

**HIGH COURT OF TRIPURA
AGARTALA**

CRL.A(J) NO.42 OF 2017

Sri Dipankar Sarkar @ Titu
S/O-Sri Kanchan Sarkar
Village-Dhalak Tilla Para,
P.S. Birganj, Dist.- Gomati Tripura

..... Convict Appellant

Versus

The State of Tripura

.... Respondent

For Petitioner(s)	: Mr. A. Acharjee, Adv.
For Respondent(s)	: Mr. Samrat Ghosh, Panel counsel.
Date of hearing & delivery of Judgment	: 11.10.2018
Whether fit for reporting	: NO

HON'BLE MR. JUSTICE ARINDAM LODH

Judgment & Order(Oral)

11/10/2018

This is an appeal filed by the accused-appellant who has been convicted and sentenced to suffer imprisonment for a period of five years vide judgment and order dated 29.08.2016 passed by the learned Special Judge, Gomati Judicial District, Udaipur in connection with Case No. Special 9 (POCSO) of 2015.

2. The father of the victim, a six and half years old girl lodged a complaint to the Officer-in-Charge, Birganj Police Station stating inter alia that on 10.06.2014 A.D at around 11.00 o' clock in morning his daughter came back to the house from her school and at around 11.30 in morning the accused

namely Dipankar Sarkar had taken his daughter from the dwelling hut saying that his mother was calling her daughter. As the accused was a neighbor, his wife that is the mother of the victim allowed their daughter to accompany the accused, but, she was taken to a jungle and on search, it was found that the girl was crying. The daughter i.e., the victim girl disclosed that the accused had committed some ill act upon her. On the basis of the said compliant, the Officer-in-Charge, Birganj Police Station had registered a case bearing No. Birganj P.S Case No. 29/14 under Section 376(2) (i) of IPC and also under Section 6 of the Protection of Children from Sexual Offences Act. Investigation was proceeded and after prima facie satisfaction, the investigating officer submitted charge-sheet under Section 376(2)(i)/506 IPC read with Section 6 of the Protection of Children from Sexual Offence Act.

3. The learned Special Judge, Gomati District, Udaipur registered the case being Special 9(POCSO) of 2015.

4. After perusal of the materials on record the learned Special Judge has framed charges which are reproduced below:-

"Firstly-That you, on 10.06.2014 at about 1130 hours at Dalak Tilla para nearby jungle committed rape upon Miss Manika Dey (aged about 06 years and 6 months) and you thereby committed an offence punishable under Section 376(2)(i) of the Indian Penal Code and within the cognizance of this Court;

Secondly – That you, on the same date, time and place, committed criminal intimidation by threatening Miss Manika Dey to face dire consequences if she

disclosed the matter of sexual assault upon her and you thereby committed an offence punishable under Section 506 of the Indian Penal Code and within the cognizance of this Court.

Thirdly – That you, on the same date and place, committed aggravated penetrative sexual assault upon Miss Manika Dey and you thereby committed an offence punishable under Section 6 of the Protection of Children from Sexual Offence Act, 2012 and within the cognizance of this Court.”

5. Records reveal two Special Judges have framed charges on two different dates, however, the charges are similar.

6. In the course of trial, the prosecution has examined as many as 14 witnesses to substantiate the charges. There is no eyewitness to the incident which also cannot be expected in this nature of cases. So, this Court was looking for prime witnesses to substantiate the charges framed against the accused-appellant.

7. P.W-1, Sri Santosh Kr. Dey, the father of the victim girl has corroborated his statement made in the compliant. Smt. Biva Das, P.W-2 the mother of the victim in her examination has stated that the accused Titu @ Dipankar had called her daughter i.e., the victim girl stating that his mother had called her but she was taken to the jungle and raped. She has further stated that she saw some bruises in her private parts. She has further stated that the accused removed her pant after laying her daughter on the ground. During her cross-examination, the said statements were found absent when her attention was

drawn to her statement recorded during the course of investigation.

8. P.W.-3 i.e., the victim girl during her examination she has narrated the incident that Titu Kaku i.e., the accused-appellant took her to the jungle for collecting mango and there Titu Kaku had placed gamcha, removed her panty and the accused also removed his pant, laid her down on the gamcha, pressed his private part on the urine point of the victim girl. She has further narrated that she got pain but the accused gagged her mouth. The accused threatened the victim girl that he would cut down her throat if the fact was disclosed. She has further stated that she went to her mother and told her that Titu Kaku undressed her and pressed his private part on her urine point and she suffered pain. She was sent to Magistrate for recording her statement. In her Cross examination, she denied all the facts what she has deposed in her examination in chief. This statement also is found absent in her statement recorded under Section 164 Cr.P.C. I also have taken note of the evidence of this witness, a child of six years very carefully.

9. P.W.-4 is the most vital witness who is the Doctor and examined the accused as well as the victim girl. In his examination, he has categorically stated that he did not find any external injury on the person of the victim. He has further stated that the hymen was found intact with swelling. He did not make any opinion about sexual intercourse.

10. I have perused the medical report marked as Exbt. P. 3 series, wherein the Doctor has inferred that he did not find any supporting evidence whether sexual intercourse had taken place. In his deposition the Doctor had stated he did not give any opinion about sexual intercourse. However, he sent vaginal swab of the victim girl for SFSL examination. But prosecution has failed to furnish any SFSL report.

11. The Investigating Officer has been examined as P.W-12. I have carefully gone through his statements. He has stated that he sent the vaginal swab and blood samples to SFSL examination. He seized gamcha of the accused and the birth certificate of the victim. He also arranged for recording of statement of the victim under Section 164 of Cr.P.C. and he also recorded the statement of other witnesses. In his cross-examination, he has stated that he did not examine any person of the nearby houses of the complainant.

12. On the basis of the above evidence, this Court has perused and weighed the findings of the learned Special Judge, Gomati Judicial District, Udaipur while he has convicted and sentenced the accused for committing offence under Section 376 (2)(i) of the Indian Penal Code read with section 511 of Indian Penal Code and under Section 10 of Protection of Children from Sexual Offences Act, 2012.

13. It is the settled principle of law that to substantiate the allegation of rape, there has to be penetration even in slightest form/degree by the penis of the person to the vagina of the women which is absent in the present case. The Doctor in his evidence has never stated that there was any penetration of the penis of the accused to the vagina of the victim. Further, to substantiate the charge under Section 511 of the Indian Penal Code and under Section 10 of the POCSO Act, the attempt of rape as well as the story of aggravated sexual assault is necessary to be proved beyond reasonable doubt. The statements made by the prosecutrix that the accused has touched the private part of her person has not been substantiated by any scrape of evidence, rather in her cross she has categorically denied the story which she narrated in her examination in chief. The Doctor also found no injury on any parts of her body.

14. According to this Court, the story of taking away the victim girl from her house has been proved and it has also been proved that she was taken to the jungle. So, I am of the considered view that the offence committed by the accused, at best, falls under the purview of the definition of Section 354 of IPC, which is reproduced below:-

" 354. Assault or criminal force to women with intent to outrage her modesty.- Whoever assaults or uses criminal force to any women, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine."

15. From the evidence of P.W.-1, P.W-2 and P.W.-3 it has become evident that the said witnesses have tried to improvise the story which they have not stated before the Magistrate under Section 164(5) of Cr.P.C.. This has raised a serious doubt in the mind of this Court about the genuineness of the prosecution case in respect of rape or sexual assault. Thus, according to me, the accused is entitled to get the benefit of doubt.

16. The age of accused was 21 years at the time of commission of offence and it is his first offence being a young person. Considering the age of the accused and other circumstances, this Court is inclined to reduce the sentence of the accused-appellant to the period he has already undergone.

17. Accordingly, the sentence is modified and reduced to the period of imprisonment the accused has already undergone. Accused Dipankar Sarkar @ Titu be set at liberty forthwith, if he is not wanted in connection with any other case.

18. With this observation and direction, this instant appeal is allowed to the extent as indicated above.

Send back the L.C.Rs.

JUDGE