

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 153 of 2018

With

CRAN 2 of 2020

Amirul Gain @ Bappa

-Vs-

State of West Bengal

For the Appellant : Mr. Sumanta Chakraborty, Adv.

For the State : Mr. Partha Pratim Das, Adv.
Ms. Manasi Roy, Adv.

Heard on : 10th March, 2022

Judgment on : 10th March, 2022

Joymalya Bagchi, J. :-

Appellant has assailed judgment and order dated 20th March, 2018 and 21st March, 2018 passed by the learned Additional Sessions Judge, 2nd Court, Barasat, in Sessions Trial No. 07(11)2016 (Special case No. 259 of 2016) convicting the appellant for commission of offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and sentencing him to suffer rigorous imprisonment of 10 years and to pay a fine of Rs. 1,00,000/- in default, to suffer

rigorous imprisonment for one year more and directing compensation to the tune of Rs. 4.5 lakhs be paid to the mother of the victim girl (P.W. 2) through the District Legal Service Authority, North 24 Parganas.

Appellant had a live in relationship with the mother of the victim (P.W. 2). They were residing together in a rented apartment in the house of one Surajit Pal (P.W. 5). It is alleged during the absence of P.W. 2, the appellant subjected her daughter, a eight years old child, to penetrative sexual assault on various occasions by putting his mouth on her vagina and inserting his penis into her mouth. Initially, the victim remained quiet as she was threatened by the appellant. Finally, she came out with the sordid details to her mother, P.W. 2. P.W. 2 confronted the appellant but he denied. When she expressed her intention to lodge criminal case, appellant left the rented apartment and started living with his family at Deganga. P.W. 2 lodged written complaint at Bongaon police station resulting in Bongaon P.S. Case No. 938/16 dated 07.09.2016 against the appellant under Section 6 of the Protection of Children from Sexual Offences Act. In the course of investigation, the minor was medically examined and her statement was recorded before Magistrate. Appellant was arrested and medically examined. Charge-sheet was filed and charges under Section 6 Protection of Children from Sexual Offences Act as well as 376(2) of the Indian Penal Code were framed against the appellant. The appellant pleaded not guilty and claimed to be tried.

In the course of trial, prosecution examined 11 witnesses including the victim as P.W.1. The defence of the appellant is one of

innocence and false implication. It was his specific defence that P.W. 2 had demanded a sum of Rs. 7 lakhs and a house between Madhyamgram and Barasat. Father of the appellant offered them to stay in a land adjoining his house. But P.W. 2 refused and falsely implicated the appellant. She had developed intimate relationship with another man and had assaulted the appellant. To probabilise his defence appellant examined his maternal uncle and a neighbour as D.W. 1 and 2 respectively.

In conclusion of trial, the trial Judge by the impugned judgment and order dated 20th March, 2018 and 21st March, 2018 convicted and sentenced the appellant, as aforesaid.

Hence, the present appeal.

Mr. Chakraborty, learned Advocate appearing for the appellant argues the dates on which the victim was allegedly raped have not been disclosed either in the charge or in the deposition of the witnesses. Hence, the allegation is vague and non-specific in nature. It is further argued place of occurrence has not been properly disclosed in the charge. No incident occurred at the Digha as referred to by the Trial Court in the impugned judgment. It is also argued P.W.2 had deserted her husband and multiple relationships. She had demanded money and a flat from the appellant and when he refused she falsely lodged the case. There is no independent corroboration of the allegation of rape. Medical evidence also does not support the prosecution case. Hence, conviction and sentence of the appellant is liable to be set aside.

On the other hand, Mr. Das with Ms. Roy appearing for the State argues the appellant was residing with P.W. 2 and her minor daughter in a rented apartment in Rail Bazar in Bongaon. On repeated occasions the minor had been sexually abused. She was threatened by the appellant and kept mum. Finally, she disclosed the incident to her mother who lodged the criminal case. It is clear that the sexual abuse on the minor was a continuing one. Hence, her failure to state the specific dates does not erode the truthfulness of the prosecution case. Place of occurrence was in the rented apartment in the house of P.W. 5 at Rail Bazar in Bongaon and the appellant cannot be said to have been misled on such score. It is also argued independent witnesses P.Ws. 3, 4 and 5, that is the landlord and his relation had been informed of the incident by P.W. 2 and all of them corroborated her version. In view of the nature of the sexual acts perpetrated on the minor, absence of injuries is natural. The defence of the appellant is a concocted one and an afterthought. No suggestion was given to P.W. 2 with regard to meeting held between herself and the relations of the appellant over her demand of 7 lakhs and a house. No suggestion had also been given to P.W. 2 with regard to the allegation that she had assaulted the appellant. Belatedly, the defence case was built up through D.W. 1 and D.W. 2 which is patently improbable and was rightly rejected by the trial Judge. Hence the appeal is liable to be dismissed.

P.W. 1 is the minor who was aged around 8 years at the time of occurrence. She was 9 years old when she came to Court to depose. She

was interviewed by the trial Court. Trial Court found that she answered questions posed to her intelligently and upon being satisfied with regard to her competence to depose, her evidence was recorded. She stated she was living with her mother and the appellant. Appellant used to do mischief in the absence of her mother. Appellant disrobed her and put his penis in her mouth. He did this 3 to 4 times. He also committed similar mischief once when they had gone to Digha. At that time, her mother was in bathroom. Appellant used to show obscene videos to her. He told her that he used to show similar videos to her mother and she did not object. He also threatened her not to disclose the incident to anyone. In the event, she did her mother would be killed. He also penetrated her and she felt pain. Finally, she narrated the incident to her mother who lodged F.I.R. Her statement was recorded before Magistrate. She was also examined by the doctor. In cross-examination, she stated they used to stay in a rented house at Bongaon. Appellant used to pay the rent of the said house. She also stated that she resisted the appellant but the appellant did suffer any injury. She denied knowledge with regard to the suggestion that her mother demanded two cottahs of land and two lakh of rupees from the appellant.

P.W. 2 is the mother of the victim girl. She stated she was married to one Tapash Biswas. She used to reside with the appellant in Bongaon in a rented apartment. Her daughter used to reside with her. She corroborated the version of her daughter with regard to penetrative sexual assault perpetrated upon the latter by the appellant in her

absence. Her daughter narrated the incident to her. She confronted the appellant who initially denied the incident. She finally lodged complaint, Exhibit-3.

In cross-examination, she stated that a divorce proceeding is pending between her and her husband. Earlier she used to reside with one Anup Pandit. At the time of occurrence she was residing with the appellant. She denied the suggestion that she demanded two lakhs from the appellant for building a house. She stated when she tried to contact police, the appellant without informing her fled from the house. She contacted the appellant and requested him to return the obscene photographs taken by him.

P.W. 5, Surajit Pal, is the landlord of the rented apartment where the appellant resided with P.W. 2 and her daughter.

P.W. 3, Dipa Nag is his daughter and P.W. 5, Bidyut Nag is her husband.

P.W. 3 deposed one and half years ago appellant had taken a room on rent and were residing there with P.W. 2 and her daughter. On 08.09.2016, P.W. 2 and the minor informed her that the appellant had committed rape on the minor. P.W. 4 has corroborated his wife with regard to the incident.

P.W. 5 Surajit Pal is the landlord who stated previous year the appellant resided as a tenant in his house with his wife and daughter. Subsequently, he came to know they were not married to each other. He had heard from P.W. 2 the appellant had tried to rape the child.

P.W. 7 Jagat Biswas is the medical officer who examined the victim. He deposed the victim complained of rape about a month before the examination. He did not find any external injury. He proved the discharge certificate and the medical report marked as Exhibit-6 and Exhibit-2 respectively.

P.W. 9 Amlan Dey examined the appellant and found he was capable of sexual intercourse. He did not find any external injury on his private parts.

P.W. 8 (Chaitanya Mondal) is the investigating officer. He deposed he had arrested the accused. He send him for medical examination. He send the victim and her mother for recording their statements under Section 164 Cr.P.C. Victim was medically examined. He collected medical examination report of the victim and submitted charge-sheet.

Appellant examined his maternal uncle Walinur Ahamed D.W. 1 and a neighbour namely Raju Sarkar as D.W. 2. D.W. 1 stated appellant was residing with P.W. 2 and the minor at Bongaon. After six/seven months, he received a phone call from the appellant. P.W. 2 had demanded Rs. 7 lakhs and a flat between Madhyamgram and Barasat. A meeting was organized which was attended by the appellant, P.W.2, Raju Sarkar (D.W. 2) and others. Father of the appellant offered land for their residence. P.W. 2 did not agree and threatened she would teach the appellant a lesson. Appellant thereafter stayed back at Deganga. P.W. 2 had an affair with another man and had assaulted the appellant. Subsequently, she filed criminal case.

In cross examination, D.W. 1 stated they had not lodged any general diary with regard to the demands made by P.W. 2 or threat held out by her or assault upon the appellant. D.W. 2 corroborated the evidence of D.W. 1

From the aforesaid evidence on record, it appears the appellant was living with P.W. 2 and her minor daughter in a rented room under P.W. 5. Taking advantage of the absence of P.W. 2, appellant used to subject the minor to penetrative sexual assault. He also showed obscene videos to the minor. When the minor resisted, he stated that he used to show similar videos to her mother but she did not resist. He also threatened the minor not to disclose the incident to her mother if she did so, her mother would be killed. As a result, the minor kept mum and bore the inhuman sexual torture upon her. Appellant perpetrated such assaults on a number of occasions. Finally, the minor mustered courage and informed her mother who confronted the appellant. Initially, the appellant denied such allegation but when P.W. 2 threatened to lodge complaint, he left the house and took shelter at his paternal home at Deganga. Upon coming to know of the aforesaid incident, P.W. 2 narrated the same to the landlord as well as his daughter and son-in-law i.e. P.Ws. 3, 4 and 5. These independent witnesses have corroborated the allegation of rape upon the minor as narrated by the minor herself and her mother. Minor was examined in Court and has succinctly described the inhuman manner in which she had been sexually abused. Her evidence is criticised on the ground that she is

unable to disclose the dates on which the appellant subjected her to penetrative sexual assault.

I have considered the evidence of the minor in the backdrop of the facts of the case. P.W. 1 has clearly described the manner in which she was sexually abused. She stated she had been subjected to abuse at least on 3/4 occasions. From her narration, it is clear that the appellant by abusing his quasi-paternal position had continuously subjected the minor to repeated sexual attacks. In view of the repetitive assaults on a tender victim, it is natural that the minor was unable to disclose the exact dates on which the sexual assault was perpetrated on her. Moreover, when a minor victim is sexually abused by a person who is a father like figure to the victim, her conduct during and after the incident requires to be assessed bearing in mind the overwhelming influence the predator has on her. In this backdrop, it is most probable that the minor who was subjected to continuous and repeated sexual attacks by the appellant had kept mum and was unable to disclose the incident promptly to her mother. That apart, it appears from the evidence on record that the appellant had prevailed over the minor by telling her that he had shown similar obscene videos to her mother who had not objected. Subsequently, he threatened her that her mother would be killed if she divulged the incident to anyone. Conduct of the appellant in attempting to pollute the mind of a minor by showing her obscene videos (which he claimed he had shared with her mother who had not objected) and thereafter holding out threats upon the child clearly exposes

unhealthy atmosphere in which the helpless victim was sexually exploited by the appellant and the reasons for her silence. Finally, she broke her silence and narrated the incident to her mother.

Upon coming to know of the incident, P.W. 2 confronted the appellant who initially denied it. He stated that no one would believe her as the victim had not suffered injuries. These circumstances clearly show how the appellant sought to cover his perverted acts by threats and intimidation upon P.W. 2 as well as the minor. Finally, P.W. 2 decided to lodge complaint and disclosed the incident to P.Ws. 3, 4 and 5. These independent witnesses have corroborated her deposition and that of the minor. Evidence of the minor corroborated by other witnesses have a ring of truth and I am inclined to rely on their versions with regard to continuing sexual assault on a helpless child by the live in partner of her mother. In view of the nature of sexual acts perpetrated on the minor and the delay in subjecting her to medical examination, absence of injuries found on the body of the minor is most natural. It is trite law if the version of a minor victim regarding sexual assault appears to be truthful and convincing, absence of injuries is no ground to disbelieve her version.

Although a suggestion was given to the minor (P.W. 1) and her mother (P.W. 2) that the latter had demanded Rs. 2 lakhs for purchasing a house which was stoutly denied by both of them, during his examination under Section 313 of the Code of Criminal Procedure the appellant came out with a more elaborate defence of false implication at

the behest of P.W. 2. Appellant contended P.W. 2 had demanded a sum of Rs. 7 lakhs and a house between Madhyamgram and Barasat. Over such issue, a meeting was held at his house when P.W. 2 threatened to teach him a lesson. Thereafter appellant stayed back at his parental residence at Deganga. He had also been assaulted by P.W. 2 who had an affair with another man. Thereafter, P.W. 2 lodged first information report.

Appellant examined two witnesses to prove his defence. D.W. 1, Walinur Ahamed is his own maternal uncle and D.W. 2, Raju Sarkar is his neighbour. D.W. 1 stated that the appellant and P.W. 2 were residing in a rented apartment at Bongaon for 6/7 months. At that stage, a dispute cropped up. P.W. 2 demanded Rs. 7 lakhs and a flat between Madhyamgram and Barasat. A meeting was organised at the residence of the appellant which was attended by D.W. 1 and D.W. 2. Father of the appellant proposed to give some land but P.W. 2 refused and threatened that she would teach a lesson to the appellant. Therefore, appellant stayed back at Deganga and P.W. 2 filed the case. Appellant had also been assaulted by P.W. 2 who is said to have an affair with another man.

It is pertinent to note that during the cross-examination of P.W. 2 no suggestion was put to her with regard to the so-called meeting at the house of the appellant or any threat hold out by her and/or assault upon the appellant. These aspects of the defence case is belatedly manufactured and is not supported by the attending circumstances of

the case. No contemporaneous complaint was lodged by the appellant or his family members with regard to the alleged threat or assault by P.W. 2 on the appellant. Defence witnesses claimed the dispute cropped up between the appellant and P.W. 2 after residing in the rented apartment for 6/7 months. Thereafter, a meeting was held at his residence where P.W. 2 threatened him and the appellant started residing at his paternal home at Deganga. On the other hand, the landlord and his relations viz., P.Ws. 3 to 5 state that the appellant and P.W. 2 and her daughter were staying in the rented apartment for more than a year. They do not speak of any dispute between the appellant and P.W. 2 as claimed by the defence witnesses.

In the light of the aforesaid, I find that the independent witnesses viz., P.Ws. 3, 4 and 5 have corroborated the allegation of rape upon the minor but not the so called dispute between the appellant and P.W. 2 which is said to have cropped up after they were residing in the rented apartment for 6/7 months.

Thus, I am of opinion that the defence version seems hollow and lacks credibility. Plea of exorbitant demands by P.W. 2 and her threats upon non-fulfillment of such demand resulting in false implication of the appellant was conjured up to protect the appellant from lawful punishment and does not find corroboration from independent and/or contemporaneous materials on record.

In this backdrop, I am of the opinion defence adduced on behalf of the appellant is untrustworthy and does not rebut the statutory presumption under Section 29 of the POSCO Act.

In the light of the aforesaid discussion, I am inclined to rely on the convincing version of the minor victim P.W. 1 which is corroborated by her mother and other independent witnesses. Conviction and sentence of the appellant is thus upheld and the appeal is dismissed.

In view of dismissal of the appeal, connected applications, if any, is also disposed of.

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of 428 of the Code of Criminal Procedure.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)