

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

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

**C.R.A. 157 of 2016
with
CRAN 1 of 2018 (Old CRAN 3147 of 2018)**

**Subir Dakshi
-Vs-
State of West Bengal**

For the Appellant	:	Mr. Sabir Ahmed, Adv. Mr. Ayan Chakraborty, Adv. Ms. Sohini Mukherjee, Adv.
For the State	:	Mr. Sudip Ghosh, Adv. Mr. Bitasok Banerjee, Adv. Mr. Apurba Kumar Datta, Adv.
Heard on	:	16.09.2022
Judgment on	:	16.09.2022

Joymalya Bagchi, J. :-

Appeal is directed against the judgment and order dated 03.02.2016 and 05.02.2016 passed by the learned Additional District and Sessions Judge, Chandannagar in Sessions Trial No. 57 of 2013 arising out of Sessions Case No. 46 of 2013 convicting the appellant for

commission of offence under Section 376(2)(i) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 20 years and to pay a fine of Rs.10,000/-, in default to suffer simple imprisonment for one year more. Fine amount, if paid, would be given to the victim girl.

Prosecution case levelled against the appellant is to the effect that the victim, a 4½ year old girl had gone out to play with her friends. While she was playing, the appellant who was the maternal uncle of another friend called her to his room. He removed her inner garments and put his finger in her private parts. Stunned by such act of sexual predation the child returned to her residence and informed her mother. Her mother found swelling in her private parts and consulted with a local homeopath. Out of shame and embarrassment she kept the matter private. However, discomfort of the victim continued and she came out with the incident to her husband and mother-in-law, PWs 3 and 7 respectively. On 05.03.2013 child was taken to one Dr. Manash Kumar Ghosh (PW 9) for treatment. Dr. Ghosh found congestion over vulva and prescribed medicine. Mother of the victim (PW 2) lodged written complaint at the police station resulting in registration of Chandannagar Police Station Case No. 56 of 2013 dated 05.03.2013 under Sections 376(2)(f)/511 of the Indian Penal Code against the appellant. During investigation victim was medically examined. Her statement was recorded before the learned Magistrate. Appellant was arrested and charge-sheet was filed. Charge was framed under Section

376(2)(i) of the Indian Penal Code. Appellant pleaded not guilty and claimed to be tried. In the course of trial prosecution examined 12 witnesses and exhibited a number of documents. Defence of the appellant was one of innocence and false implication. In conclusion of trial, learned trial Judge by the impugned judgment and order convicted and sentenced the appellant, as aforesaid.

Mr. Ahmed, learned Counsel appearing for the appellant submits there is delay in lodging F.I.R. Explanation with regard to delay by PW 2 is not believable. It is absurd that PW 2 would take the victim to a local homeopath but not disclose the incident to her husband. PW 6, a Gynaecologist who examined the victim on 06.03.2013 did not find any injury in her private parts. Her finding contradicts the medical opinion of PW 9. Hence, prosecution case has not been proved beyond doubt. Appellant may be acquitted of the charge levelled against him.

Mr. Ghosh, learned Counsel for the State submits the victim was a 4½ year old child. She was examined as PW 1. Her version in Court is consistent with that before the learned Magistrate. Her deposition proves the offence of penetrative sexual assault. The victim is corroborated by her mother PW 2, father (PW 3) and grandmother (PW 7). Dr. Manash Kumar Ghosh (PW 9) examined the victim on 05.03.2013 and found injury in her private parts. Hence, prosecution case is proved beyond doubt.

PW 1 is the minor child. She was 4½ year old at the time of the incident. Owing to her tender age, trial Court put questions to determine her capacity to depose. Upon being satisfied, her deposition was recorded. She submitted she had gone out to play with her friends. Appellant was maternal uncle of her friend, Puja. He called her to his house. He put his finger into her vagina. He also squeezed her breast. She suffered pain in her private parts. She returned home and narrated the incident to her mother. She identified the appellant in Court. She stated she was treated by a doctor and made statement before the Magistrate. She remained unshaken during cross-examination.

Her deposition is corroborated by her mother, PW 2 who is the de facto complainant. She stated her daughter had gone out to play with her friend. At that time maternal uncle of Puja, another friend of her daughter, called the latter to his house. He put his finger into her private parts. When her daughter returned home she was unable to walk properly. Upon query she disclosed the incident. Out of shame and stigma, she did not divulge the incident to anybody. She found swelling and bleeding in the private parts of her daughter. She consulted a local homeopath. However, pain did not subside. Accordingly, she informed her husband, mother-in-law and neighbour on 05.03.2013. Her daughter was treated by Dr. Manash Kumar Ghosh (PW 9). She lodged complaint on that day.

Her deposition is corroborated by her husband, PW 3 and her mother-in-law, PW 7. PW 8, another relation of PW 3, has corroborated PWs 1 and 2.

PW 9 (Dr. Manash Kumar Ghosh) medically examined the victim on 05.03.2013. He noted local congestion over vulva. He advised proper medicine. He proved his report as Exbt.-6.

But PW 6 (Dr. Rita Barai) who examined the victim on 06.03.2013 did not find any injury on the victim. On query from the investigating officer she replied as follows:-

1. It cannot be said definitely whether the patient was raped.
2. No recent mark of injury seen in her private part.
3. Hymen was intact.
4. No mark of injury seen on her breast, body or lower part i.e., genitalia.
5. It cannot be concluded as to whether the patient was suffering with any venereal diseases.
6. I collected the vaginal swab, rectal swab for chemical examination.

Mr. Ahmed, learned Counsel for the appellant assails the prosecution case on the ground of inordinate delay. He submits though PW 2 took her daughter to local homeopath she did not disclose the incident to her husband. After five days F.I.R. was registered.

I have given anxious thought to the aforesaid contention of the defence. Incident occurred on 28.02.2013. Victim was a 4½ year old child. She had gone out to play with her friends. When she returned home her mother found she was not walking normally. On query, she narrated the incident. Her mother noted swelling and bleeding from her private parts. Act of rape on a 4½ year old child by an acquaintance is a shocking event. Hearing this from her child, her mother (PW 2) was terribly shocked. Due to shock and fear of social stigma she kept silent, perhaps hoping against hope her daughter would recover. Unfortunately, state of affairs turned worst. Pain did not subside and she informed the incident to her husband, mother-in-law and neighbour. They took the child to a medical practitioner i.e. Dr. Manash Kumar Ghosh (PW 9) on 05.03.2013. Dr. Ghosh noted congestion over vulva and prescribed medicine. In these circumstances, the parents of the victim child informed the police and criminal law was set into motion. Even in the F.I.R. PW 2 had stated that they had lodged complaint after “a long thought”. In Court she explained out of shame and fear of social stigma she initially kept mum. Her conduct when judged from the perspective of the mother of a 4½ year old child who had been raped cannot be said to be unnatural. In most cases of sexual assault victim is initially hesitant to report to the police. The situation is further aggravated when the sexual assault is on a minor child as in

the present case. In this backdrop, I am of the opinion delay in lodging F.I.R. is neither unnatural nor unexplained.

Mr. Ahmed, learned Counsel for the appellant also argues depositions of the minor and her parents are not supported by medical evidence. PW 6, Gynaecologist who examined the victim at the hospital did not find injuries in her private parts or secondary sexual organs. Hence, prosecution case is not proved. I am unable to subscribe to this argument also. Dr. Manash Kumar Ghosh (PW 9) examined the victim first. On 05.03.2013 he found local congestion over vulva. He prescribed medicines. His evidence supports the allegation of rape. Speculative plea that the victim may have suffered injury in a bush while playing, is wholly hypothetical and squarely improbabilised by the versions of the victim and her parents. On 06.03.2013 PW 6 (Dr. Rita Barai) examined the victim. Though she claimed she did not find any mark of injury in the private parts she had prescribed an anti biotic syrup to the patient. When the Judge sought clarification from the doctor why notwithstanding noting absence of injury she had prescribed an anti biotic syrup, the witness could not come out with any convincing explanation. Reading evidence of PW 6 as a whole, I find her findings regarding absence of injury to be inconsistent with her medical advice. While medical officer stated she did not find any injury on the victim she prescribed anti biotic syrup to the child. Anti-biotics are ordinarily prescribed to combat infection. She was unable to explain

the reason for making such prescription. Under such circumstances, I choose not to give much credence to the findings of PW 6. On the other hand, I am inclined to rely on the other medical practitioner, PW 9 who examined the victim first and found injuries on her vulva.

Evidence on record proves the allegation of penetrative sexual assault on the victim by the appellant beyond doubt. In spite of extensive cross-examination no case of false implication has been made out.

In view of the aforesaid discussion, I uphold the conviction of the appellant.

Coming to the issue of sentence I note appellant has been sentenced to suffer rigorous imprisonment for 20 years. Victim who was a 4½ year old child and had been subjected to penetrative sexual assault. No doubt, the offence is very grave but the appellant does not have criminal antecedents. Balancing the aforesaid incriminating and aggravating circumstances, I am of the opinion that the substantive sentence imposed on the appellant may be reduced from rigorous imprisonment of 20 years to rigorous imprisonment for 15 years. Fine amount imposed on the appellant by the trial Court shall remain unaltered.

The appeal is, accordingly, disposed of.

In view of dismissal of the appeal, connected application being CRAN 1 of 2018 (Old No. CRAN 3147 of 2018) is also dismissed.

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 Section 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 appellant upon completion of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)