

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

PRESENT: **THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA**  
**AND**  
**THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE**

**CRA/8/2021**

Suresh Tirkey ... Appellant

VS.

The State ... Respondent

For the Appellant : Mr. Gopala Binnu Kumar

For the respondent : Ms. A. S. Zinu

Heard on : August 18, 2022

Judgment on : August 25, 2022

**MOUSHUMI BHATTACHARYA, J.**

1. The present Criminal Appeal is from a Judgment dated 15<sup>th</sup> April 2021 passed by the Special Judge under The Protection of Children from Sexual Offences Act, 2012, North and Middle Andaman. By the impugned Judgment, the appellant (accused before the Court) was sentenced to imprisonment for 20 years for the offence under section 376 of the Indian Penal Code, 1860, and a fine of Rs 2 lacs as compensation to the victim under section 357 of The Code of Criminal Procedure, 1973.

2. The appellant was convicted on the basis of an FIR dated 27.12.2020 under sections 5 and 6 of the POCSO Act read with section 376 of the IPC. Charges were framed under the same sections on 16.3.2021. The evidence of 10 witnesses were taken for the prosecution. The evidence of the accused under section 313 of the CrPC is part of records.

3. The relevant facts, as recorded in the impugned judgment, are as follows. The appellant was accused of committing rape on the victim, who was alleged to have been below the age of 18 years on the date of the occurrence of the incident. The prosecution case was that the accused person/appellant and the victim were in a physical relationship before the victim became pregnant. The victim initiated the case after the appellant refused to marry the victim. The judgment records the age of the victim as 19 years as on the date of the judgment.

4. The impugned judgment proceeds on the basis that the victim was a minor on the date of the alleged occurrence. The Court was of the view that the case of the prosecution was corroborated by the witnesses for the prosecution and the appellant was not able to lead any evidence to prove the contrary. The Court accordingly came to the conclusion that the appellant committed the offence of rape upon the victim girl and that the prosecution proved the said offence under section 376 beyond all reasonable doubt. The Court accordingly held

the appellant should be convicted for committing the offence of rape and found the appellant guilty of the said offence.

5. Since the basis of the impugned judgment is that the appellant was guilty of the offence under (i) POCSO Act and (ii) section 375 of the IPC, the discussion is divided into the following sections.

6. (i) The POCSO Act

The Chargesheet states that the appellant committed the offence under sections 5 (j)(ii)(l) and 6 of the POCSO. Section 5 (j)(ii)(l) relates to aggravated penetrative sexual assault under which Sub-section (j)(ii) is concerned with penetrative sexual assault on a child which makes the child pregnant as a consequence of the sexual assault where the penetrative sexual assault on the child is committed more than once.

7. The presumption of the above section is hence penetrative sexual assault on a child resulting in pregnancy. The evidence of the 10 witnesses for the prosecution, which shall be dealt with later in the judgment, including of the victim herself, indicates that the appellant and the victim were in a physical relationship after February 2019 at Diglipur after which the victim became pregnant and gave birth to a child. The question is whether the victim was a “child”, within the meaning of section 5 of the POCSO Act on the date of occurrence of the event. Section 2(1)(d) of the POCSO defines “*Child*” as any person below the age of eighteen years.

8. The victim (PW-1) in her cross-examination stated that she was born on 8.2.2002. The victim further stated that she had a physical relationship with the appellant after February, 2020 after the victim had already completed the age of 18 years. PW-4, being the Medical Officer who examined the victim on 27.12.2020, deposed that the incident occurred on 7.5.2020 at 10 PM. The Investigation Officer (PW-10) deposed in his cross-examination that at the time of initiation of the proceeding under POCSO, the victim had already crossed the age of 18 years by 9 months. The Investigation Officer also stated in the cross examination that there is no material under section 6 of the POCSO Act.

9. Therefore, from the evidence of the victim (PW-1), Medical Officer (PW-4) and the Investigating Officer (PW-10), the fact that the victim had crossed the age of 18 years on the date of occurrence has been established. Even otherwise, since the victim according to her own evidence was born on 8.2.2002, she was more than 18 years of age on the date of the occurrence which was 7.5.2020 (examination-in-chief of PW-4 – Medical Officer). In essence, the victim was not a “*Child*” as defined under the POCSO Act, on the date of occurrence of the alleged offence. Hence, the appellant being chargesheeted under sections 5 and 6 of the POCSO Act and the case being heard and tried by the Special POCSO Court, North and Middle Andaman, cannot and does not have any factual or legal basis.

10. (ii) Sections 375-376 of the IPC.

Section 375 enumerates four physical activities by a man which amounts to “*Rape*”. The four enumerations must however fall within any of the seven descriptions which follow section 375(a)-(d). The seven circumstances are built around the consent - or the lack of it-on the part of the victim. The foremost presumption is the absence of consent as expressed by the expressions “*Against her will*” and “*Without her consent*” in the first and second descriptions under section 375. The third to seven circumstances present a layering of the giving of consent where the consent was either obtained under the threat of death or hurt or the victim was misled into believing a set of facts which was either not true or was beyond the comprehension of the victim.

11. *Explanation 2* makes “*Consent*” an unequivocal, voluntary act of agreement which is communicated by the woman by words or gestures, including non verbal communication, of a willingness to participate in the specific sexual act. Reference in this context may also be made to section 90 of the IPC where a consent given by a person under fear or under a misconception of fact is not a consent as intended by any section of the IPC.

12. The predominance of “*consent*” (or its absence) is the defining feature of the offence of rape in section 375. A rape is an act of force where the consent to such act, if at all, is presumed to have been

obtained under threat or by misleading the victim into believing a particular state of affairs in the present or likely to happen in the future. Rape, as defined in section 375, is not confined to physical acts of certain descriptions. The four acts explicit in their descriptions and disjunctive in sequence, must be read with an imperfect consent on the part of the victim woman so as to locate the acts within the underlying presumption of the offence of rape being an act of force and not a consensual act in which the victim is a willing participant being fully aware of the act and its consequences. The seven circumstances in 375 deconstructs 'consent' more as a "pushed to the wall" consent than an informed expression of free will; or where the victim is not capable of understanding the implications of the act itself.

13. The victim has stated in her cross-examination that the victim "*fully agreed with such physical relationship*". The victim's mother (PW-2) corroborates the same by stating that the victim's family did not lodge any complaint after coming to know the facts of pregnancy. The Medical Officer (PW-4) states that the appellant was a close friend of the victim and that both of them stayed in a rented room for three months. PW-4 further stated that the incident occurred on 7.5.2020 at 10 PM "*with her consent*". The Investigation Officer (PW-10) states that the victim did not lodge any complaint about continuing physical relationship with the appellant and that "*the victim has habitual sexual relationship with the accused*". The medico – legal examination of report of sexual violence also describes the incident in the words of narrator/victim as;

*“He was her close friend And she was staying in rent room since 3 months And her friend had bought the rent room for her. The incident occurred in May 7 at 10:0 pm with her consent.”*

14. The evidence hence points to the fact that the physical relationship between the appellant and the victim was consensual at all times and none of the witnesses for the prosecution deposed to the contrary.

15. Therefore, the evidence demolishes all the seven circumstances under section 375 under which the alleged offence is committed against the will of the victim or without her consent. The alleged offence therefore does not fall within the parameters of section 375 of the IPC.

16. The second issue is whether the consent of the victim was given in her full senses without the consent being obtained through any of the seven descriptions under section 375.

17. The statement of the victim under section 164 of the CrPC is that the appellant promised to marry the victim and entered into a physical relationship with the victim. It is hence to be seen whether the statement falls within the fifth circumstance under section 375 where the consent is either given by reason of unsoundness of mind or in a state of intoxication or by the perpetrator administering a stupefying substance to the victim or where the victim is unable to understand the nature and consequences of that to which she gives consent (underlined for emphasis).

18. The inability of the victim to understand the consequence of the act to which she gives consent cannot be an automatic assumption in the absence of corroborating evidence. The concluding part of the fifth circumstance is an independent tail-ender compared to the first part which concerns the victim being of unsound mind or being under intoxication or being administered some unwholesome substance by the perpetrator himself or through another person. Just as the unsoundness of mind or intoxication or administration of stupefying substance is a matter of evidence which has to be proved to establish that the consent falls outside the definition given in Explanation 2 to section 375 and the clarifications thereunder, the victim being unable to understand the consequence of giving consent must equally be proved by evidence or by corroborating circumstances.

19. Although the victim in her 164 statement states that the appellant promised to marry her, no such statement was made in the victim's deposition before the Special Judge (POCSO). The other witnesses for the prosecution, including the victim's mother (PW-2), also did not give any evidence of the victim giving her consent to a physical relationship with the appellant on the (mistaken) belief that the appellant would marry her. Further, the fifth circumstance following section 375 (a)-(d) is more than the victim girl giving her consent to participate in any of the four physical acts under section 375 on the promise of marriage or any other inducement made with the intention to procure the consent. The presumption is wider in import; it is a complete inability on the part of the victim to



understand the consequence of consent. The circumstance envisaged is of the victim being totally unaware of the result of giving consent. In other words, the victim's consent to the sexual act is not on a false premise; the victim consents to the sexual act being wholly uninformed of not only the nature of the act but also the consequence of such act.

20. There is nothing in the evidence before the Court which would satisfy the last limb of the fifth circumstance of section 375. The victim as well as other witnesses of the prosecution have not discharged the onus of proving that the victim was made to give her consent to the physical relationship with the appellant either without understanding the nature of the physical relationship or the implication thereof, including the pregnancy.

#### The infirmities in the impugned judgment

21. The impugned judgment starts with the finding of guilt. The learned Court concludes in the very first sentence that the appellant has committed an abhorrent act on an innocent child. The remaining part of the judgment attempts to justify the conclusion arrived at in the very first line.

22. The impugned judgment also starts on the factual premise of a "victim – child" although notices in the very same line that the victim had crossed 18 years on the dated of alleged offence. There is no discussion in the judgment of the POCSO Act not being applicable by

reason of the victim not coming within the fold of the Act. Although the Special Court concludes that the prosecution has sufficiently proved that the appellant was guilty of the offence under section 376 of the IPC, the relevant part of the judgment does not contain any finding as to the charge framed under section 6 of the POCSO Act being demolished by the evidence before the Court.

23. The omission is significant since the underlying presumption of the Court is the guilt of the appellant. Section 29 of the POCSO Act constitutes a departure from the accepted rule of presumption of the innocence of the accused until proved guilty. Section 29 entitles the Special Court to presume that a person has committed, abetted or attempted to commit an offence under sections 3, 5, 7 and 9 of the Act unless the contrary is proved. Since the POCSO Act is admittedly not applicable in the facts of the case and the relevant evidence was before the Court, the presumption of guilt on the part of the appellant amounts to a palpable infirmity on the face of the record.

24. The impugned judgment further glosses over the consensual nature of the physical relationship between the appellant and the victim. As stated above, the fact of the victim giving her consent to enter in and continue with the physical relationship with the appellant was part of the evidence not only of the victim herself but also the Medical Officer and the Investigating Officer. There is also no evidence to prove that the victim's consent was obtained by force, fear or threat. The evidence further does not establish that the victim gave her

consent to the physical relationship on a mistaken belief of marriage or otherwise.

25. The fact that the case does not fall within the fifth description under section 375 of the IPC has already been discussed above. It was never the victim's case that the victim was unable to understand the nature of the relationship with the appellant or the consequence of the relationship to which the victim gave her consent. Since the consent given by the victim falls within Explanation 2 of section 375 as voluntary and unambiguous, the conclusion that the prosecution succeeded in proving the case beyond all reasonable doubt is a conclusion which is repugnant to the relevant facts as well as the law on the subject. The Supreme Court in *M. Nageshwar Rao vs. State of Andhra Pradesh (2011) 2 SCC 188*, drew a distinction between suspicion, however strong it might be and proof and is relevant in this context.

26. The contradictions in the deposition of the victim and the 164 statement have also gone unnoticed in the impugned judgment. Reference may be made to *Phool Chand vs. State of Uttar Pradesh*, the Division Bench decision of the Allahabad High Court, *2003 Supp AllCriC 1* where it was held that statements recorded under section 164 of the CrPC cannot be treated as substantive evidence and can only be used to corroborate the statements of the witness or for the purpose of contradiction. It is also striking that the finding of the

Special Court of the investigation being improper has also not been given due weightage.

27. In view of the above reasons, this Court finds the impugned judgment of the Special Court under the POCSO Act to be vulnerable to challenge on several counts. The impugned judgment dated 15.04.2021 of the Special Court is accordingly set aside.

28. CRA/8/2021 is disposed of in terms of this judgment.

29. The Lower Court Records be sent down.

30. The appellant is discharged from his bail bond. The learned Special Judge, North and Middle Andaman, Mayabunder is to take steps accordingly.

31. Urgent photostat certified copy of this order be supplied to the respective parties upon compliance of usual formalities.

**( Moushumi Bhattacharya, J. )**

32. I agree

**( Ajoy Kumar Mukherjee, J. )**