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**IN THE HIGH COURT AT CALCUTTA [CIRCUIT BENCH AT PORT BLAIR]**

CRIMINAL APPELLATE JURISDICTION

***SHEKHAR B. SARAF; KESANG DOMA BHUTIA, JJ.***

CRA/12/2021 IA No. CRAN/1/2021; March 25, 2022

**RAM SEVAK LOHAR vs. STATE**

**Protection of Children from Sexual Offences Act, 2012; Section 6 – Indian Penal Code, 1860; Section 376 - Evidence of a victim need not be tested with the same amount of suspicion as that of an accomplice. (Para 8)**

*For the Appellant: Mr. Deep Chaim Kabir; For the Respondent: Ms. A. S. Zinu*

**KESANG DOMA BHUTIA, J.**

1. This appeal is directed against the order of conviction and sentence passed by Special Judge (POCSO), Andaman and Nicobar Islands, Port Blair in Sessions Case No. 24 of 2017 on 06.11.2017, whereby the appellant has been convicted for commission of offence punishable under Section 6 of the POCSO Act, read with section 376 IPC and sentenced to suffer rigorous imprisonment for twenty-five years with fine of Rs. 1 Lakh and in default to suffer further simple imprisonment for one year for committing of offence under Section 5(j)(ii) of POCSO Act, 2012.

2. In the present case the criminal proceeding against the Appellant perpetrator, who happens to be the step father of the prosecutrix has been set in motion on the initiative taken by PW3 Sister Rose Ann, sister-in-charge of Nirmala Shishu Bhawan, Port Blair (the Children's Home of Missionaries of Charity for abandoned street babies and children or a shelter home or institution meant for minor children in need of care and protection) where the victim girl who was six months old pregnant was admitted by her own mother and the perpetrator step father on 08.06.2017.

3. That Sister Ann on finding the victim to be a minor pregnant girl and on learning that she was impregnated by her own step father put criminal law in motion by informing the concerned authority i.e. Mr. P.C. James (PW10) Nodal Officer of Social Welfare Department and who in turn appears to have informed District Child Protection Unit, Port Blair. On receiving information from Mr. James, Dr. Sheetal Anup, DCPO, Port Blair along with child line workers Renu Singh and Suman Barla (PW2) proceeded to Nirmala Shishu Bhawan after informing Women Police Cell of Port Blair. That members of DCPU and lady police official of Women Police Cell, Port Blair after reaching the Children's Home enquired the victim girl and who invariably told them that it was her step father who committed sexual offence/rape on her and which resulted in her pregnancy. Then they obtained a written complaint duly signed by the victim and on which the members of DCPU too have signed and forwarded the same to Aberdeen P.S. for taking necessary legal action. On receiving such complaint of victim from DCPU and official of police women cell, PW 12 Station Writer of Aberdeen PS started Zero FIR dated 15.06.2017

under Section 5(j)(ii)/6 of POCSO Act read with Section 376 IPC and transmitted the same to the Hutbay PS for initiating regular case or FIR.

4. PW13 Mohd. Mustafa, Head Moharar of Hutbay PS on receiving Zero FIR and on direction of PW 14 Inspector Bishal Ram registered Hutbay PS case No 44/17 dated 16.06.2017 under section 5(j)(ii)/6 of POCSO Act read with Section 376 IPC against the accused. PW 14 Inspector Bishal Ram, the then SHO of HutBay P.S. took up the investigation of the case suo moto and arrested the perpetrator the convict/accused. That on completion of investigation and having found sufficient materials against the accused for committing offence under section 5(j)(ii)/6 of POCSO Act read with Section 376 IPC submitted charge sheet under those sections.

5. From the above discussed facts, it appears when the mother of the victim found her eldest daughter was six months pregnant, instead of lodging any FIR against the actual perpetrator and without ascertaining the identity of actual perpetrator from the daughter seems to have brought the pregnant girl along with her second husband all the way from Hutbay to Port Blair and dumped her in a Children's Shelter Home run by Missionaries of Charity. P.W.3 the Sister In-charge of the shelter home in her evidence has stated that parents of the victim were in hurry to catch return ship to HutBay from Port Blair and they just left behind the victim with an assurance to take her back after delivery. Such unusual conduct on the part of the biological mother of the victim gives rise to presumption that she was very much aware of the involvement of her second husband of few months in the crime and knew him to be the real perpetrator and thereby she wanted to give protection to him or she wanted to hushup the entire incident just to save the family from being ostracized in the local community and/or to save her second marriage, and therefore, did not bother to lodge any FIR or find out from the daughter about the real culprit.

6. It is true the prosecution has failed to examine the mother of the victim who has been cited as a Charge Sheet witness No. 18, but non examination of the mother of the victim does not appear to be fatal to the prosecution case in view of the discussion to be followed.

7. Learned counsel appearing for the respondent contended conviction in rape case can be based on the sole testimony of victim that stands and is not countered. Non-examination of other witnesses per se cannot vitiate the prosecution case and referred to following decisions in support of her such contention: -

**a. State of Punjab vs. Gurmeet Singh reported in (1996) 2 SCC 38**

**b. State of UP vs. Pappu reported in (2005) 3 SCC 594**

**c. Bipin Kumar Mondal vs. State of West Bengal reported in (2010) 12 SCC 91**

In fact, after going through the evidence which have come on record it appears the entire prosecution case lies on the sole evidence of the victim and DNA report of the child born to the victim.

**8.** It has been held by the Hon'ble Supreme Court of India in various decisions that barring serious exceptions, the evidence of victim of sexual assault is enough for conviction. A girl, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. Maintaining that the sole and trust worthy evidence of a woman, who is a victim of a sexual offence, is enough to find her assailant guilty. An accused guilty for committing of offence of rape, the solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. Further, it has been held rape is not mere physical assault but instead destroys the whole personality of the victim. The rapist degrades the very soul of the helpless female and therefore, the testimony of the prosecutrix must be appreciated on the background of the entire case, even if the mother turns hostile.

**9.** On this backdrop let me evaluate the evidence of the victim. The victim in her evidence-in-chief categorically reiterated what she has alleged in her FIR and in the statement recorded u/s 164 Cr.P.C. by learned Judicial Magistrate. Her evidence also shows that criminal motion against her step father started only after her admission in the shelter home and at the initiative taken by the sister in-charge of the home and other concerned authorities. She appears to have given her evidence before the Court after the delivery of child. She in her cross-examination categorically denied that she became pregnant as she had physical relationship with a boyfriend. Unfortunately, the defence/appellant has failed to bring on record the details and particulars of the alleged boyfriend of the victim or victim's physical access to some other male at the relevant period of time. On the contrary, the victim in her evidence recorded under oath corroborated what she had alleged in the FIR and in her Section 164 Cr.P.C. statement recorded by Magistrate during investigation stage. In fact, no substantial materials have come during cross examination of the victim to shatter what she has stated in her chief or in the complaint/FIR and in her statement recorded under section 164 Cr.P.C. There is nothing to disbelieve the evidence given by the victim.

**10.** Exhibit 10, certificate of marriage, issued by Parish Priest of St. Anthony's Church, Hutbay prima facie proves that Sunita Tigga, mother of the victim married Ram Sevak Lohar on 24<sup>th</sup> June, 2016. The victim in her evidence both in chief and cross categorically stated that her father Christopher Tete died in the year 2010 and her mother married her perpetrator in the year 2016. That after marriage Ram Sevak Lohar started to reside with them in their house. Nothing has come on record from the side of defence to show that after marriage mother of the victim and her newly married husband resided in a separate house from the victim and her sister. In fact Exhibit 14, photographs of place of occurrence, and evidence of IO PW 14 show that accused used to live in Tsunami shelter having two rooms along with his newly married wife and her two daughters. The statement of the mother of the victim recorded by police under Section 161 Cr.P.C during investigation shows that the accused appellant is an ordinary resident of Bamboo flat.

She was introduced with the accused by one of her friends who happens to be the relative of the accused. That after marriage the accused came to Hutbay and started living in her house. Such facts prima facie proves during the alleged occurrence the accused had access of the victim as they used to live in the same house.

**11.** The victim in her evidence has stated that sometime in the month of July, 2016 when her mother and sister were not at home at that time finding her alone in the house her step father made a sexual advance by touching sensitive parts of her body including her private part. On that day she objected and accused spared her, but she could not save herself from the lust of the accused on the subsequent occasions. Whenever her mother and sister used to be away from home, then the accused taking advantage of the situation raped and ravished her sexually on several occasions in between July, 2016 till she informed her mother about missing of her period. When she found her menstruation has stopped, she informed her mother who took her to the Hospital at Hutbay. On medical examination she was found six months pregnant and she was brought to Port Blair by her mother and step father and left her at Nirmala Shishu Bhawan.

**12.** It is true in the present case the prosecution has failed to examine the Doctor of Hutbay, who medically examined the victim and found her to be six months old pregnant, but non examination of such Doctor is not likely to affect the prosecution case as the fact remains that when the victim was admitted in Nirmala Shishu Bhawan on 08.06.2017 she was in advance stage of pregnancy and she delivered a baby boy at G.B. Pant Hospital on 09.08.2017.

**13.** It has been contended by Mr. Deep Chaim Kabir, learned counsel for the appellant appointed by the Court, if the victim was really raped by the accused and against her will then she could have raised hue and cry which could have come to the hearing of the persons residing adjacent to her house. He draws attention of the Court to the sketch map of the place of occurrence Exhibit 17 and Exhibit 14 the four photographs of the place of occurrence and which show the house of the grandmother of the victim is the adjacent room having common partition wall and house of PW4 and that of his brother K. Murugan is the next nearby house.

**14.** He further contended if the victim was really sexually ravished by the accused, then she could have informed about the incident to her own mother and sister. Failure on her part to disclose about the incident to her mother or to the person to whom she can confide raises an adverse inference against the victim.

**15.** It is true the victim in her evidence recorded by the Court invariably stated that she did not inform about the incident to any person including her mother and she did not even tell her mother that her step father was the one who made her pregnant out of fear.

**16.** For the sake of argument, even if we assume that victim is a consenting party to the sexual acts committed by her step father, the step father cannot evade the legal consequences for his misdeed as Exhibit 9, the birth certificate of the victim, shows she was born on 18.12.2001 and when the alleged incident took place in between July, 2016

to early part of 2017 the victim was a minor girl below 16 years of age. It is settled principle of law that a minor's consent is no consent in eyes of law in rape cases.

**17.** In view of clause 6 of Section 375 IPC sexual intercourse with a girl not related as wife below 16 years is an offence of rape. No matter whether the victim girl consented or not consented to sexual intercourse. Even if the victim girl is not modest or is a willing party or even if she invited the accused to have the sexual intercourse with her, the act of sexual intercourse would be still be an offence.

**18.** The evidence of PW 5 Dr. Anthony who was posted as Medical Officer at PHC, Hutbay and PW 6 Jyoti Basu a Head Worker of PHC Hutbay in their evidence have stated that one Ram Sevak Lohar was brought to the PHC by police for medical examination on 16.06.2017. On medical examination the accused was found to be potent and capable to have sexual intercourse. That police made seizure of sample of pubic hair and penis swab of Ram Sevak Lohar collected in two test tubes under a seizure list in their presence and who identified their signatures on the seizure list and labels. Such evidence of Dr. Anthony proves that accused is sexually active and capable of having sexual intercourse.

**19.** It has been contended by the counsel for the appellant the conviction of the accused has been based on DNA report (Exhibit 19) of the child born to the victim on 09.08.2017 while she was staying in Children's Shelter Home at Port Blair. But manner in which the sample was collected was not done scientifically and there is manipulation in the sample collected. He submitted that blood sample of the victim and that of the child were collected on 07.09.2017 and that of the accused was collected on 08.09.2017. DNA is at a molecular level and which renders it extremely fragile and subject to contamination. The samples were never packed, sealed and labelled properly. The FTA Card were simply put together and sent in an envelope to the lab and which had every chance of contamination at any point of time, with cross contact between the sample FTA Cards. CFSL Kolkata received the sample on 09.10.2017 and tested the same on 27.11.2017 to 30.11.2017. The long delays and gaps in between the collection and examination, there is every chance of sample being contaminated and as such the report cannot be relied on.

**20.** He further submits that doctor who collected the sample was not examined and even the Serologist/Forensic Scientist who did the DNA profiles of the blood sample collected from the victim, the child and the accused is not examined as a witness and as such the DNA profiles report cannot be taken into consideration.

**21.** It is true Dr. Ganesh Samadder, Chief Medical Officer, G.B Pant Hospital, Port Blair who collected the blood sample of the victim, the accused and the child born to the victim in presence of PW2 and Renu Singh, Member of DCPU were not examined by prosecution. But the victim and PW2 another member of DCPU, in their evidence have stated that blood sample was obtained at G.B. Pant Hospital on 07.09.2017. PW14 I.O. in his evidence stated that the samples were collected in the presence of independent

witnesses and in whose presence, he made seizure of the same. Thereafter, he sent the sample to CFSL, Kolkata for DNA profile.

**22.** On the other hand, learned counsel for the State submitted DNA report is a conclusive proof and referred to ***Rajender Prasad Rao Wasnik Vs. State of Maharashtra*** reported in ***AIR 2019 SC 1***.

**23.** PW15 Sub-Inspector M Sarvanand stated that he received the DNA report of the victim, accused and the child from Director CFSL, Kolkata. Thereafter, he submitted supplementary charge sheet on 30.01.2018. The DNA report along with forwarding letter has been marked collectively as Exhibit 19 and without examining the expert who did the DNA profiles test. This Court is of view non-examination of the expert is not likely to discard the evidentiary value of the DNA report in view of provision of Section 293 Cr.P.C.

**24.** Section 293 Cr.P.C deals with reports of certain Government, Scientific Experts and reads as follows:

(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:-

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief Controller of Explosives;

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director [, Deputy Director or Assistant Director] of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government.

(g) any other government Scientific Expert specified by notification, by the Central government for this purposed.

**25.** Sub-section (2) of Section 293 lays down that expert covered by this Section should not be examined as a matter of routine at the instance of a party. The Court has discretion in the matter and only when the court finds that it is expedient to do so in the interest of justice the expert should be summoned and the expert's opinion should be tested by cross-examination. Summoning of an expert is within the discretionary power of the Court and such discretionary power is to be exercised depending on facts of each case.

26. It appears the accused or his counsel did not find necessary to examine the expert and they have failed to file any application challenging the DNA test report before the Trial Court before or after the same was marked as Exhibit 19 on production by PW 15. Therefore, this court is of view the accused cannot raise any objection against non examination of the expert at the appellate stage. Thus, this Court is of the view the learned Trial Court has rightly exercised discretion provided under Section 293 (2) Cr.P.C.

27. That apart, DNA profile test report being submitted by Central Forensic Laboratory, Kolkata a Government undertaking for conducting DNA test and as such it can be admitted in evidence without examination of the expert.

28. DNA test report confirm the accused Ram Sevak Lohar, the step father of the victim to be the father of the child born to the victim and leaves no room for doubt that the accused is the one who impregnated the victim by sexually abusing her. It appears the accused instead of becoming a guardian and protector of the minor children of his newly married wife made the victim, the eldest daughter of his wife, an object of his sexual pleasure and lust and that too within a month of his marriage.

29. Further, it has been urged by learned counsel for the accused the charge as framed against the accused is bad in law as in view of provision of Section 212 of Cr.P.C the time, date and place of occurrence needs to be specifically mentioned, but the charge which has been framed against the accused is silent about the particulars as to time date and place of the alleged offence. Defective framing of charge amounts to failure of justice in terms of Section 464 Cr.P.C and refers to **Wille Slaney vs. State** report in **AIR 1956 SC 116**.

30. From the lower court records it is revealed that the accused has failed to challenge the defect in the framing of charge before the Court below and allowed the trial to proceed against him on such charge. After holding him guilty of the charge he cannot raise such issue before the appellate Court.

31. He further contended the manner in which the accused has been examined under Section 313 Cr.P.C was done in a stereotype manner and failed to put question to the accused on the circumstances derived from the evidence and which has prejudiced the trial. He refers to Maheswar Tigga vs. State reported in AIR 2020 SC 4535 and Naval Kishor Singh vs. State reported in (2004) 7 SCC 502 to buttress his above argument.

32. Perused Section 313 Cr.P.C statement of the accused and this Court finds that the learned Court below has examined the accused on all the adverse circumstances and evidence which have come on record against him and accused appears to have given evasive replies to all those questions put to him.

33. Further, Section 29 of the Act provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3, 5, 7 and 9 of this Act, the Special Court shall presume such person has committed or abetted or

attempted to commit the offence, as the case may be unless the contrary is proved. In the present case, the defence has failed to demolish the presumption by adducing defence witness or by producing substantial evidence to prove his innocence. No substantial materials have come in the cross-examination of prosecution witnesses including the victim to disbelieve the evidence which they have given in chief.

**34.** In view of the discussions and findings made above this Court is of the considered view that prosecution has been able to prove that the victim who was below 16 years was subjected to penetrative sexual assault repeatedly by her own step father immediately after becoming a member or part of their family and that too in their shared household beyond all reasonable doubt and accused has failed to rebut the presumption under Section 29 of the POCSO Act. Accordingly, this Court does not find any illegality or infirmity in the judgement of conviction passed by the learned Trial Court against the accused/appellant for committing offence under Section 5 of POCSO Act, 2012 punishable under Section 6 of the Act.

**35.** However, this Court finds that the learned Court below while passing the sentence has overlooked the fact that occurrence having taken place sometime in the year 2016 and 2017 prior to the amendment in Section 6 of POCSO Act, by Amendment Act 25 of 2019 and which has been given effect from 16.08.2019 has sentenced the accused by invoking the amended provision of section 6 of the Act and thereby sentenced the accused to suffer rigorous imprisonment for a term of twenty five years and fine of Rs.1 Lakh and in default to suffer S.I. for another one year.

**36.** Section 6 of the POCSO Act prior to amendment which has taken effect from 16.08.2019 read as:

“Punishment for aggravated penetrative sexual assault. - Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.”

The amended Section 6 of the POCSO Act reads as follows. –

1) Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine or with death.

(2) The fine impose under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

**37.** In view of Article 20 of the Constitution of India no one shall be subjected to a greater penalty for an offence than what was provided under the law in force when the offence was committed. The expression law in force refers to the law factually in operation at the time when the offence was committed and does not relate to a law subsequently made.

**38.** In the present case the alleged offence having taken place in between July, 2016 to April, 2017 and in view of provision of Article 20 of the Constitution of India, the accused is liable to be sentenced as per the original provision of Section 6 of the POCSO Act and

not as per the amended provisions of Section 6 of the POCSO Act, which came into effect from 16.08.2019.

**39.** That apart no materials have come on record to show any criminal antecedents of the appellant or his involvement in similar offences earlier. The victim in her evidence has admitted that she has not heard about Ram Savek Lohar committing offence of sexual assault on any other person.

**40.** Therefore, this Court sets aside the sentence imposed by the Trial Court being void and illegal and hereby sentences the accused Ram Sevak Lohar for committing offence punishable under Section 6 of the POCSO Act read with Section 376 IPC with rigorous imprisonment for fourteen years and fine of Rs. 50,000/- and in default R.I. for another six months. The period of detention undergone by the accused is subject to set-off against the sentence of imprisonment under Section 428 of Cr.P.C.

**41.** Let copy of this judgement be supplied free of cost to the accused/convict.

**42.** Accordingly, CRA 12 of 2021 is disposed of and connected application is also disposed of.

**43.** Let the lower court records be sent down along with the copy of this judgement immediately.

**44.** All parties to act in terms of the copy of the order downloaded from the official website of this Court.

**45.** Urgent certified copy of this order if applied for may be supplied to the parties upon compliance of usual formalities. **(Kesang Doma Bhutia, J.)**

**46.** I have had the pleasure of perusing the judgement craftily penned by my sister judge and I am completely at *consensus ad idem* with her. The present case is one where the prosecution has laid the foundations as required under Section 29 of the POCSO Act, 2012. It is a fountain that has not been repelled or shattered in any manner by the defence. On a perusal of the evidence, it is clear that the defence could not bring any credible witness to rebut the presumption and foundation of the prosecutors' case. The arguments and submissions made by Mr. Kabir, amicus curiae appointed by this court, especially with regard to the procedure for handling the DNA samples is commendable. However, since the sole testimony of the victim has stood steadfast and unblemished, one can clearly hold that the case of the prosecution has been proved beyond reasonable doubt.

**47.** We would like to thank the counsel appearing on behalf of both the parties for diligently putting forward their arguments. It is evident from the judgements cited and arguments put forward by the counsel appearing on behalf of both the parties that pain-staking efforts have been undertaken by them. In conclusion, I wholeheartedly subscribe to the view taken by my learned sister judge and agree with the judgement passed by her. **(Shekhar B. Saraf, J.)**