

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

C.R.A 69 of 2020

Digen Mandal

Vs

The State of West Bengal

For the appellant :Mr. Tapan Dutta Gupta, Advocate
Mr. Parvej Anam, Advocate

For the State :Mr. Saswata Gopal Mukherjee, Ld. Public Prosecutor
Mr. Partha Pratim Das, Advocate
Ms. Manasi Roy, Advocate

Heard on : July 14, 2022

Judgment on : July 20, 2022

Bibhas Ranjan De, J.:-

1. This is an appeal against the judgement and orders of conviction and sentenced under Section 6 of the Protection of Children from Sexual Offence Act 2012 passed by the Ld. Special Court, (Additional District Judge 2nd

Court) at Malda (Sadar) in Sessions trial no. 164 of 2016 (POCSO Case No 75 of 2016) arising out of English Bazar women PS case no. 114116 dated 1.05.2016.

Prosecution case in Brief:

2. One Bina Mondal (PW-2) lodged a written complaint on 01.05.2016 before inspector in charge English Bazar Women Police Station, District Malda alleging inter alia that on 01.05.2016 at about 12.00 hours her daughter and son in law going to working filed leaving their minor daughter (victim) alone at home. After returning home they noticed their daughter lying on the bed. On being asked victim revealed that appellant (Digen Mondal) took her to his bed room and made her lying flat on his bed and raped on her. When she tried to make noise appellant pressed her mouth. Thereafter, appellant fled away from his room leaving the victim on his bed alone. Victim then returned to her house.

3. On receipt of the complaint English Bazar women PS case no. 114116 was started and endorsed to Sub Inspector of Police Kandara Roy for investigation. Investigating Officer (for short IO) examined complainant (PW-2) and victim girl (PW-1) and also got the victim girl (for short V.G) examined by the doctor attached to Malda Medical College. I.O visited place of occurrence and prepared rough sketch map and examining available

witnesses. I.O. Seized bed sheet from the house of the appellant and one coloured panty of the victim from her house by one seizure list. Appellant was arrested. On the prayer of I.O statement of V.G was recorded under Section 164 Criminal Procedure Code (for short Cr.P.C) and also got the appellant examined by the doctor. I.O collected birth certificate and school certificate of victim girl. On completion of investigation charge sheet has been filed.

4. Ld. Judge of the Trial Court framed charge under Section 376 (2) (i) of the IPC and under Section 6 of the POCSO Act against the appellant/accused, on 23.08.2016, who pleaded not guilty and claimed to be tried. Hence trial.

5. During trial prosecution examined 11 witnesses and produced a good number of documents were admitted in evidence as exhibits 1 to 7/1. After conclusion of evidence appellant was examined under Section 313 of Cr.P.C. When appellant denied all the questions relating to incriminating circumstances, appearing in the evidence.

6. Ld. Trial Judge, appreciated all the evidence and documents on record and returned findings in following words:

“ As per Section 29 of the POCSO ACT, presumption is against the accused and he has to prove that he is innocent after discharging the onus of proof by the prosecution. As discussed previously, accused has not taken any particular defence apart from denying the prosecution case. In this case there is no

evidence in cross-examination to disbelieve the case of the prosecution. In this case, accused has not produced any evidence to exonerate himself. Thus, the accused has also failed to discharge his onus to prove. It is true that though the presumption under Section 29 of the POCSO Act is against the accused, but it is the duty of the prosecution to prove its case. I have already stated that the prosecution has able to prove from oral and medical evidence that the accused has partially inserted his penis into the vagina of the victim child. So, without hesitation, I can say that the victim child sustained penetrative sexual assault by the accused.

In this case charge has been framed for offence punishable U/s – 376 (2)(i) of IPC read with u/s 6 of POCSO Act. But for the same offence provision under two different Statute would not lie. Section 42 of the POCSO Act made it clear that the provisions would lie in alternate and the conviction should be given under the provision of that Statute in which the punishment is higher.

In this case the age of the victim child has been claimed to be of six years during the commission of the alleged offence. The victim child has also deposed before the Court and during taking her evidence, this Court has noted her age as 7 years. Age of the victim child has never been disputed or challenged by the accused. As discussed above, it appears that the accused has inserted his penis in the vagina of the victim child partially and the victim child is aged below 12 years and thus has committed offence mentioned in Section 5(m) of the POCSO Act, alternatively u/s- 376 (2) (i) of the I.P.C.

Considering the entire facts and circumstance of the case as well as oral and documentary evidence on record, without hesitation I can say that the accused namely, Digen Mondal has committed the offence punishable u/s-6 of the Protection of Children from Sexual Offences Act, 2012, alternatively Section

376(2) (i) of the Indian Penal Code and he is liable to be convicted accordingly.

Now, the punishment for offence punishable u/s-6 of POCSO Act and that u/s-376(2) (i) of the I.P.C are same. Under both provisions the amount of punishment is rigorous imprisonment not below than 10 years and may extend up to life. Considering the same I am inclined to convict the accused under provisions of POCSO Act as this Act is meant specifically for sexual offences against child.

Hence, it is.

ORDERED

That the accused person namely, Digen Mondal is found guilty for committing offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and he is convicted U/s-235 (2) of the Cr.P.C.

The convict is taken into custody. The convict be produced before me tomorrow, i.e on 29.11.2019 at 10.30 a.m. for hearing on the point of sentence.”

7. Mr. Tapan Dutta Gupta, Ld. Advocate, appearing on behalf of the appellant pointed out the discrepancies in the evidence of prosecution witnesses and non-examination of the witness (Swapan Mondal) whose name has been appeared in the evidence of PW-4 i.e grandmother of the victim.

8. Mr. Dutta Gupta, has submitted that prosecution withheld the witnesses in support of place of occurrence and thereby adverse presumption accrued against the prosecution under Section 114(g) of the Evidence Act. Mr. Dutta Gupta further assailed the evidence of doctor (PW-9) and the medical report

(Exhibit 5) and tried to make this Court understand that no rape was committed on the victim.

9. In support of his contention he relied on the case of ***Nanda Saha v. State of West Bengal*** reported in ***(2020)1 C Cr LR*** and ***Rohim Box and another*** reported in ***AIR 1973 Supreme Court 343***.

10. In opposition to that, Mr. Saswata Gopal Mukherjee, Ld. Public Prosecutor appearing on behalf of the State has strenuously relied on the evidence of PW-1 (victim Girl), PW-4 (Mother of the victim Girl) and PW-9 (doctor) and submitted that the prosecution has succeeded to prove the offence under Section 6 of the POCSO Act against the appellant beyond any shadow of doubt.

Decision

11. Settled proposition of law is that a woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of

rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance.

12. Before recording evidence of victim being a child witness Ld. Judge put some question to test her ability to give rational answer and certified thereon.

13. On 18.04.2017 PW-1 (victim) testified in her evidence that one year back Digen Mandal (appellant) penetrated his penis into her vagina in the house of “Dadu”. In her cross-examination she specified the place of occurrence as house of the appellant. She specified that she resided in the house of her own “Dadu” Uday Mandal and the incident took place in the house of “Dadu” Digen Mandal. She negated oozing of blood but she was crying with pain. She was taken to Malda Medical College and Hospital for medical examination. She further deposed that Magistrate recorded her statement.

14. After careful scrutiny of the evidence of victim (PW-1) and her statement recorded under Section 164 Cr.P.C. (Exhibit 1) we find hardly any discrepancy. Besides, no material contradiction could be elicited from her cross-examination.

15. PW-2 (grandmother of victim) has deposed that on the date of incident she went to field for walk and after returning home she found both her

daughter (PW-4) and granddaughter (PW-1) crying and on being asked they stated about the incident of rape committed on her granddaughter (PW-1) by the appellant in his bed room locking from inside. She then took her (victim) to Malda Medical College & Hospital and thereafter lodged written complaint (exhibit-7). Scribe of written complaint (PW-11) corroborated the fact of judgment of written complaint. In her cross-examination PW-2 categorically denied suggestion put to her and nothing controversy is found from her cross-examination.

16. PW-3 (Sefali Mondal), one of the villagers testified that one and half years back when she returned from field in the evening and found one of assembly villagers and she came to know that victim (PW-1) was raped by Digen Mandal (appellant). She told that appellant was a resident of the same village.

17. From evidence of PW-4 (Bharati Mandal) mother of the victim (PW-1) it appears that on the alleged date and time she was in the house of one Swapan Mandal, adjacent to their house, and her daughter (PW-1) came to her weeping and narrated all incident of rape committed on her by the appellant. She also narrated the incident to her mother (PW-2) and they along with villagers went to Police Station. During her cross-examination she specifically denied the suggestion of land dispute between them.

18. PW-5 (Bisu Rajak) one of villagers heard the incident of rape. We along with other 4/5 villagers accompanied victim to Medical College & Hospital as well as Police Station. In his cross-examination he denied all suggestions put to him.

19. PW-6 (Bithika Mandal) another neighbor also testified that she heard the incident of rape from the victim (PW-1). She was examined by police and she witnessed the seizure of one bed sheet and one panty under a seizure list (Exhibit- 2/1) prepared by Police and she put her signature (Exhibit-2) on it. In her cross-examination she simply denied suggestions.

20. PW-7 (Biswajit Karmakar) another villager, was declared hostile by the prosecution, but he deposed he took victim (PW-1) to Malda District Hospital.

21. PW-8 (Dr. Abu Ahammed) examined appellant and found him capable of performing sexual intercourse. His report was admitted in evidence as Exhibit-4.

22. PW-9 (Dr. Chaitali Mallick) examined victim girl and found no external injury on her private part but doctor found her **genital area reddened**. Medical report was admitted in evidence as Exhibit-5. From her cross-examination it appears that grandmother of victim gave the history of incident of rape. Defence made an effort during cross-examination of doctor

that the victim girl was suffering from dermatological problem, but failed as doctor (PW-9) specifically answered that it was not possible without written examination of swab.

23. PW-10 (S.I. Kandara Roy) investigated this case and submitted charge sheet. We have discussed entire investigation conducted by I.O in paragraph 2. In his cross-examination he testified that he did not send any requisition for opinion of the doctor and did not seize swab and did not send bed sheet and panty for forensic examination. He further deposed that during investigation nothing was revealed as to enmity between family of the victim and that of the appellant.

24. PW-11 (Rajendra Nath Roy) scribe of written complaint specifically deposed that on request of PW-2 he reduced written complaint into writing and he read over and explained the contents to the PW-2 who put her L.T.I. Written complaint was admitted in evidence as Exhibit-7.

25. In ***Rohim Box*** (supra) Hon'ble Apex Court observed that the rape of a minor girl of 10/12 years by a fully developed man cannot be accepted unless the man sustained any injury on his male organ when the hymen of the minor girl is found intact.

26. In this case PW-9 (Doctor) examining the victim girl deposed that hymen was found intact. But appellant was examined by PW-8 (Doctor) on

02.06.2016 i.e almost after one month of the incident which took place on 01.05.2016. Therefore healing of injury, if there be any, sustained by the appellant cannot be ruled out. Accordingly ratio of **Rahim Box** (supra) cannot be said to be applicable in terms of a different facts and circumstances of this case.

27. In **Nanda Saha** (supra) this Hon'ble Court dealt with appellant involving his deliberate touching the vagina of victim girl of three years old. In that case Hon'ble Court after re-appreciation of evidence found the offence attracting Section 9 (m) of the POSCO Act. Ratio of that case is not all applicable in our case involving allegation of sexual assault of the victim girl of 7 years by penetration.

28. In this case appellant has been found guilty of committing offence of aggravated penetrative sexual assault under 5 (m) of this POCSO Act prior to amendment of Section 6 of the POCSO Act which came into force on and from 16.08.2019.

29. Evidence of victim girl (PW-1) remained undemolished throughout her cross-examination. Besides, her evidence has been further corroborated by the doctor (PW-9) who found genital area reddened. Post occurrence witnesses namely mother of the victim (PW-4) and grandmother of the victim corroborated the version of the victim.

30. Mr. Dutta Gupta, in course of argument, submits Investigation Officer did not conduct investigation properly by not examining other witness or was negligent is not being able to send seized articles for forensic examination.

31. We cannot accept the submission. Laches on the part of the I.O cannot be the ground of rejecting evidence of the victim who had no control over the investigating agencies. We are not oblivious to the fact that in a case of penetrative sexual assault of a minor girl, no self-respecting mother or grandmother would come forward in a Court just to make a humiliating statement at the cost of chastity of her own daughter or granddaughter.

32. After re-appreciation evidence on record we have already found that the prosecution has succeeded to prove the case of penetrative sexual assault upon the victim girl (PW-1) whose evidence was further ratified by the evidence of doctor (PW-9) and her grandmother (PW-2) and mother (PW-4).

33. Now we have reached the stage to discuss the “presumption” enumerated in Section 29 of the POCSO Act 2012. Section 29 of the POCSO Act 2012 runs as follows:

“29. Presumption as to certain offences.- Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or

attempted to commit the offence, as the case may be, unless the contrary is proved.”

34. It is settled law that no presumption is absolute and presumption under Section 29 of the POCSO Act 2012 is rebuttable and such presumption would come into operation only when the presumption is first able to establish fact that would form the foundation for the presumption under Section 29 of the POCSO Act to operate.

35. As we have already discussed that prosecution has able to prove the commission of offence punishable under Section 6 of the POCSO Act as a foundation for presumption under Section 29 of the Act 2012. But the appellant failed to rebut the said presumption even by giving any plausible explanation during his examination under Section 313 of Cr.P.C. far to speak of adducing any evidence thereon.

36. However, for the reasons discussed herein before, we hold that the charge brought against appellant, Dwigen Mandal, under Section 6 of the POCSO Act 2012 has been proved beyond reasonable doubt by leading cogent evidence on record.

37. In the result we affirm the sentence awarded by the Learned Trial Court.

38. With the above observations, the appeal stand disposed of.

39. Let a copy this judgment along with the Trial Courts record be sent back forthwith.

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

41. Urgent photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

[BIBHAS RANJAN DE, J.]

42. I Agree.

[DEBANGSU BASAK, J.]