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

CRA No.011 of 2018
[Subrata Biswas & another Vs. The State]

Mr.Deep Chaim Kabir
Mr.R.Arul Peter ... for the appellants

Ms.A.S.Zinu ... for the State

June 11, 2019
[SR]

The appellant in the present case has been charged with the most deplorable conduct of having raped his step-daughter aged around 13 years. In this backdrop, it is pertinent to bear in mind howsoever heinous the accusation, it is the bounden duty of the Court not to be swayed by its gravity but to dispassionately assess the veracity of the prosecution case with utmost objectivity so that the gruesomeness of the accusation does not cloud judicial clarity in determination of guilt.

Gist of the accusation which gives rise to the instant prosecution is to the effect that the appellant had allegedly outraged the modesty of his step-daughter at his residence firstly on the day of Holi i.e. 24.03.2016 at 12 noon and thereafter on 14.04.2016 in the night at 11.00 pm had raped her in a road side jungle near his house.

On the statement of the victim girl, Havelock P.S. Case No.13 of 2016 dated 18.04.2016 under section 4/8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act) was registered. In the course of investigation, police seized a condom and a sanitary napkin from the place of occurrence. The victim and the appellant were medically examined and the statement of victim andher mother were recorded under section 164 of the Criminal Procedure Code. In conclusion of investigation, charge sheet was filed against the appellant and charges were framed under section 354 IPC and under sections 9/10 of the POCSO Act with regard to the alleged incident of outraging of modesty on 24.03.2016 and under section 5/6 of POCSO Act and under 376 of Indian Penal Code with regard to the incident of rape/penetrative sexual assault on the victim in the night of 14.04.2016 in a nearby jungle. The appellant pleaded not guilty and claimed to be tried. Prosecution examined 14 witnesses including the victim [PW-1], her mother [PW-2] and her maternal uncle [PW-3]. Various documentary evidence were exhibited in support of the charge sheet. Defence of the appellant was one of innocence and false implication. It was also contended by the appellant at the time of incident of rape on 14.04.2016, he was discharging his duty as a Daily Rated Mazdoor at Andaman Public Works Department, Havelock. In support of his alibi, he examined two witnesses and exhibited the muster roll maintained in the ordinary course of business in the said establishment, Exhibit –A.

Upon consideration of the aforesaid evidence, the Trial Judge, by the impugned judgment and order dated 26.02.2018 convicted the appellant for the offence punishable under section 5 (n) of the POCSO Act and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs.50,000/- in default to suffer rigorous imprisonment for three months more.

It is relevant to note that the Trial court did not record any verdict with regard to the charges under sections 9 and 10 of the POCSO Act and under section 354 of Indian Penal Code which relates to outraging of modesty of the victim on 24.03.2016 on the fallacious reasoning that the appellant had been found guilty of the graver charge.

Reasoning of the Trial Judge not to record a finding on the charge framed under sections 9 and 10 of the POCSO Act and/or under section 354 of the Indian Penal Code, in my considered opinion, is an erroneous one. It has been opined by the Trial Court as the accused was found guilty of the graver charge, it is not necessary to record a finding with regard to the lesser offence. Such a course of action may be advisable when the facts disclosing the graver or lesser offence are the same as contemplated under section 222 of Cr.P.C. However, when different set of facts give rise to separate offences albeit of the same species, it is incumbent on the Trial Court to record a finding independently on each charge irrespective of the nature of said charges. It is all the more necessary to do so, in the facts of the present case as the allegation of outraging of modesty which occurred on 24.03.3016 may have a bearing on the subsequent incident which took place on 14.04.2016 as alleged by the prosecution. The Trial Judge failed to appreciate the nature of the prosecution case and committed an error in failing to record the finding on each of the charges framed in the instant case which constituted separate offences on different dates and time.

Now let me address the probability of the prosecution case as levelled against the appellant. Learned lawyer appearing for the appellants has argued that the alleged incidents are out and out false as the version of the victim PW.1 is highly unreliable and opposed to commonsense and broad probabilities of the case. The incident of outraging of modesty on the day of Holi as narrated by the victim is not corroborated by her uncle PW.3 in whose house she allegedly took refuge after the incident. The subsequent incident of rape on 14th April, 2016 appears to be most improbable in the backdrop of conduct of the parties particularly the victim (PW.1). The victim had refused to return to her home after the day of Holi. It is, therefore, most unlikely that she would accompany her step father/appellant in the night of 14th April, 2016 to the Basanti Puja giving rise to the incident of rape. The version of the victim, therefore, is riddled with inconsistencies and improbabilities and ought to be rejected outright. It is further argued that there is delay in lodging the FIR and there are embellishments in the version of the victim when compared to her earlier statements made to the police as well as the Magistrate. It is also submitted that the seizure of incriminating articles were from a public place which was

50 cubits from the main road and accessible to all. No forensic examination was conducted with regard to the seized condom and sanitary napkin to connect the said articles with the appellant or the victim respectively. It is also submitted that no evidence was led to establish that there was a Mela in the neighbourhood. No witnesses are forthcoming who saw the appellant with the victim in the Mela immediately prior to the incident. The medical report also does not support the prosecution case with regard to the forcible rape inside the forest as no marks of injuries were found on the body of the victim. *Alibi* relied upon the appellant is probable and, therefore, the prosecution case ought to be dismissed.

On the other hand the learned counsel appearing for the State argued that the evidence of a minor victim of sexual assault ought to be treated with due sensitivity and care, more particularly when she has levelled a charge of rape against her step father. It cannot be ignored that the appellant had fiduciary control over the victim and, therefore, access of the appellant to the victim and/or the delay in lodging the FIR are clearly explained in the facts of the case. The victim herself pointed out the place of occurrence where incriminating articles were recovered corroborating her version. The medical report shows that the hymen was ruptured probabalising the act of rape. Her evidence is corroborated by her relations PW 2 and PW 3 and in view of the statutory presumption of Section 29 of the POCSO Act the prosecution case is fully established and the appeal is liable to be dismissed.

PW 1, the victim is the most vital witness in the present case. She stated that she was a student of class IX at the time of the incident. She deposed, on the day of Holi her father had asked her to lie on the cot on the excuse of giving her a massage. Thereafter he took off his trouser and lay on her body. She cried out in pain. Thereafter she ran away to her material uncle's home. Her mother had gone out for marketing and was not present in the residence at that time. Her mother went to her maternal uncle's home and requested her to return. She, however, refused to do so. On 14th April, 2016 she asked permission from her step father to go to Basanti Mela. Her father took her to Basanti Mela. On her way back her father committed rape on her using a condom beneath a tree. She was menstruating at that time. In the evening of 17th April, 2016 she informed the matter to her mother. On 18th April, 2016 her mother took her to the police where she lodged complaint. She was medically examined. She took the police to the place of occurrence where a used condom and a sanitary napkin was recovered under a seizure list. The police seized her wearing apparels. She put her signature on the seizure lists. She made a statement to the Magistrate. In cross examination, she stated on 14th April, 2016 there was no school. She had gone to Basanti Mela with her father at 8.00 P.M. in a two wheeler. They returned to home around 11.00 P.M. She admitted that there was a house near the place of occurrence at a walking distance of one meter.

Her mother, PW 2 deposed that on the day of Holi she was informed by her daughter that her husband i.e. the appellant had tried

to commit rape on her forcibly. As a result her daughter went to her maternal uncle's house. Her husband, however, denied the incident. Thereafter, her husband had taken her daughter to Basanti Mela on 14th April, 2016. On 17th April, 2016 her daughter informed that her husband had committed rape on her on that day. They lodged FIR on 18th April, 2016. She also made statement to the police. In cross examination, she stated that on 18th April, 2016 her daughter was at her maternal uncle's house. She came to their residence on that date.

PW 3 is the maternal uncle of the victim. He is significantly silent with regard to the incident of 24th March, 2016, although he deposed that an incident occurred on 14th April, 2016 of which he was informed by her sister PW 2 on 18th April, 2016. He went to the place of occurrence with the police and he is a signatory of seizure of condom and sanitary napkin. In cross examination, he stated that the place of occurrence is 50 cubits from the main road. House of the victim is 200 meters from the place of occurrence. There is an adjacent house which is used as a Resort.

PW 4 is also a signatory to the recovery of condom and used sanitary napkin by police on 18th April, 2016.

PW 14 is a medical officer who examined the victim. He proved the injury report wherein he noted that he did not find any mark of violence on the victim. He, however, noted that the victim complained of forcible sexual intercourse. He also found her hymen ruptured but noted that she was not habituated to he sexual intercourse.

PW 13 is the first Investigating Officer in the present case. He recorded the statement of the mother of the victim. He forwarded the victim for medical examination. He collected vaginal swab and pubic hair from doctor. He went to the spot. He took photographs of the place of occurrence. He prepared the site map. He collected a used condom, a condom packet and a sanitary napkin from the place of occurrence. He seized the wearing apparels of the victim from her mother. He seized the birth certificate of the victim. He arrested the accused person who was medically examined.

PW 10 is the second Investigating Officer of the case. He took steps for recording the statements of the victim and her mother under section 164 Cr.P.C. He deposed that the seized articles have been sent to CFSL at Kolkata. However, no report was received and he submitted the charge sheet.

From the aforesaid evidence on record it appears that the prosecution case is founded on two incidents. On 24th March, 2016 i.e. the day of Holi it is alleged that the appellant being the step father of the victim had made her lie down on the bed on the excuse of giving massage. Thereafter he had attempted to violate the victim after taking off his trousers. Mother of the victim had gone to the market at the time of occurrence. Due to trauma the victim ran to her maternal uncle's home and took refuge there. She narrated the incident to her mother

and refused to return to the residence of the appellant. The aforesaid incident as narrated by the victim PW 1 and her mother PW 2, however, is not corroborated by the maternal uncle PW 3 in whose house the victim had sought refuge. Learned counsel for the State strenuously argued that it is possible for the victim out of shame had not narrated the incident to her maternal uncle. I would have otherwise accepted such version had not the victim taken refuge at the residence of the maternal uncle after the incident in spite of request of her mother to return to the residence of the appellant and remained there. Under such circumstances, it is difficult for me to believe that her maternal uncle would be completely unaware of the incident of attempted rape as alleged by the prosecution. Lack of corroboration from the maternal uncle (PW 3) with regard to the incident of attempted rape on the victim renders the same improbable and highly unreliable. On the other hand, it appears that the victim had been ordinarily residing at the residence of maternal uncle at the time of the alleged incidents. This fact is further fortified from the conduct of the prosecution witnesses as emanating from their versions during trial. Although the incident of rape allegedly occurred in the night of 14th April, 2016, it is relevant to note that the victim did not meet her mother and narrate the incident to her till the evening of 17th April, 2016. Her mother (PW 2) in cross examination admitted that her daughter was at her maternal home on 18.04.2016 and came to her residence on 9.00 pm. Moreover, it appears from the statement of the victim recorded under Section 164 Cr.P.C (Ext. 7/2) that she had gone to school from her maternal uncle's house on the date of the alleged incident i.e. 14th April, 2016. In court, she tried to cover up such fact and claimed she did not go to school on that day. The aforesaid circumstances clearly show that at the time the incident of rape and thereafter the victim was residing at her maternal uncle's home till the FIR was registered on 18th April, 2016. In this backdrop, unfolding of the prosecution case of rape on 18th April, 2016 appears to be patently absurd and inherently opposed to commonsense and the broad probabilities of the case. In fact, the prosecution case of attempted rape on 24th March, 2016 militates against the possibility of access of the appellant to the victim on 18th April, 2016 when she was alleged to be raped. It is the prosecution case that the victim had been attempted to be violated by her step-father on 24th March, 2016 and had taken refuge at her maternal uncle's home because of such predatory conduct. Under such circumstances, is it plausible that the victim would seek the sole company of her step-father, the predator himself, to accompany her to the Basanti Mela within three weeks of incident i.e. 14th April, 2016?. I find no explanation forthcoming from the facts of the case which would justify such conduct on the part of the victim so as to give credence to the possibility of exclusive access of the appellant to the victim in the night of rape on 18th April, 2016. The aforesaid improbability in the prosecution case is rendered more acute by the absence of any independent evidence with regard to the presence of the appellant and the victim together at the Basanti Mela. No independent evidence is forthcoming that a Basanti Mela was being celebrated in the neighbourhood. Nor any neighbour or independent witness saw the appellant and the victim together on the date of the incident at the

Mela. On the other hand, the evidence on record appears to probabilise the fact that at the time of occurrence or thereafter the victim continued to reside at her maternal uncle's house and after three days she narrated the incident to her mother, PW-2. PW-3 her maternal uncle in whose custody the victim remained after the alleged incident was wholly ignorant of the alleged act of rape till the same was disclosed to him by the mother of the victim after four days i.e. on 18th April, 2016. Although, it has been argued that the allegation of rape ought to be believed as no evidence of enmity between the parties are forthcoming and delay in lodging FIR in sexual offences involving a minor ought to be treated with due sensitivity and care, I am unable to convince myself with regard to the conduct of the victim in the instant case in reposing trust on her step-father and accompanying him alone to Basanti Mela on 18th April, 2016, notwithstanding her contention that the selfsame individual had attempted to rape her three weeks ago i.e 24th March, 2016 and consequently she had withdrawn from his company and was residing with her maternal uncle. Even after the incident of rape, the victim continued to reside with her maternal uncle for three days and did not disclose the incident to either him or her mother. The incident came to light only in the evening of 17th April, 2016. The conduct of the victim is, therefore, most unnatural and opposed to normal human conduct in the broad probabilities of the case. Hence, I find it difficult to rely on her version to come to a finding of guilt against the appellant. The versions of the victim and her mother are not only riddled with contradictions but the prosecution case of attempted rape on 24th March, 2016, in fact, militates against the probability of the victim relying on the selfsame predator and giving him an opportunity to violate her again on 14th April, 2016, as alleged. No explanation is forthcoming why the victim who had withdrawn from the residence of her step-father would within a couple of weeks would come to rely on him so much so as to seek his permission and accompany him alone to the Mela as alleged by the prosecution.

When one part of the prosecution case renders another part patently improbable and self destructs itself, it is impossible to salvage such a situation by recording a finding of guilt on such a shaky foundation.

Little reliance can be placed on the alleged recovery of incriminating articles namely used condom and sanitary napkin in the present case. The articles were recovered four days after the incident from a public place which was accessible to all. PW-3 deposed that the place of recovery was 50 cubits from the main road. Although the place of recovery was a forested area, there were nearby human habitation including a resort. No forensic report connecting to the said articles with the body fluids of the appellant and the victim have been placed on record.

In the aforesaid factual backdrop, it is not possible to unequivocally connect the seized articles with the appellant and the victim and the probability of those articles being left thereby other entities cannot be wholly ruled out.

Medical evidence of PW-14 who examined the victim is also not conclusive and do not show any mark of violence on the body of the victim although she alleged that she was forcibly raped on the forest floor.

I am not unconscious of the statutory presumption engrafted in Section 29 of the POCSO Act which reads as follow:-

> **"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 section 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".

The statutory presumption applies when a person is prosecuted for committing offence under Sections 5 and 9 of the Act and a reverse burden is imposed on the accused to prove the contrary. The word "is prosecuted" in the aforesaid provision does not mean that the prosecution has no role to play in establishing and/or probablising primary facts constituting the offence. If that were so then the prosecution would be absolved of the responsibility of leading any evidence whatsoever and the Court would be required to call upon the accused to disprove a case without the prosecution laying the firm contours thereof by leading reliable and admissible evidence. Such an interpretation not only leads to absurdity but renders the aforesaid provision constitutionally suspect. A proper interpretation of the said provision is that in a case where the person is prosecuted under Section 5 and 9 of the Act (as in the present case) the prosecution is absolved of the responsibility of proving its case beyond reasonable doubt. On the contrary, it is only required to lead evidence to establish the ingredients of the offence on a preponderance of probability. Upon laying the foundation of its case by leading cogent and reliable evidence (which does not fall foul of patent absurdities or inherent probabilities) the onus shifts upon the accused to prove the contrary. Judging the evidence in the present case from that perspective, I am constrained to hold that the version of the victim (PW-1) and her mother (PW-2) with regard to twin incidents of 24th March, 2016 and 18th April, 2016 if taken as whole, do not inspire confidence and runs contrary to normal human conduct in the backdrop of the broad probabilities of the present case.

Hence, I am of the opinion that the evidence led by the prosecution to establish the primary facts suffer from inherent contradictions and patent improbabilities particularly the inexplicable conduct of the victim herself. One part of the prosecution case improbabilises the other part to such an extent that no man of reasonable prudence would accept the version as coming from the witnesses. Hence, I am of the opinion that the factual matrix of the case does not call for invocation of the aforesaid statutory presumption so as to convict the appellant on the charges levelled against him.

As I am convinced that the evidence on record does not bring home the guilt of the appellant, I choose not to comment on the plea of *alibi* which was raised by him in the course of trial.

In the light of the aforesaid discussion, I hold that the conviction and sentence of the appellant under section 5(n) read with section 6 of the POCSO Act are liable to be set aside. The appeal is allowed. The appellant shall be forthwith released from custody upon furnishing a bond to the satisfaction of the learned trial Court which shall remain in force for a period of six months in terms of section 437 A Cr.P.C.

A copy of the judgment along with the LCR be sent down to the Trial Court at once for necessary action.

Advance copy of the order be sent forthwith to the Correctional Home for immediate release of the appellant.

I agree.

(Abhijit Gangopadhyay, J.) **(Joymalya Bagchi, J.)**