

**THE HIGH COURT OF TRIPURA
AGARTALA**

CRL A (J) 52 OF 2019

Sri Lafruchai Mog alias Hlafruchai,
S/o Lt. Thaingya Mog of
Village Kalshi R.F. (Madhumog Para),
PS- Baikhora, Dist. South Tripura.

.... Appellant

– Vs –

The State of Tripura,

....Respondent

**BEFORE
HON'BLE MR. JUSTICE ARINDAM LODH
HON'BLE MR. JUSTICE S.G.CHATTOPADHYAY**

For the appellant : Ms. R. Purkayastha, Advocate.

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

**Date of hearing and
date of delivery of
Judgment & Order** : **28.08.2020**

Whether fit for reporting : NO

Judgment & Order (Oral)

Heard Ms. R. Purkayastha, learned counsel appearing for the appellant. Also heard Mr. S. Debnath, learned Addl. Public Prosecutor appearing for the State-respondent.

2. The convict-appellant has preferred the instant appeal against the judgment and order of conviction dated 15.06.2019 and

sentence dated 19.06.2019, passed by the learned Special Judge, South Tripura, Belonia, whereby and whereunder the appellant has been sentenced to suffer imprisonment for remainder of his natural life and to pay a fine of Rs.10,000/- with default stipulation for committing offence punishable under Section 376(2) (1) of IPC and Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 in Case No. Special (POCSO) 15/2017.

3. Prosecution case was set in motion on filing of a complaint made by the father of the victim to the effect that on 28.05.2016 at about 10:30 am while he was working in the land located in the backside of his house and his wife working in the kitchen, at that time the convict-appellant had committed rape upon her minor daughter (name withheld) who is mentally retarded inside a room where rubber is stored. The victim girl raised alarm and hearing her alarm the younger daughter and his wife had rushed to the spot and caught the convict-appellant. The neighbouring people also had gathered there. The convict-appellant was assaulted at the spot and that he saw her daughter having blood stain on her wearing apparels. On being informed, the police party arrived there and the informant lodged a complaint to the Officer-in-Charge of Baikhora Police Station.

4. On receipt of the said complaint, Baikhora P.S. FIR No.2016/BKR/31, under Sections 444/376 of IPC and Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 was registered. Being endorsed, the investigating officer had carried out investigation; recorded the statements of the available witnesses including the victim; seized the wearing apparels of both the victim girl and the convict-appellant; also seized some blood stained soil from the spot; arranged for recording statement of PW-2, the younger sister of the victim girl under Section 164(5) of CrPC; sent all the seized articles to the Forensic Expert for scientific examination; further arranged for medical examination of the victim girl within two hours of the incident and also arrested the accused from the place of occurrence. Finally, after completion of investigation submitted charge-sheet against the convict-appellant for commission of offence under Sections 448/376 of IPC and Section 6 of the POCSO Act.

5. After taking cognizance of the offence in terms of the charge-sheet, the learned Special Judge had framed charges against the convict-appellant under Sections 342/376(2)(i) of IPC and Section 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. Additional charge was framed against the convict-appellant under Section 6 read with Section 5(k) of the POCSO Act. The

contents of the charges were read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

It may be noted herein that while framing the charges against the convict-appellant, the learned Special Judge had considered the fact that the victim girl was mentally retarded.

6. To substantiate the charges, the prosecution had examined 20 (twenty) witnesses and introduced as many as 16 documents including the TSFSL report.

7. After conclusion of the evidence of the prosecution witnesses, the convict-appellant was examined under Section 313 of CrPC where he pleaded his innocence and stated that the imputations levelled against him were false.

8. Having heard the learned counsel appearing for the parties, the learned Special Judge had convicted and sentenced the accused-appellant as aforestated.

9. Being aggrieved by and dissatisfied with the said conviction and sentence, the convict-appellant has preferred the instant appeal challenging the legality and validity of the conviction and sentence.

10. Ms. R. Purkayastha, learned counsel appearing for the convict-appellant has submitted that the prosecution has miserably failed to establish the factum of rape by the convict-appellant upon the victim girl. She has drawn our attention to the medical examination report where she did not find any injury mark in any parts of the body of the victim girl including her private parts.

11. Learned counsel for the appellant has further submitted that PW-2 Parmita Mallik had improved her statement during her examination-in-chief from the statements which she made before the learned Magistrate while recording the statement under Section 164(5) of CrPC. She has further submitted that the victim was taken to the hospital just after the incident but the Doctor did not find any sign of blood being oozed out from vagina of the victim or the Doctor (PW-19) did not find any stain of blood in her legs. Lastly, she has urged that the convict-appellant may be acquitted from the charges levelled against him and the conviction and sentence as imposed by the learned Sessions Judge may be set aside and quashed.

12. On the other hand, Mr. S. Debnath, learned Additional Public Prosecutor has submitted that the prosecution has been able to prove its case beyond reasonable doubt. Mr. Debnath has strongly

argued that medical examination report or the opinion of the expert cannot override the ocular testimony of the prosecution witnesses. He has tried to persuade this Court that all the witnesses have categorically stated that they had seen blood was being oozed out from the body of the victim girl.

Learned Addl. P.P. further submitted that PW-2, the sister of the victim girl who had rushed to the spot after hearing the cry of the victim girl have categorically stated that while she entered into the room she found her sister crying. She asked her the reason of crying. On her query, the victim girl replied that she was being raped by the convict-appellant. Mr. Debnath, learned Addl. P.P. has contended that the victim girl was a mentally retarded. So, the Court has to keep this fact in mind. Learned Addl. P.P. has defended the judgment of conviction and sentence delivered against the convict-appellant by the learned Special Judge.

13. We have meticulously scrutinized the evidence on record. Firstly, we like to note that the prosecution has introduced the certificate of disability to substantiate the extent of disability of the victim girl and it was found that the victim girl was mentally retarded to the extent of 75% [Exbt.9].

14. PW-1, Smt. Amita Bhowmik (Mallik) is the mother of the victim girl as well as PW-2. She has deposed that when she heard the cry of PW-2, she entered into the store room and found the victim girl and the convict-appellant standing in the corner of the store room and she noticed blood on the frock and leg of the victim when PW-2 informed her that she found her sister and the convict-appellant wearing their undergarments and on being enquired, the victim girl had divulged that when she went to the store room to give the key to the convict-appellant he raped her. She further deposed that the convict-appellant was caught red handed at the spot and he was assaulted.

15. PW-2, Kumari Parmita Mallik is the most vital witness of the case who is a child witness having 13 years old. She deposed that at around 10:30 am on the day of occurrence, she asked her victim sister to give the key of the store room and her sister went to the store room. Just after a few while she heard her sister crying when PW-2 immediately entered into the room and found both of them were wearing their under-garments and her victim sister informed her that the convict-appellant committed rape upon her. PW-2 had narrated the incident to her mother. She further deposed that the convict-appellant

was apprehended at the spot. She further deposed that she made statement before the learned Magistrate after two days of the incident.

In her cross-examination nothing material contradiction was found.

16. PW-3 Smt. Minu Majumder is a neighbour. She went to the house of Parimal Mallik after hearing halla. She found the victim girl, the elder daughter of Parimal was crying and PW-1 and PW-2 were found standing there. She also deposed that accused Lefruchai was also standing there. PW-1 informed her that when the victim girl went to give the key to Lefruchai, he raped the victim girl. She noticed blood on the leg and frock of victim girl.

17. PW-4, Basanti Bal is another neighbour. She heard the factum of incident from PW-1. She further deposed that the police officer had seized some blood stained earth from the store room by preparing a seizure list. She put her signature therein which was markes as Exbt.2.

18. PW-5, Sri Debashis Biswas is a witness to the seizure of blood stained soil. She identified her signature on the seizure list as Exbt.2/1. PW-6 Smt. Aparna Mog was working as a Staff Nurse at the Baikhora Public Health Centre where the victim was medically

examined. PW-7, Sri Biswajit Mallik is the witness to the seizure of disability certificate relating to the victim girl.

19. PW-8 Smt. Swapna Baidya is one of the neighbours of the victim girl. She deposed that on enquiry, PW-2 informed her that her sister was raped by the convict-appellant. She further deposed that she had noticed blood on the frock of the victim girl.

20. PW-9, Sri Madhusudhan Mallik was working as a constable at Baikhora P.S. He identified the seizure list of the blood sample collected from the convict-appellant.

21. PW-10, Sri Samir Mallik deposed that he came to know about the incident of rape upon the victim girl from PW-1. He noticed blood on the frock of the victim.

22. PW-11, Smt. Chandrabati Reang was working as a Staff Nurse at Baikhora PHC. She was a witness to the seizure of Exbt.7, i.e. the blood sample in gauge cloth from the victim girl. PW-12 Smt. Rupa Saha was also a seizure witness of the blood samples from the victim girl.

23. PW-14, the victim herself in her examination-in-chief deposed that the convict-appellant was known to her by way of

shaking of her head in a positive mood. When question was put to her that whether she went to give the key to the convict-appellant, PW-14 again had shaken her head in positive direction. She was asked by the Court whether the accused had touched her? In reply, she had shaken her head in a positive mode. Nothing more was elicited from PW-14 when PW-14, the victim girl was put to cross-examination and was suggested that she did not go to give the key to the convict-appellant, she preferred to keep mum. Suggestion was further given to her that the accused did not touch her. In reply to that also she kept herself mum.

24. PW-15, Sri Parimal Mallik is the father of the victim. He deposed that the date of birth of her daughter was 20.06.2000. He also produced the disability certificate [Exbt.9]. The birth certificate was exhibited as Exbt.8. He further deposed that he heard the whole incident from his wife (PW-1) and daughter (PW-2) and lodged the complaint (Exbt.10).

Nothing material contradictions are found in his cross-examination.

25. PW-16, Sri Bichitra Reang was a witness to the seizure of birth certificate. PW-17 was the witness of the seizure of the medical

report [Exbt.11]. His signature was being identified marked Exbt.11/1. PW.18, Sri Anup Kr. Das was a witness to the written ejahar and his signature was marked as Exbt.10/1.

26. PW-19, Dr. Bana Das was posted as Medical Officer at Baikhora PHC. She identified the medical report which she prepared. She further deposed that she collected vaginal swab of the victim girl which was seized by the investigating officer. She also had put her signature on the seizure list wherein one skirt, one panty, one shirt and one inner garment of the victim girl were seized. Her signature on the seizure list was marked as Exbt.3/1. She further deposed that she collected blood sample of the victim and one police officer seized the blood sample by preparing seizure list. She put her signature therein [Exbt.7/2].

27. PW-20 Sri Litan Bhadra was the investigating officer. He deposed that during the course of his investigation he visited the place of occurrence, prepared hand sketch map, recorded the statements of the available witnesses including the victim; arranged for recording the statement of PW-2, Smt. Paramita Mallik under Section 164(5) of CrPC; seized the wearing apparels of both the victim and the convict-appellant. He also seized blood stained soil from the spot; the birth

certificate and the disability certificate of the victim girl from the custody of the father of the victim girl (PW-15) and arrested the accused during investigation from the spot itself. After completion of investigation being prima facie satisfied, he submitted charge-sheet against the convict-appellant.

28. Now, we are to decide whether on the basis of aforesaid evidence, the conviction and sentence as imposed by the learned Special Judge upon the convict-appellant, is sustainable or not. While deciding a case relating to sexual offence, the Court is to keep in mind the well settled principle that ocular testimony of the victim and other prosecution witnesses will have primacy over the medical evidence. It is also equally true that medical evidence should not always be discarded mechanically. It is the duty of the Court to weigh the prosecution evidence and the ocular evidence with great caution particularly, when a victim is found to be mentally challenged. It is also well-settled that if ocular evidence is trustworthy, without any embellishment or any sort of exaggeration or improvements, then, the conviction may be declared upon the accused on the basis of sole testimony of the victim girl.

29. Keeping in view the aforesaid principle, let us proceed to decide the present appeal. As it is brought to our notice by learned counsel for the appellant about the 164(5) CrPC statement made by PW-2, we have perused the same. Needless to say, the statement under Section 164(5) CrPC is not a substantive piece of evidence but it can be used for contradiction and corroboration. We have found that PW-2 during her statement under Section 164(5) CrPC has stated that –
“Being heard I rushed to the house where Rubber sheets are being made. Reaching there I saw my elder sister was wearing her panty and Lafruchai @ Ahalfpruchai Mog also wearing his pant who came to our house for making Rubber sheet. On being asked to my elder sister she stated to me that Lafruchai @ Ahalfpruchai Mog has opened her panty. Thereafter I informed the matter to my mother. I have also seen blood coming down from the legs of my elder sister Rakhi Mallik.”

30. We have given our due attention to her statement which she deposed before the Court as PW-2. She has stated that after hearing cry, she went to the store room and found her victim sister wearing her panty. She also found that convict-appellant wearing his pant. On further inquiry her victim sister told her that when she went to give the key to the convict she was fell down on the ground by him inside the store room and raped her. Immediately she raised alarm and

narrated the incident to her mother and other neighbouring people who had rushed to the spot. Most interestingly, we have noticed substantial deviation and improvement from her statement which she made under Section 164(5) CrPC within two days of the occurrence of the incident. In her 164(5) statement, nowhere she has stated that her victim sister told her that the convict-appellant had raped her. Another more interesting feature in her evidence is that she has stated in her 164 CrPC statement that she had seen blood coming down from her legs but in her examination-in-chief she did not depose that she found blood was coming down from the legs of her elder sister. She was the first witness to arrive at the spot and thereafter other witnesses like PW-1, PW-2, PW-3 had arrived at the spot. In this regard, we have again given our bird's-eye view to the medical examination report prepared by Dr. Bana Das (PW-19). In her report under the caption "*General examination*" we did not find any remark that the doctor found any blood was oozing from the legs though the victim girl was produced immediately after the incident. On examination of the private parts of the victim, she remarked—"*Vulva-stain/injury-nil, Clitoris-normal, Vestibule- normal, forchette-normal, Posterior commisure-normal, Labias- normal*". On her systemic examination it was found that—"*Chest-normal, C.N.S. Normal, C.V.S.—normal,*

Abdomen-normal, Marks of injury over the body including breast, vulva and inner aspects of thighs-nil". In her pre-vaginal examination she detected that- "Vaginal orifice- no injury seen, Hymen-intact/tear or any other injury-torn, Signs of S.T.D.-no, Uterus-normal, Cervix-normal, Discharge-vaginal secretion, Vaginal mucous membrane-normal, Vaginal canal- no injury seen".

31. We find much support of this medical examination report from the deposition of PW-2. The statements made by PW-2 in her examination-in-chief, according to us, appears to be improved version of her statements which she made before the learned Judicial Magistrate 1st Class under Section 164(5) of CrPC. The statements made by PW-1, PW-3, PW-8 that they found the blood was oozing out from the legs of the victim are not supported by the evidence of PW-2, the younger sister of the victim girl who at first arrived at the spot. If we try to appreciate the evidence of PW-1, PW-3 and PW-8 who deposed that they had seen blood was being oozed out from the legs of the victim girl and further that they found the stain of blood in the frock/skirt of the victim girl, then, we can easily visualize the quantity of blood was being oozed out from the private parts of the victim girl. According to us, the quantity of blood that was being oozed out must indicate the severity of the injury or even minimum injury at the

private parts of the victim girl. The doctor did not find any injury at labia majora, labia minora or the vulva region of the victim girl. In our opinion, even if there was slightest degree of penetration, there must be some injury at least at the labia majora or labia minora or vulva region of the private parts of the victim girl. There is absence of swelling or tenderness in and around the vaginal orifice of the victim girl which appears to be absurd when an adult male organ penetrates the female private organ even at its slightest degree. Further, the doctor who had examined the victim within a very short spell of time did not notice any sign of blood in the legs of the victim. There is no evidence that the legs of the victim girl and the blood thereon, were washed out with water or she took bath before going to hospital.

32. After close scrutiny of the SFSL report, it is found that the scientific expert did not find any blood stain in the soil which was seized from the place of occurrence. The scientific officer has clearly opined that- *“No blood stain could be detected in the exhibits marked as D, E, F1 and I.”* Exbt.I is the sealed paper envelope containing some soils which were recovered from the place of occurrence. From further examination of the scientific examination report of the blood stained clothes and the wearing apparels of the victim and the convict-appellant, it is found that the frock/skirt of the victim girl contains the

blood stain of her own. The wearing apparels of the convict-appellant also contain the blood group of his own. This finding of the scientific expert in regard to blood grouping of the convict-appellant gets support as he was being assaulted by the persons assembled therein.

33. Under the aforesaid circumstances, in our opinion, the prosecution story of aggravated penetrating assault committed upon the victim girl by the convict has not been proved beyond doubt. On careful appraisal of medical evidence that there is no sign of injury in and around the private parts of the victim coupled with the testimony of PW-2, the sister of the victim girl who had first arrived at the scene of occurrence and the ocular testimony of PW-1, PW-3 and PW-4, etc. has led us to draw two possible views and in that case, the view of favouring the accused should be adopted and the convict is entitled benefit of doubt.

34. In *State of Gujarat v. Jayrajbhai Punjabhai Varu*, AIR 2016 SC 3218, the Apex court held that when two views are possible, views favourable to the accused should be adopted. The Court observed thus:-

“13. The burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the

other towards his innocence, the view which is favourable to the accused should be adopted.”

35. Again, in ***State of Uttar Pradesh V. Munni Ram & Ors., (2010) 14 SCC 364***, the Apex Court held that – *if two views are possible on the evidence adduced, one pointing to the guilt of the accused, and the other innocence, the view which is favourable to the accused is normally to be adopted.*

36. In ***State of U.P. v. Ashok Kumar Srivastava, AIR 1992 SC 840***, The Apex Court held thus:-

“9.Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to be fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.....”

37. In our considered view, the evidence adduced by the prosecution has not been considered by the learned trial Court in its right perspective. We have reasons to doubt the opinion expressed by the learned trial Court while convicting the accused under Section 376(2)(1) of IPC.

38. The cumulative effect of the prosecution witnesses read with medical evidence and other surrounding circumstances, as highlighted here-in-above, when considered, with the background of

legal principles as quoted *supra*, it is clear that the accusation of committing of offence of rape against the convict-appellant has not been established beyond doubt, and certainly, benefit of doubt is to be given to the appellant. The impugned conviction and sentence under Section 376(2)(1) cannot sustain.

39. However, the victim was caught red handed at the place of occurrence and both of them were found wearing apparels i.e. panty and pant. The victim in her examination-in-chief has categorically stated by way of positive sign that the convict-appellant had opened her panty meaning thereby the convict-appellant came into physical contact with the victim girl. This circumstance has been proved beyond doubt. The victim girl being a mentally retarded person, the offence committed by the convict-appellant comes within the purview of clause (k) of Section 9 of POCSO Act and punishable under Section 10 of the Said Act.

40. Section 10 defines punishment for aggravated sexual act which reads as follows:-

“10. Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.”

41. Considering the extent of gravity of the offence as committed by the convict-appellant, in our opinion, it will be

appropriate if we convert the sentence from Section 6 of the POCSO Act to Section 10 read with Section 9 of the POCSO Act in consonance with the offence the accused committed. As we have already held that there is evidence of sexual assault defined under Section 9 of the POCSO Act committed by the convict-appellant upon the victim girl, the finding of conviction returned by the learned Special Judge is maintained and confirmed. However, the sentence to suffer imprisonment for natural remainder of life as imposed by the learned Special Judge under Section 376(2)(1) of IPC is set aside and quashed.

42. The convict-appellant has been sentenced to suffer 5(five) years of rigorous imprisonment for committing offence under Section 10 of the POCSO Act and shall also be liable to pay a fine of Rs.5000/- in default to suffer S.I. for 6(six) months.

43. Consequently, the appeal stands allowed in part in the aforesaid terms. The convict-appellant shall serve out the sentence for the remaining period.

The appeal, accordingly, stands disposed of.

JUDGE

JUDGE