

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/1/2018 (Old No. : CRAN/3447/2018),
CRAN/2/2020
in
CRA 601 of 2018**

**Ashis Sk.
-Vs.-
State of West Bengal & Anr.**

For the appellant : Ms. Busra Khatun, Adv.

For the respondents : Mr. Ranabir Roy Chowdhury, Adv.,
Mr. Sandip Chakraborty, Adv.

Heard & Judgment on : 11.11.2021.

Bibek Chaudhuri, J.:

In the instant appeal judgment and order of conviction and sentence dated 4th October, 2018 and 5th October, 2018 respectively passed by the Learned Special Judge under Protection of Children from Sexual Offences Act, 2012 (POCSO), Malda. In Sessions Trial No. 11 of 2014 arising out of Sessions

Case No. 316 of 2014 and POCSO Case No. 42 of 2014, thereby convicting the appellant under Sections 376(2)(i)/511 of the Indian Penal Code and read with Sections 6/18 of the POCSO Act. The appellant was sentenced to suffer rigorous imprisonment for five years with fine of Rs.5,000/-, in default, further rigorous imprisonment for five months.

Since the learned advocate-on-record on behalf of the appellant took no step during the pendency of appeal, Ms. Busra Khatun, learned advocate was appointed as *Amicus Curiae* to assist the Court on behalf of the appellant. The learned *Amicus Curiae* and the learned advocate for the State respondent made their elaborate submission at the time of final hearing of the appeal.

English Bazar Police Station Case No. 480 of 2014 dated 31st May, 2014 was registered on the basis of a written complaint submitted by one Entajuddin Sk. stating, *inter alia*, that on the selfsame date at about 4.30 p.m. her minor daughter who was at the relevant point of time aged about only seven years went to the house of the appellant to play with her friend. Finding the daughter of the de facto complainant alone in his house the appellant took her to his house disrobed her. He also put off his

pant and tried to commit rape upon her. When the daughter of the de facto complainant cried out, the accused left her. At once, she fled away and returned to her home and narrated the entire incident to her mother.

The investigation of English Bazar Police Station Case No. 480 of 2014 culminated in filing charge-sheet against the appellant under Section 376(2)(i)/511 of the Indian Penal Code and Sections 6/18 of the POCSO Act. The accused/appellant was brought under arrest. Charge under Section 376(2)(ii) of the Indian Penal Code and Sections 4/6/8/12 of the POCSO Act was framed against the accused as he pleaded not guilty when the charge was read over and explained to him, trial of the case commenced.

During trial, prosecution examined as many as 7 witnesses. Amongst them the victim deposed as P.W.1. The Medical Officer who examined the victim immediately after the alleged incident was examined as P.W.6. P.W.2 is the father of the victim and de facto complainant of the case, P.W.7 is the Investigating Officer and other witnesses are the local people.

It is submitted by Ms. Busra Khatun, learned *Amicus Curiae* that though charge was framed under Section 376 (2)(ii) of the

Indian Penal Code and Sections 4/6/8/12 of the POCSO Act, the accused was convicted under Section 376 (2)(ii)/511 of the Indian Penal Code and Sections 6/18 of the POCSO Act. It is pointed out by the learned *Amicus Curiae* that the appellant was not charged under the penal provisions on which he was convicted and sentenced. So the charge was not properly framed and no conviction can be based under an offence for which the appellant was not charged. Ms. Khatun next draws my attention to the FIR as well as the statement of the victim recorded under Section 164 of the Code of Criminal Procedure and her evidence. It is pointed out by her that everywhere allegation was made against the accused that he tried to rape or commit aggravated penetrative sexual assault with the victim. However, from the evidence of the Medical Officer (P.W.6) and the medical examination report of the victim, it is ascertained that there was absolutely no injury in the private part of the victim. If a child of about 7 years is attempted to be sexually exploited by way of penetrative assault, there must be some marks of injury on her private part because the accused was 25 years of age at the relevant point of time. In view of such contradictions, it is submitted by the learned *Amicus Curiae* that

the judgment and order of conviction and sentence passed by the learned Trial Judge is liable to be set aside and accused should be honourably acquitted.

Mr. Ranabir Roy Chowdhury, learned P.P.-in-Charge, on the other hand, submits that in a case of rape or sexual assault, the evidence of the victim is of greatest importance. If the evidence of the victim is trustworthy, reliable and cogent and there is no ambiguity in her evidence, the Court can base its conviction and sentence on the basis of the sole evidence of the victim. It is also submitted by him that in case of such offence, the victim is not an accomplice but she is an injured witness and reliance and credit of her evidence should be given similar to the evidence of an injured witness.

With this introduction Mr. Roy Chowdhury refers to the FIR. It is pointed out by him that the incident took place on 31st May, 2014 at about 4:30 p.m. and the FIR was made within two hours of the incident at 6:25 p.m. on the same date. There is hardly any chance of concoction in the FIR. The de facto complainant in her evidence stated that the appellant took her to his house and after removing his pant, he tried to insert his penis in her private part. In cross-examination, the victim further asserted that

when she was playing with her friend Ripa, the appellant was watching television sitting in his room. After Ripa left, "Ashis played with me 'Nengtu Nengtu' for one hour".

It is submitted by Mr. Roy Chowdhury that after such positive assertion in the cross-examination, defence case was demolished and no other evidence is required to be looked into as the evidence of other witnesses are hearsay in nature. It is also submitted by Mr. Roy Chowdhury that the Medical Officer might not find any external injury on the person of the de facto complainant as there was no resistance by the victim child of 7 years against a grown up man of 25 years.

Having heard the learned *Amicus Curiae* and learned Advocate for the State and on careful perusal of the entire evidence on record as well as the judgement of the Trial Court, this Court likes to record at the outset that the Trial Court is empowered to convict a person in lesser punishment even if he is not charged with the lesser one, but charged under graver section. This Court also finds that when an accused is charged under different provisions of POCSO Act including aggravated penetrative sexual assault, he need not be charged under Section 376 of the Indian Penal Code because the POCSO Act is a special

Act for conducting trial of the accused persons who are involved in committing offence upon the children under the age of 18 years.

The learned Trial Judge held the accused guilty for committing offence under Section 6/18 of the POCSO Act. Section 6 is the penal provision for aggravated penetrative assault. Section 3 is the definition of penetrative sexual assault which runs thus:-

3. Penetrative sexual assault. - A person is said to commit "penetrative sexual assault" if –

- (a) he penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

Aggravated penetrative sexual assault as defined in Section 5 is commission of penetrative assault by some class of persons like a police officer within the limits of his police station, a member of Arm Forces within the limits of the area to which he is deployed, a Public Servant and so on. It is needless to say that if a girl child of 7 years becomes a victim of penetrative sexual assault, there must be injury in her private part. Even if penetration is partial, the injury would naturally be visible superficially on the labia majora or labia minora or pudendum of the victim. The Medical Officer did not find any such injury of the victim immediately after the occurrence.

However, from the cross-examination of P.W.1, it is proved beyond any shadow of doubt that he was sexually assaulted within the meaning of Section 7 of the POCSO Act and, therefore, he is punishable for offence under Section 8 of the said Act.

In view of such discussion, the instant appeal is disposed of holding the appellant guilty for committing offence under Section 8 of the POCSO Act.

He is convicted accordingly.

For an offence under Section 8 of the POCSO Act, the appellant shall be punished with imprisonment of either description for a term which shall not be less than 3 years but which may extend to 5 years and shall also liable to fine.

The learned Trial Judge passed a sentence of rigorous imprisonment of 5 years and fine with default clause against the appellant.

Therefore, I do not think to rewrite the quantum of sentence for committing offence under Section 8 of the POCSO Act by the appellant.

It is found from the record that the appellant was in custody since the date of his arrest. If the appellant completes the period of sentence, during the pendency of the instant appeal, he shall be released forthwith on completion of sufferance of sentence.

Let a copy of this judgment be immediately sent to the learned Court below along with the lower court record for information and compliance.

Urgent photostat certified copy of this order, if applied for, be given to the learned Advocates for the parties on the usual undertakings.

(Bibek Chaudhuri,

J.)

Srimanta/Mithun
A.R. (Court)