Item No.18

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 248 of 2019
With
CRAN 2 of 2021 (Old CRAN 2848 of 2019)

Ganesh Orang
-Vs-
State of West Bengal & Anr.

For the Appellant	:	Mr. Anjan Bhattacharyya, Advocate Ms. Amita Shaw, Advocate
For the State **(In CRA 248 of 2019)**	:	Ms. Anasua Sinha, Advocate Mr. Pinak Kr. Mitra, Advocate
For the State **(In CRAN 2 of 2019)** **(Old CRAN 2848 of 2019):**		Mr. Abhra Mukherjee, Advocate Mr. Dipankar Mahata, Advocate
Heard on	**:**	February 02, 2022
Judgment on	**:**	February 02, 2022

Joymalya Bagchi, J. :-

With the consent of the parties, the appeal is taken up for hearing.

The appeal is directed against the judgment and order dated 05.03.2019 and 08.03.2019 passed by learned Additional Sessions Judge,

1st Court, Bongaon, North 24-Paraganas and Judge, Special Court, Bongaon, North 24-Paraganas in Special (POCSO) No.95 of 2017 convicting the appellant for commission of offence punishable under Section 376(2)(i)(n) of the Indian Penal Code and under Section 6 of the POCSO Act and sentencing him to suffer rigorous imprisonment for seven years and to pay a fine of Rs.15,000/- and in default to suffer rigorous imprisonment for six months more for the offence punishable under Section 376(2)(i)(n) of the Indian Penal Code and to suffer rigorous imprisonment for a term of 10 years and to pay fine of Rs.15,000/- and in default to suffer rigorous imprisonment for six months more for the offence punishable under Section 6 of the POCSO Act, both the sentences to run concurrently.

Prosecution case as levelled against the appellant in the first information report lodged by P.W.1, mother of the victim girl is to the effect that the victim girl was a student of class IX and aged about 14 years. Appellant was her private tutor. Appellant had raped her daughter on a number of times in the house where he gave tuition. On 08.08.2017 at 7.30 P.M. appellant came to her residence and forcibly raped her daughter. He also threatened her daughter with dire consequences. After few days, her daughter started behaving strangely and upon persuasion on 14.09.2017, she disclosed the incident to her. On the self-same day, she lodged a written complaint resulting in registration of Bagdah P. S. Case No.666 dated 14.09.2017 against the appellant.

In the course of investigation statement of the victim girl was recorded under Section 164 of the Code of Criminal Procedure. She was medically examined. Appellant was arrested and charge sheet was filed. Charges were framed against the appellant under Section 376(2)(i)(n) of the Indian Penal Code and under Section 6 of the POCSO Act. To prove the case, the prosecution examined ten witnesses. Defence of the appellant was one of innocence and false implication.

In conclusion of trial, the Trial Judge by the impugned judgement and order dated 05.03.2019 and 08.03.2019 convicted and sentenced the appellant, as aforesaid.

Mr. Bhattacharyya, learned Advocate appearing for the appellant argues that the evidence of the victim girl (P.W.2) is squarely at variance not only with the deposition of her mother (P.W.1) but also vis-a-vis her earlier statement before Magistrate. While in her statement before the Magistrate under section 164 of the Code of Criminal Procedure, P.W.2 stated that she had been forcibly raped by the appellant on an earlier occasion and thereafter on 9th August, 2017 at 8.30 P.M. at her residence, in Court she claimed that a singular act of forcible rape had been perpetrated at the house of the appellant on 08.08.2017 in the afternoon around 1.30 P.M. Moreover, the time, place and circumstances relating to forcible rape as narrated by the victim girl (P.W.2) is also at variance with the case alleged in first information report as well as the deposition of her mother (P.W.1). While in the first information report as well as the deposition of her mother (P.W.1) in Court, it

is alleged that the victim had been repeatedly raped on a number of times in the tuition room and thereafter at the residence of the complainant in the evening of 08.08.2017, the victim is silent with regard to the charge of multiple rape and alleged she had been raped in the afternoon of 08.08.2017 at the residence of the appellant.

Mr. Bhattacharyya further argues that the age of the victim has not been proved by way of ossification test or production of relevant documents from the school records. Even P.W.1 is silent regarding the age of the victim in Court. Hence, the fact that the victim was a minor at the time of occurrence has not been established beyond doubt. It is also argued that the explanation with regard to delay in lodging the first information report is fraught with contradictions. In her deposition, P.W.1 claimed that her daughter narrated the incident of rape to her on 08.08.2017 itself. However, in the first information report, she stated that such fact was divulged to her belatedly on 14.09.2017. On the other hand, her daughter claimed that she had divulged the incident to her mother 4/5 days after the incident. All these inconsistencies go to the root of the prosecution case and renders the case untenable both in fact and law. Hence, the appellant is entitled to an order of acquittal.

Ms. Sinha, learned advocate appearing for the State submits that the victim was a minor and had spoken of rape by her private tutor on 08.08.2017 at his residence. Version of the victim is credible in view of the fact that the victim was a student and the appellant had fiduciary control

over her as a tutor. Since she had been threatened by the latter, delay in lodging FIR does not affect the credibility of the prosecution case. Minor variations with regard to the time and place of occurrence should not affect credibility of the case and the appeal is liable to be dismissed.

Mr. Mukherjee appearing with Mr. Mahato in CRAN 2 of 2021 supports the submissions of Ms Sinha and submits that in the FIR it is stated that the victim was aged around 14 years and a student of class IX.

Ordinarily, in a case involving penetrative sexual assault on a minor victim, sufficient latitude is to be given in the assessment of the evidence of such a victim. However, in the present case where the deposition of the victim is squarely at variance with her earlier statement before the Magistrate under Section 164 of the Code of Criminal Procedure and that of her mother (P.W.1), both in the first information report as well as in Court, an onerous duty is cast on the Court to evaluate the intrinsic value of her evidence in the backdrop of such contradictions and/or inconsistencies before recording a finding of guilt against the appellant.

In the backdrop of the submissions made on behalf of the parties, let me analyse the evidence of the victim, P.W.2 *vis-a-vis* other earlier statement before Magistrate, FIR and the deposition of her mother. PW 2 in her deposition stated that the incident occurred at 1.30 P.M. in the house of the appellant. The appellant had called her to his house for giving tuition and when she went to his house she was forcibly raped. She had been taking tuition from the appellant for last two years and was presently a student of

class IX. She narrated the incident to her mother 4/5 days after the occurrence. As the appellant had threatened her of dire consequences, she initially did not inform anyone. She was medically treated in the hospital. She also made statement before the magistrate. She further deposed she took private tuition along with other girls. On the date of the incident accused called her for the first time to his residence and subsequently thereafter had called her to his house on a number of times. When she went to the house of the appellant her friends were taking tuition there. There was scuffling at the time of rape.

Mother of the victim was examined as P.W.1. She in her deposition claimed that the incident had occurred on 08.08.2017 between 8 P.M. to 8.30 P.M. at her residence. After she returned home she found her daughter in morose condition and upon query her daughter stated that she was raped on that day and on previous 8/10 occasions. She lodged complaint at Bagda P.S which was subscribed by one Dipak Mondal. She proved her signature on the complaint (Exhibit 1/1). Her daughter was examined in the hospital. Police seized undergarments of the daughter under a seizure list. She put her signature on the seizure list.

For a better appreciation of the time, place and circumstances in which the alleged offence had taken place, a tabular chart with regard to the aforesaid circumstances as narrated in the depositions of the aforesaid witnesses, P.W.1 and 2 vis-à-vis the first information report and the

statement of the victim girl recorded under Section 164 of the Code of Criminal Procedure is set out hereinbelow :-

	FIR	**Deposition of PW1**	**Statement of PW2 before Magistrate**	**Deposition of PW2**
Time and Date of occurrence	08.08.2017 at 7:30 P.M.	08.08.2017 at about 8 P.M. to 8:30 P.M.	09.08.2017 at 1:30 P.M.	8-9 months ago at 1.30 P.M.
Place of occurrence	House of PW1	House of PW1	House of the appellant	House of the appellant
Manner of commission of the offence	Forcible rape on that day as well as on a number of times earlier in the tuition class	Forcible rape on that day as well as on a number of times earlier in the tuition class	She had been forcibly raped on a earlier occasion at the residence of the appellant and thereafter again on 09.08.2017 in their house at about 8.30 P.M.	She had been raped only once at the house of the appellant at 1.30 P.M.
Reason for the delay	Due to threats by the appellant, incident was disclosed on 14.09.2017	Incident was disclosed to her on 08.08.2017 itself	She had been threatened by the appellant	She was threatened and divulged the incident 4-5 days after the date of occurrence

From the aforesaid tabular chart it appears that P.W.2 is completely silent in her deposition with regard to any previous forcible sexual assault upon her apart from the alleged sexual assault which occurred on 08.08.2017. Even with regard to the incident of 08.08.2017, her deposition in court is that the incident occurred in the afternoon around 1.30 P.M. in the house of the appellant whereas before the magistrate she claimed that she had been raped in her own house at 8.30 P.M. Therefore, there is a clear departure with regard to time and place when the alleged rape occurred on 08.08.2017.

Place, time and circumstance under which the offence is committed are the essential parameters which are required to be established in order to prove the prosecution case. In the instant case, there are inherent contradictions in the version of the victim with regard to the time and place where the alleged rape occurred. Moreover, her deposition in court with regard to rape in the afternoon in the house of the appellant does not find support either from her earlier statement before the Magistrate under section 164 Cr.P.C or in the narration of the incident in the FIR or deposition of her mother P.W.1 in court.

In the light of the aforesaid contradictions and/or inconsistencies in the prosecution case, I am constrained to observe the allegation of repeated forcible rape prior to 08.08.2017 has not been proved as the victim herself is completely silent in that regard in her deposition. Even the allegation of forcible rape on 08.08.2017 as narrated by her, is on shaky foundation. Time and place where the incident of rape occurred on 08.08.2017 does not appear to be established beyond reasonable doubt. Even if one ignores the contradictions between the deposition of the victim and that of her mother P.W.1, I find it difficult to rely on her version with regard to the alleged rape on 08.08.2017 as it is not only at variance with her statement before the Magistrate under section 164 Cr.P.C. but is highly unlikely in the attending facts and circumstance of the case. She claimed that she had been raped in the house of the appellant on 08.08.2017 at 1.30 P.M. There was scuffling at the time of the incident. However, in her deposition, she admits that her

friends were also present on that day in the house of the appellant. None of these girls have been examined to establish whether the victim girl had come to the house of the appellant on that day and had been raped as claimed by her.

P.W.2 also admitted that even after the incident she went to the house of the appellant without informing her mother. This conduct on her part is unnatural as a girl who has been subjected to forcible rape would be loathe to visit the house of the perpetrator.

Even the delay in lodging F.I.R. in the instant case is not adequately explained. Though in the F.I.R., P.W.4 stated her daughter disclosed the incident after a month that is on 14.09.2017, in Court she deposed that her daughter had narrated the incident on 08.08.2017 itself. P.W.2 stated she disclosed the incident within 4/5 days. Explanation regarding delay is, therefore, founded on contradictory evidence which is patently inconsistent and does not inspire confidence.

It is argued on behalf of the State that the version of the victim ought to be relied upon in view of the statutory presumption under Section 29 of the POCSO Act.

Section 29 of the POCSO Act reads as follows :

> **"29. Presumption as to certain offences**. – Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3,5,7 and 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

In order to attract the statutory presumption under Section 29 of the POCSO Act the factual foundations with regard to the ingredients of the offence under Section 6 of the said Act require to be established in the first place. In the present case, nothing has been placed on record on behalf of the prosecution to show that the victim was a minor at the time of occurrence. In her deposition PW 1 has not stated the age of the victim though the same is disclosed in the FIR. It is trite law that the FIR is not substantive evidence and may at its best to use to corroborate or contradict the maker. The only piece of evidence which is relied upon by the prosecution with regard to age of the victim is that she is a student. However, neither birth certificate nor the school records endorsing the age of the victim has been proved in the present case. No ossification test was also conducted with regard to the age of the victim in order to establish that she is a minor. If it is presumed that the victim was a minor, the inherent weakness and/or patent contradictions in the prosecution case itself render the statutory presumption inapplicable. In ***Sahid Hossain Biswas vs. State of West Bengal***[1] interpreting the aforesaid presumption, this Court held as follows:

> **"**..... in a prosecution under the POCSO Act an accused is to prove 'the contrary', that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see **Sait Tarajee Khimchand vs. Yelamarti Satyam, (1972) 4 SCC, Para-15].** In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence

[1] 2017 SCC OnLine Cal 5023

> before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.
>
> Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross-examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case eg. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to mechanically accept mere *ipse dixit* of the prosecution and give a stamp of judicial approval to every prosecution, however, patently absurd or inherently improbable it may be.**"**

As discussed earlier, evidence of the minor suffers from patent contradictions with regard to her earlier statement to the magistrate *vis-a-vis* the time and place of occurrence as well as other inherent weaknesses. Glaring lacunae in the prosecution case undermines the credibility of the factual foundations which require to be prima facie established to attract the statutory presumption. When the primary facts relating to time, place and circumstances constituting the offence are not prima facie established due to patent contradictions or inherent improbabilities, such lacuane cannot be cured by resorting to statutory presumptions in law.

Hence, I am of the opinion in the light of the contradictory and inconsistent versions with regard to the allegation of rape levelled against the appellant, the factual foundations of the prosecution case has not been laid on the basis of preponderance of probabilities so as to attract the statutory presumption and the appellant is therefore entitled to an order of acquittal.

In the light of the aforesaid discussion, I set aside the conviction and sentence recorded against the appellant.

Appellant Ganesh Orang shall be forthwith released from custody, if not wanted in any other case, upon executing a bond to the satisfaction of the trial court for a period of six months in terms of section 437A of the Code of Criminal Procedure.

The appeal is, accordingly, allowed.

In view of the disposal of the appeal, all connected applications are also disposed of.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the parties upon completion of all formalities.

I agree.

(Bivas Pattanayak, J.) **(Joymalya Bagchi, J.)**

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