly opined that he did not find any sign of forceful intercourse with the victim, despite that he had submitted the charge sheet.

In the cross-examination, what he has stated would not impact the statement made in the examination-in-chief.

[26] PW-13, Mriganka Dutta Biswas who examined the victim on 06.03.2015 i.e. after two days of the occurrence has stated in the trial that after examination, he did not find any external injury. On local examination of genital parts, no foreign body was found. In labia majora there was no injury

no bite marks was detected. In labia minora, no injury no infection was seen. In fourchette no bleeding or tear was found. In vulva there was no injury, no bleeding or discharge was found. In perineum there was no injury. Her hymen was found torn in all directions. In total vagina and cervix he gave his opinion that it was wide, loose easily permitting two fingers. No injury or laceration was detected. He has taken the blood sample, urine sample, vaginal swab, saliva, public hairs. He had handed over the sample to the police. After performing the clinical examination, PW-13 opined that *"there was no sign of forceful sexual intercourse. I submitted my report on 01.04.2015."* He admitted his report in the evidence as Exbt-13. He had deposed shortly bit about the procedure that he had followed before the examination. But he has succinctly stated in the trial as under:

"I can say that the said female has undergone sexual intercourse and she had sexual experience."

The other statements those he made in the cross-examination do not appear relevant to the present context. Exactly, the same opinion has been expressed in the said report. So far the age of the victim is concerned, he has

stated that she was around 15 years of age much below the age of majority i.e. 18 years.

[27] What appears is that that prosecution has proved to the hilt that the victim was taken away by the appellant from the lawful custody of her guardian (PW-1). But it is not clear whether the appellant did enter inside the house to bring the victim out. In this regard, there is no evidence and as such when we revisit the analogy of the conviction under Section 366 of the IPC, we are persuaded by insufficiency of the evidence to set aside the conviction under Section 451 of the IPC.

[28] The sheet anchor of the argument placed by Mr. A. Acharjee, learned counsel is that there is no specific evidence of penetration which is *sine qua non* for an offence defined in Section 3 of the POCSO Act. Section 3 of the POCSO Act defines that a person is said to commit penetrative sexual assault if:

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child

or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

[29] The case of the prosecution as understood by us is penetration by penis. We have carefully read the statement of the victim. She had merely stated that the appellant did some "bad things" and the medical officer's examination report does not clearly state that there was recent sexual intercourse. The medical officer has generally stated that the victim had sexual intercourse and she was habituated to the sexual intercourse. What the victim further had stated is that her salwar was put off by the appellant and at the same time, the appellant had put off his trouser and thereafter he did the bad things. There is no description of intercourse, unless that is narrated or established from mere words 'bad things' it is very difficult to deduce that there was any penetration, particularly when the medical report is not at all specific. Benefit in such circumstances should tilt towards the accused.

[30] What Mr. Ghosh, learned Addl. PP has tried to emphasize having taken recourse to the statement made under Section 164 of the Cr.P.C. where the victim has stated that she was raped, this court should come to a conclusion that there was penetrative assault upon the victim. This analogy has not been accepted by the trial judge. He has concluded from the circumstances and the narration of the victim, read with the medical examination report that there was sexual intercourse. We are unable to agree in the context to come to a definite finding beyond reasonable doubt that there was penetrative sexual assault upon the victim and as such we are of the considered opinion that the conviction under Section 4 of the POCSO Act be set aside and accordingly it is set aside. But from the evidentiary materials, we also find that sufficient evidence has been laid by the prosecution to make out a clear case of sexual assault as defined under Section 7 of POCSO Act. Section 7 of the POCSO Act provides that whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent

which involves physical contact without penetration is said to commit sexual assault.

[31] On appreciation of the testimony of the victim, we are of the view that the appellant had committed the offence punishable under Section 8 of the POCSO Act. Accordingly, he is convicted under Section 8 of the POCSO Act without framing formal charge thereof, as the offence under which the appellant is convicted is minor and cognate to the offence punishable under Section 4 of the POCSO Act. Hence, we have observed by now that the conviction under Section 366 of the IPC is liable to be maintained. Accordingly, it is ordered. The sentence thereunder is confirmed. We have convicted the appellant under Section 8 of the POCSO Act. Hence, the appellant is liable to suffer sentence.

[32] Having regard to the aggravating and mitigating circumstances, the age of the appellant and nature of offence, we are also in agreement with the trial judge that probation cannot be extended to the appellant and he is bound to undergo the sentence.

Accordingly, the appellant is sentenced to suffer five years' rigorous imprisonment and to pay fine of Rs.5000/-

in default to paying the said fine, the appellant shall further suffer simple imprisonment for six months under Section 8 of the POCSO Act. The detention that the appellant has already undergone be set off from the substantive imprisonment. Further, the sentences shall run concurrently.

In consequence of the said finding as noted above, the appeal stands partly allowed.

Send down the LCRs forthwith.

JUDGE

JUDGE

