

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 123 of 2020

With

CRAN 1 of 2020 (Old CRAN 1019 of 2020)

With

CRAN 2 of 2021

Alam Ali

Vs.

The State of West Bengal

For the Appellants as : Mr. Angshuman Chakraborty, Adv.
Amicus Curiae

For the State : Mr. Neiguive Ahmed, Adv.
: Mr. B. Panda, Adv.
: Mr. P. Saha, Adv.

Heard on : September 13, 2022
Judgement on : September 16, 2022

DEBANGSU BASAK, J.:-

1. The appellant has assailed the judgement of conviction dated November 30, 2018 and the order of sentence dated November 30, 2018 passed by the learned Special Judge, 2nd Court, Malda in POCSO Case No. 58 of 2018/Sessions Trial No. 90 of 2018 convicting the appellant under Section 6 of the Protection of Children from Sexual Offences Act, 2012

read with Section 376 (2) (i) of the Indian Penal Code, 1860 and sentencing the appellant to suffer rigorous imprisonment for 10 years with fine of Rs. 10,000 and in default, for a rigorous imprisonment for 1 year.

2. The case of the prosecution before the trial court is that, the appellant on April 14, 2018 at about 8 A.M had committed rape upon the victim and also committed offence of aggravated penetrative sexual assault against the victim.

3. The mother of the victim had lodged a police complaint with the English Bazar Woman Police Station which was registered as Case No. 63/2018 dated April 14, 2018. After the complaint had been investigated, the charge sheet bearing No. 82/2018 dated May 5, 2018 under section 6 of the Act of 2012 had been filed as against the appellant. Charges under Section 376 (2) (i) of the Indian Penal Code, 1860 and under Section 6 of the Act of 2012 had been framed against the appellant. The appellant had claimed to be tried on the plea of not being guilty. At the trial, the prosecution had examined 9 witnesses. The prosecution had tendered 10 documents which were marked as exhibits at the trial. The appellant had been examined under Section 313 of the Criminal Procedure Code

where he claimed to be innocent. He had however stated that he would not adduce any evidence.

4. Learned advocate appearing for the appellant has submitted that, there was a delay in the lodgement of the First Information Report. The prosecution did not explain the delay. He has submitted that, the offence was alleged to be committed at 8 A.M and the First Information Report was lodged at 7.05 P.M. He has referred to deposition of the prosecution witnesses and submitted that, there was no explanation for the delay.

5. Learned advocate appearing for the appellant has submitted that, the doctor examining the victim stated that there was no injury on a portion of the body of the victim. He has referred to the age of the victim. He has submitted that, the age of the victim has not been conclusively established. He has contended that, there were contradictions in the versions of the evidence of the mother and the father of the victim.

6. Learned advocate appearing for the appellant has submitted that, the victim in a cross-examination stated that her parents asked her to depose. According to him, a child witness is a pliable witness who can be easily tutored.

Therefore, the incident which she narrated actually happened or not is doubtful.

7. Learned advocate appearing for the appellant has submitted that, the incident occurred at a place which was a residential area. No other independent witness had been produced by the prosecution at the trial establishing the charge. The place of occurrence has not been specified. There were major contradictions in deposition of the mother of the victim and the written complainant and what she had stated before the learned Trial Judge. The time of occurrence has not been conclusively proved by the prosecution.

8. Learned advocate appearing for the appellant has submitted that, there are contradictions between the statement which the mother of the victim had recorded under Section 164 of the Criminal Procedure Code and her deposition before the learned trial judge.

9. Learned advocate appearing for the appellant has submitted that, the appellant was falsely implicated due to landlord tenant dispute. The appellant was the landlord of the father of the victim. He has contended that, the appellant should be acquitted.

10. Learned advocate appearing for the state has contended that the prosecution was able to prove the charges beyond reasonable doubt. The victim had narrated the incident before the learned Trial Judge. Her statement has been corroborated by the medical examination report as also the testimony of the doctor examining the victim at the material point of time. According to him, there was no delay in the lodgement of the first information report. The time taken to lodge the First Information Report had been explained by the prosecution witnesses adequately. He has submitted that, the appellant was rightly convicted and the appellant was rightly awarded the sentence of imprisonment.

11. At the trial, prosecution had examined 9 witnesses. The victim girl had been examined as PW-1. Her deposition had been recorded after the learned Judge was satisfied that she was able to speak and give proper answers to the questions put to her. The learned Judge had also certified that she was competent witness and can depose. It is only thereafter, deposition of the PW-1 had been recorded by the learned trial judge. In her testimony, PW-1 had stated that, the appellant inserted his finger into her Vagina and Anus. She had identified the appellant in Court. PW-1 had been

cross-examined. The defence could not elicit anything favourable from PW-1.

12. The mother of the victim had deposed as PW-2. In her testimony, she had claimed that, PW-1 was 3 years 3 months at the time of her deposition. She has stated that on April 14, 2018, at about 7/8 A.M the appellant took the victim to his house to offer her snacks. Thereafter, the appellant had locked his room from inside. The victim did not come out for long time and then PW-2 had gone to the room of the appellant and found the victim to be sitting on the sofa. PW-2 had taken the victim to her room. On being asked, victim told PW-2 that the appellant inserted his finger to her Vagina and Anus. PW-2 had found blood from the vagina of the victim. PW-2 had also found blood on the inner wear of the victim. PW-2 had identified the victim in Court. PW-2 had stated that, her husband was a day labourer. She had informed her husband over telephone and that her husband came about 3 P.M when she narrated the incident to him. PW-2 had also narrated the incident to her neighbours. Thereafter, PW-2 and her husband along with the victim and some neighbours went to the English Bazar Police Station where PW-2 had lodged a written complaint. She had tendered the written complaint,

marked as Exhibit 1. She had stated that, the victim was admitted at the Malda Medical College and Hospital. She had tendered the statement recorded under Section 164 of the Criminal Procedure Code, marked as Exhibit 3.

13. PW-2 had been cross-examined in details. The appellant did not elicit anything favourable to him during such cross-examination.

14. The father of the victim had deposed as PW-3. He had also stated that the victim was 3 years 3 months old at the time of deposition. He has stated that the appellant was his landlord. With regard to the incident, he had stated that, he left home at about 7 A.M for his job as mason. At about 3 P.M, he received a phone call from his wife being the PW-2 with regard to the incident. On receiving such phone call he had returned home. He had found blood on the vagina of his daughter. He had narrated the matter to the neighbours. Then he, the victim, PW-2 and neighbours went to the police station where PW-2 had lodged the First Information Report. He had stated that the victim was examined at the Malda Medical College and Hospital. He had identified the appellant in Court. He had tendered the polio card of the victim in evidence which was marked as Exhibit 4. He had been cross-examined by the

appellant. He has stated that, he did not have a mobile phone and that he was working within 4/5 minutes of walking distance from the place of occurrence.

15. The maternal aunty of the victim had deposed as PW-4. She has stated that, she learnt about the incident from PW-2. She had stated that, she saw the injured private parts of the victim. She has stated that she was examined by the investigating officer.

16. The Judicial Magistrate before whom, PW-2 had recorded the statement under Section 164 of the Criminal Procedure Code was examined as PW-5. She had also recorded the statement of the victim, under Section 164 of the Criminal Procedure Code.

17. The person who had examined the appellant had deposed as PW-6. He had stated that, there was nothing to suggest, at the time of examination of the appellant, that he was incapable of performing sexual intercourse.

18. The doctor who examined the victim had testified as PW-7. She has stated that, on April 14, 2018, the victim was aged about 2 years 9 months then, was admitted at the Malda Medical College and Hospital unit C under Dr. Dibyendu Roy. She had examined the victim around 10:15 P.M regarding

sexual assault. On examination, she had found recent sign of injury in the lateral wall of labia minora order. The victim had felt pain during examination. She had identified the medical report prepared by her. She had tendered such injury report of the victim which was marked as Exhibit 9 at the trial. She had stated that, in case of penetration, such type of injury may be caused. In cross-examination, she has stated that, there was no injury to the Anus of the victim.

19. The person who had written the complainant at the direction of PW-2 deposed as PW-8. He had identified his signature on the complaint/First Information Report which was marked as Exhibit 1/1.

20. The investigating officer had deposed as PW-9. She has stated that pursuant to the First Information Report, she visited the place of occurrence, drew rough sketch map with index which was tendered as Exhibit 10. She had examined the PW- 1 and 2 and other witnesses and recorded their statements under section 161 of the Criminal Procedure Code except the statement of the complainant. She had sent the victim for medical examination to Malda Medical College and Hospital. She had raided and arrested the accused on April

14, 2018 at the 20:35 hours. She had identified the appellant in Court.

21. PW-9 had stated that she had sent the appellant for his capability test. She had collected the capability test as also the medical report of the victim. On April 15, 2018, she had seized the polio card of the victim and prepared the seizure list. She had identified the seizure list which was marked as Exhibit 4/1. She had also identified the Exhibit 5. She has stated how she had prayed for recording the statement of the victim and her under Section 164 of the Criminal Procedure Code. She had stated that on completion of the investigations she submitted charge sheet bearing No. 82/18 dated May 5, 2018 against the appellant. She had been cross-examined. The appellant could not elicit anything favourable to him in such cross-examination.

22. The appellant had been examined under Section 313 of the Criminal Procedure Code. He had claimed to be innocent and being falsely implicated in the case. He had stated that he did not wish to adduce any evidence in the case.

23. PW-1 had in her deposition stated that the appellant inserted his finger into her vagina and anus. She had made the same assertion in her statement recorded under Section

164 of the Criminal Procedure Code being Exhibit 7. The appellant has not been able to demonstrate any contradiction between the assertions made by PW-1 in the deposition before the trial court and the statement recorded in Exhibit 7. The deposition of PW-1 had been corroborated by the injury report which had been prepared after her examination, being Exhibit 9. She had been examined on April 14, 2018 at about 10:15 PM. The doctor who had examined her deposed as PW-7. PW-7 had corroborated the statement of PW-1 as to penetrative sexual assault by the appellant on PW-1. PW-2 had established the fact that, PW-1 was with the appellant at the material point of time. PW-2 and 4 had corroborated the evidence of the prosecution that, PW-1 suffered injury on her private parts. In such circumstances, prosecution had been able to establish penetrative sexual assault by the appellant on PW-1.

24. The age of the victim has been certified to be about two and half years by the learned judge recording her deposition. The parents of the victim being PW-2 and 3 had stated that the victim was three years three months. That the victim is a minor has been conclusively established.

25. Apart from PW-1 the prosecution has not produced any eyewitness to the incident. PW-1 as a child witness. The evidence of a child witness should not be rejected per se. The evidence of a child witness should be evaluated with greater circumspection since a child witness is susceptible to tutoring. Corroboration of the testimony of a child witness is not a rule but a measure of prudence. The court should also be cautious of a child witness being tutored while evaluating the evidence of a child witness. Where the testimony of the child witness is reliable, inspires confidence and the child witness has withstood the test of cross-examination, a conviction can be based on such testimony.

26. In the facts of the present case, the testimony of PW-1 is credible and inspires confidence. Her testimony has been corroborated by medical evidence. Her testimony has also been corroborated by PW-2, 4 and 7. She had withstood the cross-examination at the trial.

27. In the facts of the present case, there has been no delay in the lodgement of the First Information Report. The incident happened in the morning after 8 A.M. The victim had confided about the incident to her mother after the incident. Her mother had informed the father of the victim at about 3

P.M. The parents had thereafter gone to the police station for lodging the complaint. The time spent between the incident till the lodgement of the complaint with the police has been adequately explained at the trial.

28. The victim had claimed that, the appellant inserted his finger into her vagina and anus. Such insertion had left a mark of injury on her vagina. The medical examination of the victim they not find any injury in the anus of the victim. Absence of injury in the anus of the victim on medical examination ipso facto does not establish that, the appellant did not insert his finger there as claimed by the victim. As has been noted above, the testimony of the victim is credible and reliable. She had withstood the cross-examination. The appellant has not placed any material on record to this belief any part of the testimony of the victim. Therefore we have found no ground to arrive at a finding that, the appellant was not guilty of penetrative sexual assault on the private parts of the victim.

29. In view of the discussions above, CRA No. 123 of 2020 is dismissed. CRAN 2 of 2021 is disposed of accordingly.

30. Trial court records and a copy of this judgement and order be sent to the appropriate court forthwith.

31. The period of detention undergone by the appellant be set off against the sentence of imprisonment under Section 428 of the Criminal Procedure Code.

32. Urgent Photostat Certified copy of this judgement and order be given to the parties, if applied for, in accordance with the formalities.

[DEBANGSU BASAK, J.]

33. I agree.

[MD. SHABBAR RASHIDI, J]