

**HIGH COURT OF TRIPURA**  
**A\_G\_A\_R\_T\_A\_L\_A**  
**Crl. A(J) No. 68 of 2019**

Sri Prajit Malakar, son of Kanu Malakar, resident of Village: Radhanagar, Ward No. 7, P.S. Kumarghat, Unokuti District, Tripura.

*.....Appellan*

**-V E R S U S-**

The State of Tripura.

*..... Respondent.*

**B\_E\_F\_O\_R\_E**  
**HON'BLE MR. JUSTICE T. AMARNATH GOUD**  
**HON'BLE MR. JUSTICE ARINDAM LODH**

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For Appellant(s)	:	Mr. H. K. Bhowmik, Advocate.
For Respondent(s)	:	Mr. S. Debnath, Addl. P.P.
Date of hearing	:	<b>01.12.2021</b>
Date of delivery of judgment and order	:	<b>22.12.2021</b>
Whether fit for reporting	:	<b>NO</b>

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**JUDGMENT & ORDER**

**[T. Amarnath Goud, J]**

Heard Mr. H. K. Bhowmik, learned counsel appearing for the appellant and heard Mr. S. Debnath, learned Additional Public Prosecutor appearing for the State-respondent.

[2] This appeal is directed against the judgment and order of conviction and sentence dated 02.09.2019 passed by the learned Special Judge, Unokuti District Judiciary, Kailashahar, Tripura, in connection with Case No. Special (POCSO) 20 of 2018, whereby and whereunder, the appellant has been sentenced to suffer simple imprisonment for 3[three] years for commission of offence under Section-363 of IPC, with a fine of Rs. 3,000/-, in default to suffer another three months. He has also been

sentenced to suffer rigorous imprisonment for 20 [twenty] years for commission of offence under Section-376 (D) of IPC and to pay a fine of Rs.5,000/-, in default to suffer further RI for one year. It was directed that both the sentences shall run concurrently.

[3] The case of the prosecution, in a nutshell, is that on 19.12.2018, one Sri Indrajit Das (PW-1), the complainant herein lodged a written complaint with the O/C, Fatikroy police station to the effect that on 18.12.2018 at about 4.00pm his minor daughter (name withheld) aged about 16 years was going to her aunt's house at Saidabari and on her way, Prajit Malakar and Ashis Debnath, on the pretext of going for roaming along with them, lifted her in to their vehicle bearing registration No.TR-C-0533 and took her along with them. Thereafter, both the accused with ill intention forced the minor daughter to consume alcohol and then at about 10.00 at night took her in a lonely place of Radhanagar, Ward No.6 and raped her. PW-1 has stated that when his daughter came back home, narrated the entire incident, to her family members. Thereafter, the O/C, Fatikroy police station outpost forwarded the said written complaint to the officer-in-charge, Kumarghat police station for necessary action.

[4] On the basis of the aforesaid complaint dated 19.12.2018, the Officer-in-charge of Kumarghat police station registered Kumarghat P.S. Case No. 2018/KGT/113 under Sections-376DA/34 of IPC and under Section-4 of the POCSO Act, 2012 against the accused-persons, namely, Prajit Malakar and Asish Debnath.

[5] Being endorsed, the investigating officer (PW-19) took up investigation and prepared hand sketch map (Exbt.16) with separate index (Exbt.17), recorded the statements of the material witnesses, arranged for medical examination of the victim girl, and also ensured the recording of

statements of the victim girl under Section-164 of Cr. PC. Arrested the accused-persons and arranged their medical examination. School certificate (Exbt. 8, 8/1) of the victim girl was seized indicating her date of birth. He also collected the samples of swab, blood, pubic hair and wearing apparels (Exbt.A to D and Exbt. K to P) and also sent to the State Forensic Science Laboratory.

[6] On completion of investigation, the I.O. filed charge-sheet against the FIR named accused-persons Prajit Malakar and the child in conflict with law namely, Asish Debnath, for commission of offence under Sections-363/376DA/34 of IPC along with under Section-6 of the POCSO Act, 2012. It is pertinent to mention here that the accused Asish Debnath being juvenile in age, first his case was initiated by Juvenile Justice Board and later on, his case was sent to the Juvenile Court for trial and tried there. The trial in the case held only for the accused-appellant No.1, Prajit Malakar.

[7] After hearing both sides and on perusal of the documents submitted by the prosecution, the learned Special Judge, Unokuti District Judiciary, Kailashahar, Tripura, convicted the present appellant, for the offence punishable under Sections-363/376(D) of IPC, to which the appellant pleaded not guilty and claimed to be tried.

[8] To substantiate the charge, the prosecution adduced as many as 20 [twenty] witnesses including the complainant and also exhibited certain relevant documents and materials [Exbts.1 to 23] including the inquest report. On closure of prosecution evidence, the accused-person was examined separately under Section-313 of Cr.P.C. for having his response in respect of the incriminating materials surfaced in the evidence, as

adduced by the prosecution, wherein, the accused-person declined to adduce evidence in support of his defence.

[9] Having taken into account the submissions of the learned counsels appearing for the parties and on consideration of the materials on record, the learned Special Judge found the accused guilty of committing offence and the charges framed against him being proved, convicted and sentenced the accused-person as stated hereinabove.

[10] Feeling aggrieved and dissatisfied with the judgment of conviction and sentence dated 02.09.2019, the accused-person preferred this instant appeal before this Court.

[11] Mr. Bhowmik, learned counsel appearing for the accused-person has submitted that there are some contradictions between the statements of PW-1, the father of the victim girl and PW-3, mother of the victim girl in respect of her age. He has further stated that the trial court has observed that the victim is below 18 years and as such, she was child as defined by POCSO. But, facts remain for such conclusion which the learned Court has not considered the legal proposition as raised by the defence that the birth certificate issued by school teacher is not only the way to determine the age without taking the evidence of maker or the person who had furnished the date of birth certificate.

[12] Mr. Bhowmik, learned counsel has contended that the evidence as per the forensic report does not support the prosecution case, rather by taking only medical report of the victim girl, it cannot be said that the appellant raped the victim girl. Mr. Bhowmik, has further stated that it is evident from the FIR as well as evidence of PWs-1, 2 that the victim girl was not forcefully taken as because victim girl categorically stated in reply to Aradhan Malakar, PW-8 who went to the house of the

victim that she went on rooming with those boys moreover, in the FIR, PW-1 clearly stated that her daughter was taken by two accused persons for travelling who had known to previously to her daughter and it is also come into evidence from PW-2 that the victim went to Kailashahar where accused-person purchased liquor and then proceed towards Radhanagar but no where there is an evidence that she shouted or tried to escape from the clutch of the accused-persons.

[13] Mr. Bhowmik, learned counsel appearing for the appellant has contended that the trial court has failed to connect the commission of rape having medical evidence alongwith forensic report without proper corroboration of the other evidence. On the other hand, the court below has believed the evidence of PW-2 without corroboration of the same from other evidence rather, the evidence of the victim girl is found contradictory to the evidence of other prosecution witnesses.

[14] He has further submitted that in the present case, the facts and circumstances do not suggest such presumption as from the prosecution evidence it was clearly established that the victim was consenting party to move with the accused or the rape was not proved beyond reasonable doubt or the age of the victim is not proved in the proper way as per law that she was below 18 years.

[15] In support of his submission, Mr. Bhowmik, learned counsel for the appellant has relied upon a decision of the Apex Court in ***Birad Mal Singhvi v. Anand Purohit***, reported in **1988 (Supp) SCC 604** in para-14 of the judgment the Apex Court has held thus:

“14. We would now consider the evidence produced by the respondent on the question of age of Hukmi Chand and Suraj Prakash Joshi. The respondent examined Anantram Sharma PW 3 and Kailash Chandra Taparia PW5. Anantram sharma PW 3 has been the Principal of New Government Higher Secondary School, Jodhpur since 1984. On the basis of the scholar's register he stated before the High Court that Hukmi Chand joined school on 24.6. 1972 in 9th class and his date of birth as mentioned in scholar's register was 13.6.1956. He made this statement on the basis

of the entries contained in the scholar's register Ex. 8. He admitted that entries in the scholar's register are made on the basis of the entries contained in the admission form. He could not produce the admission form in original or its copy. He stated that Hukmi Chand was admitted in 9th class on the basis of transfer certificate issued by the Government Middle School, Palasni from where he had passed 8th standard. He proved the signature of Satya Narain Mathur the then Principal who had issued the copy of the scholar's register Ex. 8. Satya Narain Mathur was admittedly alive but he was not examined to show as to on what basis he had mentioned the date of birth of Hukmi Chand in Ex. 8. The evidence of Anantram Sharma merely proved that Ex. 8 was a copy of entries in scholar's register. His testimony does not show as to on what basis the entry relating to date of birth of Hukmi Chand was made in the scholar's register. Kailash Chandra Taparia PW 5 was Deputy Director (Examination) Board of Secondary Education, Rajasthan, he produced the counter foil of Secondary Education Certificate of Hukmi Chand Bhandari, a copy of which has been filed as Ex. 9. He also proved the tabulation record of the Secondary School Examination 1974, a copy of which has been filed as Ex. 10. In both these documents Hukmi Chand's date of birth was recorded as 13.6.1956. Kailash Chandra Taparia further proved Ex. 11 which is the copy of the tabulation record of Secondary School Examination of 1977 relating to Suraj Prakash Joshi. In that document the date of birth of Suraj Prakash Joshi was recorded 11.3.1959 Kailash Chandra Taparia stated that date of birth as mentioned in the counter foil of the certificates and in the tabulation form Ex. 12 was recorded on the basis of the date of birth mentioned by the candidate in the examination form. But the examination form or its copy was not produced before Court. In substance the statement of the aforesaid two witnesses merely prove that in the scholar's register as well as in the Secondary School examination records the date of birth of a certain Hukmi Chand was mentioned as 13.6.1956 and in the tabulation record of Secondary School Examination a certain suraj Prakash Joshi's date of birth was mentioned as 11.3.1959. No evidence was produced by the respondent to prove that the aforesaid documents related to Hukmi Chand and Suraj Prakash Joshi who had filed nomination papers. Neither the admission form nor the examination form on the basis of which the aforesaid entries relating to the date of birth of Hukmi Chand and Suraj Prakash Joshi were recorded was produced before the High Court. No doubt, Exs. 8, 9, 10, 11 and 12 are relevant and admissible but these documents have no evidentiary value for purpose of proof of date of birth of Hukmi Chand and Suraj Prakash Joshi as the vital piece of evidence is missing, because no evidence was placed before the Court to show on whose information the date of birth of Hukmi Chand and the date of birth of Suraj Prakash Joshi were recorded in the aforesaid document. As already stated neither of the parents of the two candidates nor any other person having special knowledge about their date of birth was examined by the respondent to prove the date of birth as mentioned in the aforesaid documents. Parents or near relations having special knowledge are the best person to depose about the date of birth of a person. If entry regarding date of birth in the scholars register is made on the information given by parents or some one having special knowledge of the fact, the same would have probative value. The testimony of Anantram Sharma and Kailash Chandra Taparia merely prove the documents but the contents of those documents were not proved. The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made in the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two

witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouch safe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted.

[16] To counter the submission of the learned counsel appearing for the appellant, Mr. Debnath, learned Addl. P.P. appearing for the respondent-State strongly defended the findings arrived at by the learned Special Judge pointing out to the statements made by PW-1, PW-3 and PW-8. He has contended that PW-8 has categorically stated that about three months back one day at about 9-30/10pm he visited the house of one Bijoy Debnath hearing hue and cry from that house where he found accused-persons along with a girl in that house and he identified the accused-appellant, namely, Prajit Malakar in the Court. Mr. Debnath, learned Addl. P.P. further stated that the medical evidence made the prosecution's case more strong that it was the accused-person only who committed rape upon the victim. He has submitted that the prosecution has been able to prove the case beyond any shadow of doubt and the learned Special Judge has not committed any error in convicting the accused-appellant as stated above.

[17] Before determining the case in hand, let us have a glimpse at the relevant statements of some relevant witnesses of the prosecution. Coming to the evidence of PW-2, the victim girl 'X' in her evidence has deposed that about 3 months back once while she was proceeding towards her aunt's house, on the way, accused Prajit Malakar and Asish Debnath forcibly got her into their car by gagging her mouth and instructed her not to raise chaos and then they taken her at the Kailashahar and it was raining at that relevant time. At Kailashahar, both the accused purchased liquor and again proceeded towards Radhanagar. They also forced her to

consume liquor and after that took her at a lonely place of Radhanagar and there they committed rape on her one after another. It has been further stated that in the meantime their vehicle out lined and then hearing the sound of the vehicle, local people rushed to the spot and found her naked condition. It is also in the evidence of PW-2 that accused committed rape on her inside the vehicle. Thereafter, the accused-persons were detained and informed the police by the local people. Subsequently, her father was informed by police and she was brought to her home.

[18] PW-1, Indrajit Das, father of the victim girl in his deposition before the Court has stated that he was the informant of the case and he identified his signature Exbt.1/1 in the written complaint. He deposed that on 18.12.2018 at about 4.00pm his minor daughter PW-2 was proceeding to her aunt's house and on that day's night at about 12, police personnel of Fatikroy outpost came to his house and informed him to visit the outpost as his daughter was at the outpost and then he visited police outpost and met with his daughter and then being handed over by police, he brought his daughter home and his daughter narrated him that on 18.12.2018 at about 4.00pm while she was awaiting over the road for going to her aunt's house, a car proceeding toward south came there and then two persons of that car forcibly lifted her into the car and proceeded to Kailashahar. He has further stated that her daughter also told him that after going to Kailashahar, those persons bought liquor and taking her went to a lonely place of Radhanagar and forced her to consume liquor and committed rape upon her. In cross-examination PW-1 averred that her daughter was 15 years of old.

[19] PW-3, Smt. Aparna Das, mother of the victim girl has stated in the same line like that of PW-1. In her cross-examination she has stated that the victim was her step daughter.



[20] Nilkanta Paul (PW-4), Pulin Malakar (PW-5) and Hemendra Debbarma (PW-6) were mere seizure witnesses of seizing birth certificate (Exbt. 8, 8/1) of the victim girl and sample of blood, penile swab, pubic hair of accused Prajit Malakar (Exbt.6/1).

[21] Anita Bhattacharjee (PW-11), the head mistress of Saidabari S.B. School has deposed that being asked by I/O of the case she issued the school certificate (Exbt.8, 8/1) of the victim girl following admission register and the same was seized by I/O. She also deposed that according to School Admission register, the date of birth of the victim girl was 03.12.2004.

[22] Dr. Subhankar Nath (PW-15) is the Deputy Director of SFSL, Tripura who analyzed the sample of vaginal swab, blood, pubic hair , wearing apparels of victim and sample blood, penile swab, pubic hair of accused Prajit Malakar and Asish Debnath. According to PW-15, he conducted DNA examination and opined that the blood stain detected in Exbt. A, B, L & P (external vaginal swab, internal vaginal swab, wearing apparels of victim girl) were originated from single source Ext. C (blood sample of victim girl).

[23] Pranjit Malakar (PW-19) is the investigating officer who deposed that he investigates the case and having found prima facie case he filed charge sheet for the offences punishable under Sections-336/376/34 of IPC and under Section-6 of the POCSO Act.

[24] Dr. Bhaskar Roy (PW20) is the medical officer of Fatikroy PHC who examined the victim girl and accused Prajit Malakar. During examination he collected her internal and external vaginal swab, blood sample and the same was seized by I/O. He further deposed that after examination he prepared the report Exbt. 21/1 to 21/3 and opined that the

victim girl was raped. Subsequently, the accused Prajit Malakar was examined medically and prepared the report Exbt. 23/1 to 23/2 and opined that the accused was capable of performing sexual intercourse.

[25] After meticulous appreciation of the evidence on record, this Court is of the considered opinion that it is not a case of kidnap, even according to the statement of PW-1, the father of the victim girl and the statement of PW-2, the accused person and the victim girl know each other and she went along with the accused in the car and they know each other for a period of time. They were also in telephonic conversation. Accordingly, this Court is not inclined to consider the case of the prosecution under Section-363 of IPC.

[26] The prosecution has failed to establish the case against the accused-person under Section-373(D). There is no evidence to say that both the accused appellant No.1 herein, and the appellant No.2, who was a juvenile and is separated from this case. There is no medical evidence to say that samples of both accused have been collected. There is no evidence to say that as to when the hymen of the victim girl has been damaged. The sample of swab which has been collected, do not disclose the presence of semen of the accused.

[27] This has not been established beyond reasonable doubt to say that the accused has committed rape and thus, attracting Section-376(D) of IPC. In so far as the issue of age is concerned, the argument made by the counsel that the father of the victim girl at one stage has stated his daughter is 14 years of old and PW-3, mother of the victim girl told that her daughter is 15 years of old and the documentary proof i.e. the birth certificate which is marked as Exbt.8, 8/1 shows that the date of birth as 2004 and the incident occurred in the year 2018, accordingly, she is 14

years of age. Whatever it may, admittedly, the age of the victim girl is below 18 years and she is a minor. The learned counsel appearing for the appellant has not established before this Court that the age of the victim girl is 18 years and above.

[28] The details given in the school admission form (Exbt.9) and the certificate issue by the school management (Exbt.11) on the strength of Anganwadi Certificate, clearly indicates that the victim girl is minor and there is no reason to disbelieve the said information about the date of birth and the age of the victim girl.

[29] Since the victim girl was found along with the accused in a car, this Court feels that Section-4 of the POCSO Act attracts since both accused and victim girl were found undressed in the car. Thus, in our considered opinion, following the doctrine of proportionate punishment, justice would be made, if the sentence of 20 years as imposed by the learned trial court is reduced to 10 years. Accordingly, the judgment and order of conviction and sentence dated 02.09.2019, declaring the sentence against the accused-person to suffer R.I. for 20 years is modified and reduced to 10 (ten) years.

[30] With the aforesaid observation and direction, the appeal stands partly allowed to the extent as indicated above. As a sequel, miscellaneous applications pending, if any, shall stand closed. Send down the LCRs forthwith.

**JUDGE**

**JUDGE**