

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 86 of 2021

Sukumar Ghosh @ Bishu

Vs.

The State of West Bengal

With

CRA 358 of 2021

With

CRAN 2 of 2022

Sukumar Ghosh

Vs.

The State of West Bengal

For the Appellant : Mr. Apalak Basu, Adv.

For the State : Ms. Zareen N. Khan, Adv.
Md. Kutubuddin, Adv.
Mr. Arup Sarkar, Adv.

Hearing Concluded on : November 24, 2022

Judgement on : December 15, 2022

DEBANGSU BASAK, J.:-

1. The appellant was put on trial on a charge under Section 6 of the Protection of Children from Sexual Offences Act, 2012, found guilty and sentenced to suffer rigorous imprisonment for 20 years by the impugned judgement of conviction dated January 25, 2021 and the order of sentence

dated January 26, 2021 passed by the learned Additional Sessions Judge, First Court, Sealdah, South 24 Parganas in Special Trial No. 07 (12) 2020 arising out of Special Case No. 51 of 2020.

2. A victim lodged a complaint with the police on December 2, 2020 complaining that, the appellant lived in the adjacent lane. The victim called him maternal uncle. The appellant used to call the victim to the house of the appellant within a gap of a few days. The appellant used to take the victim to the first floor room. After taking him there, the appellant used to take off the pant of the victim. The appellant used to take off his own trouser also. Then the appellant used to pierce his penis into the anus of the victim. The appellant used to touch the penis of the victim and suck it with his mouth. Further, the appellant used to make the victim hold the penis of the appellant and to take the same into his mouth. The victim felt pain. The appellant used to put on music on high volume so that no one could hear the shouting of the victim. The appellant occasionally used to feed the victim with roll and chowmein. The appellant took the victim at about 5:30 PM in the afternoon on December 2, 2020 to the first floor room and tried to do the same. At that time, the

local residents reached there. Thereafter, the victim came to the police station.

3. On the basis of such complaint, the police investigated the case and submitted a charge sheet on December 17, 2020 under Section 6/12 of the Act of 2012. The Court framed charges against the appellant on December 21, 2020 for the offences punishable under Section 377 of the Indian Penal Code, 1860 and Section 6 of the Act of 2012. The appellant pleaded not guilty and claimed to be tried.

4. At the trial, the prosecution examined nine witnesses. The prosecution relied upon documents which were marked as Exhibits 1 to 11. On conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Criminal Procedure Code on January 20, 2021 where he stated that, he was innocent. He however declined to produce any defence witness.

5. The victim deposed as PW 1 at the trial. He stated that, when he was playing in front of the house of the appellant, he was called inside the house of the appellant. The appellant kissed him on his cheek and inserted his penis into the anus of the victim. He narrated the incident to the local boys. The incident happened on Saturday during the period of lockdown.

He stated that, the appellant committed such incidents many times with him. The appellant did the same offence before the Saturday spoken of. He identified the statement made by him to the police which was marked as Exhibit 1. He also identified the formal complaint lodged with the police which was tendered and marked as Exhibit 2. He tendered his medical examination report which was marked as Exhibit 3 as well as the consent form for the medical examination which was marked as Exhibit 4. The statement made by the victim and recorded under Section 164 of the Criminal Procedure Code, was tendered in evidence by the victim and marked as Exhibit 5.

6. In cross-examination, the victim stated that, there were 3/4 houses in between his house and the house of the appellant. Before lockdown, one autorickshaw caught fire and for such reason, he was blamed by the local people. The appellant washes vehicles. The autorickshaw which caught fire in the morning, was standing in front of the house of the appellant. The appellant, the brother of the appellant and local people asked the victim about the fire on the autorickshaw. He admitted his mistake that, the autorickshaw caught fire at his instance. He stated that, for such reasons,

disputes arose between the family members of the appellant and the victim.

7. The doctor who examined the victim on December 7, 2020 deposed as PW 2. He stated that, on examination, he found the anus of the victim to be funnel-shaped, loose, lax and distanceable. He did not find any recent injury. He opined that, considering the loose, lax and distanceable anus possibility of anal intercourse on the victim could not be ruled out. He also examined the appellant and on examination found that there was nothing to suggest that the appellant was incapable of performing sexual intercourse/anal intercourse in ordinary course of nature. The medical examination report of the appellant was tendered and marked as Exhibit 6.

8. The police constable who took photographs of the place of occurrence and surroundings deposed as PW 3. He stated that, he took six photographs of the place of occurrence and its surroundings. The six photographs were marked as material Exhibits I to I/5.

9. The mother of the victim deposed as PW 4. She stated that, on December to 2020, at about 5:30 PM, after returning from playing, her son, the victim herein, stated to her that the

appellant called him to his house and kissed him and made the victim hold the penis of the appellant and that the appellant also held the penis of the victim. The victim also told her that, the appellant inserted his penis into the anus of the victim. During the lockdown period, appellant did the same acts with the victim. Local boys saw the victim to wear pant inside the house of the appellant. The birth certificate and wearing apparel of the victim were seized by the police by preparing a seizure list. The birth certificate of the victim was tendered and marked as Exhibit 7. She identified the appellant in Court.

10. A person knowing the victim deposed PW 5. He stated that, on December 2, 2020, a quarrel took place whereupon, he became aware that, the appellant took the victim to his house. He stated that he went to the police station at the request of the mother of the victim. He did not know anything more about the case. He identified the appellant in Court.

11. A neighbour of the victim deposed PW 6. His evidence is based on hearsay. He stated that, on the request of the mother of the victim, he accompanied them to the police station. He identified the appellant in Court.

12. The police personnel who recorded the statement of the victim as per his version in presence of his mother, deposed as PW 7. The police constable who drew the rough sketch map of the place of occurrence and the final map on the basis of the rough sketch map deposed as PW 8. The final map was tendered and marked as Exhibit 9.

13. The investigating officer deposed as PW 9. He spoke about the investigations conducted. He stated that, he visited the place of occurrence as shown by the victim. He examined available witnesses and recorded their statements. He arrested the appellant on December 3, 2020. He seized the wearing apparel of the appellant on December 2, 2020 and prepared a seizure list which was marked as Exhibit 11. He produced the appellant before the doctor for his examination. He submitted the charge sheet on conclusion of the investigation.

14. Learned advocate appearing for the appellant submitted that, there was illegality in the charges framed. He contended that, the appellant was never explained the facts for which he was being tried causing immense prejudice vitiating the trial. In support of his contention contentions, he relied upon ***All India Reporter 1956 Supreme Court 116***

(Willie (William) Slaney vs. State of Madhya Pradesh)* and *All India Reporter 1957 Supreme Court 623 (Gurbachan Singh vs. State of Punjab).

15. With regard to the statement recorded under Section 164 of the Criminal Procedure Code of the victim, learned advocate appearing for the appellant submitted that, victim admitted in cross-examination that, the police wrote a statement as per the version of his mother and his aunty. The victim also admitted that, he was tutored by his mother before he gave a statement which was recorded under Section 164 of the Criminal Procedure Code.

16. Learned advocate appearing for the appellant drew the attention of the Court to various portions of the depositions of the prosecution witnesses. He submitted that, there were embellishments and exaggerations. There were material contradictions also. He sought to highlight the same.

17. Referring to the medical evidence, learned advocate appearing for the appellant submitted that, there was no recent injury found on the victim. The doctor could not rule out the possibility of sexual activity. According to him, such evidence is inadequate to point towards a positive act of

sexual violence which is required in a case alleging anal penetration.

18. Learned advocate appearing for the appellant submitted that, the prosecution did not examine vital witnesses. The prosecution did not produce documents. Therefore, this Hon'ble Court should draw adverse inference against the prosecution under Section 114 (g) of the Indian Evidence Act.

19. Learned advocate appearing for the appellant contended that, the victim admitted that there was a dispute before the lockdown between the two families and therefore, the possibility of false implication cannot be ruled out. He contended that, the appellant should be acquitted.

20. Learned advocate appearing for the state contended that, the prosecution established the case beyond all reasonable doubt. The mother of the victim proved the age of the victim by producing of the birth certificate of the victim being Exhibit 7. The victim corroborated his complaint and the statement recorded under Section 164 of the Criminal Procedure Code. The post-mortem doctor, PW-2, corroborated the evidence of the victim.

21. Learned advocate appearing for the state submitted that, under Section 30 of the Act of 2012, an opportunity is given to the accused to rebut the presumption as to the culpable mental state which arose in Section 29. However, the accused failed to rebut such presumption. He submitted that, the appellant committed aggravated sexual assault upon the victim and therefore, the appellant was rightly convicted.

22. The appellant raised the point that, the charges framed at the trial were irregular and caused prejudice to the appellant and relied upon **Gurbachan Singh (supra)** and **Willie (William) Slaney (supra)**. **Gurbachan Singh (supra)** considered **Willie (William) Slaney (supra)** and observed as follows: –

“7.....This court in case 'Willie (William) Slaney v. The State of Madhya Pradesh' 1955 2 S C R 1140: (S) A I R 1956 S C 116) (D) elaborately discussed the question of the applicability of S. 537 and came to the conclusion that in judging a question of prejudice, as of guilt, courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. The discussions are at pp. 1153, 1183 and 1189 (of S C R): (at

pp. 122, 134, 135 and 137 of A I R) and need not be reiterated here.....”

23. Two charges were framed against the appellant on December 1, 2020. The first charge related to offence punishable under Section 377 of the Indian Penal Code, 1860. The second charge related to penetrative sexual assault upon the victim and thereby committing an offence under Section 6 of the Act of 2012. Both the charges stated the period in which the offences were committed. Both the charges specified the place where such offences were committed. In our view, the charges framed as against the appellant contained sufficient particulars for the appellant to understand the scope, nature and extent of the charges that he faced at the trial.

24. Attention of the Court was not drawn, during the hearing of the appeal, as to the appellant suffering any prejudice by reason of the charges as framed against him. The point of irregularity or illegality of the charges framed was not taken before the trial Court. At least, the attention of the Court at the time of hearing of the appeal, was not drawn to any material to suggest that, such an issue was raised before the trial judge. The appellant cross-examined all prosecution witnesses. The victim who was examined as PW 1 by the

prosecution was cross-examined at length on behalf of the appellant. The cross-examination, set up the defence that the appellant sought to take. The manner of cross-examination of the victim as well as other prosecution witnesses discloses that the appellant was sufficiently imbibed with the knowledge of the nature of charges that he faced at the trial.

25. In the facts and circumstances of the present case, we are of the view that, the contention that, the charges framed at the trial were irregular is without any substance. The appellant did not suffer any prejudice by reason of the charges framed as against him. The charges as framed, contained sufficient particulars so as not to prejudice the appellant at the trial.

26. The appellant faced a charge under Section 6 of the Act of 2012. Therefore, the age of the victim is required to be considered in order to ascertain whether the provisions of the Act of 2012 are tendered or not. The birth certificate of the victim was attended in evidence and marked as Exhibit 7. The date of birth stated in Exhibit 7 is September 9, 2006. The complaint being Exhibit 1 spoke of incidents happening during the lockdown and lastly on December 2, 2020. Therefore, as on December 2, 2020, the age of the victim was

14 years, 2 months and 23 days. The victim therefore was a minor on the dates of the incidents. Therefore, the provisions of the Act of 2012 were attracted, should the offences defined therein were established at the trial.

27. The victim as well as the prosecution witnesses spoke of the appellant indulging in sexual activities with the victim including penetrative sexual assault repeatedly. Such incidents happened during the lockdown and lastly on December 2, 2020. The version of the incident happening on December 2, 2020 varied between the prosecution witnesses. The victim stated that, on December 2, 2020, upon the appellant indulging in sexual activities with him, including penetrative sexual assault, he narrated the incident to local boys. The mother of the victim PW 4 stated that, local boys saw the victim to wear pant in the house of the appellant. Two local witnesses being PW 5 and 6 were silent with regard to the victim disclosing anything to them or they seeing the victim wearing his pant at the house of the appellant.

28. The prosecution did not bring any witness at the trial to establish the versions of the victim or his mother with regard to the incidents. No local witness came forward to state that, the victim confided in him as to the incidents or that he

saw the victim at the house of the appellant wearing his trouser.

29. In cross-examination, the victim stated that, the appellant washed autorickshaws. Before the lockdown, one autorickshaw caught fire. The local people asked the victim about the fire whereupon, he admitted that, it was due to his mistake that the autorickshaw caught fire. Disputes arose between the family members of the victim and the appellant due to such reason. The appellant therefore brought on record at the trial sufficient material to suggest, if not establish that, the appellant was falsely implicated due to prior enmity.

30. Viewed from another perspective, it is improbable that, with disputes cropping up between the two families prior to the lockdown, the appellant and the victim would meet for regular sexual escapades as sought to be claimed by the victim. The two houses were within close proximity with three or four houses standing in between as appearing from the testimony of the victim in cross-examination. Presence of people in the locality was established at the trial. Therefore, it would be unlikely that, given the nature of the disputes between the two families, the visit of the victim to the house of

the appellant as frequently as described by the victim would go unnoticed by the local people.

31. In cross-examination, the victim stated that, the police wrote the complaint as per the version of his mother and two aunties. He also stated that, he recorded the statement before the learned judicial Magistrate as per the tutoring of his mother. In response to suggestions put in cross-examination, the victim denied the suggestion that, he deposed falsely as per the tutoring of the police or his parents or that he deposed falsely as there was enmity in between his family and the family of the appellant.

32. On the basis of the cross-examination of the victim, two views with regard to the sanity of his statement recorded under Section 164 of the Criminal Procedure Code and his evidence at the trial can be taken. One possible view is that, he recorded the complaint with the police and his statement under Section 164 of the Criminal Procedure Code as per the tutoring of his mother and two aunties. The other view is that, he was not tutored to do so. It is trite law that, when two views emanate out of the facts established at the trial, the view which favours the accused should be taken. In such circumstances, the view that, the victim was tutored to record

a formal complaint with the police and his statement under Section 164 of the Criminal Procedure Code, should be accepted as it is a plausible view emanating out of the facts established at the trial and it favours the accused.

33. The medical evidence led by the prosecution at the trial does not conclusively establish penetrative sexual assault on the victim. PW 2 who examined the victim stated that, on examination he found the anus of the victim to be funnel-shaped, loose, lax, and distanceable. He did not find any recent injury on the victim. He stated that, considering loose, lax and distanceable anus, possibility of anal intercourse on the victim could not be ruled out. He did not state that, penetrative sexual assault was perpetuated or perpetrated on the victim. It was a possibility.

34. In view of the discussions above, we find that, the prosecution would not establish the charges beyond reasonable doubt as against the appellant. Consequently, we set aside the impugned judgement of conviction dated January 25, 2021 and the order of sentence dated January 26, 2021. We discharge the appellant from the charges framed against him on December 21, 2020 due to lack of sufficient materials to establish such charges.

35. The appellant is discharged of the charges he was charged with. He is directed to be set at liberty forthwith, if not required in any other case. He shall, however, furnish a bail bond to the satisfaction of the trial Court which shall continue for six months from date in terms of Section 437A of the Criminal Procedure Code.

36. The appellant preferred two appeals from the same impugned judgements of conviction and order of sentence being CRA 86 of 2021 and CRA 358 of 2021. On November 17, 2022, when the appeals were taken up for hearing, it was found that, none appeared for the appellant in CRA 86 of 2021. Since the appellant was represented through Legal Aid Services in CRA 358 of 2021, such advocate was requested to represent the appeal in CRA 86 of 2021 also.

37. An appellant cannot prefer two appeals against the same impugned judgement and order. We heard the appellant in CRA 385 of 2021. The department will, therefore, treat CRA 86 of 2021 as dismissed. CRA 358 of 2021 is allowed.

38. All pending applications, including application for bail, shall stand disposed of on the above terms.

39. Let a copy of the judgement along with the lower Court Records be sent down to the Court below at once.

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

[DEBANGSU BASAK, J.]

41. I agree.

[MD. SHABBAR RASHIDI, J]