

HIGH COURT OF TRIPURA
A G A R T A L A

Crl. A(J) No.52 of 2024

Sri Rajendra Debbarma @ Rajen

Son of Lt. Mangal Debbarma, Resident of Lambabil, PO & PS
Manu, District Dhalai Tripura.

..... Appellant(s)

- V e r s u s -

The State of Tripura

.....Respondent(s)

For the Appellant(s)	:	Mr. Ratan Datta, Advocate. Mr. A. Baidya, Advocate. Mr. S. Dhanuk, Advocate.
For the Respondent(s)	:	Mr. Rajib Saha, Addl. P.P.
Date of hearing & delivery of Judgment & Order	:	6th February, 2025.

Whether fit for reporting	:	<table><tbody><tr><td>YES</td><td>NO</td></tr><tr><td>√</td><td></td></tr></tbody></table>	YES	NO	√	
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HON'BLE MR. JUSTICE S. DATTA PURKAYASTHA
JUDGMENT & ORDER (ORAL)

Heard Mr. Ratan Datta, learned counsel appearing for
the appellant. Also heard Mr. Rajib Saha, learned Addl. P.P.
appearing for the State-respondent.

[2] The judgment dated 05.08.2024 passed by learned
Special Judge (POCSO), Dhalai Judicial District, Ambassa in Spl.
(POCSO) No.08 of 2023 convicting the appellant under Section
341,354, 506 IPC and also under Section 8 of the POCSO Act, 2012
sentencing the appellant to suffer simple imprisonment for 1(one)
month for commission of offence punishable under Section 341 IPC
and to pay a fine of Rs.500/- under Section 341 IPC and also to

suffer rigorous imprisonment for 5(five) years for commission of offence punishable under Section 354 IPC and to pay a fine of Rs.5,000/- under Section 354 IPC and to suffer rigorous imprisonment for 2(two) years and to pay a fine of Rs.1,000/- under Section 506 IPC. Appellant was also sentenced to suffer rigorous imprisonment for 5(five) years and to pay a fine of Rs.5,000/- under Section 8 of the POCSO Act, 2012, are under challenge in this appeal. All the sentences were directed to run concurrently.

[3] The gravamen of the accusation as given in the FIR lodged by the father of the victim that on 21.08.2023 (Monday) at about 06.00 am when the victim was going to her tuition centre from her house, on the way the appellant forcibly pressed her mouth, took her to the nearby jungle and raped her. The police authority on receipt of the FIR, lodged on the same day at about 12.55 hours, registered it as Manu PS case No.25 of 2023 under Section 341,376(1),506 IPC and Section 4 of the POCSO Act, 2012 and on completion of the investigation, laid the charge sheet under the similar provisions of law.

[4] Learned Trial Court also framed the charges under above said provisions i.e. under Section 341, 376(1), 506 IPC and also under Section 4 of the POCSO Act for wrongfully restraining the victim on the above said date, time and place, for committing

rape upon her and also for threatening her in fear of death not to disclose the incident to anyone.

[5] The victim is the sole eye witness of the incident and so far the charge under Section 506 IPC is concerned, the victim in her evidence nowhere stated that after commission of the alleged rape, he threatened her not to disclose the said incident to anyone rather, the victim gave statement of alleged threatening in another form just prior to the commission of alleged rape which was not reflected in the charge. Anyway, after conclusion of the trial, learned Trial Court declined to convict the appellant under Section 376(1) IPC, rather convicted him under Section 354 IPC and under Section 8 of POCSO Act in lieu of Section 4 of the Act.

[6] Mr. Ratan Datta, learned counsel appearing for the appellant submits that total 19(nineteen) witnesses were examined in this case, out of whom, PW-9 is the victim and PW-8 and PW-10 are her parents. PW-11, PW-12, PW-13 and PW-15 are her near relatives like her grandmother and aunts who are basically witnesses of hearsay evidence. Mr. Datta, learned counsel contends that the key witness of the alleged incident is PW-9 herself and her parents are also relevant witnesses whose evidences are required to be scrutinized meticulously and cautiously. According to Mr. Datta, learned counsel, in the FIR there was no allegation of any sort of threatening or molestation of the victim and even the victim or her parents also did not utter a single word regarding

molestation of the victim by the appellant but despite the same, just relying on a stray evidence of the Medical Officer [PW-17] conviction was rendered under Section 354 IPC and also under Section 8 of the POCSO Act against the appellant. Mr. Datta, learned counsel also contends that the medical report itself was also a perfunctory one as the doctor did not mention anything as to whether she had examined the internal or external part of the genital of the victim and did not even make any observation on that point despite the fact that it was a case registered under Section 376(1) IPC and therefore, the evidence of Medical Officer was also not reliable though learned Trial Court has heavily relied on her. Referring to the forensic report under Exbt.10, Mr. Datta, learned counsel also submits that the forensic report was also negative for the presence of any seminal stain/spermatozoa.

[7] The basic contention of Mr. Datta, learned counsel is that when the prosecution came up with the specific story of rape against the appellant and when such allegation failed, there is no scope to convict and punish the offender under Section 354 IPC or under Section 8 of the POCSO Act on the same set of evidence. Mr. Datta, learned counsel also raises another point that the evidences of PW-1, PW-2, PW-5, PW-6, PW-7 and PW-14 were not placed before the appellant while examining him under Section 313 Cr.P.C. and therefore, their evidences which also includes the evidences on the age of the victim cannot be taken into consideration to the prejudice of the appellant and even learned Trial Court also did not

give any specific finding on the age of the victim though the appellant was convicted under the provision of Section 8 of the POCSO Act. Mr. Datta, learned counsel, finally relies on certain decisions of the Apex Court and also of this Court which will be reflected in the later part of this judgment.

[8] Mr. Rajib Saha, learned Addl. P.P. representing the State-respondent, however, strenuously argues that that the victim was completely a trustworthy witness and law is settled that based on the sole testimony of the victim, conviction can be maintained. To buttress his submission, Mr. Saha, learned Addl. P.P. also relies on a decision of the Apex Court in ***Phool Singh vs. State of Madhya Pradesh, [(2022) 2 SCC 74]*** wherein the basic principle that conviction can be given on the sole testimony of the victim/prosecutrix when her evidence is found to be trustworthy, unblemished and credible, was reiterated by the Apex Court at paragraph 8 of the said decision. Mr. Saha, learned Addl. P.P. also argues that even if other charges are found to be not proved, still in view of the evidence of the victim, the conviction under Section 341 is required to be affirmed. In this regard, Mr. Saha, learned Addl. P.P. also refers another decision of the Apex Court rendered in ***Didde Srinivas vs. State SHO, Podduru Police Station and another in a Criminal Appeal arising out of SLP (Crl.) No.8028/2023*** decided on **13.11.2024** where in view of the given facts and evidences of that case, the Apex Court also

maintained conviction under Section 451 IPC while affirming the conviction under Section 354 IPC.

[9] This Court has given due consideration to the rival submissions of the parties and also have meticulously gone through the evidences as led by the prosecution. The victim [PW-9] stated in her evidence that on 21.08.2023 at about 05.00/05.30 am, when she was going to her tutor's house at Lambabil, the appellant suddenly appeared there on her way, gagged her mouth and placing a latex collecting blade on her neck forcibly dragged her in a nearby rubber plantation, threatened her with dire consequences showing the blade, disrobed her and committed sexual intercourse with her against her will and also repeatedly pressed her breasts and other parts of her body. She further deposed that the appellant put his penis on her private part but suddenly she bite his arm and somehow managed to flee away therefrom. Then she ran towards the house of her tutor but as she was not feeling well, she returned to her home and narrated the entire episode to her mother in presence of her father.

[10] PW-8, the father of the victim also similarly stated that on the alleged date and time when her daughter was going to her tutor's house, the appellant appeared on her way and giving threat to her with a latex collecting blade took her to the nearby jungle and then committed rape upon her and after hearing above said incident from his daughter, he lodged the FIR. PW-10, the mother

of the victim also in similar manner deposed specifically about commission of rape upon the victim by the appellant. Neither of the parents of the victim stated anything about any sort of molestation of the victim by the appellant.

[11] PW-11, the maternal grandmother of the victim stated that she had learnt about the incident from the mother of the victim. She also specifically stated about commission of alleged rape by the appellant upon the victim. PW-12, one aunt (victim's father's sister) stated that getting a call from the father of the victim she went to the house of the victim and came to know about the incident of commission of rape by the appellant upon the victim. PW-13 is maternal aunt of the victim and she also stated that getting a call from the mother of the victim she went to their house and came to know about such commission of rape upon the victim by the appellant. So, all the above said witnesses have also categorically stated about commission of rape upon the victim by the appellant. Though PW-13 made an omnibus statement that from the victim she had learnt that the appellant removed wearing apparels of the victim, molested her in the jungle and committed sexual intercourse with her against her will but did not say anything as to how or in which manner she was molested. Learned Trial Court, however, did not believe evidences of these witnesses with reference to the allegation of commission of rape and declined to convict the appellant on the charge under Section 376(1) IPC or under Section 4 of the POCSO Act. As it appears, learned Trial

Court mainly relied on the evidence of Dr. Doyel Singha [PW-17], Medical Officer while convicting the appellant under Section 354 IPC and Section 8 of the POCSO Act.

[12] The said Medical Officer [PW-17], in her evidence stated that on 21.08.2023, she was posted as Medical Officer at Chailengta Sub-Divisional Hospital, Dhalai and on requisition by the police authority, she examined the victim on that day and also collected her vaginal swab, anal swab, pubic hair, urine sample, blood sample and her undergarments during such examination including her biological fluid. She further deposed that during said examination, the victim gave her the history of molestation by the appellant after taking her in a forest area at Lambabil and according to said witness, the victim also further stated to her that the accused had touched her private parts and genital organs and also applied force upon her and the victim was injured. According to the doctor, during examination, she noticed mark of physical force applied upon her left arm but no external injury could be found. What was meant by the said witness by the words "mark of physical force" were not further elaborated by her in her evidence. She also deposed that there was no sign of penetration but the accused molested the victim and kissed her on several portion of her person. According to her, she did not find any sign of recent sexual intercourse upon the victim. In her medical report [Exbt.3], she however did not specifically mention anything about any molestation of victim by the appellant and kissing on her several

parts, rather in her report, she mentioned only kissing on forehead, nose and cheeks. In her injury report, the Medical Officer also gave the history of touching female genital part by the accused's genital. However, story of such kissing on forehead, nose and cheeks and such touching of female genital by the accused's own genital were not corroborated by the victim herself rather she brought the specific story of physical intercourse.

[13] This Court is, therefore, in agreement with the submission of Mr. Datta, learned counsel that when the prosecution evidence is led specifically regarding commission of rape upon the victim and it fails, the conviction cannot automatically be converted or altered to Section 354 IPC unless there are satisfactory evidences available to attract such provision. On that point, Mr. Datta, learned counsel relies on a decision of this Court in ***Babul Laskar vs. State of Tripura, [(2014) 1 TLR 1027]*** wherein at Para 23 it was observed that if the allegation of rape cannot be believed, on the similar set of facts it is very difficult to arrive at a conclusion that modesty of the prosecutrix was outraged by the accused inasmuch as there is no room to separate the facts in different compartments and to separate the grains from chaffs. It was also further observed that if the allegation of rape is doubtful and cannot be believed, in the given facts and circumstances, no other allegation on the same bundle of facts can be believed. Mr. Datta, learned counsel also relies on another decision of the Gauhati High Court, Agartala Bench in ***Pulin Bihari Roy vs. State***

of Tripura, [(2012) 6 GLR 138] wherein it was similarly observed by the Court that where the allegation of rape fails, under the circumstances, on the same bundle of fact, the accused cannot be punished for outraging of modesty, unless the ingredients thereof as to the commission of assault or use of criminal force, by the accused, on the prosecutrix, with an intention of outraging of modesty or knowing it to be that he would thereby outrage her modesty, are established.

[14] Learned Trial Court, as it appears, while convicting the appellant under Section 354 IPC and Section 8 of the POCSO Act referred to above said evidence of Medical Officer in respect of the history given by the victim to her and held him guilty under said provisions. But, learned Trial Court failed to consider the position of the law that the medical evidence is a opinion evidence advisory in nature and it cannot be treated as substantive piece of evidence with reference to the commission of alleged offence. The medical evidence is used for the purpose of corroboration or discredoration with reference to the substantive evidence adduced in a criminal trial by the prosecution in respect of the commission of crime. Mr. Datta, learned counsel also relies on a decision of the Division Bench of the Guwahati High Court, Agartala Bench in case of **State of Tripura vs. Haradhan Majumder and others, [(2010) 6 GLR 134]** wherein at Para 21 the followings were observed:

"21. There is nothing in the prosecution evidence from which it can be said that either the accused respondent No.1 or the mother in law, the respondent No.2 is a party to the strangulation as opined by the medical officer, P.W.7. **By this time, it is also settled by the Apex Court that the medical evidence is a opinion evidence and only on the basis of the medical evidence, a person should not be convicted unless such evidence is corroborated by other ocular evidence of prosecution witnesses.** As in the instant case, there is no corroborative evidence to support the evidence of the doctor, P.W.7, we are unable to accept the evidence of doctor, P.W.9 so far his opinion regarding the cause of death by strangulation. In the absence of any injury on the body of the deceased, the evidence of doctor also cannot be relied upon by us as he did not mention in the post mortem report regarding the age of the injury, which he found on the body of the deceased and whether those evidences are ante mortem or post mortem are highly essential to prove the case of the prosecution, but those are totally absent."

In the above said decision, it was also categorically observed that a person should not be convicted only on the basis of medical evidence unless such evidence is corroborated by other ocular evidence of the prosecution.

[15] The Scientific Officer-cum-Assistant Chemical Examiner namely, Smt. Rupali Majumder [PW-7] in her evidence also deposed that on examination of vaginal swab, anal swab, pubic hair, urine sample, one pink colour undergarment of the victim etc, seminal stain/spermatozoa of human origin could not be detected therein. This Court is also in agreement with the submission of Mr. Datta, learned counsel that when the prosecution came up with specific story of rape upon the victim and also led specific evidences in that line and when learned Trial Court declines to rely on such evidence with reference to the charge of rape or penetrative sexual assault, one should not be held guilty on the same set of evidences under Section 354 IPC in absence of any

other specific and satisfactory evidence of molestation of the victim is found available. Therefore, learned Trial Court committed err in convicting the present appellant under Section 354 IPC and under Section 8 of the POCSO Act for the reasons as discussed above.

[16] Though Mr. Saha, learned Addl. P.P. emphatically submitted that even if the conviction under Section 354 IPC or Section 8 of POCSO Act fail, still conviction under Section 341 IPC is required to be maintained but this Court is not in agreement with such contention inasmuch as when the charges or conviction for the prime offence has failed and the conviction cannot be maintained in respect of above said principal offence under Section 354 IPC and Section 8 of the POCSO Act, it will also not be proper to maintain conviction under Section 341 IPC which is a preparatory part of the principal offence. As discussed in the earlier part of the judgment about the position of materials with reference to the conviction under Section 506 IPC and also in view of that the conviction under the principal offence under Section 354 IPC has already failed, the conviction under Section 506 IPC should also not be maintained.

[17] In view of the discussion made hereinabove, the appeal is allowed. The judgment of conviction and sentence passed by the learned Special Judge (POCSO), Dhalai Judicial District, Ambassa in Spl. (POCSO) No.08 of 2023 as indicated earlier are hereby set aside.

Appellant is set at liberty.

The bail bond liability of the surety stands discharged.

In terms of the above, the appeal is disposed of.

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

JUDGE

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