

(2020) 06 CAL CK 0056

In the Calcutta High Court

Case No : Criminal Appeal (CRA) No. 203 Of 2016

Gulu Santra @ Ghunu Santra

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision : 12-06-2020

Acts Referred:

Protection Of Children From Sexual Offences Act, 2012 — Section 3, 5(m), 6, 7, 26(1), 29
Code Of Criminal Procedure, 1973 — Section 157, 164, 294, 313
Evidence Act, 1872 — Section 80

Citation : (2020) 06 CAL CK 0056

Hon'ble Judges : Sahidullah Munshi, J; Subhasis Dasgupta, J

Bench : Division Bench

Advocate : Debabrata Roy, Karabi Roy, N.P. Agarwala, Subhashree Patel,

Final Decision : Disposed Of

Judgement

Subhasis Dasgupta, J

This appeal found its emergence after it was preferred by accused/appellant against the judgment and order of conviction, and sentence, passed by learned Additional Sessions Judge, 2nd Court, Krishnanagar, Nadia, in Sessions Trial No. X(VIII)/2015, arising out of Sessions case No. 9 (05)/2015 (Spl.), convicting the accused/appellant under Section 6 of Protection of Children from Sexual Offences Act, 2012, and sentencing him thereunder to suffer imprisonment for ten (10) years and a fine of Rs. 50,000/- (Rupees Fifty Thousand), with default stipulation to undergo rigorous imprisonment for one (1) year more.

Before addressing the issues raised in this appeal by the accused/appellant, it would be relevant and convenient also to reproduce precisely the factual scenario of this case, as highlighted by the prosecution, discernable from the witnesses examined during trial that on 18.05.2015 at about 4.00 P.M. in the afternoon accused/appellant, to whom the victim girl would ordinarily address as "Pishemoshai", called the victim girl from her house on the pretext of supplying

grass for cows from field. Victim, a twelve (12) year old girl, by reason of her previous acquaintance with accused/appellant went to the field, responding to the call of accused/appellant, where she was forcibly raped making her undressed in a jute field situated near Chingrimari math within village Ishwarchandrapur, under P.S. Dhubulia. Victim then returned home after being subjected to such penetrative sexual assault, and narrated everything to her mother bursting into tears. The father of victim girl returned home in the evening on the same date, and took his victim daughter to Dhubulia B.P.H.C. for providing her medical attention. On the following date, victim girl was forwarded to Krishnanagar Sadar Hospital for her better medical/gynecological examination.

Police receiving a complaint, lodged by the father of victim, on 19th May, 2015 at 12.05 hrs., held investigation. The statement of victim girl as well as her mother was recorded under Section 164 Cr.P.C. The wearing apparels of victim, stained with mud, after it was produced, was seized by Investigation Officer. Ultimately, police submitted chargesheet against the accused/appellant.

The Trial Court conducted the trial after framing charge against accused/appellant under Section 6 of POCSO Act, 2012. To bring whom the charge against the accused/appellant, prosecution examined as many as fourteen (14) witnesses, amongst whom PW-1 is the victim, while PW-2 and PW-10 are the parents of victim being father and mother respectively. PW-3 is the elder brother of victim, PW-4 and PW-11 are the two doctors medically examining victim girl on two consecutive dates. (PW-11 examined victim girl being a Medical Officer of Dhubulia B.P.H.C on 18.05.2015 at about 11.00 P.M. i.e. on the fateful date of incident, while PW-4 being a Medical Officer of Krishnanagar Sadar Hospital medically examined victim girl on 19th May, 2015. The medical examination report of PW-11 corresponding to 18th May, 2015 is Exhibit-6, while the medical examination report of PW- 4 corresponding to 19th May, 2015, is Exhibit-4.) PW-13 is another doctor, who held the potency test of accused/appellant, a sixty (60) year (approx.) old man, and after examination he was held to be medically potent. PW-14 is the Investigating Officer. Besides above, rests of the witnesses are without any significance for their want of disclosure of facts in order to determine the offence.

The order of conviction and sentence was challenged in this appeal taking grounds, which are manifold. Learned advocate Mr. Roy for the appellant adverting to the medical evidence adduced by two doctors (PW-4 and PW-11) arduously submitted that the possibility of claim of sexual violation, as testified by victim herself (PW-1), had been completely ruled out, and thus the story of victim becoming a subject of aggravated penetrative sexual assault had also been falsified. It was submitted on this issue by learned advocate for the appellant that the victim was brought first at Dhubulia B.P.H.C. on the day of incident at 11.00 P.M., when the doctor did not find any injury of aggravated form of penetrative assault in the private parts of victim, while securing medical attention to victim girl. There was neither any bleeding, nor any cut mark found

in the private parts of victim girl. However, victim was referred to Nadia District Hospital for her further gynecological examination (medical examination of victim girl), and on the following day, PW-4 again ruled out the possibility of having committed any sexual violation in the private parts of victim girl, finding no tangible evidence of rape in her private parts during her medical examination. Argument was raised that when penetration upon the victim girl was ruled out by two doctors, like PW- 11 and PW-4 respectively, and that too on two consecutive dates after medically examining the victim girl, the entire edifice of the prosecution crumbled into pieces. Attention of the court was drawn to the evidence of PW-11 and PW-4, who are the two doctors medically examining the victim girl. According to appellant, when the first doctor (PW-11) stated that victim reached to her, seeking medical attention alleging a case of attempt to commit rape making departure from the statement recorded in F.I.R., and also in the statement of victim under Section 164 Cr.P.C., the very substratum of the prosecution suffered a massive dilution relying upon which no conviction could be based.

Referring decision reported in 2019 (3) C Cr. LR (Cal) 331, delivered in the case of Subrata Biswas Vs. The State, learned advocate for the appellant submitted on this issue that the substratum of the prosecution case having been falsified by the medical evidence, the accused/appellant could not be held convicted taking resort to Section 29 of POCSO Act.

Learned advocate Mr. Roy for the appellant with his usual vehemence submitted that learned Trial Judge most illegally attached his credence on the statement of victim girl and her mother (PW-1 and PW- 10) recorded under Section 164 Cr.P.C., while basing conviction without Magistrate being examined in this case, and thus content of the statement under Section 164 Cr.P.C. had been illegally appreciated, causing the order of conviction to be not sustainable. It was contended by appellant that the statement of victim girl was purposefully recorded with a delay of seven (7) days causing serious improvement in their respective statement, and the belated statement of 164 Cr.P.C. of both victim and her mother not being backed by sufficient explanation, would be strongly supportive of concoction and embellishment in the version of prosecution case.

Adverting to the evidence of victim, appellant further contended that the police officer remaining present at the time of recording statement of victim girl under Section 164 Cr.P.C., such statement would be nothing more than tutored one, and the same would not be safe to be relied upon.

Reliance was accordingly placed by appellant on decision reported in (2016) 4 C Cr. LR (Cal) 14 delivered in the case of Saroj Kumar Das Vs. State of West Bengal. that in order to appreciate the propriety of the statement recorded under Section 164 Cr.P.C. of victim and her mother, learned Trial Judge had illegally and erroneously exhibited the same without examining the learned Magistrate, and thus the learned Trial Judge had committed rudimentary breach in observing the fundamental principle of criminal jurisprudence.

Learned advocate for the appellant while assailing the statement under Section 164 Cr.P.C. submitted that it was not at all a substantive evidence, which could only be used for contradicting or corroborating its maker. Thus the learned Trial Judge committed a grave mistake, according to appellant, by getting the entire statement of victim and her mother under Section 164 Cr.P.C. exhibited without examining the Judicial Magistrate, who recorded such statement.

Appellant emphasizing such statement under Section 164 Cr.P.C. contended that nowhere in the evidence neither victim, nor her mother stated to have disclosed in their respective evidence that what they had stated in court in their respective evidence, had also been stated before learned Magistrate, and it was correctly recorded. More so, the statement of victim and her mother having contained many more additional facts, not even proved in evidence during trial, the statement recorded under Section 164 Cr.P.C. in the given circumstances of this case, would not be reliable document, and over which no credence could be attached.

Another decision relied upon by the appellant reported in (1980) 2 SCC 84, delivered in the case of Dhanabal & Anr. Vs. State of Tamil Nadu, was referred wherein the same point, stated above, was covered in regard to applicability of the statement recorded under Section 164 Cr.P.C. in criminal appeal, while securing assurance from it.

Strong contention was raised by appellant that the order of conviction and sentence caused serious prejudice to accused/appellant for questions being rolled up during examination under Section 313 Cr.P.C., thereby resulting in confusion on the part of the accused/appellant to comprehend the real purport of questions put to him requiring explanation therefor. Drawing attention of the court to the question no.3 of the examination sheet of accused/appellant under Section 313 Cr.P.C., learned advocate for the appellant contended that by putting questions involving multiplicity of phases of occurrence or acts, the learned Trial Judge ultimately had resulted a great prejudice to accused/appellant. Thus proposed accordingly that balanced and well considered answer from such several questions being put together in a same breath and that too in a single string would not be possible from accused/appellant, besides causing substantial prejudice. Deprecating the fashion of examination under Section 313 Cr.P.C. by learned Trial Judge reliance was placed on decision reported in 1997 C. Cr. LR (Cal) 54 delivered in the case of Ranjit Mondal and Sajal Barui Vs. State.

According to appellant the victim being allegedly subjected to penetrative sexual assault must be below twelve (12) years of age within the meaning of Section 5(m) of the POCSO Act, because the learned Trial Judge while holding the accused to be guilty of offence under Section 6 of the POCSO Act, considered the age of the victim to be less than 12 year old, and accordingly amenable to Section 5(m) of the POCSO Act, but there was nothing to prove the age of victim, besides oral testimony of victim. While assailing the order of conviction, learned advocate for the appellant in his effort contended that investigation was

completely silent to reveal the age of the victim, and that too at the time of occurrence. No age proving document of the victim not being collected in the absence of any ossification test, oral testimony of victim would be insufficient to support a case coming within the meaning of Section 5(m) of POCSO Act. Profit was sought to be recovered by appellant on this issue by referring a decision, reported in 2013 (7) SCC 263 delivered in the case of Jarnail Singh Vs. State of Haryana that for determination of age, both for child in conflict with law, and a child who is a victim of rape being a rape survivor, a similar procedure as laid down in Juvenile Justice (Care and Protection Rules) 2007 would be applicable, without which the assessment of the age of victim girl on the basis of ocular testimony of the victim girl and her mother would be not strong enough to make automatic application of Section 5(m) of POCSO Act.

There had been strong improvement and embellishment in the version of the prosecution case since its beginning, according to appellant, which could be found from the formal F.I.R. containing two different dates creating a great confusion as regards its institution of case in police station, and its forwarding to Court. Drawing attention to such formal F.I.R. it was submitted by appellant that though the F.I.R. was lodged on 19th May, 2015, but it was received by Court on 22.05.2015, and the delay in sending the F.I.R. to Court not being sufficiently explained, there left sufficient reasons to believe that such F.I.R. was registered much later than the given date and hour providing sufficient time to the prosecuting agency to set up a case of distorted version of occurrence.

On this issue appellant placed his reliance on decision reported in (2005) 2 C Cr. LR (Cal) 616, delivered in the case of Paltu Sheikh & Ors. Vs. The State of West Bengal in order to establish that the order of conviction will not be sustainable for want of delay being caused in sending the F.I.R. to court, and also for such delay remaining unexplained satisfactorily. Regarding the delay caused in sending the F.I.R. to court under Section 157 Cr.P.C., learned advocate for the appellant deriving capital from a decision of Apex Court reported in 1976 (4) SCC 355, delivered in the case of Ishwar Singh Vs. State of Uttar Pradesh, further contended that for want of explanation being offered as regards delay in sending the F.I.R. to court, there left strong suspicion which ultimately rendered the prosecution case to be highly improbable, keeping in view the medical evidence adduced by two doctors thereby, eliminating the possibility of committing any violation upon the victim girl.

Respondent/State supporting the order of conviction and sentence submitted that the order of conviction having reached after adhering to the relevant provisions of law, and also in consonance with the principle of law, the same would go unaltered.

Considering the respective submission of the parties, and the decision relied upon, and having perused the materials on record, we would now address the issues raised by following discussion.

The appellant challenged the evidence of victim girl contending that her version was not believable in context with medical evidence given by two doctors disproving her version, and learned Trial Judge had illegally attached his credence on statement of victim and her mother recorded under Section 164 Cr.P.C. without the learned Magistrate being examined in this case, who actually recorded such statement under Section 164 Cr.P.C. The statement under Section 164 Cr.P.C. of victim and her mother was thus contended to be tutored one and manufactured also for the delay in recording the statement of victim remaining unexplained.

In evidence victim girl/PW-1 stated that accused/appellant called her from her house on the pretext of supplying grass for cows, and she had been to the field responding to his call without any hesitation, because accused/appellant was previously known to victim, being a man of the village living in the self-same locality of victim.

She graphically provided the description as to how she suffered aggravated penetrative sexual assault in the hands of accused/appellant. Victim girl consistently spoke in her evidence that accused/appellant gagged her face, while taking her to the jute field, and thus she was not provided with any circumstances to raise any alarm. Accused/appellant got the victim undressed, and enjoyed sex after causing victim to suffer aggravated penetrative sexual assault. Victim claimed to have received a threat from accused/appellant requiring her not to disclose the incident to anybody else otherwise he would kill her brother. She returned home crying, and narrated everything to her mother as to how she had been sexually violated. In course of investigation she made statement before the learned Magistrate under Section 164 Cr.P.C. Victim was medically examined on two consecutive dates, one on 18.05.2015 by PW-11, and another on 19.05.2015 by PW-4, firstly at Dhubulia B.P.H.C. and finally at Krishnanagar Sadar Hospital respectively.

A sincere effort was sought to be established that the prosecution story in this case surfacing round sexual violation was nothing but a doubtful episode, which was amply reflected in the evidence of two doctors (PW-4 and PW-11), who medically examined the victim girl on two occasions thereby rendering the prosecution story to be inherently improbable. Victim in her cross-examination categorically stated that her wearing apparels had not been stained with blood, and no blood had been oozing out of her vagina. PW-2, father of victim supporting the testimony of her daughter on such issue clarified that the wearing apparels of his daughter had not been stained with blood, though it was full of mud. The mother of victim girl (PW-10) was silent on this issue, though she was the first person, to whom the victim narrated the incident bursting into tears. PW-10, however, stated in her cross-examination that she had seen mark of injury on her daughter's left hand. PW-10 reported the entire matter to the doctor of Dhubulia B.P.H.C. (PW-11). It was not the case of prosecution that the doctor distorted the version of the victim girl, while recording the summary of

sexual assault at the time of her providing medical attention to the victim girl. PW-11 did not find any injury on the person of the victim girl including her left hand, as claimed to have been sustained by mother of victim girl. Thus, the evidence indicative of commissioning of penetrative sexual assault, while satisfying lust by accused/appellant was shrouded with doubt. The medical examination report of the doctor attached with Dhubulia B.P.H.C., marked as Exhibit-6 sufficiently demonstrated that at the first blush the victim and her mother made out an allegation of having committed an attempt of rape on victim by accused/appellant, instead of committing any actual penetrative assault, what was depicted either in the version of F.I.R. or mentioned in the statement of the victim girl recorded under Section 164 Cr.P.C.

Thus, a version otherwise than rape, like attempted to commit rape was mentioned before the doctor, who first medically attended the victim girl on the day of incident at Dhubulia B.P.H.C. Even in a case of attempt of rape, there must have been some evidence left on the person of victim indicative of commissioning physical violence upon victim. There was nothing of the sort noticed by the two doctors examined on two consecutive dates. It is a case where a twelve (12) year old girl previously known to accused/appellant claimed to have been ravished by accused/appellant, a sixty (60) year old man, to whom victim would ordinarily address him as "Pishemoshai" for her pre-acquaintance with accused/appellant.

The veracity of the statement of victim girl given during trial thus met a great question mark in regard to her credibility. It is settled proposition of law that in a case of this nature, the utmost duty of the court is to consider the entire evidence adduced by the prosecution in its totality with utmost sensitivity. There cannot be any difference of information that without corroboration, the testimony of victim alone can be basis of conviction, provided the evidence of victim girl is otherwise acceptable.

The question is whether the evidence of victim girl coupled with her statement recorded under Section 164 Cr.P.C. in such state of circumstances can alone form the basis of conviction. The Trial Court put much emphasis upon the testimony of victim girl together with her statement recorded under Section 164 Cr.P.C., since it was given by a twelve (12) year old girl, and formed the same basis of conviction after attracting the presumption available under Section 29 of POCSO Act, for no contrary circumstances in denial of the offence having been established by the accused/appellant.

It is not a case of conflict between medical evidence and the oral evidence over the issue of minor contradiction between the two. The pertinent question is whether medical evidence given by two doctors in proof of medical examination of victim girl soon after occurrence should be given precedence over the testimony of victim girl or not.

The consistent view of Apex Court in this regard is that a medical witness is

called as an expert to assist the court, who is not a witness of fact, and the evidence given by the Medical Officer is really of an advisory character, given on the basis of symptoms found on examination. The expert witness is expected to reveal before the court all materials inclusive of data, which induced him to come to the conclusion and enlighten the court on the technical aspects by explaining the terms of science, so that the court although not an expert, may form its judgment on those materials after giving due regard to the expert.

In the case in hand, not only once, but twice victim was medically examined, and both the doctors consistently ruled out the possibility of committing any penetration upon the victim for want of any symptoms being exhibited on her person including her private parts. PW-4/doctor coming a step further stated that he did not find any injury on valva or vagina. Not even the redness or tenderness was noted by PW-4/doctor.

Hymen was also found intact. It is nobody's case that because of intervention of delay caused in the medical examination of victim girl, the probable medical evidence found on the person of victim disappeared. So, neither there was evidence suggestive of attempt of rape, nor commission of rape upon the victim girl. Proof of penetrative sexual assault in terms of Section 3 of POCSO Act is must, without which there cannot be any aggravated penetrative sexual assault and that too upon a girl of below twelve (12) years of age. Since medical evidence of the two doctors will not attract any of the eventualities mentioned in Section 3 of POCSO Act, it would be very difficult and doubtful also in such circumstances to believe the version of victim, as testified during trial merely upon consideration of the statement of victim girl given during trial together with her statement recorded under Section 164 Cr.P.C.

The very substratum of the prosecution case being based on the assertion to have sustained penetrative sexual assault, in our considered view, seems to be a doubtful episode by reason of the evidence of two doctors. Irresistibly, then the oral evidence of victim coupled with her statement recorded under Section 164 Cr.P.C., for the peculiarity of circumstances involved in this case, cannot be given precedence to the medical evidence. It is not at all desirable that the incident would be witnessed by many independent people living around the victim girl. When the testimony of victim girl having failed to secure any objective support from the medical evidence given by two doctors, the testimony of victim cannot be taken to be otherwise believable, inherently probable also.

It is quite impossible to assume that there will be no injury on the person of victim, a twelve (12) year old girl, including her private parts in a case, where she claimed to have been subjected to aggravated penetrative sexual assault by accused/appellant, a sixty (60) year old man.

In the given set of facts, we are of considered opinion that the testimony of victim has not passed the test of probability by narrating the incident, which was not consistent in itself, and the veracity of the statement of victim girl adduced in

her evidence pointing to the guilt of accused/appellant being found to be improbable by reason of the medical evidence thereby rendering her testimony to be mismatch with the rests of the evidence, she adduced.

The oral testimony of victim claiming to have been violated not being supported by the two doctors upon their medical examination, accordingly would render her testimony to be improbable and not natural also. The credibility of such a witness being thus tainted with doubt for the medical evidence of two doctors, it will hardly pave the way for attracting the presumption available under Section 29 of POCSO Act. The decision referred by the appellant on this issue delivered in the case of Subrata Biswas (*supra*) was thus profitably attracted to take care of the situation discussed hereinabove.

Referring some portion of evidence revealed in cross-examination of victim, challenge was raised submitting that when victim herself admitted that she had visited Dhubulia P.S. prior to attending the court, and when police personnel was present at the time of recording the statement, and the learned Magistrate having recorded the statement as per dictation of mother of victim, the ordinary inference would be that the statement recorded by the learned Magistrate was a tutored one.

Admittedly, in this case the learned Magistrate, who recorded the statement of victim girl and her mother could not be examined. In course of trial the statement of victim girl and her mother recorded under Section 164 Cr.P.C. was tendered in evidence, and marked as Exhibits-"1" and "5" respectively, without any objection being raised by the defence. In the absence of any objection being raised by the defence over the genuineness of such statement, recorded under Section 164 Cr.P.C., the learned Trial Judge got the same exhibited adhering to the provision available under Section 294 Cr.P.C. thereby, dispensing with the formal proof of such document as regards its contents therein.

True it is that there was nothing in the evidence shown in the testimony of victim and her mother that whatever they had stated in their respective 164 statement was true. More so, even an admission by witness that a statement recorded under Section 164 Cr.P.C., and that what he/she stated there was true, would not make the entire statement admissible.

The proposition of law is very clear as to the applicability and availability of statement recorded under Section 164 Cr.P.C. of a witness that such statement cannot be used as substantive evidence, and can be used only for contradicting and corroborating him, and none else.

The scheme of cross-examination adopted by the accused/appellant during the trial of this case is very significant to reveal that not a single question was put to victim in cross-examination for the purpose of establishing contradiction with reference to her former statement recorded under Section 164 Cr.P.C. The probable opportunity of contradicting a witness with reference to her former statement recorded under Section 164 Cr.P.C. thus could not be utilized. This is a

case where learned Magistrate recorded the statement of the victim girl adhering to the formalities prescribed in Section 164 Cr.P.C. There was no cross-examination even to establish that the statement was not voluntarily made. The learned Magistrate thus in discharge of his official functions recorded the statement under Section 164 Cr.P.C. The proof of such document cannot be doubted for the learned Magistrate remaining unexamined bearing in mind the presumption available under Section 80 of Evidence Act, unless circumstances have been brought out in evidence justifying the calling of the Magistrate, as a witness. This proposition of law is in consonance with the view of Apex Court reported in (1981) 2 SCC 224, delivered in the case of Madi Ganga Vs. State of Orissa.

Though, learned Trial Judge proceeded to rely upon the statement of victim girl under Section 164 Cr.P.C. coupled with her own testimony in a case where the medical evidence already falsified the same, rendering her testimony to be not inherently probable, it would not be of much help to accused/appellant for the Magistrate remaining unexamined in this case, so far as proof of content of statement of victim girl recorded under Section 164 Cr.P.C. is concerned. The decision so referred by accused/appellant rendered in the case of Saroj Kumar Das (Supra) is not that of much significance in the given text of this case and its evidence adduced therefor.

As regards the question surfacing the victim to have made statement after being tutored, it appears that though victim in her cross-examination stated that she had been to police station before coming to court for her statement under Section 164 Cr.P.C., and further that the learned Magistrate recorded her statement after being dictated by her mother in presence of a police personnel in the chamber of learned Magistrate, but the same would not make her entire testimony favourable to the purpose of accused/appellant, as the victim herself clarified in her cross-examination that she did not tell the incident to learned Magistrate, as per request of police personnel and her mother, and further she had stated voluntarily. The mother of victim girl (PW-10) in her cross-examination even denied the presence of police personnel at the time of recording statement of victim daughter by learned Magistrate. The magisterial certificate appended to the statement under Section 164 Cr.P.C. revealed the same thing that no police personnel was present at the time of recording statement. Under Section 26(1) of POCSO Act, parents of the child or any other person in whom child has trust or confidence are authorized to remain present at the time of recording statement by learned Magistrate under Section 164 Cr.P.C. and presence of mother will not necessarily leave any clue that whatever was stated before the learned Magistrate, it was an afterthought being tutored by her parents. In such circumstances, reading some lines from the cross-examination of victim girl absolutely in isolation with rest of the evidence of victim girl is thus opposed to the legislative intendment behind this piece special Act. The contention thus raised doubting the statement of victim girl to have been tutored is thus without any significance.

Significantly there was no cross-examination to Investigating Officer for obtaining clarification in explanation of delay caused in recording the statement of victim girl under Section 164 Cr.P.C., but that was not so done, yet it would not ipso facto make the statement of victim girl under Section 164 Cr.P.C. to be intrinsically reliable being inherently probable even in a absence of plausible explanation being offered by the prosecuting agency. Thus, belated recording of statement of victim girl in absence of any explanation of delay, left room for concoction and embellishment in the version of prosecution story, what was rightly contended by the accused/appellant.

With respect to the challenge raised by appellant for question being jumbled up, and put accordingly to accused/appellant during his examination under Section 313 Cr.P.C. causing much prejudice to him, it appears that the decision referred above delivered in the case of Ranjit Mondal and Sajal Barui (Supra), dealt with a case of murder, when the question was addressed by Division Bench of this Court holding that question rolled up confusing in nature involving a multiplicity of phases of occurrence or acts are not permitted to be put in stretching all the questions together by single string. It was a case where tender aged school boys crossing sixteen (16) years of age were placed in a trial with an allegation of committing murder. Since tender aged school boys were faced with the charge of murder, they were considered to be not in proper frame of mind for their the then mental state. It was in this circumstances a balanced and well considered answer was held to be not expected from such tender aged boys. The referred decision is patently distinguishable from the instant case on facts. The accused/appellant being a sixty (60) year old man was charged with an allegation of having subjected the victim to aggravated penetrative sexual assault. A man at the age of sixty (60) years can always be taken to be not comparable to tender aged school going boys within the age group of sixteen (16).

There left nothing that the accused/appellant was not in his proper frame of mind, and resultantly his mental faculty was injured to a great extent to comprehend the question put to him requiring explanation in terms of the evidence adduced against him. The important question to be noted is that the defect canvassed by reason of jumbled question being put to accused during examination under Section 313 Cr.P.C. is a curable irregularity not vitiating the proceeding. From the question put to the accused/appellant in course of this examination under Section 313 Cr.P.C., as revealed from question No. 3, it appears that explanation was sought for referring a same set of transaction providing the accused/appellant to comprehend unconditionally, and there was hardly any prejudice caused to accused by reason of putting questions connecting some events arising out of self-same transaction. Mere claim of prejudice, without any tangible proof, is thus without any consequence. The decision so referred by the appellant (Ranjit Mondal and Sajal Barui Supra), would hardly find its application in the given set of facts.

Curious enough to note that nothing was there in the cross-examination of the

witnesses challenging the age of the victim girl. In the F.I.R. victim was described to be of twelve (12) year old girl, and in course of evidence victim, declared her age as twelve (12) years. Both the parents of victim girl are, however, silent as regard the age of the victim girl. Though the accused/appellant did not challenge the age of victim girl during the trial, but he cannot be estopped from challenging the same during the appeal for the same being question of law. Even in absence of challenge being raised, disputing with the age of victim girl in all fairness, it is incumbent upon the prosecuting agency to furnish something in proof the age of victim girl at the time of occurrence.

Here in this case nothing was undertaken by the investigating agency even by subjecting the victim girl to Ossification Test. The learned Trial Judge having attracted Section 5(m) of the POCSO Act, holding the victim to be less than twelve (12) year old, in all fairness of the trial, there ought to have been sufficient adherence to the decision reported in Jarnail Singh (Supra) for determination of age of the victim of a crime being alleged rape survivor. The testimony alone of victim girl as such in the given set of facts claiming her to be twelve (12) year old would not itself be sufficient to attract the prosecution case within the meaning of 5(m) of POCSO Act, for want of sufficient corroborative evidence being adduced to that effect.

The delay in sending the F.I.R. to learned Magistrate, not remaining sufficiently explained, was contended to have left room for concoction and embellishment in the version of prosecution case. Admittedly, the occurrence was reported to police station on 19th May, 2015, at about 12.05 hrs. for an incident having held on 18th May, 2015, at about 4.00 P.M. in the afternoon, which was received in court on 22.05.2015. Under Section 157 Cr.P.C., information of cognizable offence received in police station shall be forwarded to nearest Magistrate empowered to take cognizance of such offence forthwith.

The two dates shown in the formal F.I.R., according to appellant, was suggestive of a fact that F.I.R. was registered much later than the given date and hours offering sufficient time to the prosecuting agency to set up a distorted version of the occurrence.

The decision referred by the appellant delivered in the case of Paltu Sheikh & Ors. (Supra), propounded that in absence of an explanation, there left scope to suppose that opportunity was there on the part of prosecuting agency to set up a distorted version favourable to its purpose. Most pertinent question is whether there was any extraordinary delay caused in sending the F.I.R. to learned Magistrate remaining un-explained or not. So far this case is concerned, sufficient materials were there to reveal the commencement of investigation as soon as F.I.R. was received in P.S. The victim was put up for her medical examination on the date of incident, and even on the following day, which itself was sufficient to show the commencement of the investigation. When there had been commencement of investigation, mere receipt of F.I.R. in court with delay, if any, cannot be considered to be extraordinary. Unless there is extraordinary

delay, there is hardly any occasion to obtain any explanation, but it is always desirable that the delay in sending the F.I.R., if there be any, must be explained. But for the one and only delay, the prosecution case should not be looked with suspicion. The decision so referred above, would thus hardly find any scope to be operated over in the given set of facts and circumstances of this case.

During the course of trial, accused/appellant availed of defence on three counts. Firstly, denying the offence in any manner whatsoever. Secondly, claim based on false implication, and thirdly, being failure to squeeze money from accused/appellant with a threat of false implication in a case of sexual offence.

The evidence elicited in the cross-examination is not so convincing indicative of false implication. There is an admission of victim that one Sankar Kirtaniya is her adjacent neighbor, and further Sankar Kirtaniya had a land dispute over the demarcation of land with accused/appellant Gulu Santra. Victim also found accused/appellant and Sankar Kirtaniya quarrelling together. An unproductive suggestion was put in cross-examination to victim and her mother that the instant case was a product of false implication, initiated at the instance of Shankar Kirtania after being instigated to lodge a false case against accused/appellant, which was ultimately denied. There is no convincing positive evidence as regards the demand of money. Besides denial of offence, two other defence adopted during trial appears to us to be inconsequential.

The chance of false implication is also equally not good enough to be duly appreciated. But failure of defence will not automatically establish a prosecution case.

In the given context of this case and for the discussion made above, the testimony of victim claiming to have suffered aggravated penetrative sexual assault is not believable for the same being inherently improbable, and not natural also, irrespective of the failure or weak stand of accused/appellant based on false implication.

The credibility of testimony of victim thus being found to be shrouded with doubt, there cannot be little reliance on her testimony even by scaling down a sentence, attracting the provision of Section 7 of POCSO Act.

Both the conviction and sentence accordingly are not sustainable.

In our considered view, accused/appellant thus deserves to be favoured with an order of acquittal, and he also be discharged from his bail bond.

The appeal thus stands disposed of.

Department is directed to send a copy of this judgment along with Lower Court Record to the concerned Trial Court without causing any delay through the concerned District Judge.

Urgent certified copy of this order, if applied for, be given to the appearing parties as expeditiously as possible upon compliance with the all necessary

formalities.

I agree.