

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

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

C.R.A. 108 of 2015

Shri Deoraj Dewan

**Vs.
The State of West Bengal .**

**For the Appellant : Mr. Kalyan Kumar Chakraborty, Adv.
Mr. K. Bhattacharya, Adv**

***Amicus Curiae* : Ms. Shaila Afrin, Adv.**

**For the State : Mr. Ranabir Roy Chowdhury, Adv.
Mr. Ashok Das, Adv.**

Heard on : 06.12.2021.

Judgment On : 09.12.2021.

Bibek Chaudhuri, J.

In our society, the existence of pedophiles are not uncommon. Little boys and girls are harassed and abused by those mentally ill persons in their schools, play grounds and other public places surreptitiously. Though according to the psychiatrist, pedophobia is a disease which should be properly treated, it is the statutory

mandate that pedophiles are to be dealt with in strong hands to save the childhood of the victims, failing which as a result of the specific act of the pedophiles, it will leave a permanent scar and horrific memory in the minds of the little boys and the girls.

The case in hand is a story of a pedophile harassing the students of a boarding school.

One Mrs. Reba Sarkar, mother of a boarder student of Victoria Boys' School, Dowhill, Kurseong submitted a letter of complaint to the Headmaster of the said school stating, *inter alia*, that she personally witnessed a shameful event of sexual harassment of a minor student by an unidentified male at the corridor of the kitchen of the hostel of the said school at about 2:45 p.m. on 12th May, 2013.

The Principal of the said school conducted an in-house enquiry to ascertain the veracity of the complaint. On inquiry he came to know that a student of Class-V who is referred to as "A" in the body of the judgment was sexually harassed by the appellant. This Court is not inclined to disclose his name being the victim of the harassment. He also came to know that the appellant is in the habit of sexually abusing the boarder students of Class-V and VI under flimsy pretext. The Principal of the said school accordingly lodged a complaint before the Officer-in-Charge, Kurseong Police Station against the appellant. The Officer-in-Charge of the Kurseong Police Station registered Police

Station Case No.103 of 2013 under Section 12 of the Protection of Children from Sexual Offences Act, 2012 and endorsed the case to A.S.I. Birendra Chetri for investigation.

On completion of investigation, police submitted charge-sheet against the accused/appellant before the learned Special Judge under the POCSO Act, Darjeeling. The learned Trial Judge framed charge against the appellant under Section 8/12 of the POCSO Act. The charge so framed was read over and explained to the appellant to which he pleaded not guilty.

During trial, prosecution examined as many as 12 witnesses. Some documents were marked exhibits. The accused was examined under Section 313 of the Code of Criminal Procedure. The accused, however, did not adduce any evidence in support of his defence.

The learned Trial Judge on consideration of the evidence on record held the accused guilty for committing offence under Section 8 of the POCSO Act and convicted and sentenced to suffer simple imprisonment for 4 years and to pay fine of Rs.2,000/-, in default, to suffer further simple imprisonment for 6 months. The said judgment and order of conviction and sentence is assailed in the instant appeal.

It is pertinent to mention at the outset that being the first Court of appeal, it is the duty of this Court to apprise the evidence on record independently to come to a finding as to whether the learned Trial

Judge was justified in passing the judgment of conviction and sentence as recorded above.

It is already stated that the prosecution examined 12 witnesses, amongst them P.W.1, S.I. Bhusan Chetri of Kurseong Police Station is the Recording Officer who received the complaint from the Principal of the school, recorded P.S.Case No.103 of 2013 and entrusted A.S.I. B.Chetri to investigate into the case.

P.W.11, Mrs. Reba Sarkar is the mother of the boarder student, named "D" who was studying in the said school in Class-V in the year 2013.

P.W.2, Dr. Jayanta Pal was the Principal of the school at the relevant year of 2013.

P.W.3, "A", P.W.6, "M", P.W.7, "S", P.W.8, "K", P.W.9, "R" and P.W.10, "B" were the students of the Class-V, V and VII of the said boarding school in the year 2013.

P.W.4, Sumitra Rai and P.W.5, Rupa Gurung were the employees of the kitchen of the said boarding school at the relevant point of time. P.W.12, A.S.I. B.Chetri is the Investigating Officer of this case.

It appears from the evidence of P.W.11, Mrs. Reba Sarkar that on 12th May, 2013 she came to visit her son "D" in the school during the tea time of the students. She was walking in front of the kitchen

to come to the dining hall. Other children were also present there. All on a sudden, she found that one person was trying to remove the trouser of the student in front of all at the corridor of the dining hall. P.W.11 raised protest. She also came to know that the victim was a student of Class-V named "A". On the next date she lodged a complaint to the Principal of the school disclosing the incident. The said letter of complaint was marked Exhibit.2/1 during trial of the case.

Apart from P.W.11, all the above-named students stated in unequivocal terms that during 2013, one day or other the appellant either pulled their pant and touched their private parts in presence of others when the victims tried to raise objection, the appellant used to say that he was their friends and was doing such act out of fun.

Not only the student, P.W.4 Sumitra Rai who was a staff of the dining hall of the school, corroborated the said fact in her evidence.

P.W.5, Rupa Gurung is another employee of the dining hall of the said school, according to her evidence, the victim student "A" fell down on the ground and his pant became wet in rain water, his pant was slipping down and the accused put it up in its original position. However, the said victim boy (P.W.3) stated in his evidence that the appellant purposefully opened his pant and touched his private part when he was playing cricket in the corridor with other boys. The said

fact was corroborated by other witnesses. From the evidence of the Principal of the school(P.W.2), it is ascertained that he conducted an in-house inquiry and being satisfied that the appellant is the offender, lodged a complaint against him in the local Police Station.

Mr. Kalyan Kumar Chakraborty, learned Advocate for the appellant has taken two technical objections against the impugned order of conviction and sentence.

First, he submits that Kurseong Police Station Case No.103 of 2013 was investigated by an Assistant Sub-Inspector of Police. According to Mr. Chakraborty, an A.S.I. is not competent to investigate into a case under the POCSO Act. Therefore, the entire investigation and filing of charge-sheet against the appellant is vitiated being done not in accordance with law. In order to substantiate his contention, Mr. Chakraborty makes a reference to Section 24 of the POCSO Act.

Section 24 provides the manner and mode by which statement of a child is to be recorded. It is stated that the statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer, not below the rank of Sub-Inspector. At the time of recording statement of the child, the police officer shall not be in uniform. The Investigating Officer shall ensure

that during investigation, the child should not come in contact with the accused and the identity of the child shall not be disclosed at any stage of investigation. On careful reading of the above provisions, it appears to this Court that Section 24 prescribes a guideline as to how the statement of the child is to be recorded. Recording of statement of the victim may or may not be a part of investigation. The appellant could have taken such ground of objection if the previous statement recorded under Section 161 of the Code of Criminal Procedure by the Investigating Officer of the students of the said school who are the victims of offence, were confronted with them when they appeared in Court to depose during trial. Previous statement under Section 161 of the Code of Criminal Procedure of the students who deposed during trial of the case were not confronted or contradicted with them.

The standard operating procedure in respect of investigation of an offence under the POCSO Act is that any allegation under the POCSO Act ought to be investigated by a woman police officer. It is expected that the investigating officer would possess the knowledge of child psychology and psychiatric. Nowhere in the statute it is stated that the investigation of a case under the POCSO Act shall not be conducted by an officer below the rank of Sub-Inspector of Police. An Assistant Sub-Inspector is empowered to conduct investigation to a criminal case. When the statute does not provide any such

provision, the Court cannot hold that an Assistant Sub-Inspector of Police is incompetent to conduct investigation of the POCSO Act. It is also pertinent to mention that a case under the Penal Code or under a Special Act cannot be thrown away on the ground of irregularity of investigation. Therefore, this Court is not in a position to accept the above objection raised by Mr. Chakraborty in his argument.

Secondly, it is urged by the learned Advocate for the appellant that the appellant was a leader of Employees' Association of the said school and he was vocal for the demands of the employees at large of the said school. Naturally he was an eye shadow of the administration. So the administration instituted a false case against the accused with the help of a guardian and some students of the said school.

This objection also has no leg to stand. During cross-examination of the witnesses on behalf of the prosecution by the learned Advocate for the appellant, it is not suggested to the Principal of the said school (P.W.2) that the accused was a leader of Employees' Association of the said school. When such plea was not taken during trial, the appellant cannot take the defence before this Court of appeal.

On careful perusal of the evidence on record, this Court finds that P.W.11, Mrs. Reba Sarkar disclosed for the first time that the

accused was sexually assaulting the student in the corridor of the dining hall by pulling down his pant. She immediately informed the matter to the Principal. The Principal of the school held in-house inquiry and found the accused a habitual offender of sexual assault of the students of the school. From the evidence of the students, it is ascertained that he not only pulled down the pants of the students but also used to touch their penis. Therefore, from the evidence of the students of the said school, it is proved beyond reasonable doubt that the appellant is a habitual offender of sexual assault by pulling down the pants of the students and touching their private parts. By such specific act of the appellant, it is open for the Court to take a presumption of existence of culpable mental state. Such presumption is of course rebuttable but the appellant did not take any step to rebut such presumption.

Therefore, the learned Trial Judge rightly convicted the appellant under Section 8 of the POCSO Act.

The learned Trial Judge failed to consider that P.W.3 who is one of the victims was aged about 10 years at the time of commission of offence. P.W.6 was also aged about 10 years when an offence of sexual assault was committed upon him. Same was the age of P.W.7, P.W.8 and P.W.9. In view of Sub-clause (n) of Clause (a) of Section 9 of the POCSO Act, whoever commits sexual assault on a child below

12 years and Sub-Clause (l) of the said Section that whoever commits sexual assault on the child more than once or repeatedly, he is liable to be convicted for the offence aggravated sexual assault and in case of aggravated sexual assault, the punishment shall not be less than 5 years but which may extend to 7 years and shall also liable to fine in view of the penal provision contained in Section 10 of the POCSO Act.

Thus, this Court holds that the provision of Section 9(a)(l & m) of the POCSO Act were lost sight of the learned Trial Judge and taking into consideration the aggravated form of offence, the appellant ought to be punished under Section 10 of the said Act.

For the reasons stated above, the instant appeal is **dismissed on contest.**

The Special Case No.7 of 2014 corresponding to Sessions Trial No.30 of 2014 be remanded back to the learned Trial Court below with a direction to frame charge against the appellant under Section 9(a) (l), (m) read with Section 10 of the POCSO Act and try the case giving opportunity to the accused/appellant and the prosecution to lead fresh evidence as per charge-sheet.

The learned Trial Judge is further directed to issue notice/summons upon the accused to appear before the Court of trial to face fresh trial of the case.

The learned Trial Judge shall take all endeavour to conclude the trial within 6 months from the date of receipt of the lower court record with a copy of this judgment.

Parties are at liberty to act on the server copy of the order.

(Bibek Chaudhuri, J.)