

Form J(2)

In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side

Present : **The Hon'ble Mr. Justice Bibek Chaudhuri**

IA No.:CRAN/1/2019 (Old No. : CRAN/583/2019)
in
CRA 45 of 2019

Nurai Sk. @ Nurul Sk.
-Vs.-
State of West Bengal

For the appellant : Mr. Navanil De, Adv.
Ms. Ayantika Roy, Adv.,
Mr. Subhrajit Dey, Adv.

For the respondents : Mr. Narayan Prasad Agarwala, Adv.,
Mr. Pratick Bose, Adv.

Heard & Judgment on : 15.11.2021.

Bibek Chaudhuri, J.:

Way back in 2002 when Protection of Children from Sexual Offences Act, 2012 did not see the light of the day, the Hon'ble Supreme Court through the Hon'ble Y. K. Sabharwal, J. in Criminal Appeal No. 1975 of 1996 (State of Rajasthan –Vs.- Om

Prakash) observed, *"it is necessary for the Courts to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is likely to be lifelong. A special safeguard has been provided for children in the Constitution of India in Article 39 which, inter alia, stipulates that the State shall, in particular, direct its policy towards securing that the tender age of the children is not abused and the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that the childhood and youth are protected against exploitation and against moral and material abandonment"*.

At the same time, one should not forget that administration of justice is not one way traffic. On the basis of the case and counter case based on facts and evidences, both oral and documentary, administration of criminal justice is to be imparted. The duty of the Trial Court in assessment of evidence on record in its true spirit cannot but be over emphasized because the Trial Court is the basic structure of administration of justice upon which the superior forums are standing. If the basic structure is without any base, the super structure will not

only fall, but it will cause denial of justice to an innocent person.

Bearing the above basic principle in mind, let us now dwell upon the facts and circumstances involved in the instant appeal. The appellant was convicted and sentenced to rigorous imprisonment for two years with fine and default clause for committing offence under Section 354 of the Indian Penal Code. He was further sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.10,000/- with default clause for committing offence under Section 354A(2) of the Indian Penal Code. For offence under Section 506 of the Indian Penal Code he was sentenced to suffer rigorous imprisonment for one year with fine and default clause. The appellant was further sentenced to suffer rigorous imprisonment for four years and to pay fine of Rs.10,000/- with default clause for offence punishable under Section 8 of the POCSO Act. He is also sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.10,000/- with default clause for committing offence under Section 12 of the POCSO Act.

All the sentences were, however, directed to run concurrently.

According to the prosecution, the victim girl was returning from school on 24th August, 2017 at about 4.10 p.m. and on her way back to home, the accused dragged her 'orna' and proposed her to marry. He also threatened her to cause injury by throwing acid on her body if the victim girl refused to accede to his proposal.

The materials-on-record further shows that both the victim and the accused reside in the same locality. After the incident, FIR was not lodged immediately, though the local police station is situated at a stone throw distance from the house of the victim. Only on 26th August, 2017, the FIR was lodged by the uncle of the victim. In the FIR, no allegation was made against the appellant that he pulled the hand of the victim. On the contrary, it was stated that the accused pulled the 'orna' of the victim and threatened her that he would cause injury to her if he did not agree to the proposal of marriage given by the accused to her.

In evidence the victim girl as P.W. 1 stated on oath that the incident took place on 27th of a particular month in the year 2017 at about 10.30 a.m. when she was going to her school with her friend, Rimi. Thus, at the time of recording evidence of

P.W. 1 the date and time of incident was wrongly stated by the victim girl. The prosecution noticing grave lacuna in its case filed an application for recalling P.W. 1 after about two months of her deposition for the first time in Court. In the evidence dated 13th July, 2018, the deposition of P.W. 1 was rectified and she was made to depose that the incident took place on 24th August, 2017 at 4.10 p.m.

The eyewitness of the occurrence, namely Rimi who accompanied the victim girl was not examined in this case. All other witnesses heard the incident and their evidence being hearsay in nature is of little relevance. Learned Trial Judge on appreciation on evidence held that the specific act of the accused of dragging the 'orna' of the victim girl and insisting her to marry him was done with intent to outrage her modesty with sexual intent. The learned Trial Judge held that the accused has caused her sexual assault and harassment by physical contact by pulling her hand and advance unwelcome and explicit sexual overtures to marry him. Therefore, the learned Trial Judge held the accused guilty for committing offence under Sections 8 and 12 of the POCSO Act. He also held that the specific act of the accused in the nature of sexual

harassment within the meaning of Section 354 A (1)(ii) of the Indian Penal Code.

Let me now appreciate the evidence on record as well as legal position as well as penal provisions contained in statutes independently.

In a criminal trial date of occurrence, time of occurrence and place of occurrence are the most vital pieces of evidence which the prosecution is bound to prove beyond any shadow of doubt. If there is a deviation of the above-mentioned three facts, the entire case remains doubtful because the Court is every reason to hold that no such incident took place at the given time in the given manner at the given place and the accused is entitled to get benefit of doubt. It is needless to say that the victim girl who was a student of Class-XII, on the date of examination, might forget the date of occurrence but it is heard to believe that she also would forget the time when the incident took place. In her examination-in-chief, she stated that while she was going to school with her friend, the incident took place. Subsequently, she was recalled and stated that while she was returning home from school on 24th August,

2017, the incident took place at about 4:30 p.m. In view of such discrepancies, it is open for the Court to consider the prosecution story with pinch of salt.

In the FIR, the uncle of the *de facto* complainant never stated that the accused dragged the hand of the victim. Statement of the victim under Section 164 of the Code of Criminal Procedure was recorded after 10 days of occurrence on 4th September, 2017. In the said statement, the victim introduced that she was pulled by her hands.

It is needless to say that a statement under Section 164 of the Criminal Procedure Code is not a substantive piece of evidence. The evidence that is led by the witness in Court on oath. Substantive piece of evidence and a statement under Section 164 of the Code of Criminal Procedure can only be used for corroboration or contradiction. Such statement under Section 164 of the Code of Criminal Procedure should not be taken into consideration where the victim tried to exaggerate the incident.

Section 8 of the POCSO Act is the penal provision of sexual assault. Section 7 defines sexual assault which runs thus: -

"7. Sexual assault. - Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

Similarly, Section 12 is punishment for sexual harassment and the specific acts constituting sexual harassment are defined in Section 11 which is reproduced below:-

"11. Sexual harassment. - A person is said to commit sexual harassment upon a child when such person with sexual intent-

- (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or
- (ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

- (iii) *shows any object to a child in any form or media for pornographic purposes;*
- (iv) *repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or*
- (v) *threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or*
- (vi) *entices a child for pornographic purposes or gives gratification therefor."*

Even assuming that the appellant has committed the alleged act of dragging 'orna' and pulling hand of the victim and proposed her to marry, such act does not come within the definition of either sexual assault or sexual harassment.

At best for the act of the accused, he may held liable for committing offence under Section 354 A read with Section 506 of the Indian Penal Code.

For an offence under Section 354 A(1)(ii), the prescribed punishment is rigorous imprisonment for a term which may extend to 3 years or with fine or with both.

For the offence punishable under Section 506 of the Indian Penal Code, the offender shall be punished with imprisonment of other description for a term which may extend to 2 years or with fine or with both.

From careful evidence on record, I find that no other charge is proved against the accused.

For the reasons stated above, the instant appeal is allowed in part.

The appellant is held not guilty from the charge under Sections 354, 354B and 509 of the Indian Penal Code. The appellant is also held not guilty for the charge under Sections 8 and 12 of the POCSO Act.

The appellant is, accordingly, acquitted from the above charge, set at liberty and release from bail bonds.

The instant appeal is dismissed in part and the order of conviction and sentence passed by the learned Additional Sessions Judge, Kandi in Sessions Trial No.06(3)/2018 arising out of C. Special No.111 of 2017 is partly affirmed so far as it

relates to conviction and sentence passed by the learned Trial Judge for committing offence under Sections 354(1)(ii) and Section 506 of the Indian Penal Code.

The appellant be released from Correctional Home if he served out sentence for the offence punishable under Section 354A(1)(ii) and Section 506 of the Indian Penal Code.

Let a plain copy of this judgment be sent to the Trial Court immediately along with lower court record.

The parties are at liberty to act on the server copy of the judgment.

(Bibek Chaudhuri, J.)

***Srimanta/Mithun
A.Rs. (Court)***