

Form J(2)

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

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

**IA No : CRAN/1/2019 (Old No: CRAN/619/2019)
In
C.R.A. 305 of 2018**

**Dipak Majhi @ Soren
Vs.
The State of West Bengal & Anr.**

**For the Appellant : Mr. Abhra Mukherjee, Adv.
Ms. Anita Kundu, Adv.
Mr. Sauradeep Dutta, Adv.**

**For the State : Mr. P.K. Datta, Adv.,
Mr. Santanu Deb Roy, Adv.**

**Heard &
Judgment On : 29.11.2021**

Bibek Chaudhuri, J.

The instant appeal is directed against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 2nd Special Court at Purulia under Section 366 of the Indian Penal Code and Section 4 of the POCSO Act thereby sentencing the appellant to suffer simple imprisonment for a period of 7 years and also to pay fine of Rs.5,000/- in default, simple imprisonment for one month more in the commission of offence under Section 4 of the

POCSO Act and further sentence to suffer simple imprisonment for 3 years with fine of Rs.500/- in default, simple imprisonment for one month more for the commission of offence under Section 366 of the Indian Penal Code.

In the year 2014, on the date of Panchayat election, the victim girl who was stated to be aged about 14 years old was dragged by the accused/appellant inside a bush and was subjected to aggravated penetrative sexual assault at about 12 noon.

As per the written complaint submitted to Officer-in-Charge of Kotshila Police Station in the district of Purulia, the victim girl was alone in her house on 7th May, 2014. All her family members except her younger brother went to voting center to cast their votes in Panchayat Election. The younger brother of the victim also went away from the house. In order to relieve herself from scorching heat, the victim girl was standing under a mango tree situated in front of their house. It is further alleged in the written complaint that at that point of time, the accused appeared at that place, dragged her to a place near the riverbed and committed penetrative sexual assault upon her. He also took some obscene photographs of the girl at the time of occurrence. The accused threatened her saying that if she tried to disclose the incident to anybody, the accused would forward

the obscene pictures of the victim girl to others. He also assaulted her when the victim girl tried to resist her.

After the occurrence, she returned to her house but could not divulge the incident to any of her family members out of fear. On 9th May, 2014, in the morning, she narrated the incident to her parents. The father and other family members of the victim girl intercepted the accused and took away his mobile phone. Subsequently, on the selfsame date, FIR was lodged by the victim girl. It was written by one Mohit Chandra Majhi under the instruction of the victim girl.

On the basis of the above-stated complaint, police registered Kotshila Police Station Case No.32/14 and took up the case for investigation. On completion of investigation, police submitted charge sheet against the accused under Sections 292/376(2)(i) of the Indian Penal Code and Sections 4/12 of the Protection of Children from Sexual Offences Act, 2012.

Since the offence was triable by the learned Special Court under the POCSO Act, the case was transferred to the Court of the learned Additional Sessions Judge, 2nd Court at Purulia being the Special Court under the POCSO Act for trial and disposal.

The materials-on-record further show that appellant duly appeared before the Trial Court during the trial and charge framed against him under Sections 366/376(2)(i)/ 509 of the Indian Penal

Code and Section 4 of the POCSO Act. Since the accused pleaded not guilty, trial of the case commenced. During trial, prosecution examined as many as 8 witnesses out of 17 charge-sheeted witnesses. Amongst witnesses, P.W.1 is the victim girl and *de facto* complainant, P.W.2 is her father, P.W.3 is the stepmother of the victim girl. P.W.4, P.W.5, P.W.6 and P.W.7 are Medical Officers who examined the accused/appellant in order to test his capacity whether he was capable to perform sexual intercourse in ordinary course of nature, P.W.5, Dr. Chiranjib Mukherjee was the Pathologist, attached to Purulia Sadar Hospital. He sent blood report and semen sample of the appellant for medical examination. The blood report of VDRL test of the accused suggests that the appellant was non-reactive. P.W.6, Dr. Sabyasachi Mukherjee conducted ossification test of the victim girl to ascertain her age on the basis of radiological findings of the development of bones. According to P.W.6, the victim girl was about 16 years of age to below 16 ½ years on 14th May, 2014. P.W.7, Dr. Subhabrata Das medically examined the victim girl to ascertain the principal allegation as to whether she was subjected to aggravated penetrative sexual assault. The Medical Officers submitted their medical examination reports which were marked exhibits during trial. P.W.8 is the Investigating Officer of the case from whose evidence it is ascertained that he visited the place of

occurrence and prepared a rough sketch map of the same, he also seized one mobile phone handed over to him by the father of the *de facto* complainant. The mobile phone allegedly belonged to the appellant. Seizure was also made in respect of the wearing apparels of the victim girl and all those seizure lists were marked exhibits.

It is submitted by the learned Advocate for the appellant that the learned Trial Judge completely ignored that proof of the case suffers from material contradictions. It is needless to say that according to the prosecution case, the appellant dragged the victim girl away inside a bush when there was nobody in the locality. All the persons of the locality went to cast vote at the relevant point of time to the voting center which is situated at a distance of about 5 K.Ms. away. The prosecution was under obligation to prove the said fact that there was nobody at the place of occurrence except the victim girl at the relevant point of time by examining the witnesses and the neighbours of the victim girl. Though some neighbours of the paternal house of the victim girl was cited as witnesses in the charge-sheet, prosecution did not take any attempt to examine them.

It is further submitted by the learned Advocate for the appellant that according to the victim girl, she disclosed the incident for the first time on 9th May, 2014 but from the evidence of P.w.3, who is the stepmother of the victim, it is ascertained that she found the victim

crying in the house when she returned from the polling booth after casting her vote. She asked the reasons as to why she was crying and the victim girl told her that she was subjected to sexual assault by the appellant. Therefore, according to P.W.3, the victim girl narrated the incident within 3 hours of the incident to her stepmother but according to *de facto* complainant, she for the first time, disclosed the incident on 9th May, 2014. The learned Trial Judge refused to accept such contradictions on the ground that such contradictions are minor contradictions and discrepancies and those contradictions do not relevantly affect the prosecution case.

It is contended by the learned advocate for the appellant that the above mentioned contradictions are not minor contradictions and/or discrepancies because the initial date and time of disclosure of the alleged incident is very material to consider as to whether delay in lodging F.I.R. is natural or purposeful. If the evidence of P.W.3 is believed, the victim girl narrated the incident on the date of occurrence itself. This fact is strengthened further when it is ascertained from the evidence of P.W.2, father of the girl that on the next date of occurrence i.e., 8th May, 2014 he went to the house of the accused and forcibly took away his mobile phone. He also stated that he found some obscene pictures of his daughter in the said mobile phone. Cumulative effect of the evidence of P.W.3 and P.W.2

points out that the parents of the victim girl came to know about the incident on the date of occurrence itself. In that event a natural question arises as to whether there was delay of two days in lodging the F.I.R. It is further submitted by the learned advocate for the appellant that according to the prosecution case one Mohit Chandra Majhi wrote the F.I.R. under the instruction of the victim girl. However, the said Mohit Chandra Majhi was not examined. Some of the prosecution witnesses stated that Mohit Chandra Majhi wrote the complaint in the house of the victim girl while others stated that it was written in the P.S. This contradiction also could not be clarified by the prosecution by examining said Mohit Chandra Majhi.

The most important submission made by the learned advocate for the appellant is that Section 2(d) of the POCSO Act defines "child" meaning thereby "any person below the age of 18 years". The victim girl stated that at the time of commission of offence she was aged about 14 years. She was a student of Class-VIII. The prosecution could have produced the admission register or even a certificate of the school where she used to study to show her date of birth. It is pointed out by the learned advocate for the appellant that the *de facto* complainant has the knowledge of english date and time but she could not state her date of birth. This may not be treated as a material lapse on the part of the *de facto* complainant because a

village girl may not know her date of birth, but it is the duty of the investigating authority while investigating a case under the POCSO Act to prove that the victim was aged below 18 years on the date of commission of offence. In the instant case, the doctor who held ossification test of the victim girl (P.W.6) recorded her age as 16 years as on 14th May, 2014. He also admits in his examination-in-chief that age determined by ossification test may vary plus minus two years according to medical jurisprudence. Thus, the age on the date of commission of offence of the victim may be either 18 years or 14 years. According to the learned advocate for the appellant when two views are possible, it is the duty of the Court to accept the view that helps the accused person and the victim's age ought to be held 18 years on the date of commission of offence.

Learned advocate for the appellant next contends that the prosecution failed to prove the place of occurrence in the instant case. According to the victim girl, the place of occurrence is inside a bush about 250 meters away from her house. But in her examination-in-chief, she stated that she was sexually exploited at a place near the river bed. When place of occurrence is shifted to one place to another, prosecution case is held to be doubtful.

Thus, according to the learned advocate for the appellant, the learned Trial Judge failed to consider the effect of withholding vital

witnesses from examining at the time of trial, failure on the part of the victim girl to state the history of injury and the name of the perpetrator of offence to the Medical Officer and in the absence of such evidence the learned Trial Judge proceeded more with emotion than with logical conclusion.

Mr. Prasun Datta, Learned Public Prosecutor-in-Charge, on the other hand, submits that in a case of sexual assault the evidence of the victim girl, if inspires confidence, can alone be the basis of conviction. In the instant case, the victim girl stated in the written complaint that she could not disclose the incident to her parents for two days out of fear. On 9th May, 2014, in the morning she narrated the incident to her parents. Immediately, the written complaint was recorded and it was submitted before the Officer-in-Charge of the local police station.

It is also submitted by Mr. Datta that in a case of sexual assault touching upon the dignity and honour of a minor girl, delay in lodging FIR is not at all vital, if the evidence of the victim girl inspires confidence, no amount of contradiction or discrepancy in the evidence of others should not be taken into consideration. During trial of the case, the learned Trial Judge considered credibility of the victim girl. Learned Public Prosecutor-in-Charge has raised a question as to why the victim girl will implicate an innocent person at the cost of her

dignity, honour and last but not the least inherent feminine chastity. Under this perspective, the learned Public Prosecutor-in-Charge invites the Court to assess the evidence of the *de facto* complainant.

Having heard the learned counsels for the appellant and the respondent and on careful perusal of the entire materials-on-record as well as the impugned judgment this Court admits that in a case of sexual assault evidence of the prosecutrix is of utmost importance. Her evidence can be the sole basis of conviction, if the same is truthful, cogent, unblemished and free from any contradiction. The evidence of the prosecutrix is of utmost importance because of the fact that her evidence should not be equated with the evidence of an accomplice where corroboration is necessary. Evidence of a victim girl is equated with an injured witness like that of an injured witness a victim of rape shall not implicate an innocent person in a criminal case.

It is held by the Hon'ble Supreme Court in ***Ganesan –Vs.- State Represented by its Inspector of Police*** reported in **(2020) 10 SCC 573** that in order to hold an accused guilty for committing offence of sexual assault, the evidence of the victim girl must be of 'sterling quality'. In the aforesaid report the Hon'ble Supreme Court relying on a previous decision in the case of ***Rai Sandeep –Vs.-***

State (NCT of Delhi) reported in **(2012) 8 SCC 21** was pleased to observe the qualities of sterling witness in the following words: -

"In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said

version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

Keeping in mind the decision of the Hon'ble Supreme Court in respect of the law of presumption under what circumstances sole evidence of the prosecutrix can be the basis of conviction, let me assess the evidence of the victim girl and other surrounding circumstances.

The victim girl was examined in the Court of trial on 22nd September, 2015. In her evidence-in-chief, she stated that on the date of occurrence at about 1 p.m. she was standing under a mango tree, when the accused called her. She initially refused to respond to his call but thereafter, he forcibly took her near the river and committed rape on her. Thus, according to the evidence of the victim, the place of occurrence is a place near the river side. In her written complaint, she stated that the incident took place inside a bush. The Investigating Officer drew up a rough sketch map of the place of occurrence. On perusal of the rough sketch map it is found that in between the house of the *de facto* complainant and the mango tree under which she was standing and the bush where the alleged incident took place there is a small river. Therefore, non-disclosure of river in the written complaint is not, in my considered opinion a vital contradiction. Actually, the incident took place inside a bush on the other side of the river and in the written complaint the said bush was referred to. Secondly, the victim told in her deposition that she narrated the incident on the next day morning but in the FIR she stated that she narrated the incident on 9th May, 2014. From the evidence of P.W. 2, it is asserted that he came to know about the incident on 8th May, 2014 and on that date he took away the mobile phone of the accused.

Secondly, the victim told in her deposition that she narrated the incident on the next date morning but in the FIR, she stated that she narrated the incident on 9th May, 2014. From the evidence of P.W.2, it is ascertained that he came to know about the incident on 8th May, 2014 and on that date he took away the mobile phone of the accused. On 9th May, 2014, after lodging the FIR, the father of the victim girl handed over the mobile phone to the Investigating Officer.

The learned Trial Court held that the accused committed kidnapping for the purpose of illicit intercourse with the victim girl within the meaning of Section 366 of the Indian Penal Code. However, in cross-examination, the victim girl candidly admitted that she was not dragged by the accused to the place of occurrence but she went there on being called by the accused following him. In cross-examination she clearly stated, **"while I was standing under the mango tree, a boy came and called myself, but I refused. The said boy came through the Kuli road and he called me from that Kuli road while I refused his call. I was thereafter taken by Dipak towards the river, on foot."**

In order to prove the charge under Section 366 of the Indian Penal Code, it is necessary to prove that the girl was compelled to go with the accused with the knowledge that she may be forced or seduced to illicit intercourse. In the absence of the above ingredient,

charge under Section 366 of the Indian Penal Code cannot be said to be proved. In support of my observation, the decision of the Hon'ble Supreme Court in ***Kavita Chandrakant Lakhani Vs. The State of Maharashtra*** reported in **(2018) 6 SCC 664** may be relied on. From the evidence of the prosecutrix, this Court does not find any ingredient that the victim girl was kidnapped from the custody of her lawful guardianship by the appellant. On the other hand, the evidence of the victim is absolutely clear that she followed the appellant on foot towards the river of their village.

Victim's evidence can be treated as of sterling quality only when her statement is consistent in all steps of the proceeding. The victim took the name of the accused as perpetrator of offence. However, in her statement recorded under Section 164 of the Code of Criminal Procedure, she did not state the name of the accused as perpetrator of offence. On the contrary, she stated that she was ravished by a boy. Furthermore, at the time of her medical examination, she was conspicuously silent about commission of rape upon her. On the other hand, she complained of having white discharge from her private part for few days before her medical examination.

Thus, she did not state to the Medical Officer that she was raped by the accused.

These contradictions, in my considered view, are not mere discrepancies but material contradictions that touches the root of the prosecution case.

The Investigating Officer did not even take any interest to unearth the truth of the incident, he even did not send the seized mobile phone of the accused for scientific examination to ascertain as to whether there was any obscene pictures taken by the said mobile phone or not. He also did not take any step to ascertain the ownership of the mobile phone.

In view of above material contradictions, I am not in a position to be in agreement with the learned Trial Judge in her finding of conviction and sentence.

For the reasons stated above, the instant appeal is **allowed** on contest, however, without costs.

The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 2nd Special Court, Purulia-cum-Judge, Special Court under POCSO Act, in Sessions Trial No.13 of 2014, arising of Sessions Case (Spl.) No.59/14 is set aside.

The appellant be released at once and discharged from bail bond.

Let a copy of this judgment be sent to the learned Trial Court along with the lower court records.

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

(Bibek Chaudhuri, J.)

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