

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

CRA 169 of 2020

With

CRAN 5 of 2022

Subha Dey & Anr.

Vs.

The State of West Bengal

For the Appellant : Mr. Rajdeep Mazumder, Adv.
Ms. Arushi Rathore, Adv.
Ms. Radhika Agarwal, Adv.

For the State : Mr. P.K. Datta, Ld. APP
Mr. Santanu Deb Roy, Adv.

Heard on : July 20, 2022

Judgement on : July 29, 2022

DEBANGSU BASAK, J.:-

1. The appellants have assailed the judgement of conviction dated January 21, 2020 passed by the learned additional District and Sessions Judge, First Court and Special Court Bongaon, North 24 Parganas in Special (POCSO) 88/2018 (75/18) and the order of sentence dated January 20, 2020 passed therein.

2. By the impugned judgement of conviction dated January 21, 2020, the appellants have been held guilty of the offences under section 376 (2) (j)/376 D/506 of the Indian Penal Code, 1860 and Section 6 of the Protection of Children against Sexual Offences Act, 2012. By the impugned order of sentence dated January 28, 2020, the appellants have been sentenced various terms with a maximum period of 10 years and directed to pay various amounts of fine and in default to undergo various periods of imprisonment.
3. The police received a complaint from the victim which was registered as a first information report being Gaighata police station case No. 1288/18 dated December 12, 2018 under section 376 (2) (j)/376D/506 of the Indian Penal Code, 1860 and Section 6 of the Protection of Children against Sexual Offences Act, 2012. The police had investigated into the complaint and on completion of investigations, police submitted charge sheet against the appellants under section 376 (2) (j)/376D/506 of the Indian Penal Code, 1860 and Section 6 of the Protection of Children against Sexual Offences Act, 2012.
4. The Trial Court had framed charges against the appellants under section 376 (2) (j)/376D/506 of the Indian Penal

Code, 1860 and Section 6 of the Protection of Children against Sexual Offences Act, 2012. The appellants had pleaded not guilty to the offence and on claiming to be tried were tried.

5. At the trial, the prosecution had examined 12 witnesses. The prosecution had tendered various documents as evidence which were marked as exhibits. The prosecution had also tendered material evidences which were marked as exhibits.
6. The prosecution had approached the Trial Court with the case that, the appellants had met the victim on December 11, 2018 when she had been to Bokchara Market for photography purpose. The appellants on the pretext of meeting her with her friend Furi took her to an open field near Digha, Bokchara in the night at about 10.30 P.M where the appellants had forcibly committed rape upon the victim. The appellant had threatened the victim not to disclose the incident to anybody. Consequently, the appellant had committed offences under Section 376 (2) (j)/376D/506 of the Indian Penal Code and Section 6 of the Protection of Children against Sexual Offences Act, 2012.

7. Learned advocate appearing for the appellants has submitted that, the prosecution could not establish the case against the appellants beyond reasonable doubt. He has contended that, out of the 12 prosecution witnesses which were examined, three were declared hostile by the prosecution. The victim herself had been declared hostile by the prosecution.
8. Referring to the oral testimony of the victim, being the prosecution witness No. 7, learned advocate appearing for the appellants has submitted that, the victim stated that she was asked to establish a relationship with the appellants by making an ugly proposal and that, after hearing the same, she fled away from the place and returned home. He has contended that, the statement of the victim being prosecution witness No. 7 clearly indicated that no offence as alleged by the prosecution was committed. According to him, prosecution witness No. 7 is the only eyewitness and therefore, her evidence carries the utmost of weightage.
9. Learned advocate appearing for the appellants has submitted that, prosecution witness No. 1 and 2 being the mother and sister-in-law of the victim were also declared

hostile by the prosecution. They did not support the case of the prosecution. They had stated that the prosecution witness No. 7 was detained by her friends for settling some disputes and thereafter prosecution witness No. 7 returned home on the date of the incident at about 7:45 PM.

10. Learned advocate appearing for the appellants has referred to the evidence of the other prosecution witnesses. He has submitted that, none of the prosecution witnesses have established commission of any offence by any of the appellants. He has referred to the evidence of the prosecution witness No. 8 and prosecution witness No. 11 who are doctors. He has referred to such testimony and submitted that, the doctors could not find any injury on the prosecution witness No. 7. He has submitted that the prosecution witness No. 11 stated in evidence that there was no mark of external injury over the private parts of the prosecution witness No. 7.

11. Learned advocate appearing for the appellants has submitted that, the learned judge had erred in relying upon the statement of the prosecution witness No. 7 recorded under Section 164 of the Criminal Procedure Code before the Learned Magistrate for convicting the appellants. He has

contended that, statements recorded under section 164 of the Criminal Procedure Code are not substantive evidence in itself and can only be used for corroboration. According to him, a statement recorded under Section 164 of the Criminal Procedure Code cannot be solely relied upon to convict an accused in the absence of any corroborative evidence. He has contended that, the prosecution witness No. 7 in evidence in Court, stated contrary to the statements recorded under section 164 of the Criminal Procedure Code. In court, prosecution witness No. 7 has claimed that she was tutored by the police at the time of recording her statement. He has pointed out that, the magistrate who recorded the statement of the prosecution witness No. 7 under Section 164 of the Criminal Procedure Code was not examined by the prosecution.

12. Learned advocate appearing for the appellants has relied upon **1972 (3) Supreme Court Cases 280 (Ram Kishan Singh vs. Harmit Kaur and Another)** for the proposition that, a statement recorded under section 164 of the Criminal Procedure Code is not substantive evidence. He has relied upon **2005 Supreme Court Cases (Criminal) 1050 (Raja Ram vs. State of Rajasthan)** and **2005**

Supreme Court Cases (Criminal) 1037 (Muktiyar Ahmed Ansari vs. State) for the proposition that, the defence can rely upon the evidence of a witness of the prosecution who was not supporting the case of the prosecution and was not declared as a hostile witness.

13. Learned advocate appearing for the appellants has submitted that, since the prosecution has failed to prove the case beyond reasonable doubt, the appellants should be acquitted.
14. Learned Additional Public Prosecutor appearing for the state has referred to the facts of the case as also to the evidence on record. He has submitted that, the victim who was the prosecution witness No. 7, was a minor at the time of the incident. Her statement had been recorded by the magistrate under section 164 of the Criminal Procedure Code which was marked as Exhibit 9. In the complaint, the prosecution witness No. 7 had vividly narrated the incident. He has contended that, the appellants had threatened the victim not to tell the incident to her home. He has referred to the evidence of the father of the victim being prosecution witness No. 3. He has submitted that, the appellants used to attack the victim on and off. On the date of the incident,

the appellants had called the victim at about 6 to 6:30 PM and took her to some other place.

15. Learned Additional Public Prosecutor appearing for the state has contended that, the police conducted the investigations properly. The investigating officer had visited the place of occurrence, examined the available witnesses and recorded their statements, sent the victim girl for medical examination and on completion of the investigations, filed charge sheet.

16. Learned Additional Public Prosecutor appearing for the state has contended that, the appellants are influential in the locality. The appellants had in exercise of their influence suppressed the witnesses. The appellants had taken advantage of the tender age of the victim and threatened her to keep quiet. He has contended that, the appeal should be dismissed.

17. The appellants had been tried in respect of an incident alleged to be occurring on December 11, 2018 between them and the victim being the prosecution witness No. 7. The victim being the prosecution witness No. 7 had deposed on April 4, 2019. Prior thereto, she had made a complaint to the police which was marked as Exhibit 3. She had recorded

a statement under section 164 of the Criminal Procedure Code which was marked as Exhibit 5. She had been medically examined on December 11, 2018 and the report was marked as exhibit 4.

18. The mother of the victim had deposed as prosecution witness No. 1. In her deposition, prosecution witness No. 1 has stated that, on December 11, 2018, her daughter, the victim, had been to Bokchara Market for a photography purpose at about 4 P.M and did not return till 7 P.M. Since the victim did not return till 7 P.M, they had started a search for her. The victim had returned on 7.45 P.M. After her return, the victim had told the prosecution witness No. 1 that, the victim was detained by some friends for settling an ongoing dispute. She had stated that, the victim herself, her husband and daughter-in-law had been to the police station with regard to the incident. The police had asked the victim to produce her wearing apparels on the date of the incident and also her birth certificate. Thereafter, the birth certificate along with her wearing apparels have been produced which were seized by the police. She had put her left thumb impression, and her husband and daughter-in-law put their signature on the same. Prosecution witness

No. 1, the mother of the victim, had been declared hostile by the prosecution. Subsequent such declaration, prosecution witness had denied that, she was interrogated by the police, or that she stated before the police that the appellants had spoiled the life of her daughter and that she demanded severe punishment against the appellant. She had stated that, she cannot identify the appellants.

19. Prosecution witness No. 2 is the sister-in-law of the victim and she had deposed on behalf of the prosecution. She had corroborated much of the deposition of the prosecution witness No. 1. In addition thereto, she had stated that the victim had confided in her that on some occasions, some boys used to misbehave and ill-treat the victim in course of her school and outside home. Such matter had been reported to the police. After being declared as hostile she had stated in a deposition that, she cannot identify the appellants.

20. The father of the victim had deposed as prosecution witness No. 3. He had stated that, the appellants used to hold out threats to his daughter on and off. He had stated that, on the date of the incident, the appellants had called her daughter at about 6 to 6.30 P.M and took her to some

place. In cross-examination, he had claimed that he did not say before the police on the date of the incident that the appellants had called her daughter on 6 to 6.30 P.M in the evening.

21. Prosecution witness No. 4 is a police constable and had accompanied the sub-inspector of police who went to the house of the victim. He is the scribe of the complaint which the victim had made to the police. Prosecution witness No. 5 is another police personnel who had accompanied the sub-inspector of police on the date of the incident to the house of the victim. He is one of the seizure-list witnesses.

22. The sister of the victim has deposed as prosecution witness No. 6. She had stated about some dispute between the victim and some boys which he had heard over the phone. The victim herself had deposed as prosecution witness No. 7. The victim had been declared as hostile. In her cross-examination, she had claimed that the statement made before the Magistrate recorded under Section 164 of the Criminal Procedure Code was as per tutoring by the police.

23. In her deposition recorded on April 4, 2019, prosecution witness No. 7, who was the victim, has stated that on December 11, 2018, at about 4 PM, the appellants and two others met her. The appellants had asked her to meet with another person who was at that time not with them. Thereafter, they had told her to go with them and accordingly, she had cycled with them and went to a field at Digha. She had enquired about the other person from the appellants when she was informed that, such person had gone elsewhere. The appellants had asked her to establish a relation with them by making an ugly proposal. After hearing such proposal from the appellants, she had fled away from the place and returned home. She had narrated such incident to her family members when the family members decided to initiate the complaint before the court.

24. Prosecution witness No. 7 who was the victim, had been declared hostile by the prosecution and was cross-examined by the prosecution. She had been cross-examined by the defence also. In her cross examination by the defence, she has stated that, the statement she made before the magistrate under section 164 of the Criminal Procedure Code was tutored by the police.

25. The medical officer examining the victim on December 12, 2018 had deposed as prosecution witness No. 8. He had stated that, on examination of the victim, he did not find any injury on the victim. He had referred the victim to Bongaon Sub- Divisional Hospital for further medical examination. He had identified the medical examination report of the victim which was marked as exhibit 6.
26. The owner of the photography shop as Thana More, Gaighata had deposed as prosecution witness No. 9. He had identified the photographs taken at his shop. A relative of the victim has deposed as prosecution witness No. 10. In his deposition, the prosecution witness No. 10 had stated that he heard about the incident. He is not an eye witness to incident. Therefore, much reliance cannot be placed on the evidence of prosecution witness No. 10.
27. The Doctor examining the victim at Bongaon J. R. Dhar Hospital on December 13, 2018 had deposed as prosecution witness No. 11. In his deposition, he had stated that, he found the victim was capable of sexual intercourse. He had stated that, no mark of external injury was noted over the private parts of the victim and that the hymeneal

link was not indicated. He had stated that vaginal examination was not so painful with one figure and that no injury was found. His report of the medical examination of the victim had been marked as exhibit 4. In cross-examination, he had stated that there is a possibility of rapture of the hymen of a minor girl in the case of applying force. However, he did not notice any external or internal marks on the private parts of the victim.

28. The sub-inspector of police conducting the investigation had deposed as prosecution witness No. 12. He had stated about the conduct of the investigation and the ultimately filing of the charge sheet against the appellants.

29. In their statements recorded under Section 313 of the Criminal Procedure Code, both the appellants had claimed not guilty and declined to adduce any evidence.

30. The charges that the appellants had been charged with can be divided into two parts. On one part, is the charge against the appellants that they had sexually assaulted the victim. Since the victim was a minor and given the nature of the complaint lodged by the victim the appellants had been charged with aggravated penetrative sexual assault on the victim under Section 6 of the Protection of Children against

Sexual Offences Act, 2012. In relation to the sexual assault to the victim, the appellants had been charged with criminal intimidation in relation to the aggravated penetrative sexual assault.

31. The evidence of the victim as prosecution witness No. 7 does not speak of any sexual assault being committed by any of the appellant on her. The testimony of the victim in Court, under oath as prosecution witness No. 7 is at variance with the statements that the victim had recorded with the police and her statement under Section 164 of the Criminal Procedure Code.

32. Apart from the victim, who had deposed as prosecution witness No. 7, none of the other prosecution witness can be said to be eye witnesses to the incident. Moreover, none of the other prosecution witnesses in Court had alleged sexual assault by any of the appellant upon the victim far to speak of aggravated penetrative sexual assault on the victim. The victim who had deposed as prosecution witness No. 7, her mother who had deposed as prosecution witness No. 1 and her sister-in-law, who had deposed as PW-2 were declared hostile by the prosecution at the trial. They had been cross-examined by the prosecution after they were declared

hostile. During such cross-examination also, the prosecution had not been able to elicit any evidence relating to sexual assault on the victim or criminal intimidation in relation thereto.

33. The mother of the victim as prosecution witness No. 1 and the Sister-in-law of the victim as prosecution witness No. 2 had claimed in Court, during their testimony that, the victim confided in them as to the incident. They had narrated an incident in Court, which does not involve any sexual assault far to speak of aggravated penetrative sexual assault on victim.

34. The two doctors who had examined the victim immediately after the incident, had deposed as prosecution witness No. 8 and 11. The incident had occurred on December 11, 2018. The prosecution witness No. 8, who was posted at Chandpara, BPHC on December 12, 2018 had examined the victim. He had prepared a report of the medical examination of the victim which was marked as exhibit 6. Exhibit 6 has a recording that there was no external sign of injury at any part of the body of the victim. The report has also stated that, the genitalia of the victim has not been examined The report goes on to state that the

doctor had referred the victim to a higher center for proper medico legal examination. The report had been prepared on December 12, 2018 at around 10.30 P.M

35. Prosecution witness No. 8 who was the first doctor to have examined the victim subsequent to the incident, had deposed in Court that he did not find any injury on the victim and that he had referred the victim to Bongaon Sub-Divisional Hospital for further medical examination. He has proved his report which was marked as exhibit 6. Cross-examination of PW-8 had been declined by the appellants.

36. The victim had been examined on December 13, 2018 by the Doctor who deposed as prosecution witness No. 11. He had prepared a report of the medico legal examination of the victim which was marked as exhibit 4 at the trial. In his deposition, prosecution witness No. 11 has stated that, he found the victim to be capable of sexual intercourse. He, however, did not find any mark of external injury over her private parts. He had found that the hymeneal link of the victim was not intact. He had found that the vaginal examination was not so painful with one finger but no injury was found on the victim. In cross-examination, he had stated that there is a possibility of rapture of hymen of

a minor girl in case of applying force although he did not notice any external injury mark on the private parts of the victim.

37. As the evidence stood before the Learned Trial Judge on the basis of oral testimony of the victim, post occurant witnesses the testimony of the doctors, and the medical evidence, it cannot be said that, the prosecution had proved beyond reasonable doubt that, the victim suffered sexual assault, far less to speak of aggravated penetrative sexual assault. The evidence before the Trial Court also does not sustain the case of the prosecuting that, the appellant had intimidated the victim in relation to the incident complained of.

38. The Learned Trial Judge had considered the deposition of the victim being the prosecution witness No. 7. The Learned Trial Judge has relied upon the testimony of the victim as according to him, the victim was the only eye witness and that too injured victim to the incident. He had given credence to the complaint lodged by the victim being exhibit 3 series as also to the statement of the victim recorded under Section 164 of the Criminal Procedure Code being exhibit 5 series.

39. With regard to a statement recorded under Section 164 of the Criminal Procedure Code and its use at a criminal trial, **Ram Kishan Singh (supra)** has observed as follows:-

“8. A statement under Section 164 of the Code of Criminal Procedure is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness. The first information report was considered by the Sessions Judge. Any special consideration of the statement of Hazura Singh under Section 164 of the Code of Criminal Procedure could not have produced a different result by reason of the conclusions of the Sessions Judge as to rejecting the oral evidence of Nihal Kaur, Harmit Kaur and Hazura Singh as unreliable, untruthful and unworthy of credence.”

40. At the trial, none of the prosecution witnesses as noted above, has spoken about any sexual assault on the victim far less aggravated penetrative sexual assault. The medical evidence of the victim has also not proved beyond reasonable doubt that, the victim suffered aggravated penetrative sexual assault at the behest of any of the appellants. The statement of the victim recorded under Section 164 of the Criminal Procedure Code, has not corroborated the testimony of the prosecution witness.

41. **Raja Ram (supra)** and **Mukhtihar Ahmed Ansari (supra)** have held that, where the evidence of the

prosecution witness was not supporting the case of the prosecution and such witness has not been declared hostile, the evidence of such prosecution witness is binding on the prosecution and that the defence can rely upon such evidence to bind the prosecution.

42. In the facts of the present case, the father of the victim, who had deposed as prosecution witness No. 3 at the trial, during his deposition, did not give any evidence with regard to the aggravated penetrative sexual assault on his daughter by any of the appellants. In fact, his evidence at the trial does not speak of any sexual assault on her daughter. The prosecution did not declare the father of the victim to be hostile at the trial although he had been examined as a prosecution witness.

43. In such circumstances, since the prosecution has not been able to prove the charges beyond reasonable doubt, against any of the appellants, the impugned judgement and order of conviction dated January 21, 2020 and the impugned order of sentence dated January 28, 2020 passed by the Learned Additional Sessions Judge, First Court-cum-Special Court POCSO in Special POCSO No. 88/2018 (75/18) convicting the appellants under Section

376(2)(j)/376D/506 of the Indian Penal Code, 1860 and Section 6 of the Protection of Children against Sexual Offences Act, 2012 is set aside.

44. The appellants are acquitted of the charges they had been charged with. They are directed to be set at liberty forthwith, if not required in any other case. They 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.
45. All pending applications, including application for bail, shall stand disposed of in the above terms.
46. Let a copy of the judgement along with the lower Court Records be sent down to the Court below at once.
47. Urgent Photostat certified copy of this order if applied for, be supplied expeditiously after complying with all necessary legal formalities.

[DEBANGSU BASAK, J.]

48. I Agree.

[BIBHAS RANJAN DE, J.]