IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 263 of 2017

Asgar Ali

Vs.

The State of West Bengal & Anr.

For the Appellant : Mr. Apalak Basu.

For the State : Ms. Anusuya Sinha,
Mr. Pinak Kr. Mitra.

For the Opposite Party No. 2 : None.

Hearing concluded on : 04.08.2023

Judgment on : 31.08.2023

Shampa Dutt (Paul), J.:

1. **THE APPEAL:-**

The present appeal is against a judgment dated 30.01.2017 passed by the learned Additional Sessions Judge, Fast Track Court No. 3, Barrackpore in S.T. Case No. 1(12)/2010 (S.C. No. 10/2010) corresponding to G.R. No. 1026/2009 arising out of Khardah Police Station Case No. 163/09 **dated 29.03.2009** under Sections 342/377/354/376(f) of the Indian Penal Code.

2. THE DEFENCE:-

Mr. Apalak Basu, learned legal aid counsel appearing for the appellant has submitted that the appellant was made to stand trial in the instant case which was started on the basis of a complaint made by one Morgina Bibi to the effect that on 28.03.2009 at about 07.00 PM her neighbour Asgar Ali called her daughter aged about 3 years to his room when there was no one. When her daughter did not return within reasonable time, she out of suspicion went to the room of the appellant and found that he was entering his penis in the mouth of her daughter and had opened her pant. She after seeing the same took her daughter from the clutch of the accused person and has also stated that many people had assembled after hearing her hue and cry.

On conclusion of investigation, charge sheet was filed against him and charge was framed under Sections 342/377/376(2)(f) of the Indian Penal Code to which he pleaded not guilty and claimed to be tried.

In course of trial, the prosecution examined nine witnesses and also exhibited number of documents.

The defence did not examine any witness of its own but through a process of effective cross-examination tried to probablise its own case and improbablise the prosecution case.

Upon conclusion of the trial, the learned Trial Court has been pleased to convict the present appellant under Section 377 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for a period of 7 years and to pay a fine of Rs.5,000/-, in default, to suffer simple imprisonment for 3 months.

Hence, the appeal on the ground that the Learned Judge failed to appreciate that the independent witnesses did not prove the prosecution case and no injury was found on any portion of the body of the victim.

That due to previous grudge, the complainant (P.W. 3) lodged the complaint against the appellant. There were no independent witnesses though it is the case of the prosecution that many people had assembled at the place of occurrence after hearing the hue and cry of the complainant i.e. the mother of the victim.

That the evidence of P.W. 3 and P.W. 6, is fully contradictory.

That the prosecution has thoroughly failed to bring home the charge against the appellant beyond reasonable doubt.

That the examination under Section 313 of Criminal Procedure Code was illegal, violative of the principle of natural justice and fair play and caused gross prejudice to the appellant, and has rendered a mistrial in the eyes of law.

That the impugned judgment is bad in law and liable to be set aside.

That the sentence is too severe.

3. THE PROSECUTION:-

The prosecution case, in brief, is that on 28/03/2009 at about 7.30 pm, the de-facto complainant's minor daughter Sk. **(name of victim minor girl is withheld), aged 3 years,** was playing in front of her house. At that time de-facto complainant's neighbour Asgar Ali, the appellant called her minor daughter to his house, in absence of other inmates of his house on the pretext to give her money. The de-facto complainant became suspicious and she peeped through the window and saw Asgar Ali

penetrate his penis into the mouth of her daughter and pull of her pant. Then the de-facto complainant pushed the door and rescued her daughter and started shouting. Local people assembled at the spot.

The said incident led to the registration of the present case, subsequent trial and conviction.

The State has relied upon the judgment of Gujarat High Court in ***Lohana Vasantlal Devchand & Ors. vs. The State*** reported in ***1967 SCC Online Guj 22.***

4. <u>THE EVIDENCE:-</u>

P.W. 1 is the Doctor who examined the victim (Medical Report – Exhibit 1).

P.W. 2 is the Doctor who examined the accused (Medical Report – Exhibit 2).

Written complaint has been proved by the complainant and mother of the victim (Exhibit 3) and contents reiterated. Her statement recorded under Section 164 Cr.P.C. has also been proved (Exhibit 4 series).

P.W. 4, father of the victim is a seizure witness. P.W. 6 is his mother. Both these witnesses heard about the occurrence from his wife, P.W. 3. P.W. 7 is the scribe of the written complaint.

5. <u>ANALYSIS OF EVIDENCE:-</u>

The complainant and the appellant are adjacent neighbours as tenants under the same landlord. P.W. 3, the complainant and mother of the victim, who was a child aged only 3 (three) years, found the child being abused by the appellant in the manner as described in the written complaint.

> ***This is a mother, who without wasting any time lodged the complaint and went to the Court on the very next day. Her motherly instinct made her look for her child, who was playing outside. This instinct led to her child, who was being molested and abused in a heartless/perverted manner.***

6. CONCLUSION:-

A mother's evidence in a case of this nature is the best evidence before the Court. As truthful and sacred as the love in her heart for her tender helpless child of 3 years. A mother is the shield which protects her child against any harm that may befall upon the child. Cases of such nature do not come with eyewitness/eyewitnesses and one should not expect the same, as such acts are done in private, being against nature and the law.

The evidence, statement under Section 164 Cr.P.C., and the written complaint of this witness are in consonance and there does not appear to be any discrepancies thus reliable and trustworthy, beyond all reasonable doubt.

The observation in the judgment of the Gujarat High Court in ***Lohana Vasantlal Devchand & Ors. vs. The State (Supra),*** **(Paras 6,8,12,13,16,23,24)** is relevant in this case.

> **"6.** *It will, therefore, mean that even mere penetration will be sufficient to constitute the carnal intercourse. There need not be necessarily a seminal discharge for constituting the carnal intercourse. Admittedly, this act of the petitioner No. 2 was done voluntarily and orifice of the mouth is not naturally meant for having such carnal intercourse. It could, therefore, in my opinion, without any doubt be said that this act will be against the order of nature. The important question for consideration would be, whether it could be said that the petitioner*

No. 2 had carnal intercourse with this boy Babulal or could it be said that there was an attempt to commit this offence in question and whether it could be said that there was such an attempt made, by his voluntarily putting his male organ in the mouth which was an orifice, not to be used in the order of nature, for the purpose of carnal intercourse.

8. *As urged by the learned Assistant Government Pleader, Mr. Vidhyarthi, what is important is whether there was an act of imitating the actual act of sexual intercourse or carnal intercourse. If it was an imitative act of sexual intercourse to appease his sex urge or the sexual appetite, it would be an unnatural offence, punishable under Section 377 of the Penal Code, 1860. What is important to be seen is what is passing in the mind of a person performing such an act. If it is for the purpose of his imitating an act of sexual intercourse to appease his sexual urge and to satisfy his passions, it would amount to an offence, punishable under this Act. He urged that in such a case, instrument of preparing one self for a sexual inter course, becomes an instrument of user. That is clearly indicative of the fact that it is an act which is an imitative act of sexual intercourse to appease one's sexual appetite and that being against the order of nature, as this orifice is not meant for such carnal intercourse, it amounts to an offence punishable under Section 377 of the Penal Code, 1860.*

12. *It is true that in the Penal Code, 1860, there is no such statutory definition of sodomy. The general words used, are 'whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal', shall be committing the offence under Section 377 of the Penal Code, 1860. Words used are quite comprehensive and in my opinion, an act like the present act, which was an imitative act of sexual intercourse for the purpose of his satisfying the sexual appetite, would be an act punishable under Section 377 of the Penal Code, 1860. This conclusion of mine gets support from the decision given in the case of Khanu v. Emperor, AIR 1925 Sind 286. The observations made therein are as under:—*

"The principal point in this case is whether the accused (who is clearly guilty of having committed the sin of Gomorrah coitus per os) with a certain little child, the innocent accomplice of his abomination, has thereby committed an offence under Section 377. Penal Code, 1860.

> ***13.*** *Section 377 punishes certain persons who have carnal intercourse against the order of nature with inter alia human beings. Is the act here committed one of carnal intercourse? If so, it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os is impossible"*
>
> ***16.*** *I doubt not therefore, that coitus per os is punishable under Section 377, Penal Code, 1860".*
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> ***23.*** *As already observed by me earlier, what is sought to be conveyed by the explanation is that even mere penetration will be sufficient to constitute carnal intercourse necessary to the offence referred to in this Section 377 of the Penal Code. Seminal discharge, i.e., the full act of intercourse is not the essential ingredient to constitute an offence in question. The word penetration has been given a wider meaning in Webster's New 20th Century Dictionary, unabridged, 2nd Edn., on p. 1324 as under:—*
>
> *"Penetration: v.t.; penetrated, p.t., pp.; penetrating, ppr. (L. Penetratus, pp. of penetrare; penas, within, and root tra, seen in intrare, to enter, trans, across).*
>
> *1. to enter by piercing; to find or force a way into or through; as, the dart penetrated his skin; oil penetrates wood.*
>
> *2. to have an effect throughout; to spread through; to permeate.*
>
> *3. to imbue; to cause to feel; to move deeply; as, to penetrate with grief.*
>
> *4. to reach mentally; to understand; to grasp the hidden meaning of; as, to penetrate his motives."*
>
> ***24.*** *In the instant case, there was an entry of a male penis in the orifice of the mouth of the victim. There was the enveloping of a visiting member by the visited organism. There was thus reciprocity; intercourse connotes reciprocity. It could, therefore, be said without any doubt in my mind that the act in question will amount to an offence, punishable under Section 377 of the Penal Code, 1860."*

The Supreme Court in ***Suresh Kumar Koushal & Anr. Vs Naz Foundation & Ors., Civil Appeal No. 10972 of 2013, on 11 December, 2013,*** held:-

> *"**54.** In view of the above discussion, we hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable.*
>
> ***56.** While parting with the case, we would like to make it clear that this Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377 IPC and found that the said section does not suffer from any constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General."*

The act of the appellant herein constitutes the ingredients required to constitute the offence under Section 377 of the Indian Penal Code and the same has been proved by the prosecution beyond reasonable doubt by way of evidence both oral and documentary evidence.

The appeal being CRA 263 of 2017 is accordingly dismissed.

The appellant is directed to surrender before the Trial Court within a week from the date of this order to serve out his sentence in default, Trial Court shall proceed in accordance with law.

Copy of this judgment be sent to the learned Trial Court for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)