

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRA 119 of 2019

Partha Hue

-Versus-

State of West Bengal

For the Petitioner: Mr. Milon Mukherjee, Sr. Adv.,
Mr. Rahul Ganguly, Adv.

For the State: Mr. Swapan Banerjee, APP.,
Mr. Suman, Adv.

Heard on: 31 March, 2022.

Judgment on: 21 April, 2022.

BIBEK CHAUDHURI, J. : –

1. Judgment and order of conviction dated 22nd January, 2019, passed by the learned Additional Sessions Judge, 1st Court at Sealdah in Special case no. 48 of 2018, convicting thereby the appellant for commission of an offence punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012, hereafter described as the POCSO Act for short, and sentencing him to suffer imprisonment for five years and to pay fine of Rs.50,000/- in default to suffer rigorous

imprisonment for three months more, is under challenge in the instant appeal.

2. On 24th September, 2018, one Sahanaz Begum, lodged a written complaint before the Officer-in-Charge of Beniapukur Police Station alleging, inter alia, that she took her minor grand-daughter aged about 8 years who was suffering from piles for medical treatment to the chamber of one homeopath practitioner, namely Dr. Partha Hue, the appellant herein. The appellant medically examined the granddaughter of the de facto complainant and prescribed some medicine. When the patient and the de facto complainant were about to leave the chamber of the doctor, the doctor called the granddaughter of the de facto complainant in his anti-chamber, covered the door with curtain and examined her again. Suddenly, the granddaughter of the de facto complainant cried out and ran away from the doctor's chamber out of fear. The de facto complainant asked her as to why she left the chamber of the doctor in such a manner, the said granddaughter told her that the doctor touched her private part in the name of medical examination. Immediately the de facto complainant called her daughter i.e the mother of the victim girl. Local people also assembled in front of the chamber of the said doctor. Subsequently, the de facto complainant came to the police station and submitted the complaint before the Officer-in-Charge of the jurisdictional police station, on the basis of which Beniapukur PS Case No.339 dated 24th September, 2018, was registered.

3. Investigation of the case culminated in filing charge sheet against the appellant under various penal provisions of the IPC and Section 6 of the POCSO Act. The appellant faced trial under the charge of Section 376(2)(i) of the IPC and Section 6 of the POCSO Act. The trial court on completion of trial convicted the appellant under Section 10 of the POCSO Act and sentenced him accordingly. Hence, the instant appeal.

4. It is further submitted by Mr. Milan Mukherjee, learned senior counsel on behalf of the appellant that during trial, prosecution examined 13 witnesses amongst them PW1 is the victim girl, PW3 Sahanaz Begum is the grandmother of the victim girl and de facto complainant of this case. PW2 Prakriti Ranjan Sasmal is a Medical Officer posted at Calcutta National Medical College and Hospital. He medically examined the victim girl on 25th September 2018, and submitted the medico legal examination report during investigation of the case. PW4 Md. Yunis and PW5 Md. Sabbir Ahamed are two homeopath doctors who used to practice their profession in the chamber where the appellant used to practice. PW6 is the mother of the de facto complainant. PW7 Asif Aftab is the owner of the premises no.18, Noor Ali Lane where the appellant used to run his chamber. Evidence of PW8 Quazi Abedur Rahaman is of no importance because his evidence is in the nature of hearsay. PW 9 Sankari Sardar is a lady constable of police and PW13 Aninda Sundar Giri is the Investigating Officer. PW10 Abdul Samin is the scribe of the written complaint. It is also pointed out by Mr. Mukherjee that during investigation the written complaint, FIR, medico legal examination report

and statement of the victim girl recorded under Section 164 of the Code of Criminal Procedure were exhibited.

5. After the witnesses being introduced by the learned senior counsel on behalf of the appellant he takes me to the contents of the written complaint. In the written complaint it was stated by the de facto complainant that her granddaughter was suffering from piles. However, in her evidence as PW1 the victim girl stated that on 24th September, 2018, at about 7pm she went to doctor's chamber for medical examination as she was feeling burning sensation on her stomach. She also stated that the doctor examined her and prescribed medicine. When they were leaving the doctor's chamber, the doctor again called them and went to examine her medically. At that time her grandmother was waiting outside. The doctor took her inside his chamber and on the pretext of medical examination he inserted his finger on her private part. In her cross examination the victim admitted that after initial medical examination they paid a sum of Rs. 70/- to the doctor, while he was demanding a sum of Rs. 100/-. The grandmother of the victim girl could not pay the balance sum of Rs.30/-. Over the said issue hot altercation started between the doctor and her grandmother. It is also pointed out by Mr .Mukherjee that the victim girl clearly admitted in her cross examination that she was tutored by her mother for giving deposition. Thus, it is pointed out by Mr. Mukherjee that the evidence of victim girl cannot be accepted as trustworthy, cogent and free from any blemish because she told the name

of different ailments in which she was suffering and she was tutored by her mother.

6. Mr. Mukherjee next draws my attention to the evidence of de facto complainant who is the grandmother of the victim girl. In her evidence she admitted that the appellant demanded a sum of Rs.100/- as his professional fees but she could pay only Rs.70/- and a sum of Rs.30/- was due. Over the said issue the appellant raised an objection and an altercation started between them. In her cross examination she further admitted that though in the written complaint, the de facto complainant stated that the victim was suffering from piles but in her evidence as well as before the Investigating Officer she stated that the victim was suffering from stomach pain. It is submitted by Mr. Mukherjee that both the victim and the de facto complainant was tutored to say that the victim was suffering from stomach pain at the relevant point of time namely to aggravate the case against the appellant. It is further submitted by Mr. Mukherjee, that the alleged incident took place on 24th September, 2018, the victim girl was medically examined by PW2 on 25th September, 2018, at Calcutta National Medical College and Hospital, the medical officer did not find any injury in any part of the body of the victim girl. Had there been a case of forceful insertion of finger in the private part of the victim, there would have been a strong possibility of receiving injury by the victim girl. In view of such circumstances the evidence of the victim girl cannot be the basis of conviction against the appellant. Mr. Mukherjee, admits the principle of appreciation of evidence of a victim of the offence of sexual

abuse. The victim is considered to be the best witness of the occurrence. Her evidence cannot be thrown away as the testimony of an interested witness. If the evidence of the victim appear to be sterling quality and free from all contradictions, her evidence may be the sole basis for conviction of the perpetrator of offence. However, in the instant case the victim's evidence is far from trustworthy.

7. Mr. Mukherjee, further refers to the evidence of PW4 Md. Yunus and PW5 Md. Sabbir Ahamed. Both the witnesses are homeopath doctors who used to practice in the same chamber where the appellant used to practice. They did not support the prosecution case. The de facto complainant stated in her evidence that after the alleged incident local people assembled at the place of occurrence and they ransacked the said chamber of the appellant. However, during investigation, the Investigating Officer did not examine any of such local witnesses to get corroboration of the incident. The learned Trial Judge convicted the appellant only on surmises and conjectures. Therefore, Mr. Mukherjee has prayed for acquittal of the appellant.

8. The learned Public Prosecutor-in-charge on the other hand, supports the prosecution case and the judgment pronounced by the learned trial court.

9. Having heard the learned counsels for the parties and on careful perusal of the entire materials on record let me consider the evidence on record independently to come to a finding as to whether the order of conviction passed against the appellant is justified or not?

10. From the written complaint, it is found that the victim girl was suffering from piles. In order to treat piles, per rectal examination of the patient is absolutely necessary otherwise it cannot be clinically determined as to whether a patient is suffering from piles or not. Even assuming that the victim girl was medically examined twice by the Medical Officer when she attended the doctor with history of piles. The appellant might clinically examine the victim girl as per the established norm of clinical examination. A little girl of 8 years might think at the time of her medical examination that she was inappropriately touched but for such reason a Medical Officer cannot be held guilty under Section 10 of the POCSO Act.

11. The learned Trial proceeded with the assumption that the appellant has committed the offence. He decided against the appellant even before consideration of evidence. I am tempted to replicate the first paragraph of the trial court's judgment:-

"1. PREFACE

This is the barbarity, inhuman activism of a Doctor upon an innocent victim-child of just eight years, who went to the Doctor's chamber in order to get her treatment and after examination is over the victim was called inside of chamber keeping outside the guardian and inside the chamber the Doctor assaulted her sexually by fingering. The case at hand at glaring examples in between them turned mischievous and unstable as well where the victim-child has been passing her

days with traumatic obligation since after the incident. It is heinous crime. This case has been matured on the basis of the written complaint dated 24.09.2018 lodged by the mother of the victim before the OC Beniapukur PS.”

12. From the preface of the impugned judgment, it is easily presumed by an ordinary man of prudence that the learned trial judge was overwhelmed by the allegation made out in the written complaint and the tone and tenor of the introductory paragraph of the judgment leads one to understand that the accused/appellant was held to be guilty even before appreciation of evidence on record by the learned court below.

13. It is needless to say that the trial court is expected to use self restrain while recording such findings, without considering the evidence adduced by the witnesses on behalf of the prosecution and the specific defence taken by the accused. Since the accused is a practicing doctor, the learned trial judge held even without considering the evidence that he had committed a barbaric act injuring the conscience of human mind and causing grave harm to a minor girl. It is incumbent upon a trial judge to exercise proper restrain in making such damaging observation. The observations must strictly be limited to the fair and impartial decision of the case. The learned trial judge abandoned judicial approach, allowed extraneous considerations to possess his mind and made unnecessary remark in the introductory paragraph of the impugned judgment without evidence to support such finding. Such remarks were not necessary for adjudication of the case. Of course a judge is entitled to express his

opinion about a particular incident, but such opinion should be expressed in temperate language usually associated with and reflecting the impartial dignity of judicial restraint. The strong language used in condemning the accused and otherwise casting aspersion to him without examination of evidence on record are unnecessary, uncalled for and cannot be approved.

14. For the reasons stated above the remarks made by the learned trial judge in the introductory paragraph of his judgment under the heading 'PREFACE' be expunged.

15. In view of the fact that as I have already held that the evidence on record is not sufficient to record conviction against the accused, he is entitled to be acquitted from the charge.

16. Accordingly the instant appeal is allowed on contest.

17. The order of conviction and sentence passed by the learned Additional Sessions Judge, 1st Court at Sealdah in Special Case No.48 of 2018 is set aside.

18. The appellant be discharged from his bail bond.

19. Let a copy of this judgment along with the lower court record be sent to the learned court below.

(Bibek Chaudhuri, J.)