

**HIGH COURT OF TRIPURA
AGARTALA**

Crl. A(J) 34 of 2023

Shri Nanda Malakar

.....**Appellant(s)**

Versus

State of Tripura

.....**Respondent(s)**

For the Appellant(s) : Mr. S. Bhattacharjee, Advocate.

For the Respondent(s) : Mr. Raju Datta, PP

Date of hearing & delivery
of judgment & order : 30.07.2024.

Whether fit for reporting : Yes

**HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE BISWAJIT PALIT
JUDGMENT & ORDER(ORAL)**

[T. Amarnath Goud, J]

सत्यमेव जयते

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

[2] This present appeal is filed under Section 374 of the Code of Criminal Procedure, 1973 against the judgment of conviction and order of sentence dated 12.06.2023 passed in Special (POCSO) 23/2020 by the Special Judge (POCSO), Unakoti

District, Kailashahar, sentencing the appellant to suffer rigorous imprisonment for a term of 20 (twenty) years and to pay fine of Rupees 500/- (five hundred) only. In default of payment of fine, to suffer simple imprisonment for a further term of 7(seven) days.

[3] The prosecution story in brief is that on 31.08.2020, the informant-cum-mother of the victim of the instant case went to her father's house leaving her daughter with her father in their dwelling house. Thereafter, the father of her daughter committed rape upon her on various occasion. The victim, informed the matter to the locals residing in her neighbourhood. The local people informed her mother about the incident. Thereafter, the mother of the victim inquired the matter from her victim-daughter and accordingly, the victim informed to her mother that in her absence, her father namely Nanda Malakar has committed rape upon her on various occasions.

[4] On the basis of written complaint lodged by the informant against the accused person namely Nanda Malakar, a case was lodged at Pecharthal PS on 06.09.2020 and the same was registered as Pecharthal PS, Case No. 2020/PTL/0021, dated 06.09.2020 under sections 376 (AB) of the IPC and under section 6 of the POCSO Act. Thereafter, the case was endorsed to one Investigating Officer for investigation. Accordingly, IO took up the

charge of investigation. During investigation, firstly, on 06.09.2020, the IO recorded the statement of the victim under section 161 of the Cr.PC by one woman constable namely Dainyamala Debbarma of Pecharthal PS. Further, on the same day, the IO seized the blood sample of the victim and has also arranged for the medical examination of the victim at Kumarghat CHC. During the course of investigation process, on the same day, the IO also arrested the FIR named accused person namely Nanda Malakar and on the following day, he forwarded the said accused person before the court. In the course of investigation, on the next day, the IO visited the place of occurrence and prepared a hand sketch map along with separate indexes. Further, on 07.09.2021, the IO has made arrangement for the medical examination of the accused at Pecharthal CHC and subsequently, the report of the said potency test was collected by him. Again, on the same day the IO has seized the original birth certificate of the victim, on being produced by the mother of the victim. Again, during investigation, the IO forwarded the victim to the court for recording of her statement under section 164(5-A)(a) of the Cr.PC. Moreover, during the course of investigation, on 20.10.2020, the IO seized one transfer certificate of the victim, on being handed over by the teacher-in-charge of Khirodcherra High School.

[5] On completion of the investigation, the IO submitted charge-sheet vide Pecharthal PS C/S No.26/2020 dated 31.10.2020 under section 376(AB) of the IPC and under Section 6 of the POCSO Act, finding prima facie evidence against the accused person namely Nanda Malakar, appellant herein.

[6] Upon receipt of the aforesaid charge-sheet, cognizance of the offence punishable under section 376 (AB) of the IPC and under Section 6 of the POCSO Act was taken by the Court below against the accused person namely Nanda Malakar. Thereafter, the accused copies of the incriminating documents were supplied to the accused person through his engaged counsel in accordance with law. Thereafter, charges were framed against the accused person namely Sri Nanda Malakar under section 376 (AB) of the IPC and under Section 6 of the POCSO Act. Thereafter, the contents of the charge was read over and explained to the accused person, to which, he pleaded not guilty and claimed trial. During trial, to prove the charge levelled against the accused person, prosecution examined as many as 24 witnesses. The charge levelled against the accused reads as under:

"Firstly, that you in between 31.08.2020 to 06.09.2020 in your residential house at Shantipur under Pecharthal PS, committed the offence of penetrative sexual assault upon your minor daughter *****, aged about 11 (eleven) years and that you thereby committed the offence of aggravated penetrative

sexual assault within the cognizance of this Court and thereby liable to be punished for offence U/s 6 of POCSO Act.

And I do hereby direct that you be tried on the said charge.

Secondly, that you on the date, time and place as mentioned in the aforesaid charge, committed the offence of rape with the victim ***** aged about 11(eleven) years and that you thereby committed an offence punishable U/s 376 AB of IPC and within the cognizance of this Court.

And I do hereby direct that you be tried on the said charge."

[7] After completion of prosecution evidence, statement of accused person was recorded under Section 313 of Cr.P.C. The accused person stated that he is innocent and he has been falsely implicated in the instant case and that he has not committed the said offence. During his examination, the said accused person declined to adduce any defence witness, in his favour.

[8] Learned Court below after taking into consideration the deposition of the witnesses and upon hearing the rival contention of the parties, framed the following points for determination:

"(1) Whether the prosecution has proved beyond all reasonable doubt that the victim on the alleged date and time of occurrence of offence was a 'child' within the meaning and definition of 'child' contemplated and stipulated under section 2(1)(d) of the POCSO Act?

(2) Whether the prosecution has been successfully able to prove the delay in lodging of the instant case?

(3) Whether the prosecution has been able to prove beyond reasonable doubt that the accused in between 31.08.2020 to 06.09.2020 in his dwelling house situated at Shantipur under Pecharthal PS, committed penetrative sexual assault upon her minor daughter, which is an offence punishable under section 6 of the POCSO Act?

(4) Whether the prosecution has been able to prove beyond reasonable doubt that the accused in between 31.08.2020 to 06.09.2020 in his dwelling house situated at Shantipur under Pecharthal PS, forcefully

committed rape upon her minor victim girl, aged about 11 years, which is an offence punishable under Section 376(AB) of the IPC?"

[9] Thereafter, learned Court below on 12.06.2023 sentenced the accused person, appellant herein in the following manner:

".....O R D E R

16. In the result, the convict namely, Sri Nanda Malakar stands sentenced to suffer **rigorous imprisonment for a term of 20(twenty) years and to pay fine of Rupees 500/- (Five Hundred) only, in accordance with the provisions engrafted under section 6 of the POCSO Act.** In default of the payment of fine, the said convict shall suffer simple imprisonment for a further term of 7(seven) days....."

[10] Aggrieved by the aforesaid sentence by the Court below, the appellant has preferred this present appeal seeking following reliefs:

"I. Admit this appeal.

II. Call for the record of case no. Special (POCSO) 23/2020 by the Special Judge (POCSO), Unakoti District, Kailashahar.

III. After hearing the parties may be pleased allow this appeal by quashing/setting aside the impugned judgment of conviction and order of sentence dated 12/06/2023 passed in Special (POCSO) 23/2020 by the Special Judge (POCSO), Unakoti District, Kailashahar and may please set the appellant at liberty....."

[11] Mr. S. Bhattacharjee, learned counsel for the appellant submits that the learned Court below misread the evidence on record and came to a wrong conclusion that the appellant is guilty of the offence. He further contends that the learned Court below ought to have analyzed the exhibits in its proper perspective. It is further contended that the birth certificate of the victim exhibit P11 was marked on the basis of the deposition of P.W. 20, the mother of

the victim. In her cross-examination, P.W. 20 stated that she cannot say the basis on which the birth certificate of her daughter was prepared and even the P.W. 22, the Tehsildar, who produced the birth register also in cross-examination could not say the basis of which documents, the birth certificate of the victim was issued. He also submits that the prosecution has failed to produce any documents to prove that at the time of alleged offence, the victim was minor. He, therefore, urges this Court to set aside the impugned order of conviction and order of sentence dated 12.06.2023 passed by the Court below.

[12] *Per contra*, Mr. R. Datta, learned PP appearing for the State submits that the birth certificate and the school certificate of the victim have been duly proved in accordance with law. The prosecution has successfully adduced both the Transfer Certificate as well as birth certificate to determine the age of the victim. Apart from the above, the prosecution has also proved the contents of the said Transfer Certificate as well as the Birth Certificate of the victim by calling its authors (i.e. P.W.22, P.W. 23 & P.W. 24) as witnesses before the Court below to show the reliability of the documents along with its contents. He further submits that learned Court below examining all the material evidences on record and observing all the facts and circumstances of the case, has passed the impugned

sentence against the appellant herein and the same should not be interfered with. He, therefore, prays for dismissal of the instant appeal.

[13] Heard the submissions made at the Bar. Perused the record.

[14] P.W. 19 is the victim and daughter of the informant. Being the victim, she deposed that about two years back, one day, she was sleeping with her father as her mother went to the house of her maternal uncle. At that time, her father opened her wearing apparels and committed rape upon her. She disclosed about the incident to her elder DiDi residing adjacent to her house. Subsequently, the neighbour (DiDi) disclosed the incident to the persons of the locality of the victim. Thereafter, the neighbours informed her mother about the incident and she lodged the case against the accused. It was also deposed by the victim that during investigation, police seized her birth certificate from the possession of her mother. She further deposed that during investigation, one day, she was produced before the Magistrate whereupon, her statement was recorded on a paper and her signatures were taken upon it. Further, one day, police made arrangement for her medical examination at Kumarghat, CHC. It was recorded in the deposition

of the victim that she identified the accused person when his picture was shown through the mobile phone display.

In the cross-examination the victim denied that at that time, her father did not open her wearing apparels and did not commit rape upon her. It was also denied that in the following morning, she did not disclose about the incident to her elder Didi residing adjacent to her house and subsequently, she did not disclose the incident to the persons of their locality.

[15] P.W. 20 is the informant-cum- mother of the victim. She deposed that on 25.08.2022, the IO of this case, seized one original birth certificate of her victim daughter by preparing a seizure list and took her signature upon it as a possessor of the said birth certificate. It was recorded in the deposition of P.W. 20 that the signature of the witness on the aforesaid seizure list dated 25.08.2022 was identified by her and was exhibited earlier. This was the said birth certificate of the victim which on identification stands marked as Exhibit- P11.

In the cross-examination she replied in response to a query that she could not say the basis on which the birth certificate of her victim-daughter was prepared.

[16] It is observed that prosecution adduced both the Transfer Certificate as well as birth certificate to determine the age of the victim. Prosecution to prove the contents of the said Transfer Certificate as well as the Birth Certificate of the victim, produced authors (i.e. P.W.22, P.W. 23 & P.W. 24) as witnesses before the Court below. The Court below observed that the contents of the birth certificate as well as transfer certificate were duly proved by the authors.

[17] In the F.I.R. dated 06.09.2020, the age of the complainant i.e. the mother of the victim was reflected as 25 years approximately. It is also seen from the said F.I.R. that the victim would read in Class-V at that time. The accused person never disputed the age of the mother of the victim recorded in the F.I.R. In the 'Form of Recording Examination of Accused Person' under Section 313(1)(b) of the Criminal Procedure Code, which was recorded on 06.05.2023, the age of the accused person namely, Nanda Malakar was reflected as 30 years and if it is assumed to be true, the age of the accused person was about 28 years at the time of lodging of the F.I.R. Now, if the age of the mother was 25 years and the accused father was 28 years, the plea of the accused appellant herein that the victim was not a minor at the time of alleged incident, does not hold water.

[18] P.W. 8, the Doctor deposed that she examined the victim. The time of commencement of the examination was 06.09.2020 at 11-35 P.M. to 07-09-2020 at 12-08 A.M. As per the deposition, it was found that there were signs of suggestive forceful penetration of vagina.

In the cross-examination, she denied that she gave final opinion without proper examination.

[19] In view of the above discussions, we are of the opinion that the appellant herein has committed a heinous offence punishable under Section 6 of the POCSO Act and thus, he is not entitled to get any relief by way of filing this appeal. There is no infirmity in the impugned judgment of conviction and order of sentence dated 12.06.2023 passed in Special (POCSO) 23/2020 by the learned Court below and accordingly, the same are affirmed.

Thus, the instant appeal is dismissed. As a sequel, miscellaneous application(s), pending if any, shall also stand closed.

B. PALIT, J

T. AMARNATH GOUD, J

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SUHANJIT SINGHA

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