

Form J(2)

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

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

C.R.A. 622 of 2018

**Bhema Sk @ Firul Sk
Vs.
The State of West Bengal**

For the Appellant : Mr.Manas Kumar Das,Adv.

**For the State : Mr.Saswata Gopal Mukherjee,Ld.P.P.
Mr.Swapan Banerjee, Adv.
Mr.Suman De, Adv.**

Heard on : 16.07.2021.

Judgment On : 30.07.2021

Bibek Chaudhuri, J.

Judgment and order of conviction for committing an offence under Section 10 of the Protection of Children against Sexual Offences Act (hereinafter described as the POCSO Act) and sentence to suffer imprisonment for five years with fine of Rs.1,000/- and default clause passed in Sessions Trial No.06(06) 2018, corresponding to C. Special No.16 of 2018 is assailed in the instant appeal by the convict/appellant.

One Taherun Bibi lodged a written complaint on 13th April, 2018 stating *inter alia* that her minor daughter aged about 7 years at the relevant point of time went to graze her all goats beside 'Notenala' situated at the Western side of their village on 9th April, 2018. At about 2 p.m. the appellant found the minor daughter of the *de facto* complainant alone in the field and forcibly embraced her. Then he opened her pant and put his finger into her vagina to irritate her. Thereafter, the appellant lay her down on the field and forcibly committed rape upon her. She sustained bleeding injury on her person due to such offence. The *de facto* complainant heard the incident from local people and rushed to the spot and found her daughter in injured condition. The victim narrated the incident to her mother. Immediately she admitted her minor daughter to Kandi Sub-Divisional Hospital. She was discharged from the hospital on 12th April, 2018.

On the basis of the said written complaint, police registered Kandi Police Station Case No.125 of 2018 dated 13th April, 2018 under Section 376(2)(i) and Sections 4 and 5 of the POCSO Act and took up the case for investigation. The investigation concluded in filing charge-sheet against the accused Bhema Sk.

It is pertinent to mention at the outset that at the time of commission of offence, the appellant was minor above the age of 16

years. He was initially produced before the Juvenile Justice Board, Murshidabad. The Board conducted a preliminary assessment with regard to his mental and physical capacity to commit such offence and ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence and passed an order on the basis of the said preliminary assessment that the appellant was required to be tried as an adult.

The learned Magistrate of the jurisdictional Children Court held that the appellant was to be tried as an adult as per the provision of the Code of Criminal Procedure and accordingly, the case was committed to the Court of Sessions. Subsequently the case was transferred to the Special Court under the POCSO Act, Kandi.

Trial Court framed charge against the accused/appellant under Section 6 of the POCSO Act and Section 376(2)(i) of the Indian Penal Code. When the charge was read over and explained to the accused, he pleaded not guilty.

In order to establish the charge against the appellant, prosecution examined six witnesses. Amongst them P.W.2 is the victim. P.W.1 is the mother of the victim. P.W.3 to P.W.5 are Medical Officers and P.W.6 is a lady Sub-Inspector attached to Kandi Police Station at that relevant point of time and was the Investigating Officer of this case. The F.I.R., sketch map of the place of occurrence and

medical examination reports were marked exhibits, which I proposed to refer subsequently the body of judgment.

The learned Trial Judge relied on the testimony of the victim girl and her mother. He was also of the view that the ocular evidence of the victim girl regarding the commission of offence was corroborated by the medical evidence and accordingly, he held the accused/appellant guilty for committing offence under Section 354 of the Indian Penal Code and Sections 10 and 6, read with Section 18 of the POCSO Act. The learned Trial Judge, however, did not pass any order of sentence under Section 354 of the I.P.C. The appellant was sentenced to suffer imprisonment for 5 years with fine for the offence under Section 10 of the POCSO Act. He was also sentenced to imprisonment for 5 years with fine and default clause for the offence punishable under Section 6 read with Section 18 of the POCSO Act.

The learned Trial Court convicted the appellant for committing offence under Section 10 of the POCSO Act and also for offence punishable under Section 6 read with Section 18 of the said Act and sentenced him accordingly.

It is pertinent to note that Section 10 of the POCSO Act is the penal provision for aggravated sexual assault. A sexual assault becomes aggravated sexual assault if the offence of sexual assault is committed by certain class of persons and also when such sexual

assault is committed on a child below 12 years [Section 9(m) of the POCSO Act].

Section 7 defines sexual assault which includes touching the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or any other act committed with sexual intent which involves physical contact without penetration.

Section 6, on the other hand, is the penal provision for aggravated penetrative sexual assault and Section 18 prescribes punishment for attempt to commit an offence.

The learned Trial Court on appreciation of evidence found that the accused committed sexual assault upon the victim who was aged about 8 years at the relevant point of time when the incident took place and also attempted to commit penetrative sexual assault.

The victim girl was examined by the Trial Court as P.W.2. Since she was aged about 7 years on the date of recording her evidence, the learned Trial Court examined the capacity of the victim girl as to whether she was able to understand the questions to depose in the case and on being satisfied her evidence was recorded. In her evidence she stated that on the date of occurrence she along with one Musaraf, Mahesh, Dhumpa, Sarbo, Basir and Haran were grazing goats in the field. At that time the accused told the victim to

accompany him to drive away the goats of Dhumpa and he took her to the field of Silai. One Sarbo was also with them. Bhema assaulted Sarbo and he fled away from that place. Then pressed the mouth of the victim by her hands, pushed her down on the ground and inserted finger in her vagina causing bleeding injury on her person. She also stated that when she fell down on the ground, on being pushed by Bhema, she sustained injury on her back and chest. Thereafter, she returned home and narrated the incident to her maternal aunt, Nurnechha Khatoon and her grandmother. She also stated the fact to her mother.

It is vehemently argued by the learned Advocate for the appellant that the boys and girls who were also grazing their cattle with the victim were the best independent witnesses to say about the incident. The prosecution failed to examine any of the said boys and girls. Prosecution also failed to examine one Sarbo who was with the victim immediately before the occurrence.

Learned Advocate for the appellant next draws my attention to the evidence of Taherun Bibi, mother of the victim girl. In her evidence she also stated that her daughter told her that the accused caught hold of the victim, put off her pant and then pushed his finger in her private part causing bleeding injury on her vagina.

It is submitted by the learned Advocate for the appellant that the evidence of the mother of the victim (P.W.1) is totally contradictory with the statement made by her in her written complaint. In the written complaint she alleged that on 9th April, 2018 at about 2 p.m., the accused found her daughter alone in the field and forcibly embraced her, open her pant and put his finger into her vagina to reiterate her and then he forcibly committed rape upon her. In her evidence P.W.1 did not make any allegation as to commission of rape by the accused.

The victim was medically examined on 13th April, 2018 at Kandi Sub-Divisional Hospital. In his evidence it is found that he clinically examined the victim as an indoor patient on 13th April, 2018 and noticed small lacerated injury caused due to nailing of finger between vaginal orifice and anal orifice.

It is pointed out by the Learned Advocate for the appellant that the alleged incident took place on 9th April, 2018 and the victim was admitted to Kandi Sub-Divisional Hospital on the very date of occurrence. Though it is stated in the injury report (exhibit – 3) that the victim was admitted to the hospital on 9th April, 2018 at about 7 p.m. with history of sexual assault, the Medical Officer did not record the name of the offender who committed such assault.

I have carefully perused the injury report (exhibit – 3). It is true that the name of the offender has not been recorded in the injury report but the report suggests that the victim was admitted to the hospital with history of sexual assault and there was an injury between vaginal orifice and anal orifice. Prosecution case is that the accused pushed her finger into the vagina of the victim causing bleeding injury. There is every possibility that if a boy aged about 17 years on the date of commission of offence pushes finger into the vagina of a little girl of seven years there shall be injury caused by nail mark around the private part of the victim. The injury report corroborates the nature of injury received by the victim. The victim never made exaggerated statement in her statement recorded under Section 164 of the Code of Criminal Procedure and in course of her evidence in Court. The mother of the victim though stated in her F.I.R. that the victim was allegedly raped by the accused, she stated in her evidence that the accused committed sexual assault upon her daughter.

At this stage, the question that crops up for adjudication is as to whether the prosecution case is liable to fail for non-examination of the boys and girls who were grazing their cattle with the victim on the date and time of occurrence.

The rule of appreciation of evidence in a case of sexual abuse , rape or molestation is laid down by the Hon'ble Supreme Court in plethora of cases. In a case of sexual abuse, evidence of the victim is considered to be the most important piece of evidence and conviction can be based on the basis of the solitary evidence of the victim if her evidence appears to the Court to be reliable, trustworthy, unembellished and of sterling quality.

In the ***State of Maharashtra -vs- Chandraprakash Kewalchand Jain***, reported in ***1990 SCC (Cri) 210***, the Hon'ble Supreme Court held that the victim of rape cannot be treated like that of an accomplice her evidence should not be tested with same amount of suspicion as that of an accomplice. On the contrary, her evidence is as important as the evidence of an injured person. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 of the Indian Evidence Act which requires it to look for corroboration.

In a very recent case of ***Ganesan -vs- State*** represented by its Inspector of Police, reported in ***(2020) 10 SCC 57***, three Judges Bench of the Hon'ble Supreme Court after considering series of pronouncements on the subject was pleased to observe that an

accused guilty for commission of an offence of rape , the solitary evidence of the prosecutrix is sufficient , provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

Who can be said to be a sterling witness has been dealt with and considered by the Hon'ble Supreme Court in the case of ***Rai Sandeep -vs- State (NCT) of Delhi***, reported in ***(2012) 8 SCC 21***. In paragraph 22, it is observed as under:

"22. 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."

On careful consideration of the deposition of the victim girl on the touch stone of the law laid down by the Hon'ble Supreme Court in the case of **Ganesan (supra)** , I am of the considered view that the sole testimony P.W.2 victim is absolutely trustworthy and unblemished and her evidence is of sterling quality. She not only stated the fact of sexual assault committed her by the accused in her examination-in-chief but in cross-examination she stated in affirmative that the accused inserted his finger inside her vagina putting off her pant.

There are of course some discrepancies between the statement made in the FIR and the evidence of mother of victim. However, such discrepancy cannot be treated as material contradictory. In the FIR the mother of the victim alleged that that victim raped by the accused, however, in her evidence she stated that the accused inserted finger in the vagina of the victim causing bleeding injury. The mother of the victim (P.W.1) is an illiterate village lady. When she saw bleeding injury between the vaginal orifice and anal orifice , she thought that her little daughter was raped. Subsequently the doctor (P.W.4) who examined the victim opined that he found a lacerated injury caused by nail of finger between the vaginal orifice and anal orifice. The evidence of the doctor corroborates the oral testimony of the victim. Therefore, the learned trial Judge did not commit any error in recording conviction of the accused under Section 10 of the POCSO Act.

However, it is found from the statement of the victim recorded under Section 164 of the Code of Criminal Procedure on 16th April,

2018 that the victim stated before the learned Judicial Magistrate that the accused inserted his finger forcibly inside her genitalia. She sustained pain and bleeding injury in her private part then the accused left her and fled away. The statement of the victim recorded under Section 164 of the Code of Criminal Procedure as well as her evidence during trial never suggest any attempt to commit sexual assault on the victim by the accused. Therefore, the conviction under Section 6 read with Section 18 of the POCSO Act passed by the learned trial Judge and the sentence thereof is liable to be set aside.

In view of the above discussion the instant appeal is allowed in part.

The conviction and sentence passed by the learned trial Judge under Section 6 read with Section 18 of the POCSO Act is set aside.

However, the order of conviction and sentence passed by the learned trial Judge against the appellant for committing offence under Section 10 of the POCSO Act is upheld.

The instant appeal is accordingly disposed of on contest.

Urgent photostat certified copy of this judgment shall be supplied to the learned advocates for the appellant free of cost.

(Bibek Chaudhuri, J.)

