

16.09.2021  
SL No.17  
Court No.30  
(gc)

**CRA 525 of 2017  
With  
CRAN 1 of 2019  
(Old No: CRAN 3717 of 2019)**

**Md. Ismail @ Ismail @ Ismaile Miyan  
Vs.  
The State of West Bengal**

**(Via video Conference)**

Ms. Meenal Sinha,  
Ms. Kanchan Roy,  
Ms. Jagriti Bhattacharya,  
... For the Appellant.  
Mr. Abhra Mukherjee,  
Mr. Dipankar Mahata,  
... For the State.

By consent of the parties, the appeal is heard on the basis of the available record.

An 8-year-old girl complained of aberration, misbehaviour and sexual assault in her own private parts give rise to a complaint being lodged at the Entally Police Station under Section 376(2)(f) of the Indian Penal Code. The utter insensitivity and lack of awareness of the Investigating Officer is reflected in the charge-sheet as it only refers to Section 376(2)(f) of the Indian Penal Code disregarding the fact that the complaint clearly disclose an offence under Section 9(m) of the POCSO Act, 2012.

The learned Trial Judge although had referred to the testimony of the child and noticed an unequal encounter between the ape and the angel but possibly overlooked the said provision during trial and while giving sentence.

However, nothing much turns on it as it did not affect the conviction based on the quality of the evidence. The victim was the neighbour of the appellant/petitioner. The minor girl complained of inappropriate touches at her private places to her mother and the mother obviously being perturbed by such obnoxious behaviour of an elderly person who happens to be the neighbour lodged a police complaint.

In a case of this nature the victim child could be the only witness to narrate the frightful incident which disturbed her youthful mind. Much criticism has been made to the delay in lodging the F.I.R. and the quality of the evidence of the mother, doctor and the child but the fact remains that the child at the relevant time was only 8 years old and she narrated the incident with her innocent injured mind which had remained unshaken during the cross-examination. That the appellant touched her private parts with his hands and penis was being established by the child witness is good enough to pass a sentence against the appellant for committing an aggravated sexual assault under Section 9(m) of the POCSO Act. The evidence of the child in this case can be said to be spontaneous when she narrated the incident to her mother, before the Court and the statement recorded under Section 164 of the Code of Criminal Procedure. The deposition of the child witness inspires the confidence of this Court to accept her statement for the purpose of conviction. In a situation like this, the child could be the best witness to narrate the incident as to what happened to her and the trauma that caused to her by reason of such inappropriate and shocking act of

an elderly person from whom he expected only care and protection and in a position of trust. The evidence also clearly establish that the accused person took the victim to his house when the victim was playing with other children and he subsequently closed the door. The incident of sexual assault can only be narrated by the child as the appellant would not certainly divulge such fact although he might repent for such conduct. The learned Trial Judge although has proceeded on the basis of Section 376(2)(f) of the I.P.C. but in the back of his mind the object of the POCSO Act which came into force on 20<sup>th</sup> June, 2012 prior to the date of the offence reverberated his mind present and the same would be reflected from the judgment itself. The learned Judge may have unconsciously entered into the arena of the provisions of POCSO Act and while penning the judgment such principles imperceptively entered his mind which is adequately reflected from the analysis of the evidence and the conclusions arrived at by the learned Judge in his judgment. There is nothing to show in the evidence of the victim that the entire incident was improbable or imaginary. In this case all the witnesses appeared to have corroborated to a material extent in material particular by independent evidence. Moreover, there is nothing on record to show that the defacto complainant or the victim have any previous animosity with the accused facing the trial. From the oral testimony of the victim and the supporting evidence, it is clear that there was an intention to commit sexual assault by the accused and on the basis thereof the appellant was held guilty.

However, while passing the sentence, the learned Trial Judge was influenced by Section 376(2)(f) of the I.P.C.

In case of sexual assault, the greatest distress and humiliation is caused to the victim. However, the Court must also be careful that the case is not placed on false implication. In the instant case, the victim is the injured witness when the incident happened and that ordinarily the child witness could not tell a lie as to the actual assault. The prosecutrix was aged about eight years and as per the settled position of law the statement of the prosecutrix is sufficient to clench guilty to the accused person. Mere deposition of sole prosecutrix is sufficient for awarding conviction. Considering the gravity of the circumstances and the evidence on record, we find that the evidence of P.W.-3, the victim, is credible.

Now we come back to the sentence as prescribed under Section 9(m) read with Section 10 of the POCSO Act.

As the POCSO Act came into force while the offence took place, and on consideration of the evidence as above, we alter the charge of Section 376(2)(f) of the I.P.C. to the charge under Section 9(m) of the POCSO Act in exercise of power under Section 216 of the Code of Criminal Procedure as well as under Section 482 of the Code of Criminal Procedure.

We are inclined to sentence the appellant for six years for the offence punishable under the aforesaid Sections in view of the fact that the act complained of is not an aggravated penetrative sexual assault which forms the basis of conviction. We accordingly sentence the convict to suffer rigorous infringement for six years

along with fine of Rs.1,00,000/- out of which 90% of the amount is to be paid to the victim girl as a compensation under Section 357 of the Code of Criminal Procedure. In default of payment, the convict will undergo rigorous imprisonment for six months.

The appeal being CRA 525 of 2017 and the application for suspension of sentence being CRAN 1 of 2019 (Old No: CRAN 3717 of 2019) stand disposed of with the aforesaid modifications of the impugned order.

All parties shall act on the server copies of this order duly downloaded from the official *website* of this Court.

**(Rabindranath Samanta, J.)**

**(Soumen Sen, J.)**