

Form No.J(1)

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Present:

The Hon'ble Justice Tirthankar Ghosh

C.R.A.(SB) 14 of 2022

***Adarsha Dey*
versus
The State of West Bengal**

For the Appellant : Mr. Amajit De,
Mr. Apalak Basu.

For the State : Mr. Saswata Gopal Mukherjee, Ld.P.P.,
Mr. Faria Hossain,
Mr. Anand Keshari.

For the victim :Mr. Saryati Datta.

Heard On : 21.12.2022.

Judgement On : 21.12.2022.

Tirthankar Ghosh, J. :

The present appeal has been preferred challenging the judgment and order of conviction and sentence dated 23.12.2021 and 24.12.2021 passed by the learned Additional Sessions Judge-cum-Judge, Special Court under Protection of Children from Sexual Offences Act, Krishnagar, Nadia in connection with Sessions Trial No.1(X)/2020

arising out of Sessions Case No.38(06)/2020 (Spl.) wherein the learned special court was pleased to convict the appellant under Section 10 of the Protection of Children from Sexual Offences Act and imposed sentence of five years and to pay fine of Rs.20,000/-, in default simple imprisonment for six months.

In this appeal, 'Y' represents mother of the victim girl, 'X' represents the victim girl and 'Z' represents the father of the victim girl. Nakashipara Police Station Case No.284 of 2020 dated 21.06.2020 was registered for investigation on the basis of a complaint lodged by 'Y' with the Officer-in-Charge of the said Police Station.

The allegations made in the complaint were to the effect that on 20.06.2020 at about 7.00 a.m. the complainant's minor daughter aged about 10 years went for private tuition to a neighbouring house. The name of the private tutor is Adarsha Dey. She returned back home at around 9.00 a.m. and represented to her mother/complainant 'Y' that she was ill, when 'Y' questioned her, she started weeping and represented that after releasing all the students the accused Adarsha Dey requested her to stay and after some time she was taken upstairs room. The accused directed her to put off her pant and bring coconut oil. The accused thereafter put off his pant and directed to apply the oil at his male organ. The accused also inserted his finger in 'X's vagina.

The minor 'X' was thereafter compelled to repeat such act for masturbation on the plea that if she repeat such conduct then in that case her education would progress. The accused also threatened 'X' that if she disclosed the same to others she would be assaulted.

On the basis of the aforesaid complaint of 'Y', Nakashipara Police Station Case No.284 of 2020 dated 20.06.2020 was registered for investigation under Section 376AB of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act against the accused appellant and on completion of investigation, charge-sheet was submitted before the learned Special Court. The learned trial court on 14.10.2020 was pleased to frame charges under Section 376AB of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act. The contents of the charges were read over to the appellant to which he pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 11 witnesses, namely, P.W.1 'Y', mother of the victim; P.W.2, namely, Jayanta Kr. Barai, Scribe of the FIR; P.W. 3, uncle of the victim; P.W.4, namely, Laxmi Sarkar, L.S.I. of Police; P.W.5, namely, Kumaresh Pal; P.W. 6, namely, Dr. Biplap Biswas; P.W.7, 'X', victim girl; P.W.8, namely, Nandini Dey; P.W.9, namely, Firdous Mondal, S.I. of Nakashipara P.S.; P.W.10, 'Z', father of the victim girl and P.W.11, namely, Sidhartha Roy,

S.I. of police and investigating officer of the case. The prosecution also relied upon three documents, being, written complaint-exhibit 1, medical report of the victim girl exhibit 2/1 and seizure list exhibit 3.

P.W.1 'Y' in her evidence before the court deposed that her minor daughter was 11 years old and on 20th June, 2020 in between 07.00 a.m. to 9.30. a.m. in the morning at the house of Adarsha Dey, the incident took place. Her daughter returned back home at around 10.00 a.m and was weeping. When asked for the reasons she said she would not go to the tuition any more. Thereafter 'X' divulged to her mother that after releasing all other students, the accused took her inside a room which earlier used to be under lock and key. He opened the lock and entered the room with her daughter inside the room. He asked his daughter to unfold a mat and asked her to lay down. He then asked her daughter to open her pant and asked her to bring coconut oil. He also asked her to masturbate his male organ with the help of oil and told her that by this process a white fluid would ooze out which would be better for progress of her education. The accused also inserted his finger at the vagina of the minor. After hearing this from her daughter, she reported the matter to her husband and also to the maternal uncle of the accused. Thereafter, she along with others went to Nakashipara Police Station and informed the matter in writing. She also deposed, that at the

Police Station, the complaint was drafted as per her instruction, she understood the contents of the same, read over and thereafter she signed the same. Her daughter was also referred to Bethuadohary Rural Hospital for medical examination. At the time of the said medical examination, doctor took her consent and she signed the same. Police also seized the birth certificate of her daughter by way of preparing seizure list. The wearing apparels of her daughter were also seized. The witness identified the accused in court.

P.W. 2, Jayanta Kr. Barai is the scribe of the FIR who deposed that as per instruction of P.W.1, he prepared the complaint, read over and explained the same to the P.W.1, who being satisfied, signed the same. The witness also identified his signature in court.

P.W.3 is the uncle of 'X'. He deposed that he did not have any knowledge regarding the incident and he never met the police in relation to the incident. The witness was declared hostile and cross-examined by the prosecution.

P.W.4 is Laxmi Sarkar, Lady Sub-Inspector of Police attached to Krishnagar Women Police Station. She deposed that on 22.06.2020 she recorded the statement of the victim in connection with Nakashipara Police Station Case No.284 of 2020 under Section 161 of the Code of Criminal Procedure as per direction of I/C of the said Police Station.

After recording such statement, she handed over to the same to the I.O. of the case.

P.W.5 is the uncle of the victim girl. He deposed that he used to reside at Kolkata for his work and on the alleged date he was at Kolkata and had never met with the police in connection with this case. The witness was declared hostile and cross-examined by the prosecution.

P.W.6 is Dr. Biplab Biswas, who was associated with Bethuadahary Rural Hospital as Medical Officer on 21.06.2020. He examined the victim girl in connection with Nakashipara Police Station Case No.284 of 2020. The victim girl was identified before him by a lady constable. His deposition is set out in verbatim as follows:

“The victim stated before me that she had spread coconut oil over accused’s penis and masturbated with extraction of semen with the help of victim’s hand. Accused penetrated his little finger in victim’s vagina.

On examination I have found no external injury over her body. On examination of private parts, vulva, vagina found normal. No injury or ecchymosis was found. Hymen ruptured or torn. Only tip of little finger admits through vaginal canal. Per abdomen no palpable mass or pain abdomen.”

He identified the medical report which was prepared and signed by him. He also deposed that the victim girl 'X' and her mother 'Y' both signed the same and the examination was done in presence of a lady staff nurse.

P.W. 7 is 'X', victim girl. The learned trial court asked number of questions to assess her capacity to understand. The learned court after being satisfied recorded the version of the victim girl which is set out in verbatim as follows:

“On a Sunday, in the month of July of 2020 at about 07.00 A.M. in the morning I went to take tuition from one Adarsa Dey, a resident of our village. Distance of his residence is very near to our residence. I went there by walk.

I studied there up to 09.30 A.M. We were three students in all. After completion of our study, our teacher released other two students but did not release me. Thereafter, other two students left his house and I alone remained there. Thereafter, he asked me to go to a room on the first floor of the building.

We took our tuition on the Varendaha of first floor.

After entering into the room our teacher also entered into the said room and asked me to unfold a mat. Accordingly, I unfold a mat on the floor. Thereafter, he asked me to bring some coconut oil.

That coconut oil was on the varendaha. I bring the same from there.

Thereafter, he put of his pant. He also put of my pant.

Thereafter, he put his finger on my private part. [The witness then shown her private part by her finger allegedly where the accused put his finger].

The accused also asked me to cause "NARAGHATA" his "NANU" (penis). He told me that if I do that 'NARAGHATA" frequently then a liquid like milk would be oozed out and if one can seen the same her education would be more better. Then some fluid came out from his private part. Thereafter, he released me but threatened me not to disclose anybody else. He also threatened that if I would disclose to anybody he would kill me.

Thereafter, I returned home. Initially I was weeping. When my mother enquired, I divulged the same to her. In the evening my mother told this to our neighbour. Thereafter, police came and apprehended that boy."

I can identify Adarsa Dey.

[At this stage after opening the curtain she got frightened but anyhow could identify the accused. At this stage this court feel

that a break is necessary. Accordingly, the matter deferred for ½ an hour].”

Victim also deposed that she was taken to court and her statement was recorded. She also identified her signature in the statement under Section 164 of the Code of Criminal Procedure. She deposed that she was taken to hospital and had been examined by a doctor wherein she signed and also narrated the incident to the doctor. The witness stated that she had trouble in free movement after the incident and is unable to mix freely with others. She also had left her earlier school and took admission to a nearby school.

P.W. 8, Nandini Dey, is the student of the same school. She stated that she did not have any knowledge regarding any incident relating to the victim girl.

P.W.9 is the Inspector, Ferdous Mondal, who deposed that on 21.06.2020 he received a written complaint from ‘Y’ mother of ‘X’ victim girl and accordingly registered Nakashipara Police Station Case No.284 of 2020 dated 21.06.2020 under Sections 376AB of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act. He identified his endorsement with signature in the complaint which was admitted in evidence.

P.W.10, 'Z' is the father of the victim girl. He narrated the incident in the same manner as P.W.1.

P.W.11 is the Investigating Officer of the case. He deposed the chronology and manner in which he conducted the investigation. He also stated that he had visited the place of occurrence, prepared a hand sketch map of the place of occurrence along with index, recorded the statement of the witnesses, requisitioned the I/C to request a lady officer for recording the statement of the victim girl, seized birth certificate of the victim, taken steps to produce the victim girl before the medical officer as well as the learned Magistrate, collected the report of the medical officer as well as the statement under Section 164 of the victim girl and on completion of investigation submitted charge-sheet.

Mr. Amajit Dey, learned advocate appearing for the appellant submits that the prosecution in this case has failed to bring home the charges so far as the present appellant is concerned. There has been intentional withholding of evidence as also non-production of vital evidence in the instant case. To demonstrate the same, learned advocate submits that the other students who were present on 20th June, 2020 were not examined by the prosecution, the mat over which the alleged incident took place was not seized by the Investigating Agency, although wearing apparels were seized, the same were not sent for CFSL

examination. Additionally, the jar which has been referred to for coconut oil was also not seized by the Investigating Agency. Learned advocate submits that the appellant has been falsely implicated in connection with the instant case coupled with the fact that the Investigating Agency has victimised the present appellant by withholding the witnesses and not producing the vital witnesses. Consequently, learned advocate submits that there should be interference with the judgment and order of conviction and sentence passed by the learned Judge, Special Court and the same should be set aside.

Ms. Faria Hossain, learned advocate appearing for the State resists such contention and submits that the victim girl in this case is 10 years old. Her statement throughout has been consistent. No case has been made out by the defence in course of cross-examination that the appellant has been falsely implicated in the instant case, furthermore the medical report in this case do support the prosecution case. Minor inconsistency of a child or for that matter the affected family should not be a major guiding factor while deciding a case under the POCSO Act where under the relevant sections, the Act prescribes for presumption. According to the State, there is no scope for interference with the judgment and order of conviction and sentence passed by the learned Trial Court.

I have considered the evidence as a whole and I find that in this case the victim from the very inception has been very consistent regarding her accusations against the appellant viz., her statement under Section 164 of the Code of Criminal Procedure which was recorded by the learned Magistrate, her statement before the doctor at the time of medical examination and her deposition before the court which are in the same tenor and spirit and without any deviation. In fact, in the cross-examination also she could not be shaken by the defence. The medical evidence which has been deposed by the P.W.6 though reflects that there were no injury or ecchymosis but the hymen was found to be ruptured or torn. Such factum do extend support to the prosecution case wherein there were accusations by the minor girl regarding the vaginal insertion by the appellant at her private parts.

In **Attorney General Vs. Satish** reported in **(2022) 5 SCC 545** the terms of “sexual assault” and “sexual intent” has been elaborately dealt with and after interpreting the definitions appearing under the relevant provisions of the POCSO Act it has been held in paragraph 40 as follows:

“The Court cannot be oblivious to the fact that the impact of traumatic sexual assault committed on children of tender age could endure during their whole life, and may also have an

adverse effect on their mental state. The suffering of the victims in certain cases may be immeasurable. Therefore, considering the objects of the POCSO Act, its provisions, more particularly pertaining to the sexual assault, sexual harassment, etc. have to be construed vis-à-vis the other provisions, so as to make the objects of the Act more meaningful and effective.”

The Hon’ble Supreme Court in **Pappu V. State of U.P.** reported in **(2022) 10 SCC 321** in paragraph 108 was pleased to observe as follows:

“108. In the given set of circumstances, it could safely be said that the presumption contemplated by Section 29 POSCO came into operation and the burden came staying with the appellant; and it was for him to rebut the presumption and to prove that he had not committed the offence. The appellant has failed to discharge this burden. Viewed from this angle too, the decisions in Noor Aga [Noor Aga V. State of Punjab, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748] and Justin [Justin v. Union of India, 2020 SCC OnLine Ker 4956] do not come to the rescue of the appellant; rather on the principles stated therein and in terms of Section 29 POCSO, the presumption would only lead to the finding of guilt against the appellant.”

Learned advocate for the appellant relied upon **John @ Vivek Ramesh Jadhav Vs. The State of Maharashtra** reported in **2015 ALL MR (Cri) 4053** wherein the Hon'ble Bombay High Court in paragraph 6 was pleased to observe as follows:

“6. The trial Court believed the story as narrated by the child. Virtually all the contents of the FIR have been narrated by the child during her substantive evidence before the Court. It is significant to note that the age of the prosecutrix girl PW no.2 is eight years. She was not administered oath considering her understanding capacity as to the sanctity of the oath. Also the substantive evidence of PW no.1 is in consonance with what is mentioned in the FIR. However, during the cross-examination of PW no.1, the strained relations between the parties were brought on record. It is admitted position that the present appellant-accused is the landlord of the Chawl where in one of the rooms the parents of the victim girl reside as tenants. It was suggested during the cross-examination of PW no.1 that there were arrears of rent and the landlord was demanding arrears of rent to the father of the girl and also the landlord had asked the father of the girl to vacate the premises. On this count, there was dispute. In the considered opinion of this Court, this was the probable

defence raised on behalf of the accused and the prototype evidence of PW no.1 and 2 would have been critically examined by the trial court in the light of the said defence. However, the trial Court has failed to appreciate the said evidence and believe the testimony of the child witness. Whatever is the evidence of PW no.1 complainant mother is in fact hearsay evidence, as according to her, entire events were narrated by the child after the child was taken back to home by her mother PW no.1. As such in fact the entire case of the prosecution rests only on the substantive evidence of child witness PW no.2, then aged about 8 years. In the opinion of this Court, it will be definitely risky to rely upon the evidence of child when there is no other corroborative evidence, moreover, there could not have been any medical evidence in the case considering the allegations.”

In view of the aforesaid dictum of the Hon’ble Supreme Court and the difference in the factual circumstances in the judgment relied upon by the learned advocate appearing for the appellant that there were strained relations between the parties, I am of the view that the judgment delivered by the Bombay High Court is not applicable to the facts and circumstances of this case.

In the present case, the evidence of P.W.7 in court reflects that she was traumatized and to that effect the learned trial court has not only recorded in the evidence that she felt trouble in her free movement after the incident and was not able to freely mix with others and also had to leave the school where she earlier studied but also it has been observed by the learned trial court that the victim girl got frightened when she was shown the accused for the purpose of identifying him in court.

Taking into account the fact that the offence under Section 9 of the POCSO Act has been made out in this case, the presumptions under Section 29 of the POCSO Act on the factual foundation laid down by the prosecution is to be invoked. Consequently the culpable mental state which is the presumption available under Section 30 of the Act would operate in the factual circumstances in this case in view of the fact that the defence case is simply a case of denial without any material substance of rebutting the presumptions.

Accordingly, the judgment and order of conviction and sentence passed by the learned Special Court dated 23.12.2021 and 24.12.2021 cannot be interfered with, the same as such is affirmed.

Consequently, CRA (SB)14 of 2022 is dismissed.

Pending application, if any, is consequently disposed of.

The department is directed to send back the lower court records immediately.

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

Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of all formalities.

(Tirthankar Ghosh, J.)

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