

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRA 372 of 2016
With
CRAN 2 of 2016 (Old No.CRAN 3344 of 2016)

Prafulla Kanjilal
-Vs-
State of West Bengal

For the Appellant: Mr. Dipanjan Chatterjee,
Mr. Sujoy Sarkar.

For the State: Mr. Ranabir Roy Chowdhury,
Ms. F. Hossain.

Heard on: March 10, 2021.

Judgment on: March 16, 2021.

BIBEK CHAUDHURI, J. : –

1. The instant criminal appeal is directed against the judgment and order of conviction and sentence dated 10th February, 2016 and 15th February, 2016 respectively passed by the learned Additional Sessions Judge, 2nd Court at Krishnagar, Nadia in Sessions Trial No.XIX (IX) 2015 arising out of Sessions Case No.14(05) of 2015 convicting the appellant under Section 8 of the POCSO Act and sentencing him to suffer imprisonment for three years for offence punishable under Section 8 of

the Protection of Children from Sexual Offences Act, 2012 (hereafter described as the said Act) and also to pay fine of Rs.5000/-, in default rigorous imprisonment for further three months.

2. Hashkhali P.S Case No.243 of 2015 dated 29th May, 2015 was registered under Sections 6/8 of the said Act on the basis of the written complaint lodged by one Shyamal Mondal alleging, inter alia, that on 29th May, 2015 at about 12.30 pm his minor girl aged about three years went to the house of the accused to watch television. At that time the accused tried to commit rape upon her. When the said minor girl did not return to her home, her grand-mother had been to the house of the accused person and saw both the accused and the victim in necked condition and the accused was trying to commit rape upon her. Seeing the grand-mother of the victim, the accused fled away pushing her back.

3. On completion of investigation charge-sheet was submitted under Section 6 of the said Act before the learned Court below being the special court under Section 33(1) of the said Act.

4. The accused duly appeared before the trial court to face trial. When the charge was framed and read over against the accused he pleaded not guilty. During trial prosecution examined as many as 14 witnesses. Series of documents were marked paper exhibits which I propose to record subsequently in the body of the judgment.

5. It is pertinent to mention here that in a case under the said Act the evidence of the victim and her close relatives, such as parent, grand-parents etc are most relevant.

6. In the instant case the victim was aged about 3 ½ years. She was not examined during trial of the case. It is ascertained from the evidence of PW1 that on the date of occurrence at about 12/12.30 p.m he was busy with his job at that time his wife informed him over phone that the accused defamed her daughter. He rushed to his house and came to learn that his daughter was raped by the accused. He submitted a written complaint before the Officer-in-Charge of the local police station on the basis of which formal FIR was drawn. The Investigating Officer seized the wear in apparel of his daughter. Signature of PW1 on the said seizure list was marked as Exhibit-2.

7. From the evidence of PW2 who is the mother of the victim girl it is found that on the date and time of occurrence she was engaged in cooking. At that time her mother-in-law raised hue and cry from the house of the accused. Immediately she saw the accused fleeing away with a *gamcha*. Then her mother-in-law told her that she saw the accused and the victim together in necked condition. The accused embarrassed her and tried to commit dirty things. PW3 is the mother of the defacto complainant and grand-mother of the victim. She stated in her evidence that on the date of occurrence at about 12.30 p.m she went to the house of the accused in search of her grand-daughter. After entering into the room of the accused, she saw that the accused and her daughter were in necked condition. Her grand-daughter was lying on the bed and the accused tried to commit dirty things on her grand-daughter. When she raised alarm, the accused fled away taking a *gamcha*.

8. PW4 Tandra Mondal, PW5 Hasilata Mondal, PW6 Babi Sarkar, PW7 Jyotirmoy Biswas, PW8 Mrityunjoy Biswas and PW9 Indrajit Saha are all heresay witnesses and accordingly their evidence are all no importance considering the case of this nature.

9. PW10 Kishore Kumar Biswas is the Medical Officer who examined the victim on the date of occurrence and found two abrasion mark on the lower aspect of the vagina and another two abrasion mark on the lateral vaginal wall. There was conjection of middle of the vaginal wall. The medical examination report of the victim girl was marked as Exhibit-4. PW12 to PW13 are the police officer who conducted investigation of the case.

10. PW14 was posted as a Judicial Magistrate at Krishnagar on 12th June, 2015 on that date he recorded statement of PW3 under Section 154 of the Code of Criminal Procedure.

11. PW11 Dr. Pranab Kumar Ghosh conducted potency test of the accused and the report was marked as Exhibit-5.

12. These are all about the evidence on behalf of the prosecution. The learned trial judge on appreciation the evidence on record held the accused guilty for committing offence under Section 8 of the said Act.

13. It is seriously contended by the learned Advocate for the appellant that in the instant case the victim girl has not been examined. Without examination of the victim girl, the court cannot hold the accused guilty for committing sexual assault upon the victim. It is also submitted by her that victim was aged about three years at the relevant point of time. It

might not be possible for her to depose in Court. However there is no observation made by the learned trial judge after examining the victim under Section 118 of the Indian Evidence Act. It is also submitted by him that the parents of the victim admittedly did not see the incident. Only PW3 claimed herself to be the eyewitness of the occurrence. From her evidence it is found that she saw the victim girl lying on the bed in necked condition and the accused was also found necked. Seeing her accused pushed her away and fled away from his room.

14. The learned Special Judge found that the accused had committed an offence under Section 8 of the said Act. Section 8 is the penal provision of sexual assault. Section 7 defines sexual assault as an Act which has been committed with sexual intent and the various acts such as touching the vagina and other private part of the child with such a function are included in the definition. The evidence on record shows that the appellant disrobed the victim of the girl. There is no evidence on record that the accused had touched vagina.

15. The learned Judge held the accused guilty for committing offence under Section 8 of the POCSO Act relying on the evidence of PW4. PW4 being the Medical Officer examined the victim and submitted medico legal examination report which was marked as Exhibit-4. The Medical Officer found two abrasion marks on the lateral vaginal wall and conjunction of middle of the vaginal wall. From the evidence of the eyewitness (PW3) it is not found that the accused caused injury on the vagina of the victim girl.

Such injury may occur due to reasons other than sexual assault to a girl child aged about three years.

16. Considering the above evidence on record, I am not in a position to concur with the finding arrived at by the learned Special Judge POCSO in Sessions Trial No. XIX (IX) 2015.

17. Accordingly the instant appeal is allowed.

18. The judgment and order of conviction and sentence passed by the learned Judge Special Court, POCSO in Sessions Trial No. XIX (IX) 2015 arising out of Sessions Case No.14(05) of 2015 is set aside. The accused be released at once if he is in custody.

19. Let a copy of this order be sent to the Court below along with the lower court record.

(Bibek Chaudhuri, J.)