

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA (DB) 3 of 2022

With

CRAN 1 of 2022

Bimal Ch. Jana @ Bimal Chandra Jana

Vs.

The State of West Bengal

For the Petitioner : Mr. Prabir Kr. Mitra, Adv.
 Mr. Pinak Kr. Mitra, Adv.
 Ms. Arbia Shahab, Adv.
 Mr. Yashovardhan Shaw, Adv.

For the State : Ms. Z. N. Khan, Adv.
 Mr. Arup Sarkar, Adv.

Hearing Concluded on : November 23, 2022
 Judgement on : December 12, 2022

DEBANGSU BASAK, J.:-

1. The appellant has assailed the judgement of conviction dated December 6, 2021 and the order of sentence dated December 7, 2021 passed by the learned Additional Sessions Judge, Third court, Tamluk, Purba Mednipur in Sessions Trial No. 10 (7) 15 convicting the appellant under Section 6 of the Protection of Children from Sexual Offences Act, 2012. By the impugned order of sentence, the appellant has been sentenced

to suffer rigorous imprisonment for 10 years for committing an offence under Section 6 of the Act of 2012 and also to pay a fine of Rs. 50,000, in default to suffer further rigorous imprisonment for one year.

2. The prosecution had approached the Trial Court with a case that, the appellant on July 12, 2014 at about 2 P.M and thereafter, on several occasions, at the house of the victim, committed rape on the minor victim aged under 16 years at several locations and thereby committed offence punishable under Section 376 (2) (i) and (n) of the Indian Penal Code, 1860 and under Section 6 of the Act of 2012. Charges as against the appellant had been framed on August 2, 2021 under Section 376 (2) (i) and (n) of the Indian Penal Code, 1860 and Section 6 of the Act of 2012. The appellant had pleaded not guilty and claimed to be tried.

3. At the trial, the prosecution had examined seven witnesses. The prosecution had produced various documentary evidences, which were marked as Exhibits 1 to 9.

4. Learned advocate appearing for the appellant has submitted that, the prosecution did not prove the case beyond

reasonable doubt. He has contended that, there was delay in the lodgement of the first information report. The incident was alleged to have taken place on July 12, 2014. He has contended that, there was a village meeting on March 29, 2015 and that, the police complaint was lodged on March 30, 2015 subsequent to the meeting at the village. He has contended that, the delay in the lodgement of the First Information Report remains unexplained.

5. Learned advocate appearing for the appellant has referred to the contents of the first information report. He has contended that, the police complaint does not contain vital informations.

6. Learned advocate appearing for the appellant has submitted that, the victim has at least two dates of birth disclosed at the trial. The age of the victim is at variance. Therefore, the age of the victim has not been conclusively established by the prosecution. Consequently, the provisions of the Act of 2012 could not have been invoked by the prosecution.

7. Learned advocate appearing for the appellant has contended that, the medical evidence produced at the trial

does not support the case of the prosecution. He has referred to the medical examination report being Exhibit 2. He has contended that, the victim did not suffer any injury. The victim had never consulted any doctor contemporaneously. According to him, no independent witness came forward to depose about the incident.

8. Learned advocate appearing for the appellant has contended that, the appellant was not examined under Section 53A of the Criminal Procedure Code. No seizure of the alleged obscene pictures had been made from the appellant. He has contended that, when two views are possible, the one favouring the accused should be accepted.

9. Learned advocate appearing for the appellant has relied upon ***All India Reporter 1975 Supreme Court 1026 (Ram Kumar vs. State of M.P), 2003 Supreme Court cases (Criminal) 1484 (Sudhansu Sekhar Sahoo vs. State of Orissas), 2004 Supreme Court Cases (Criminal) 79 (State (Andman & Nicobar Admn.) Vs. Shyam Raj), 2016 Volume 1 Supreme Court Cases (Criminal) 536 (State of Madhya Pradesh vs. Munna)*** and ***2007 Supreme Court Cases***

(criminal) (1) 732 (Vikramjit Singh alias Vicky vs. State of Punjab) in support of his contentions.

10. Learned advocate appearing for the State has submitted that, the delay of eight months in lodging the first information report should be taken into consideration in the light of the age of the victim and the nature of threat that the victim was subjected to. He has submitted that, the victim is a minor who was threatened by a lifelong moral/character destruction by the exposure of inappropriate photographs taken by the appellant. Moreover, the victim had to muster enough courage to lodge the first information report. The first information report had been lodged after the victim was exposed to the entirety of the village. According to him the prosecution had explained the delay in lodging the First Information Report adequately.

11. Learned advocate appearing for the State has submitted that the victim in her oral testimony did not deviate from the statement recorded by her, under Section 164 of the Criminal Procedure Code. He has pointed out that, the victim was cross-examined at length and that, the version of the victim could not be shaken.

12. Learned advocate appearing for the State has contended that, nondisclosure of existence of obscene pictures in the letter of complaint is not fatal to the case of the prosecution since, the victim was a minor, underwent extreme sexual trauma and agony. A victim of such age is not expected to dictate with utmost accuracy which she had faced for the past eight months. Moreover, a first information report cannot be treated as an encyclopaedia of the events when the victim had clearly stated about the brutal rape that she was subjected to by the appellant, on several occasions.

13. Referring to the medical examination report, learned advocate appearing for the State has contended that, the medical examination was held on March 30, 2015 with regard to an incident occurring on July 12, 2014. He has referred to the medical examination report being Exhibit-2 and contended that, the hymen of the victim girl was found to be ruptured and that there were old tear found. He has contended that, the injuries on the body of the victim are consistent with the age of the victim and the nature of the crime.

14. Referring to the age of the victim, learned advocate appearing for the State has contended that, the date of birth

of the victim as appearing in the original birth certificate is conclusive of evidence of her age. The original birth certificate of the victim had been tendered in evidence and marked as Exhibit-7.

15. Learned advocate appearing for the state has distinguished the judgements relied upon by the appellant and contended that they are not applicable in the facts and circumstances of the present case.

16. The victim had deposed as PW-1. She had stated that, the incident took place on July 14, 2014 at about 2 P.M at her residence. She had stated that, her father was staying at Kolkata for his work and that, she was with her mother at the village home. On that day, her mother had been at the shop at the market and that she was alone at her residence. She had stated that, the appellant was a friend of the father and a regular visitor to her residence. On the fateful date and time the appellant had come to her residence and raped her. The appellant had promised that he would marry her and also threatened her that he would circulate the photographs taken on his mobile, of the relationship if she discloses the incident to anyone. Thereafter, on several times, the appellant had met

her physically without her consent with the threat to expose her photographs on the internet. Initially, she did not inform the incident to anyone but had only given hints to her mother about his indecent attitude. Thereafter, on one day, the village people had called her and her family members where she came to know that the appellant had exposed the affair to the village people. On the pretext of giving examination, she had come out of the custody of the village people and lodged the complaint. She had identified the complaint which was marked as Exhibit-1. She had been medically examined and her medical examination report was tendered in evidence which was marked as Exhibit-2. She had recorded the statement under Section 164 of the Criminal Procedure Code which she identified and tendered in evidence as Exhibit-3.

17. In a cross-examination she had stated that her mother started a beauty parlour 8 to 9 months prior to the date of the incident. She had also stated that, she was aware that the appellant was married and that she visited the appellant at his residence. She had given hints to her mother about two to two and half months prior to the date of the complaint and that she did not disclose the affair even to her mother. Her

mother had learnt about the incident on the date previous to the date of the complaint. Her father had also come to know on such date. The villagers had demanded properties and money from them. The appellant had physically met her 9 to 10 times prior to and after the incident.

18. PW-1 had been recalled when she produced her original birth certificate, original certificate of Madhyamik Examination and the original admit card of West Bengal Board of Secondary Education to prove her age. She had stated that, her date of birth is July 30, 1998. The original birth certificate had been marked as Exhibit-7 with the original certificate of Madhyamik and the original admit card being marked as Exhibits- 8 and 9 respectively.

19. The mother of the victim had deposed as PW-2. She had stated that, about 6 to 7 months prior to the complaint, she noticed that her daughter was sad. She had then asked about her sadness when the victim did not disclose anything completely. However, the victim had hinted about some incident conducted by the appellant. She had forbade her to talk with the appellant. She had stated that, the appellant used to visit her residence as a friend of her husband.

20. PW-2 had stated that, on March 29, 2014 the secretary of the village committee called a meeting which she attended along with her daughter. In such meeting it was disclosed to her that she had to give some land to the village people in lieu of the indecent pictures of the victim. Indecent pictures of the victim had been shown in the meeting. The village people had also demanded a sum of Rs. 50,000 and demanded that the victim be given in marriage to the appellant. She had corroborated the evidence of PW-1. PW-2 had been cross-examined in extenso on behalf of the appellant. The appellant could not elicit anything favourable to him in such cross-examination.

21. The Secretary of the village committee, who had convened the meeting on March 29, 2014 had deposed as PW-3. In his examination-in-chief he had stated that, he called the appellant when the appellant disclosed that he wanted to marry the victim. Since the appellant was married, PW-3 did not accept his proposal. PW-3 had called the Investigating Officer and disclosed such fact to him. PW-3 had been declared hostile. Upon such declaration, PW-3 had been cross-examined on behalf of the prosecution. In such cross-

examination, he had stated that, he was the Secretary of the village committee and he used to mediate at the village level. Cross-examination of PW-3 had been declined on behalf of the appellant.

22. A neighbour of the victim had deposed as PW-4. He had stated that, he heard about the complaint. He had been interrogated by the police where he disclosed his identity only. He had been declared hostile by the prosecution. On cross-examination by the prosecution, subsequent to PW-4 being declared hostile, he had denied telling the Investigating Officer that the victim and her mother stayed alone and that the appellant was familiar with them and that they had intimacy. In cross-examination on behalf of the appellant, he had stated that, he was deposing before the Court about the incident for the first time and he did not know the facts personally except what he derived from the newspapers.

23. An elected member of the panchayat had deposed as PW-5. He had stated that, he knew the victim and her mother as also the appellant. He had claimed that, the police come to him to investigate and that he came to know of the incident by reading the newspapers. He had been declared hostile by the

prosecution. The appellant had declined to cross-examine him.

24. The Investigating Officer had deposed as PW-6. In his deposition, PW-6 had stated about the conduct of the investigation. He had tendered the formal First Information Report which was marked as Exhibit-4. He had tendered the rough sketch map of the place of occurrence which was marked as Exhibit-5. He had stated that, he arrested the appellant on May 30, 2015 and had the appellant medically examined and collected the medical report. He had also got the victim medically examined. He had stated that PW-3 disclosed to him that the appellant, taking advantage of the absence of the father of the victim, committed rape on the victim and also gave her the proposal of marriage. PW-3 had also disclosed him that the appellant took indecent photographs of the victim which the victim could not disclose to anyone out of shame.

25. PW-6 had also stated that, PW-4 disclosed to him that due to the friendship with the father of the victim, the appellant used to visit the residence of the victim and on July 12, 2014, taking the advantage of the absence of the mother of

the victim, the appellant raped the victim and thereafter proposed to marry her. PW-4 had also stated to him that, out of shame and fear, the victim did not disclose such fact to anybody. PW-4 upon learning about the incident had advised the mother of the victim to go to the police station along with the victim.

26. The Investigating Officer had also stated that, PW-5 had disclosed to him that being the Panchayat Member of the village he used to hold salishi (mediation). PW-5 had disclosed to him that, the appellant as a friend of the father of the victim, on July 5, 2015, taking advantage of the absence of the mother of the victim the appellant, had raped the victim and thereafter proposed to marry her. Later on, upon coming to know of the incident, he had advised the victim and her family members to lodge a complaint with the police.

27. In cross-examination, PW-6 had stated that, the date of birth of the victim is July 30, 1998 as appearing from the admit card.

28. The doctor who had examined the victim had deposed as PW-7. He had stated that on March 30, 2015, he examined the victim after taking the consent of the mother of the victim.

On examination, he did not find any marks of injury on the private parts of the victim. The hymen of the victim was ruptured and old tear was seen in the hymen. No other injury was detected in other part of the body of the victim. He had tendered his medical report which was marked as Exhibit-2.

29. In his statement recorded under Section 313 of the Criminal Procedure Code, the appellant had claimed that he did not do anything and that, he was innocent. He had declined to adduce any evidence at the trial.

30. At the trial, the appellant had been charged with raping a minor. The prosecution had produced documents establishing date of birth of the victim at the trial. The birth certificate of the victim had been produced at the trial which was marked as Exhibit-7. Exhibit-7 being the original certificate of birth dated November 20, 1998 of the victim has specified the date of birth of the victim to be July 30, 1998. Exhibit-8 and 9 have also stated that the date of birth of the victim is July 30, 1998. The victim in her deposition has stated that her date of birth is July 30, 1998. The incident had occurred on July 12, 2014 with victim being just shy of 16 years of age. The victim, therefore, was a minor as on the

date of the incident. The age of the victim had been established by cogent evidence being Exhibit-7, 8 and 9.

31. In her deposition, the victim had claimed that, she was raped by the appellant. She had also stated that, the appellant met her physically against her consent with threat to expose obscene pictures of her on the internet. The medical examination report of the victim being Exhibit-2 had noted that, hymen of the victim was ruptured and that there was old tear of hymen present. Exhibit-2 has corroborated the oral testimony of the victim so far as her sexual activity is concerned.

32. The incident of the appellant being involved in raping the victim had been established by the testimonies of the victim herself and the corroborative testimonies of her mother and other witnesses. The victim had identified the date and time when one of the incidents of rape occurred. The appellant was a friend of the father of the victim and had been a regular visitor to her residence. The appellant had established the sexual relation with the victim on threat of publishing the offensive pictures on the internet if the victim complained to anyone about the events. The victim did not muster courage to

confide with her mother about the events. Therefore, in facts and circumstances, it would be impetuous to expert independent witness to the events.

33. PW-3 had stated that, when he became aware of the complaint of the victim from her parents, he had called the appellant when the appellant disclosed that the appellant wanted to marry the victim. PW-3 had been declared hostile at the trial. There is no material in the records to disbelieve the testimony of PW-3 when he had claimed that the appellant proposed to marry the victim. The proposal for marriage is a pointer, if not anything else of the involvement of the appellant with the victim.

34. The prosecution had duly explained the delay in the lodgement of the First Information Report. As has been noted above, the First Information Report was lodged by the victim who was a minor. She had been subjected to threat of dishonour of herself and her family by the appellant. She was under such amount of pressure that she did not divulge her trauma to her mother also. It cannot be expected of a minor to lodge a complaint of the crime of the nature she was subjected to at the first available opportunity.

35. As has been rightly pointed out by the learned Advocate for the State, the First Information Report is not expected to be an encyclopaedia of events. Moreover, given the age of the victim and nature of crime that had been perpetuated on her over a period of time lack of all details of the crime, subsequently coming to light at the trial stands explained. The victim did not deviate from her statements recorded under Section 164 of the Criminal Procedure Code being Exhibit-3 when she had deposed at the trial. The defence would elicit anything favourable to them despite cross-examining her at length during the trial.

36. Non seizure of any obscene photos of the victim by the police has neither diluted nor destroyed the case of the prosecution in the facts and circumstances of the present case. The prosecution had established a case of rape of a minor beyond reasonable doubt. Absence of the photographs of the relationship between the victim and the appellant at the trial has not affected the decision rendered at the end of the trial.

37. An imaginary view of the events happening, divorced from the materials on record cannot be juxtaposed with the

view emerging from the evidence on record to justifiably claim that as two views have emerged, the one favouring the accused should be accepted. The view that, the appellant had been falsely implicated as the appellant had lent and advanced money to the mother of the victim for setting up the business of beauty parlour has not been substantiated at the trial. The contention of the appellant that such a view is plausible has no foundational basis and cannot be accepted. Two plausible views must emerge out of the facts proved at the trial for the defence to successfully contend that the view favouring the defence has to be accepted.

38. Therefore, in our view, the prosecution had led cogent evidence at the trial to establish that the appellant was involved in raping the victim, who was a minor at the material point of time.

39. In ***Ram Kumar Pandey (supra)*** the Supreme Court has observed that a First Information Report which is a previous statement and strictly speaking be only used to corroborate or contradict the maker of it, omission of important facts in the First Information Report affects the

probabilities of the case, are relevant under Section 11 of the Evidence Act in charging the veracity of the prosecution case.

40. The written complaint with the police, being Exhibit-1 was lodged by the victim herself. She was a minor at that material point of time. The written complaint has the essential ingredients of rape committed by the appellant as against the victim. It has the date and the time of the incident. It has the explanation as to why she had kept quiet despite she being violated over a period of time.

41. The oral testimony of the victim at the trial and the other corroborative evidence as produced at the trial does not contradict any of the statements made by the victim in her written complaint being Exhibit-1.

42. ***Sudhansu Sekhar Sahoo (supra)*** has noted that, sole testimony of the victim can be a basis for conviction in respect of a sexual offence provided that such testimony is safe, reliable and worthy of acceptance. It has noted that, a rape victim must not be treated as accomplice but as an injured witness. In the facts of that case, the Supreme Court on analysing the evidence led at trial, held that the accused was

entitled to the benefits of doubt. Such factual scenario does not obtain in the present case.

43. *Shyam Raj (supra)* has affirmed a judgement of reversal of conviction of an accused in rape of a minor. In the facts of that case, the Supreme Court has found that, plea of alibi was not taken into consideration by the Trial Court. The existence of enmity between the father of the victim and the accused were also not taken into consideration by the Trial Court. Again, the factual scenario obtaining in the present case is different. The appellant was the family member of the victim. Nothing has been placed on record to suggest that there was any enmity between the appellant and the family of the victim or the victim herself.

44. *Munna (supra)* has dealt with a situation where, the age of the victim was not proved beyond reasonable doubt. Moreover, it was found that, the parties had entered into consensual intercourse. Again, in the facts of the present case, the age of the victim had been conclusively proved by Exhibit-7, 8 and 9 and that the victim was a minor at the material point of time. Therefore, it cannot be said that the relationship was consensual.

45. *Vikramjit Singh alias Vicky (supra)* has observed that, where two views of a story appears to be probable the view favourable to the accused should be accepted. In the facts of that case, the Trial Court as well as the High Court after having weighed the probabilities of the stories convicted the accused on the basis that the accused was not able to prove his case and, therefore, the case of the prosecution should be accepted. In the facts of the present case, the prosecution has been able to prove the case beyond all reasonable doubt.

46. In view of the discussions above, we have not found any ground to interfere with the judgement of conviction and the order of sentence.

47. Accordingly, Conviction and sentence imposed upon the appellant are upheld.

48. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

49. CRA (DB) 3 of 2022 is dismissed accordingly.

50. In view of the dismissal of the appeal, nothing remains in the application for suspension of sentence being CRAN 1 of 2022. The same is also dismissed.

51. Trial Court records along with a copy of this judgement be sent down at once to the appropriate Court for necessary action.

52. Photostat certified copy of this order, if applied for, be given to the part parties on priority basis on compliance of all formalities.

[DEBANGSU BASAK, J.]

53. I agree.

[MD. SHABBAR RASHIDI, J]