

**HIGH COURT OF TRIPURA
AGARTALA
Crl. A. No.24 of 2023**

Md. Abdul Rahim,
S/o. Abdul Latif,
Vill – Bhitorgul, P.S. Kadamtala,
District-North Tripura.

----- Convict-Appellant

Versus

The State of Tripura,
Represented by the Secretary,
Department of Home,
Government of Tripura,
New Secretariat Complex
Kunjaban, P.S. N.C.C.
District-West Tripura.

----- Respondent

For Appellant(s)	:	Mr. Alik Das, Adv.
For Respondent(s)	:	Mr. Raju Datta, P.P., Mr. S. Ghosh, Addl. P.P.
Date of hearing	:	30.09.2024
Date of delivery of Judgment & Order	:	07.10.2024
Whether fit for reporting	:	YES

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

This appeal is preferred challenging the judgment and order of conviction and sentence dated 18.10.2023 delivered by Learned Special Judge (POCSO), North Tripura, Dharmanagar in connection with case No.Special(POCSO) No.1. of 2017. By the said judgment, Learned Court below has found the appellant to be guilty for the offence under Section 354 of IPC and also under Section 8 of the POCSO Act and sentenced him to suffer RI for 3(three) years and to pay a fine of Rs.1000 under Section 354 of IPC and i.d. of payment of fine to suffer SI for a further

period of one month and the Learned Court below further sentenced the convict to suffer RI for 3(three) years and to pay fine of Rs.1000/- under Section 8 of POCSO and i.d. to suffer imprisonment for a further period of 1(one) month and it was further ordered that both the sentences shall run concurrently.

2. Heard Learned Counsel Mr. Alik Das representing the appellant and also heard Learned P.P. Mr. Raju Datta assisted by Learned Addl. P.P. Mr. S. Ghosh for the State-respondent.

3. Here in the given case, prosecution was set into motion on the basis of an FIR laid by the victim herself to the O/C Kadamtala P.S. alleging inter alia that on 13.12.2016 in the afternoon the victim girl aged about 10 years was washing the house hold utensils in the courtyard of her house at Tangibari under Kadamtala P.S and during that time, she was alone in the residence when the appellant who is having betel nut garden near the house of the victim girl came there and caught hold the victim from her back and pressed her breast. The minor victim girl became frightened and she ran inside her house then the accused also followed her inside the house and caught hold her hand. However, the victim somehow managed to escape from her house and went to the house of her grandmother Surja Mani Munda and disclosed the incident and the matter was also informed to the local panchayat but no action was taken. So, the victim herself laid the FIR.

4. On the basis of FIR, O/C Kadamtala P.S. registered Kadamtala P.S. Case No.59/2016 dated 15.12.2016 under

Section 448/354A of IPC and also under Section 8 of POCSO Act and endorsed the case to the IO. The IO on completion of the investigation laid charge sheet against the appellant before the Court.

5. Before the Trial Court, the prosecution to substantiate the charge adduced in total 10 nos. of witness and one witness as CW-1 was examined by the Court and the prosecution was also relied upon some documents which were marked as exhibits in this case.

For the sake of convenience, the name of witnesses and the exhibited documents are mentioned hereinbelow:

Prosecution witnesses:

- i) PW-1 : Miss Rupali Munda
- ii) PW-2 : Smt. Bithika Munda
- iii) PW-3 : Smt. Laxmi Mani Munda
- iv) PW-4 : Smt. Ruhita Munda
- v) PW-5 : Rob Ali
- vi) PW-6 : Sri Subhas Barua
- vii) PW-7 : Sri Biswajit Paul
- viii) PW-8 : Sri Sandip Deb
- ix) PW-9 : Sri Pijush Kanti Saha
- x) PW-10 : Smt Simati Urang
- xi) CW-1 : Sri Niranjana Halam

Prosecution Exhibits:

- i) Exbt.-1 : Signature of PW1 on the ejahar
- ii) Exbt.-1/a : Signature of PW10 on the ejahar
- iii) Exbt.-2,2a,2b : Signature of PW1 u/s. 164(5) Cr.P.C. statement.
- iv) Exbt.-3 : Signature on the seizure list.
- v) Exbt.-3/a : Seizure list
- vi) Exbt.-3/b : Signature of PW10 on the Seizure list
- vii) Exbt.-4 : Report of Medical examination
- viii) Exbt.-5 : Hand sketch map with Index
- ix) Exbt.-6 : Report of Radiologist

6. On conclusion of trial, the Learned Court below found the appellant to be guilty and convicted him guilty accordingly. It is to be noted here that in course of examination, the

appellant under Section 313 of Cr.P.C. denied the prosecution allegation and also denied to adduce any witness in support of his defence. Rather he took the plea that at about 15 days back prior to the lodging of FIR, he scolded the victim girl as she was damaging his trees and plants in his land and thereafter this case was registered against him.

7. Now, for the sake of convenience, let us project the subject matter of evidence on record of the prosecution before the Learned Court below.

8. PW-1 is the victim of this case. She deposed that she was a student of Class V and the incident took place when she was in Class IV and appeared in annual examination and it was a day of winter. That day, she along with her younger brother Bijen Munda were present in the residence and he was a student of Baloary school. That time, she was washing utensils outside their house. She carried water from a lunga where a well was situated. There the appellant came and he came from the back side and pressed her breast. Immediately she ran away and entered into her hut. The appellant also chased her and entered inside the hut and caught hold her hand. Then she ran away and went to her uncle's house and she informed the appellant that she would tell everything to her nani and when the appellant inquired what she would tell her nani thereafter he left. At that time her mother was out of her house as she was a worker of Piyaracherra tea garden. She further stated that house of the appellant is situated at Bhitorgul and near by

her house, the appellant had a betel nut garden and on that day he came there to see his garden. She further stated that the accused was absent on that day to the Court and had he be present she could identify him. She further stated that she knew the appellant from earlier because he came to their locality on so many occasions and her mother returned back to home at about 4pm then she reported the matter to her mother then her mother informed the matter to different persons and incident took place on Tuesday and on Thursday she laid the FIR. She further stated that her two mothers and her uncle accompanied with her to Kadamtala P.S. when she narrated the incident to a female police officer and that person recorded her complaint. She identified her signature on the ejahar marked as Exbt.-1. She further stated that police arranged for recording her statement by a Judicial Magistrate and she identified her signature on the statement recorded by a Judicial Magistrate which was marked as Exbt-2, 2a and 2b. She further stated that her mother gave her RTI. She was taken to Dharmanagar District Hospital and police seized her wearing frock which was of violet colour with yellow flower and she put her signature on the seizure list and she identified her signature on the seizure list marked as Exbt.3 and seized frock was marked as Exbt.MO-I.

During cross-examination, save and except denial nothing came out relevant.

9. PW-2, Bithika Munda is the mother of the victim. She deposed that on 13.12.2016, she was absent at her residence as she went to tea garden for work. She returned back to home at about 4.00 pm and after returning back her daughter i.e. the victim informed her that on that day at noon while she was washing utensils, that time, the appellant came and from back side he touched the breast of the victim and being afraid she raised alarm and went inside the hut and when the appellant also followed her and caught hold her hand and out of fear she ran away to her uncle's house and after two days of the incident she took her daughter to Kadamtala PS and there one female police officer recorded her oral ejarah. She reported the matter to the panchayat for salishi and Panchayat advised her to report the matter to PS and accordingly she informed the matter to PS. She further stated that during investigation police took her daughter to Dharmanagar Hospital for examination and brought her to Dharmanagar Court for recording her statement. She put her RTI in her deposition sheet. She identified Exbt.MO-I. Further stated that the appellant Rahim had some betel nut plants near by her house and regularly he used to come to that garden. Also stated that she could identify the appellant had he be present in the Court. Also stated that her husband married two times and she used to live with the first wife of her husband.

During cross-examination, nothing came out relevant except denial.

10. PW-3, Laxmi Mani Munda deposed that her husband married twice and the second wife of her husband had three children and the present case relates to the daughter of the second wife of her husband. She could not say anything furthermore about this case.

11. PW-4, Ruhita Munda deposed that the mother of the victim is the daughter-in-law of the brother of her husband and as such victim used to tell her as Nani and her house is adjacent to the house of the victim. The incident took place about six months back one day at noon at about 12.00 hours. That day, the victim reported her that almost after few minutes of the incident while she was cleaning utensils outside their hut that time the appellant Rahim came from the backside and pressed her persons and the actual word used by her were as follows:

"Rahim amare tipatipi karche." At that time I and Surjyamohan Munda were taking the beetle leaves at my house. I know Rahim. Today Rahim is not present in the court. I could identify Rahim had he remained present in the court.

During cross-examination, nothing came out relevant.

12. PW-5, Rob Ali deposed that the incident took place about 5-6 months back one day at noon. On that day in the evening he came to know about the incident. That day mother of the victim, step mother of the victim and the victim visited his house and reported him that in absence of the other

members of the house of the victim when the victim was cleaning the utensils, that time the appellant Rahim came and touched her persons and when the appellant rushed to her hut, that time, the appellant also chased her and outraged her modesty and pressed her breast. He further stated that that time he stated that as the appellant belongs to another panchayat so he advised them either to inform the panchayat members of that locality or the matter may be reported to the police. He further stated that the appellant was known to him and he could identify him had he be present in the Court.

During cross-examination, nothing came out relevant.

13. PW-6, Subhas Barua could not say anything about the prosecution case.

14. PW-7, Biswajit Paul deposed that on 17.12.2016 in the Dental Clinic (OPD) of Dharmanagar Hospital in connection with Kadamtala PS case no. 2016 KDL 059 dated 15.12.2016 U/S 448,354(1)(i) IPC and 8 of POCSO Act, 2012 he examined one child name withheld to ascertain her age on the basis of her teeth. On examination of her teeth, he found that in upper jaw in both the sides teeth number 1,2,3 and 6 were erupted after falling of milk teeth and there were two milk teeth which were D and E and after falling of milk teeth D and E in their place, the permanent teeth number 4 and 5 would appear and in both sides of lower jaw, he found 1,2 and 6, D and E teeth. The teeth number 3 in lower jaw was in erupting stage and in the upper jaw in the right side, number 3 tooth was also found in erupting

stage. On the basis of position of teeth he opined that she was about 9 years old and further stated that at best one year may be added on the basis of physical condition and he identified the report which was marked as Exbt.-4.

He was declined to cross-examination by the appellant.

15. PW-8, Sandip Deb deposed that on 15.02.2016 he was posted as Medical Officer of Kadamtala CHC. When police personnels brought one person to ascertain the age of the victim either for ossification test or for examining the teeth, since they had no such arrangement in the CHC, they used to refer the patient to Dharmanagar Hospital. He could not say anything furthermore about this case.

He was declined to cross-examination by the appellant.

16. PW-9 is the IO who laid charge sheet against the appellant. He deposed that on 15.02.2016 he was posted at Kadamtala PS. On that day, he received Kadamtala PS case No.2016/KDL 059 under section 448, 354 (1) (I) IPC and 8 of POCSO Act, 2012 which was registered by the O/C Pradhyut Ch. Datta on the basis of oral ejahar made by the victim recorded by one Woman Constable Smt. Simati Udang. He further stated that the allegation, in short, was that on 13.12.2016 at about 12.00 hours when the victim was alone at home and she was cleaning utensils in the courtyard of her house. That time, the appellant, Abdul Rahim aged about 45 years came from her back side and started to touch her breast and out of fear of said Rahim, she rushed to her hut and that time, Rahim also chased

her. The victim told Rahim to leave her and also cried out and somehow she managed to escape from the hut and went to Surja Mani Munda's house and in the mean time, the accused managed to escape. He visited PO and prepared hand sketch map with index of the PO. He identified hand sketch map of the PO with index which was marked as Exbt.-5. In the hand sketch map 'A' was shown as the place where the victim was cleaning utensils and that was the first PO and that place was within the house premises of the victim and 'B' is the dwelling hut of the victim. 'C' is an ongoing construction of a hut within that house. 'E' is the pond of one Moniruddin and 'F' is another pond owned by the accused. 'I' is the betel nut garden owned by the accused person and that is situated in a lunga and 'G' is the entire courtyard of the victim's house. 'D' indicates the house of one Ruhita Munda. He further stated that after preparing hand sketch map of the PO he arranged for recording 161 statement of the victim and on that day he seized one wearing tap frock of the victim by a seizure list and identified the same marked as Exbt.-MO-I. He also identified the report of the radiologist regarding age of the victim which was marked as Exbt.-6 and the report of Dental Surgeon which was marked as Exbt.-4. He further stated that he arranged for recording the statement of the victim by Judicial Magistrate, Kanchanpur and on completion of investigation, he laid charge sheet.

During cross-examination, he stated that PO is about 10 km away from the PS. The incident took place on

13.12.2016 at noon and the incident was reported to the PS on 15.12.2016. He did not collect the School certificate of the victim.

17. PW-10 deposed that on 15.12.2016 she was posted at Kadamtala PS as woman constable. On that day being ordered by the O/C she recorded the oral ejahar of the victim and she read over and explained the contents of the same to her and she identified the recorded oral ejahar with her signature which was marked as Exbt.-1/a. She further stated that after obtaining the signature of the victim, she handed over the same to the officer-in-charge of the PS for registration and after registration of the case, she also recorded the statement of the victim child as per instruction of IO and on that day the IO also seized one wearing frock which was of violet colour with some yellow flower print and after identification marked as Exbt.-3/b. She also took the victim to Kadamtala CHC and thereafter to Dharmanagar Hospital for her ossification test and for examination by Dental Surgeon and introduced the victim to the Medical Officer and Dental Surgeon.

18. CW-1 deposed that on 22-05-2018 he was posted at Kadamtala PS as ASI of police and on that day, O/C of the PS endorsed him to execute the proclamation against the appellant and accordingly he went to Bhitorgul, Ward No.2 for executing the proclamation and he read out the proclamation in presence of the villagers and then pasted the proclamation in a conspicuous place of their homestead and another copy of the

proclamation was pasted in the official notice board and then he returned back the service report.

These are the sum and substances of the evidence on record of the prosecution in respect of determination of charge laid against the appellant.

19. In course of hearing of argument, Learned Counsel for the appellant submitted that in this case on perusal of the charge, it appears that the same was not duly signed and Learned Counsel for the appellant further submitted that during the entire trial, the appellant remained absent and in absence of the evidence recorded by the Learned Trial Court and furthermore, no independent witness was adduced by the prosecution before the Learned Trial Court. So, in summing up Learned Counsel for the appellant urged for setting aside the Judgment of the Learned Trial Court and to remand back the matter to the Learned Trial Court for de novo trial of the appellant.

20. On the other hand, Learned P.P. appearing for the State-respondents fairly submitted that from the act and conduct of the appellant, it is crystal clear that he was duly represented by his Learned defence Counsel before the Learned Trial Court and even during his examination under Section 313 of Cr.P.C., no such plea was taken by the appellant that the evidence was recorded in his absence and he failed to give any explanation against the incriminating materials revealed against him from the evidence on record of the witnesses of the

prosecution and urged for upholding the judgment and order of conviction and sentence delivered by the Learned Trial Court.

21. From the evidence on record, it appears that at the time of alleged occurrence to the PO save and except the victim, no other person was present to the PO. So, here the victim herself is the eyewitness of the case. To substantiate the charge, prosecution as already stated has adduced in total 10 nos. of witnesses.

22. The appellant by the trend of cross-examination of the witnesses of the prosecution i.e. specifically the victim could not raise any doubt or cloud to discard the evidence on record of the prosecution. In course of hearing of argument, Learned Counsel for the appellant although took the plea that Learned Court below recorded the evidence in absence of the appellant before the Learned Trial Court but on perusal of the record, it appears that two counsels were engaged by the appellant to conduct his defence who conducted the case on his behalf before the Learned Trial Court below.

23. The appellant in course of his examination under Section 313 of Cr.P.C save and except denial did not submit anything regarding that the trial was conducted in his absence. Rather he took the plea that he caused a slap to the victim girl for which this case was manufactured. But in this regard, to substantiate his defence, no satisfactory evidence on record could be adduced by the appellant before the Learned Trial Court.

24. Admittedly, there was some delay in lodging the FIR but considering the materials on record, it appears that after the incident, the mother of the victim took up the matter with the local murrubis but as they could not resolve the matter so ultimately the victim laid the FIR against the appellant.

25. Now, if we go through the statement of the victim girl recorded by Learned Magistrate, it appears that before the Court also she reiterated the same story as mentioned by her in the initial FIR laid by her to the O/C of the concerned PS. The appellant inspite of cross-examination of the victim could not raise any circumstance to disbelieve her evidence. Even from the dental report which remains unrebutted, it appears that the victim on that relevant point of time was 9 years old. In this regard, there was no cross-examination from the side of the appellant before the Learned Trial Court regarding age of the victim.

26. Admittedly, in this case, Learned Court below found the appellant to be guilty for the offence punishable under Section 354 of IPC and also under Section 8 of the POCSO Act which in my considered view was not proper in view of the provision provided under Section 42 of the POCSO Act. The Learned Trial Court below could either convict the appellant under Section 354 of IPC or under Section 8 of the POCSO Act. Since the charge under Section 8 of POCSO Act is proved against the appellant so the sentence under Section 354 of IPC cannot be sustained against the appellant.

Now, for the sake of convenience I would like to refer herein below the relevant provision of Section 8 of POCSO Act which is as follows:

8.Punishment for sexual assault.-Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

27. Since from the evidence on record, it appears that the present appellant has violated the provision of Section 7 of the POCSO Act as such he is liable to be convicted under Section 8 of the POCSO Act. Furthermore, the delay in filing the ejahar/FIR as alleged by PW-1 (victim) cannot demolish the prosecution case in the context of the age of the victim and the nature of offence as reported. Hon'ble Supreme Court of India in **Tulshidas Kanolkar v. State of Goa** reported in **(2003) 8 SCC 590**, laid down the principle of law by observing the delay per se is not a mitigating circumstances and such delay, if explained properly, is not fatal for the case of the prosecution. Here in the facts and circumstances of the case, from the evidence on record it appears that as the victim herself is the informant of the case and there is evidence on record that soon after the incident they took up the matter with the local murrabis and the PS is also situated from their house at a considerable distance so the delay as apparent on the face of record has been properly explained by the prosecution in this case for which there is no scope to discard the present prosecution case.

28. In the result, the appeal filed by the appellant fails and is hereby dismissed on contest. The judgment and order of sentence delivered by Learned Special Judge (POCSO), North Tripura, Dharmanagar in connection with case No.Special(POCSO) No.1. of 2017 is hereby upheld with modification that the appellant of the present case shall only be convicted for the offence punishable under Section 8 of the POCSO Act and to suffer RI for 3(three) years with fine of Rs.1000 i.d. to suffer further RI for a period of 1(one) month and the order of sentence and conviction imposed by the Learned Court below under Section 354 of IPC against the appellant is hereby set aside. The period of sentence suffered by the convict, if any, during trial or investigation shall be set off from the punishment imposed under Section 428 of Cr.P.C. The appellant be asked to surrender before the Learned Trial Court henceforth to serve out the sentence if he is on bail.

Send down the LCR along with a copy of this judgment.

Pending application(s), if any, also stands disposed of.

JUDGE