Form J(2) **IN THE HIGH COURT AT CALCUTTA**
Criminal Appellate Jurisdiction
Appellate Side

Present :
The Hon'ble Justice Bibek Chaudhuri

C.R.A. 269 of 2019

Subrata Pradhan
Vs.
State of West Bengal & Anr.

With

C.R.A. 270 of 2019

Prasanta Das & Anr.
Vs.
State of West Bengal & Anr.

For the Appellant : **Mr. Phiroze Edulji**
Mr. Ajit Kumar Mishra
Mr. Abhishek Acharya

For the State : **Mr. Saswata Gopal Mukherjee, Ld. P.P.**
Ms. Faria Hossain
Mr. Anand Keshari

Heard on : **02.03.2022 and 09.03.2022**

Judgment on : **10.03.2022**

Bibek Chaudhuri, J.

These two appeals arose assailing the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, First Court and Special Court under the POCSO Act, Kakdwip in Special Sessions Trial No.7 of 2018 under Sections 366/376/120B of the Indian Penal Code (I.P.C. for short) and also under Section 4 of the POCSO Act.

The appellant in Criminal Appeal No.269 of 2019 was convicted for committing offence under Section 366/120B/376 of the Indian Penal Code and also under Section 4 of the POCSO Act. The learned trial Judge handed down sentence of imprisonment for three years with fine and default clause for the offence under Section 366 of the Indian Penal Code. He was also sentenced to suffer rigorous imprisonment for three years with fine and default clause for the offence punishable under Section 120B of the Indian Penal Code. The convict Subrata Pradhan was also sentenced to suffer rigorous imprisonment for seven years with fine and default clause for the offence committed under Section 376 of the Indian Penal Code. He was also sentenced to suffer rigorous imprisonment for seven years with fine and default clause for the offence committed under Section 4 of the POCSO Act. It was directed that the sentences of imprisonment shall run concurrently.

In Criminal Appeal No.270 of 2019 the convicts, namely, Prasanta Das and Sampa Das were sentenced to suffer rigorous imprisonment for three years with fine and default clause for committing offence under Section 366 of the Indian Penal Code and also sentenced to suffer rigorous imprisonment for three years with fine and default clause for the offence under Section 120B of the Indian Penal Code.

On 14th December, 2017 a school going girl was kidnapped by the appellants on her way to school at about 9 A.M. She was taken to some unknown place by a car. It is also the case of the prosecution that for a considerable period of time before the incident Subrata Pradhan used to tease the girl and give her bad proposal whenever he found her on the road. He also proposed to marry her. The victim girl informed the matter to her parents and other elderly persons in her house. The de facto complainant, being the uncle of the victim girl used to escort her up to the bus stand of their village, commonly known as 5 No. Bus Stand. On the date of occurrence he could not accompany the victim girl and taking opportunity of his absence the said girl was forcibly kidnapped from the bus stand.

On the basis of the said complaint, police registered Gangasagar Coastal P.S. Case No. 125 of 2017 on 15th December, 2017 under Section 363/366/34 of the Indian Penal Code.

Since the allegation involves commission of sexual intercourse with a minor girl, the case was transferred to the Court of the learned Special Judge at Kakdwip for trial and on completion of the trial the learned Special Judge has passed the order of conviction and sentence as narrated hereinabove.

In **Rama versus State of Rajasthan** reported in **(2002) 4 SCC 571** the Hon'ble Supreme Court has expressed about the duty of the Appellate Court in the following words:-

> *"It is well-settled that in a criminal appeal, the duty is enjoined upon the Appellate Court to reapprise the evidence itself and it cannot proceed to dispose of the appeal upon apprisal of evidence by the trial Court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused, which cannot be permitted under law."*

The Hon'ble Apex Court reiterated the same guideline regarding the duty of the Appellate Court while hearing an appeal subsequently in **Md. Ali @ Guddu versus State of U.P.**, **2015 AIR SCW 1711.**

Bearing the above principle in mind let me now reconsider and reappreciate the evidence adduced by the witnesses on behalf of the prosecution in the instant case. It is not in dispute that the victim

was found missing on 14th December, 2017 and on the very next day, according to the victim she was brought to the local P.S. by the accused Subrata Pradhan. The Investigating Officer of this case, however, contradicted the said evidence of the victim girl saying that the accused Subrata Pradhan was arrested by him from Benuban within the jurisdiction of the local P.S. and the victim girl was also recovered from the said place. Whatever may be the truth, the victim girl was away from the lawful custody of her guardian for about a day.

Learned advocate for the appellants submits before the Court on the basis of the evidence on record that in the written complaint (Ext.1) it was stated by the de facto complainant that the victim was missing from 5 No. Bus Stand. But in the evidence the victim girl as well as the de facto complainant and the mother of the victim girl stated that she was allegedly kidnapped from 5 No. Bus Stand. In the F.I.R. as well as deposition of the victim girl it is stated that the victim was allegedly kidnapped at about 9 A.M. on her way to school. However, in examination-in-chief the de facto complainant stated that the accused Subrata Pradhan picked up her when she was returning from school and took her away to some place by a vehicle. According to the learned advocate for the appellant the evidence of P.W.1 and P.W.2 as well as statement made in the FIR are contradictory and

such contradiction is material contradiction that touches the root of the case.

It is further submitted by the learned advocate for the appellant that in the instant case the evidence of the de facto complainant is of prime importance. If the evidence of the de facto complainant is found to be unimpeachable and beyond reproach, a conviction can be based. According to the victim, when she was waiting at 5 No. Bus Stand for a bus to come to her school, the accused persons came by a Tata Sumo car. They stopped the car in front of her and got down from the car and proposed her to give a lift to her school. When the victim girl refused, they forcibly picked her up in the said car. Accused Prasanta Das pressed her mouth and Subrata Pradhan threatened her with dire consequences brandishing a knife. They took her to the bank of a river by the said car. Then they hired a boat and crossed the river. She came to know that she was brought to a place, named Namkhana. Then she was confined in a room. Accused Sampa Das and her husband Prasanta made her to wear a sari and accused Subrata put vermilion on her forehead and conch bangles on her hands. Accused Subrata also committed sexual intercourse with her. It is submitted by the learned Advocate for the appellant that Section 4 of the POCSO Act is a penal provision for penetrative sexual assault. In order to prove penetrative sexual assault medicological

examination is absolutely necessary. The victim girl stated that her date of birth is on 2nd April, 2004. So, on the date of occurrence she was aged about 13 years and few months. If P.W.2 was subjected to penetrative sexual assault by a grown up young man, there must be injury in her private part. Prosecution, however, failed to produce such evidence in course of trial. It is needless to say that when a minor girl is subjected to penetrative sexual assault and she denies to be examined medically, the Court is entitled to have adverse presumption against the victim girl. In her examination-in-chief the victim girl stated that she declined to undergo medical examination as there was no female doctor in the hospital. However, from the injury report this Court does not find such explanation as stated by her in her deposition. According to the learned advocate for the appellant, this is improvement or development of the prosecution story and accordingly, the prosecution story cannot be believed.

Learned advocate for the appellant further submits pointing out at the cross-examination of the victim girl that she in her cross-examination admitted that she and Subrata Pradhan developed acquaintance when Subrata used to visit his elder sister's residence. During that time they had formal conversation. According to the learned counsel for the appellant, Subrata was previously known to the victim girl. It is the defence case that Subrata used to work as a

compounder under a doctor. The victim admittedly was suffering from appendicitis and tumour. The defence had taken a specific plea that Subrata extended help for medical treatment of the victim but the father of the victim refused to pay money for medical treatment of the victim. When Subrata demanded the said money, the uncle of the victim filed a false case against them. In order to prove his contention, the accused produced series of medical documents of the victim from his custody. The said documents were marked 'X' for identification though the victim herself admitted authenticity of the said documents stating that the said medical reports were genuine, the trial Court refused to mark the said documents as exhibits. learned advocate for the appellant has called upon this Court to take judicial notice of the said documents.

Even if, judicial notice is taken over the said documents, it only proves that the accused Subrata Pradhan had some medical documents of the victim girl in his custody. This alone does not absolve the accused persons from the charge labelled against them. However, the learned advocate for the appellant has pointed out series of contradictions in the evidence of the witnesses. As for example, P.W.1 did not state to the police that on 14th December, 2017 he returned late from the market. On that date the victim girl had a computer examination in her school. So, the victim girl left

home at about 9 A.M. She did not return from school at usual hour. Then P.W.1 conducted a search for her and came to know that the accused persons had kidnapped his minor niece.

P.W.1, however, did not tell in his evidence from whom he came to know about the alleged incident on 14th December, 2017. It is stated by the de facto complainant and P.W.2 in their evidence that there are few shops at No.5 Bus Stand. If the prosecution case is believed, the victim girl was kidnapped any time after 9 A.M. from No.5 Bus Stand. The shop owners and local inhabitants were not examined by the Investigating Officer to get a clear and independent picture of the incident. The investigation of the case was absolutely perfunctory because of the fact that the Investigating Officer believed the statement of the victim girl as gospel truth.

It is further pointed out by the learned advocate for the appellant that P.W.4 Sk. Hossain and P.W.5 Dhiraj Maity were declared hostile by the prosecution. P.W.8 Sk. Bapi was tendered for cross-examination. The evidence of Malati Goswami (P.W.6) and P.W.7 Gopinath Goswami are of little importance because their evidence is hearsay in nature.

Having heard the learned Advocate for the appellants, I like to record at the outset that the aforesaid criminal case was initiated on

the basis of a written complaint submitted by one Gour Gobinda Goswami, who happens to be the uncle of the victim girl.

The statement made in the F.I.R. itself is in the nature of hearsay. From the evidence of the *de facto* complainant this Court finds serious infirmity with regard to time when the alleged offence took place. In the F.I.R., it is alleged by the *de facto* complainant that the victim girl was kidnapped on her way to school. However, she stated on oath that the accused, Subrata Pradhan, picked her up when she was returning home from school and took her somewhere by a vehicle. In view of such contradiction a reasonable question always arises in the mind of the Court as to whether the prosecution tried to rope in the appellants merely on assumptions, surmises and conjectures.

On a careful scrutiny of the evidence of P.W.2, who is the victim girl herself, it appears that she tried to cover up lacuna in the prosecution case and went on improving the case of the prosecution. To illustrate, let me jot down the following circumstances:

The victim girl refused to get examined medically after she was produced before the medical officer. In the medical examination report she clearly stated that she was not willing to get herself medically examined. But in her examination-in-chief, she stated on oath that she declined to get herself medically examined as there was

no female doctor in the hospital. Assigning a reason for her refusal to get herself examined medically as an instant of improvement, which amounts to material contradiction in the case. This Court may further knock down that the victim girl would not even state the registration number of the vehicle on which she was allegedly taken to a place by the side of a river to reach Namkhana. In her evidence, the victim girl further stated that the accused had taken away her medical documents from her school bag. The said fact was not stated by her before the investigating officer. This is the important omission, amounting to material contradiction in view of the fact that the specific case of the accused is that the accused and the victim girl had developed a relationship and the accused helped the victim girl in her medical examination. Production of medical examination report by the accused proves the defence case more believable and reliable.

The Hon'ble Apex Court in *State of* ***Madhya Pradesh Vs. Shriram and anr****.,* reported in ***(2019) 14 S.C.C. 430*** observed that where a case of the prosecution suffers from material contradiction, the accused is entitled to get benefit of doubt.

The victim girl further stated in her evidence that the accused, Subrata Pradhan, brought her to the local police station. On the other hand, the investigating officer stated that he arrested the accused, Subrata Pradhan and the victim girl on 16th December, 2017 from a

place, called, Benuban within the jurisdiction of Gangasagar Coastal Police Station.

The contradiction between the evidence of P.W.2 and the investigating officer with regard to apprehension of accused Subrata Pradhan cannot be considered as trivial. The contradiction ought to be held to be vital one and the accused persons are entitled to be acquitted in the instant appeal.

In support of his contention, learned Advocate for the appellants has placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Parvat Singh and ors. Vs. State of Madhya Pradesh,*** reported in ***(2020) 4 S.C.C. 33***.

The learned Advocate for the appellants rightly submits that hearsay evidence is excluded on the ground that it is always not desirable in the interest of justice, to get the person whose statement is relied upon, into Court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be brought to light and exposed, if they exist by the test of cross-examination. The hearsay is discarded because it is inaccurate and vague. Except no certain circumstances, hearsay evidence is not admissible, exception being Section 32 of the Evidence Act.

In the instant case, except the victim girl, all the witnesses stated about the incident on the basis of what they had learnt or

heard from the victim girl. The evidence of the said witnesses suffers from various contradictions which were recorded hereinabove.

A pertinent point was raised by the learned Advocate for the appellants by placing reliance on the judgement passed by the Hon'ble Supreme Court in *State of* ***Madhya Pradesh Vs. Anoop Singh,*** reported in ***2015 AIR SCW 3985.*** It is held by the Hon'ble Supreme Court in the above report that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 is applicable in determining the age of the victim of rape.

In the instant case, the victim stated on oath that on the date of committing offence she was aged about 13 years. The investigating officer of this case did not seize any birth certificate, school leaving certificate or any other documents to show that the victim girl was aged about 13 years at the relevant time of commission of offence. According to the learned Advocate for the appellants, in the absence of any documents regarding proof of age of the victim, her oral testimony cannot be taken into consideration.

Learned Public Prosecutor in-charge submits on this issue that the victim was not cross-examined by the defence on the question of her age or date of birth. Only suggestion was put to the victim that she was more than 13 years of age, which the victim denied.

Rule 12(3) of the Juvenile Justice (Case and Protection of Children) Rules, 2007 states :-

"In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of

one year and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

In the instant case, the prosecution did not try to collect the birth certificate of the victim girl or the school leaving certificate where she used to read at the time of occurrence or any other documents. The prosecution also failed to place her before the medical board for ascertaining of her age. In the absence of such evidence, she cannot be held to be a minor and charge under Section POCSO Act cannot stand.

Undoubtedly, the victim in a case of sexual violence is the best evidence and conviction can be based on the basis of sole testimony of the victim girl, provided the evidence of the victim is held to be trustworthy, cogent, believable and unblemished.

In ***Rai Sandeep alias Deepu Vs. State of NCT of Delhi,*** reported in ***AIR 2012 S.C. 3157****,* the Hon'ble Supreme Court was pleased to hold that the victim witness must have 'sterling quality'.

In paragraph 15 of the said report the Hon'ble Supreme Court described the qualities of a sterling witness in the following words :-

"15. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the

weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

In the touchstone of the principles laid down by the Hon'ble Supreme Court on the question of acceptance of the sole testimony of the prosecution, if the evidence of the victim girl (P.W.2) is

assessed, it would be found that the victim by her own conduct during investigation of the case falsify the case of the prosecution with regard to charge under Section 376 of the I.P.C. and Section 4 of the POCSO Act. It is needless to say that Section 4 of the POCSO Act is a penal provision for penetrative sexual assault. Therefore, it is the duty of the prosecution to prove that there was penetration at the time of causing sexual violence upon the victim girl. According to the victim, she was a minor of about 13 years of age. If a girl of 13 years is violated by a grownup person like the accused, Subrata Pradhan, there must be marks of violence and injury on her private part. The said mark of injury would be visible at the time of medical examination of the victim. However, the victim denied to have examined medically. Thus, the absence of any report of medical examination of the victim would go in favour of the accused and he is entitled to get benefit of doubt.

With regard to the charge under Section 366 of I.P.C., it is the case of the prosecution that principal accused, Subrata Pradhan, with the help of Sampa Das nee Pradhan and her husband Prasanta Das kidnapped the victim girl from No.5 bus-stand with the intention or knowledge that the said victim girl would be compelled to marry Subrata against her own will or that she would be forced or seduced illicit intercourse.

In support of the said charge, the material witness is the victim girl alone. She stated in her evidence that the accused, Subrata Pradhan, Prasanta Das and Sampa Das nee Pradhan kidnapped her and took her to a house. Prasanta and Sampa compelled her to wear a *saree* and Subrata put *vermilion* on her forehead and *conch bangles* on her hands. In order to prove the charge under Section 366, the investigating officer did not seize the *saree* which the victim girl wore on the date of occurrence. He also failed to seize the *conch bangles.*

I have already recorded that the evidence of the victim girl suffers from various infirmities. Considering such aspect of the matter, this Court is of the view that the learned Trial Judge committed an error in convicting the appellants under Section 366 of I.P.C.

It is, however, found from the record that the victim girl was found in association with Subrata Pradhan on the following date of alleging F.I.R. by her uncle. If the evidence of *de facto* complainant is accepted to be true, Subrata brought her to the police station on the next date of occurrence. If, on the other hand, the evidence of the investigating office is believed, Subrata was arrested in association with the victim girl on the next date of lodging F.I.R. Thus, it is proved that the accused, Subrata had kept the victim

away from the lawful custody of her natural guardian. It is not the case of the prosecution that the victim herself on her accord went away with the accused. It is also the case of the defence that the victim was not a minor on the date of commission of offence.

Thus, it is proved convincingly that the accused, Subrata kidnapped the victim girl on 14th December, 2017. The victim girl was under his custody till he brought the victim to the police station or he was arrested along with the victim by the investigating officer.

I have also recorded that the victim stated in her evidence that she was aged about 13 years at the relevant point of time and there was no cross-examination suggesting the victim that she was above 18 years of age on the date of commission of offence.

In view of the above discussion, though I hold that the learned Trial Judge committed error in convicting the accused, Subrata Pradhan, Prasanta Das and Sampa Das nee Pradhan under Section 366 of I.P.C. and accused Subrata Pradhan under Section 376 of I.P.C. and Section 4 of the POCSO Act, the evidence on record sufficiently proves a charge under Section 363 of I.P.C. against the appellant, Subrata Pradhan. Since the charge under Section 363 of I.P.C. is a lesser offence than that of

Section 366 of I.P.C., this Court can pass an order of conviction and sentence in terms of Section 222 of the Code of Criminal Procedure.

For the reasons stated above, the accused Subrata Pradhan, Prasanta Das and Sampa Das nee Pradhan are found not guilty in committing offence under Section 366 of I.P.C. The accused, Subrata Pradhan is also found not guilty in committing offence under Section 376 of I.P.C. and Section 4 of POCSO Act and the judgement and order of conviction and sentence passed by the learned Trial Judge is liable to be set aside. However, the appellant Subrata Pradhan is convicted under Section 363 of I.P.C.

So far as the offence under Section 363 of I.P.C., the appellants may be sentenced to suffer imprisonment of either description for a term which may extend to 7 years and shall also be liable to fine.

Now comes the question of sentence. It is found from the record that the alleged incident took place in the year 2017. The appellant is facing trial for last 7 years. He is a young man working as compounder under a medical practitioner. The prosecution has failed to establish any criminal antecedent of Subrata Pradhan. Therefore, I am of the view that incarceration in the correctional

home in association with the seasoned criminals may turn him to a hardcore criminal.

For the reasons recorded above, I am inclined to take a lenient view with regard to sentence.

The appellant, Subrata Pradhan is sentenced to suffer rigorous imprisonment of one year with fine of Rs.10,000/-, in default, imprisonment for further three months for committing offence under Section 363 of I.P.C. The period of incarceration already undergone by the abovenamed appellant shall be set off against the actual period of substantive sentence of imprisonment. However, the imprisonment for non-payment of fine shall run separately.

The appellants Prasanta Das and Sampa Das nee Pradhan are acquitted from the charge and discharged from their respective bail bonds.

Both the appeals are, thus, disposed of on contest.

Let a copy of this judgement be sent to the Court below along with lower court records.

Let photostat plain copy of this order duly countersigned by the Assistant Court Officer of this Court be handed over to the learned Advocate for the appellants free of costs.

(Bibek Chaudhuri, J.)

Suman/Sujit Srimani, A.R.s (Court)