

IN THE HIGH COURT AT CALCUTTA
(Criminal Appellate Jurisdiction)

Appellate Side

Present:

Justice Bibhas Ranjan De

C.R.A. (SB) 167 of 2022

Animesh Biswas

Vs.

The State of West Bengal Anr.

For the Appellant

:Mr. Mit Guha, Adv.

Mr. Sayan Kanjilal, Adv.

For the State

:Mr. Saswata Gopal Mukherjee, Ld. PP

Mr. Saryati Datta, Adv.

Mr. Sandip Chakrabarty, Adv.

For the de facto
complainant/victim

: Ms. Sreyashee Biswas

Hearing on

:23.06.2023, 14.08.2023, 17.08.2023,
18.08.2023

Judgment on

:September 05, 2023

Bibhas Ranjan De, J.

1. This is an appeal assailing the judgement and order dated 07.05.2022 passed by Learned Additional Sessions Judge, 2nd Court cum Special Court under POCSO Act, Krishnanagar, Nadia in connection with POCSO Case No. 105 of 20, whereby Learned Judge, found the appellant/accused guilty of committing offence under Section 10 of the Protection of Children from Sexual Offence Act, 2012 (hereinafter referred to as POCSO Act) and sentenced him to suffer rigorous imprisonment for 5 years and to pay a fine of Rs. 5000/- in default of payment to suffer further simple imprisonment for six months.
2. Factual matrix of the case is that on 28.02.2020 at about 10.00 a.m. appellant/accused laid the victim, a student of class 3, on the floor of the school and forcibly committed rape upon her before the class was started. As a result, victim started shouting loudly and accused/ appellant slapped her twice and fled away from this school. After the alleged incident victim was taken to Mira Bazaar Health Center where from she was referred to Krishnanagar District Hospital. Her paternal

grant father lodged the complaint before officer in charge Kaliganj Police Station, Nadia.

- 3.** On receipt of the said written complaint a case was registered as Kaliganj Police Station Case No. 105/20 dated 28.02.2020 under Section 376AB read with Section 6 of the POCSO Act. One Mr. Arijit Mohan Roy, then Sub Inspector of Police, took up investigation of this case. He visited place of occurrence prepared rough sketch map, examined victim and her grandfather, complainant and other witnesses and recorded statement under Section 161 of the Code of Criminal procedure (hereinafter referred to as CrPC). Victim also gave statement under Section 164 of the CrPC and also attended test identification parade. Wearing apparels of victim, birth certificate of victim and medical report were seized by the Investigating Officer. After completion of investigation charge sheet was submitted and cognizance was taken.
- 4.** Ld. Judge, Special Court framed charge under Section 376 AB of the Indian Penal Code (hereinafter referred to as IPC) read with Section 6 of the POCSO Act against the accused/appellant on 07.01.2020.
- 5.** In course of evidence 22 witnesses were examined as follows:-

Victim- PW1

Grandfather of victim –PW2

One Dinesh Ch. Roy –PW3

Golam Mustafa –PW4

Constable Subir Halder –PW5

Jayanta Biswas –PW6

Dr. Paulami Ray Chowdhury –PW7 (Attached to GDMO of Kaliganj Rural Hospital)

Prosen Biswas –PW8 (GDA staff of kaliganj BPHC)

Himangshu Sekhar Biswas –PW9 (Teacher in-charge of Primary School)

Mother of the victim –PW10

Lady Constable Indrani Biswas –PW11 (attached to Kaliganj Police Station)

Lady Constable Sefali Khatun –PW12 (attached to Kaliganj Police Station)

Father of victim –PW13

Dr. Bhabotosh Bhowmick –PW14 (MO attached to Nadia District Sadar Hospital)

Sub Inspector Nandita Halder –PW15 (attached to Krishnanagar Women Police Station)

Ld. Magistrate Sanghamitra Debnath–PW16 (Judicial Magistrate, 2nd Court, Krishnanagar)

Firoj Hossain –PW17 (Teacher of Primary School)

Anindita Das –PW18 (Staff Nurse of Nadia District Sadar Hospital)

Md. Ajmat Sekh –PW19 (Para teacher of Primary School)

Samiul Islam –PW20 (Chief Controller of Krishnanagar Correctional Home)

Sub Inspector Sanjib Karmakar –PW 21(the then Recording Officer attached to I.C of Mira ROP)

Sub Inspector Arijit Mohan Roy – PW22 (Investigating Officer of this case)

- 6.** In course of their evidence a good number of documents were admitted in evidence as exhibit 1 to 10 viz. written complaint, seizure lists and signatures therein, memo test identification parade with signatures, formal FIR.
- 7.** On completion of evidence accused/ appellant was examined under Section 313 of the CrPC. He pleaded not guilty and attributed his false implication in this case.
- 8.** Having heard the Ld. Counsels appearing on behalf of the parties, Ld. Special Judge, after evaluating the evidence

particularly that of the victim (PW1) returned his findings holding, *inter alia*, that sole evidence of victim passed the test of 'sterling character' leading to prove of the factum of sexual assault upon the victim by the accused/appellant on 28.02.2020 in a vacant room of the school of the victim. As a sequel, the accused/appellant was found guilty of committing offence within the meaning of Section 10 of the POCSO Act, 2012 and sentenced to suffer five years and also to pay a fine of Rs. 5000/- in default to suffer further imprisonment for six months. Being aggrieved by and dissatisfied with said order of conviction the instant appeal has been preferred.

- 9.** Ld. Advocate, Mr. Mit Guha, appearing on behalf of the accused/ appellant has assailed the evidence on record and submitted that the offence alleged in this case was not supported either by any teachers or staff of the school i.e. alleged place of occurrence. According to Mr. Guha, none of the students was examined by the Investigating Officer in this case. Mr. Guha, particularly squinted on the issue of non-examination of a friend who enter into vacant room after hearing alarm of victim.

- 10.** Mr. Guha alternatively took the plea of insanity and poor vision of the accused/appellant and tried to convince this Court with a cloud of importability of commission of offence by the accused/appellant as alleged in this case. In support of his contention, he has referred to the doctors report.
- 11.** Per contra, Mr. Saryati Datta, representing the State has relied on the evidence of victim (PW1) which was further corroborated by her statement recorded under Section 164 of the CrPC. Her evidence was corroborated by the doctor (PW14). Mr. Dutta has further drawn my attention to replies given by the accused in course of his examination under Section 313 CrPC and submitted that accused appellant was fully alert which was ratified by the doctor (PW7) who examined him and submitted report (exhibit 4/1). Parting with his argument Mr. Datta has submitted that prosecution has succeeded to prove an offence within the meaning the Section 9 of the POCSO Act.
- 12.** In view of catena of decisions of the Hon'ble Apex Court, it has become now settled that the sole testimony of the victim can be relied upon in a case of sexual assault, but at the same time her evidence must be trustworthy and unblemished as

well as sterling quality i.e. clear consistency among the all statement given by the victim right from statement before Police/ Magistrate till the evidence before the Court qua the accused leaving no doubt as to the alleged incident.

13. The Victim in her initial statement recorded under Section 164 of CrPC stated that when she was in school one boy forcibly took her to a room against her will and she was disrobed and laid there and sexually assaulted. She was crying. Then one of her friend came over there and rescued her. Accused/appellant was placed in test identification parade in the correctional home virtually and victim identified the accused/appellant.

14. Thereafter, victim (PW1) aged about 9 years, was examined on 9.12.2020 and 10.12.2020. During her evidence she specifically testified that on day of occurrence he reached school when it was vacant almost and no teachers arrived. Accused took her inside a class room and forced her to lay down and sexually assaulted her. When she cried out accused fled away then one of her friends arrived there and on query she narrated the incident to her and in turn that friend disclosed to others. Her mother came to school and she

narrated everything to her mother then she was taken to hospital. Her statement was recorded by Magistrate, she identified the accused/appellant in the Court room.

15. From her cross examination, it is revealed that her school usually start from 10.30 a.m. She also stated that local children used to madden the accused/appellant by saying 'Pagol' and sometimes accused assaulted said children when he became angry. She sustained swelling injury.

16. Dr. Bhabotosh Bhowmick (PW14), attached to Nadia Sadar Hospital, examined the victim who also stated before him that she had been sexually assaulted by the accused/appellant at around 10.a.m. at school room, though doctor found no injury on any parts of body including her private parts. In cross-examination, doctor denied the suggestion regarding statement of victim before the doctor.

17. On careful scrutiny of the evidence of victim as PW1 and also the statement recoded under Section 164 of CrPC, I find hardly any material discrepancies between the evidence adduced by the victim and the statement recorded under Section 164 of CrPC with regard to manner of sexual assault. It is true that one of her friend came to the place of occurrence

either at the time of occurrence or immediately after the occurrence. It is also evident from the record that Investigation Officer (PW22) did not examine that particular friend of the victim. Such laches on the part of the Investigating Officer cannot disregard entire evidence of victim. In cross-examination victim admitted that local children used to madden accused as 'Pagol' and sometimes accused used to assault children when he became angry. Specific suggestion was made during her cross-examination that all the evidence of examination in chief were tutored but she denied the suggestion. She further testified that lady police accompanied her and told her to depose before the Ld. Magistrate.

- 18.** De facto complainant/grandfather of victim testified in his evidence that his grand daughter went to the school at 10.a.m. when teacher did not arrive and in the mean time accused took his granddaughter inside a class room and committed sexual assault. A suggestion was put to the de facto complainant (PW2) that his grand daughter and her friends maddened accused and as a result accused became angry and slapped his granddaughter. The suggestion was denied.

- 19.** PW3, grandfather by relation, also stated that he heard about rape of his daughter at her school.
- 20.** PW4, could not say anything about incident alleged. PW5 pronounced accused before Medical Officer at Kaliganj BPHC for examination and identified. PW6 testified that accused slapped the victim girl.
- 21.** PW7, Doctor Poulami Roy Chowdhury, examined accused at Kaliganj Rural Hospital and after examination doctor opined as follows:-
- “ On examination I found his eye sight was poor but he has no cerebral problem he suffers from pain on his lower abdomen. He told that he had been assaulted by his brother”.*
- PW8 being a staff of Kaliganj BPHC was present at the time of examination of accused by the doctor (PW7).
- 22.** PW9, Teacher in charge of school, testified that after attending school he heard that accused slapped the victim at school. Her evidence is totally hearsay and she even could not say who disclosed the incident of slap to her.
- 23.** PW10, mother of the victim, has stated that at about 12 noon one of her aunt by village relation informed the incident

of rape of her daughter at school and asked her to take her daughter back. There was a big gathering at school. She rush to the school. Her daughter was found weeping in distress condition and she told that accused disrobed her and sexually assaulted. Her father in law lodged complaint with the police. Her daughter was examined by doctor at Krishnanagar Hospital. Police seized wearing apparels of her daughter by a seizure list where she put signature. But, her evidence regarding sexual assault narrated by her daughter was not ratified by the Investigating Officer (PW22) who has stated that PW10, mother of the victim, never disclosed about any sexual assault narrated by his daughter like disrobing her or putting his finger in her private parts. Such missing link is not at all fatal to the prosecution case as she might not disclose the actual manner of sexual assault to the Investigating Officer. PW10 further stated in her evidence that at the relevant point of time i.e. at 10.a.m. there were 20/25 students in the class room, but, Investigating Officer never took any effort to examine any of those students particularly the students. Again, that latches cannot lead to a go-by to the entire prosecution case.

24. PW11, took the victim to Nadia District Hospital for medical examination. PW12 produce the victim before the Magistrate for recording her statement of under Section 164 of CrPC.

25. PW13, father of the victim, who testified as follows:-

“ The incident took place at about 10.00 a.m. in the morning. On the date of incident I was not at home. I had gone to a poultry farm near Kaliganj as I used to work there. At about 11.00/11.30 A.M. I got an information over phone that my daughter was sexually assaulted at her school. That phone was received from my wife and she asked me to return home. I then and there came back home. After about an hour I returned home and found that there was a big gathering in front of my house as well as inside of my house. There local people narrated about the incident. Then I took my daughter inside of a room. My daughter was then crying. My daughter stated to me that she had been sexually assaulted by Animesh. Thereafter, I took my daughter to PHC at Mira. There doctor examined her and asked me to take my daughter to Krishnanagar

Sadar Hospital. Thereafter, we went to Mira ROP, under P.S. Kaliganj. There my uncle (Jethamasoy) lodged a written complaint and thereafter, the police asked us to go to Sadar Hospital. Accordingly, I came to Sadar Hospital, where my daughter was examined medically.”

His evidence was also not ratified by the Investigation Officer (PW22). PW13, never stated before the Investigation Officer that accused took his daughter inside a room and sexually assaulted. This omission cannot be looked into because of the background of this case where a nine year old girl was sexually assaulted and father of that girl narrated the incident before the Investigating Officer who committed so many serious lapses in investigation of such sensitive case.

26. PW14, Doctor Bhabotosh Bhowmick, examined victim who stated before him that she was sexually assaulted by the accused at around 10.a.m. The doctor (PW14) did not find any sort of injury on any parts of body including her private parts. Doctor in his cross-examination volunteered that patient was admitted in the hospital and everything is written in the bed head ticket. From the evidence of Investigation Officer, I find

that no such bed head ticket was ever seized by the IO. Therefore, cause of admission of the victim remained unknown.

27. PW16, Ld. Magistrate, held Test Identification Parade at Krishnanagar District Correctional Home. Test Identification Parade of victim is of no consequence as accused is well-known to the victim and other witnesses examined in this case. PW20, Chief controller of the correctional home ratified the test identification parade held on 18.03.2020.

28. PW17, Teacher of the school, was present at the time of seizure of birth certificate of victim. PW18, a staff attached to Nadia District Hospital, was present at the time of examination of victim by the doctor PW14. PW19, para teacher of the school, witnessed the seizure of the birth certificate of the victim only.

29. PW21, Recording Officer, received the written complaint and registered the same as kaliganj PS case no. 105/20 he prepared formal FIR.

30. Investigating Officer (PW22) visited Place of occurrence examined witnesses under section 161 CrPC, talked with victim, prepared sketch map with index, seized wearing

apparels of victim, collected school certificate of victim. Investigating Officer also referred the victim for medical examination and got her statement recorded under Section 164 of the CrPC. On completion of investigation he submitted charge sheet.

31. There is nothing on record to suggest that the victim did not understand the question put to her. Rather, she was found to have answered rationally. And to add to that, her competency was tested by the Learned Special Judge, at the time of examination by putting few questions.

32. In catena of decisions Hon'ble Apex Court held that the evaluation of the evidence of child witnesses, especially where the child is the victim herself/himself, is always a tricky affair. Combating, and, at times, conflicting, considerations come into play in such cases. On the one hand, there exists a presumption that a child of tender years would not, ordinarily, lie. The applicability, or otherwise, of this presumption, would necessarily depend, to a large extent, on the age of the child. No dividing line can be drawn in such cases; however, one may reasonably presume that a child of the age of four, or thereabouts, would be of an age at which, to questions

spontaneously put to the child, the answer would ordinarily be the truth. As against this, the Court is also required to be alive to the fact that children are impressionable individuals, especially when they are younger in age, and are, therefore, more easily tutored. The possibility of a small child, whose cognitive and intellectual faculties are yet not fully developed, being compelled to testify in a particular manner, cannot be easily gainsaid. Even so, the prevalent jurisprudential approach proscribes courts from readily treating the evidence of child witnesses as tutored and, ordinarily, where a child is subjected to sexual assault, her, or his, statement possesses considerable probative value.

33. On the other hand, Hon'ble Apex Court reiterated that one of the cardinal principles to be borne in mind, while assessing the acceptability of the evidence of a child witness, is that due respect has to be accorded to the sensibility and sensitivity of the Trial Court, on the issue of reliability of the child, as a witness in the case, as such decision essentially turns on the observation, by the Trial Court itself, regarding the demeanour and maturity of the concerned child witness. An appellate court would interfere, on this issue, only where

the records make it apparent that the Trial Court erred in regarding the child as a reliable witness. Where no such indication is present, the appellate court witness, where the Trial Court has found it to be credible, convincing and reliable. It went onto note that in the present case it is not disputed that the victim (Child witness) was not competent to depose to the facts and was not a reliable witness. Once a child witness, if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words evening he absence of oath, the evidence of a child witness can be considered under Section 118 of the Indian Evidence Act, 1872 provided that such witness is able to understand the answers thereof. (Dattu Ramrao Sakhare & Ors Vs. State of Maharashtra, 1997 Latest Caselaw 447 SC).

34. Overall evaluation of the evidence, I find that consistent evidence of victim was supported by her parents (PW10 & PW 13) and also by the Doctor of Nadia Sadar Hospital (PW14).

35. I cannot disbelieve the evidence of victim, a nine year old girl only on the plea of defence that accused was called as 'Pagol' in the locality ignoring he evidence of Dr. Poulami Ray

Chowdhury (PW7) as well as a report of Medical Board quoted below:-

“Clinical examination, mental status examination (MSE), past history suggestive of mild anxiety Neurocicis with behavioral abnormality. Although, patient is on psychotropic drugs & he is mentally completely stable as on date.”

- 36.** From the evidence of doctor (PW7) and medical report, called for at the instance of this Court, cannot, in any manner, suggest that at the time of incident accused was insane or abnormal. To show such abnormality/insanity defence did not adduce any evidence in spite of having enough opportunity to rebut the presumption under Section 29 of the POCSO Act.
- 37.** This Court thus upheld the conviction and dismissed the appeal.
- 38.** In view of the above observations, Criminal Appeal Being NO. CRA (SB) 167 of 2022 stands disposed of. Bail bond, if furnished, stands cancelled. Appellant/ accused is directed to surrender before the Trial Court to serve sentence.
- 39.** Pending applications, if there be any, stand disposed of.

- 40.** Let a copy of this order be communicated to the Court of Ld. Additional Sessions Judge, 2nd Court cum Special Court under POCSO Act, Krishnanagar, Nadia.
- 41.** All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.
- 42.** Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]