

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

PRESENT:

**THE HON'BLE JUSTICE TIRTHANKAR GHOSH**

**CRA 232 of 2018**

***Raj Kumar Rai***

***-vs.-***

***The State of West Bengal***

|                    |   |                                                             |
|--------------------|---|-------------------------------------------------------------|
| For the Appellant  | : | Mr. Somopriya Chowdhury,                                    |
| For the State      | : | Mr. Saswata Gopal Mukherjee, Ld. P.P.<br>Mr. Saryati Datta, |
| Heard on           | : | 04.07.2022, 14.07.2022 & 01.08.2022.                        |
| <b>Judgment on</b> | : | <b>23.08.2022</b>                                           |

**Tirthankar Ghosh, J:-**

The present appeal has been preferred challenging the judgment and order dated 27<sup>th</sup> February, 2018 passed by the learned Additional District & Sessions Judge, First Court, Sealdah, South 24 Parganas in Special Case no. 31 of 2017, wherein the learned Trial Court was pleased to convict the appellant under Section 10 of the Protection of Children from sexual Offences Act, 2012 and sentenced him to suffer imprisonment for five years and also to pay a fine of Rs.30,000/-, out of which 90% amount was to be paid to the victim as compensation under Section 357 of the Code of Criminal Procedure,

and in default of payment he would have to undergo Rigorous Imprisonment for six months more.

The initiation of the case relate to a written complaint under Section 8 of the POCSO Act, 2012 registered against the appellant vide Entally PS case no. 327 dated 06.07.2017.

The allegations in the written complaint were to the effect that the de facto complainant's daughter, aged about 3 years 10 months was sexually assaulted by the appellant on 05.07.2017 at the bathroom of Mahabir Institute of Education and Research situated at 17/1 Canal Street, wherein the appellant with his hand touched the vagina, for which the instant case was registered.

The Investigating Agency after completion of investigation submitted charge-sheet under Section 8 of the POCSO Act, 2012. The learned Court after compliance with the provisions relating to supply of documents upon the accused was pleased to frame charges under Section 10 of the POCSO Act. The charges were read over and explained to the appellant/accused to which he pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon the oral evidence of 8 witnesses namely, PW1, '**X**', victim child; PW2, '**Y**', mother of the victim child and the de facto complainant; PW3 '**Z**' the father of the victim child; PW4, Sanjib Sen, an acquaintance; PW5, Gerald Gomes, Principal of Mahabir Institute of Education and Research; PW6, Tarekh Ahmed, acquaintance of the

father of victim; PW7, Dr. Palash Paul and PW8, SI Sayen Biswas, Investigating Officer.

The prosecution also relied upon number of documents which included the signature on the statement of the victim child under Section 164 of the Code of Criminal Procedure marked as Ext.1 series; written complaint marked as Ext.2; Statement under Section 164 of Cr.P.C. marked as Ext.3; copy of attendance sheet marked as Ext.4; Medical Report of victim child marked as Ext.5; formal FIR marked as Ext.6 and rough sketch map marked as Ext.7.

Learned Advocate appearing for the appellant submitted that he is not interested to pursue the appeal as the appellant has served out the sentence and has been released. Consequently this Court had no other option but to engage Mr. Somopriya Chowdhury learned advocate for conducting the appeal on behalf of the appellant in view of the nature of the sentence passed by the learned Trial Court.

The learned trial Court on an appreciation of the evidence of the victim child 'X', her mother PW2 'Y' and her father PW3 'Z' observed as follows:

*“As the evidence of prosecutrix does not full of discrepancies and the story of aggravated sexual assault was clearly divulged by the victim herself before the Court of Law, who was at the relevant point of time aged about three years ten months, inspired the active confidence of the Court. The victim was a minor girl of three years ten months and her statement is very much acceptable and it was duly corroborated by the statement under Section 164 of Cr.P.C. A minor girl*

*of three years ten months came before the court of law and gave statement before the Learned Magistrate about the aggravated sexual assault caused by the accused. So this factum can not be disbelieved. Subsequently mother and father of the victim narrated the entire incident before the police station. Moreover there is nothing to show in the evidence of the victim that the entire incident was improbable or imaginary. In this case all the above witnesses appeared to have corroborated to a material extent in material particular by independent evidence. Moreover, there is nothing on record to show that the de facto complainant or the victim have any previous animosity with the accused facing the trial. So, the argument put forward by the accused person appears to me too fragile to merit acceptance. Neither law warrants nor it is possible that every facts should be proved by way of mathematical calculation.”*

As an appellate Court, I have assessed the evidence and I find that the finding of the learned Trial Court on the statement of the victim girl child and her parents inspires confidence as they were unshaken in the cross-examination. The parameters required by the learned trial Court for sentencing including the issue of fine and compensation were also taken into account by the learned Trial Court and as such the same cannot be interfered with. However, the attitude of the learned advocate appearing for the appellant was that as the appellant has suffered the substantive sentence as well as the default sentence the amount of fine which was imposed upon the appellant is not recoverable.

Thus, the issue which came up for hearing in this appeal is whether the appellant having served out the default sentence in respect of the fine imposed by the learned trial Court is waived on the appellant/accused undergoing the sentence?

Mr. Somopriya Chowdhury, learned advocate who was engaged by the Court submitted that in respect of fine and compensation imposed by a Court of law while sentencing an accused the law has been settled in Kumaran –Vs. – State of Kerala & Anr. reported in (2017) 7 SCC 471. Learned advocate referred paragraphs 23 to 27 which are set out as follows:

**“23.** A conspectus of the aforesaid judgments would show that compensation under the old Cr.P.C. was always recoverable as a part of fine, and that even after default imprisonment having been undergone, a fine could still be collected in the manner provided by Section 386. The requirement of special reasons was introduced by the amending Act of 1923. The special reasons outlined in the Bombay High Court judgment of 1935 as well as in the Mysore High Court judgment of 1964 would show that it is enough that sufficient reasons or some good reason be given in order that fine be realized even after default imprisonment has been undergone. The Courts held that despite the fact that the reach of Section 386(1) proviso was only qua warrants that issued after default imprisonment was undergone, yet, the principle of the proviso to Section 386(1) would apply even to warrants issued before default imprisonment was undergone. The law, therefore, till the enactment of the 1973 Code, made it clear that Section 386, and Section 70 IPC read together would lead to the conclusion that fines were recoverable even after default imprisonment was undergone, provided there were special reasons for recovery of the same.

**24.** With the Code of 1973 came an interesting change. Sub-section (3) was added to Section 357, which was an entirely new provision making it clear that the Court may, when passing judgment, order the accused to pay by way of compensation such amount as may be specified in the order

to the person who has suffered loss or injury by reason of the act for which the accused person has been sentenced. This is provided that the Court imposes a sentence of which fine does not form a part. Another important change was made in Section 421(1). The proviso to the said sub-section was altered because the 41st Law Commission Report, in recommending amendments to the old Section 386 stated, after noticing the Bombay High Court judgment in Digambar's case (*supra*) as follows :

“28.10. Fine should be recoverable when compensation has been ordered. – We notice that in the above judgment the fact that the complainant has been allotted part of the fine was not considered a relevant special reason for purposes of the proviso as it stands. A contumacious offender should not, in our opinion, be permitted to deprive the aggrieved party of the small compensation awarded to it by the device of undergoing the sentence of imprisonment in default of payment of the fine. When an order under Section 545 has been passed for payment of expenses or compensation out of fine, recovery of the fine should be pursued, and in such cases, the fact that the sentence of imprisonment in default has been fully undergone should not be a bar to the issue of a warrant for levy of the fine. We recommend that the proviso to section 386(1) should make this clear.”

**25.** Following paragraph 28.10, the words “or unless it made an order for the payment of expenses or compensation out of the fine under Section 357” was added to the proviso which was contained in old Section 386(1) and continued in Section 421(1).

**26.** At this juncture, it is important to note that in *Vijayan v. Sadanandan K.* (2009) 6 SCC 652, this Court held : (SCC p. 659, paras 29-31)

“29. To appreciate the said legal position, the provisions of Section 431 are set out hereinbelow:

**‘431. Money ordered to be paid recoverable as fine.**—Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine:

Provided that Section 421 shall, in its application to an order under Section 359, by virtue of this section, be construed as if in the proviso to sub-section (1) of Section 421, after the words and figures ‘under Section 357’, the words and figures ‘or an order for payment of costs under Section 359’ had been inserted.’

Section 431 makes it clear that any money other than a fine payable on account of an order passed under the Code shall be recoverable as if it were a fine which takes us to Section 64 IPC.

30. Section 64 IPC makes it clear that while imposing a sentence of fine, the court would be competent to include a default sentence to ensure payment of the same. For the sake of reference, Section 64 IPC is set out hereinbelow:

**“64. Sentence of imprisonment for non-payment of fine.—**In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.”

31. The provisions of Sections 357(3) and 431 CrPC, when read with Section 64 IPC, empower the court, while making an order for payment of compensation, to also include a default sentence in case of non-payment of the same.”

This statement of the law was reiterated in *R. Mohan v. A.K. Vijaya Kumar*, (2012) 8 SCC 721 (see paras 26 to 29).

**27.** These two judgments make it clear that the deeming fiction of Section 431 Cr.P.C. extends not only to Section 421, but also to Section 64 of the Indian Penal Code. This being the case, Section 70 IPC, which is the last in the group of Sections dealing with sentence of imprisonment for non-payment of fine must also be included as applying directly to compensation under Section 357(3) as well. The position in law now becomes clear. The deeming provision in Section 431 will apply to Section 421(1) as well, despite the fact that the last part of the proviso to Section 421(1) makes a reference only to an order for payment of expenses or compensation out of a fine, which would necessarily refer only to Section 357(1) and not 357(3). Despite this being so, so long as compensation has been directed to be paid, albeit under Section 357(3), Section 431, Section 70 IPC and Section 421(1) proviso would make it clear that by a legal fiction, even though a default sentence has been suffered, yet, compensation would be recoverable in the manner

*provided under Section 421(1). This would, however, be without the necessity for recording any special reasons. This is because Section 421(1) proviso contains the disjunctive “or” following the recommendation of the Law Commission, that the proviso to old Section 386(1) should not be a bar to the issue of a warrant for levy of fine, even when a sentence of imprisonment for default has been fully undergone. The last part inserted into the proviso to Section 421(1) as a result of this recommendation of the Law Commission is a category by itself which applies to compensation payable out of a fine under Section 357(1) and, by applying the fiction contained in Section 431, to compensation payable under Section 357(3).”*

This appeal was preferred against the judgment and order of conviction and sentence wherein the learned trial Court was pleased to direct the appellant to undergo imprisonment for five years under Section 10 of POCSO Act and also to pay a fine of Rs.30,000/-, out of which 90% was to be paid to the victim as compensation under Section 357 Cr.P.C. in default of payment he would have to go through Rigorous Imprisonment of six months.

In course of hearing of the appeal a report was submitted by the police officer of Entally Police Station which reflected that on enquiry upon the victim girl he received information that so far as the compensation that was directed to be paid by the government, the same has been received by her. However, she did not receive any compensation as directed to be paid by the appellant.

As is evident from the fine imposed by the learned trial Court that 90% of the fine is to be paid as compensation. Naturally, the law laid down by the Hon’ble Supreme Court is to be applied and the mere serving out the default sentence would not waive payment of the fine. Accordingly, the learned trial

Court is directed to issue process under Section 421 of Code of Criminal Procedure.

Accordingly, CRA 232 of 2018 is dismissed.

Learned trial Court is directed to proceed according to the guidelines set out by the Hon'ble Supreme Court in Kumaran (supra) for recovering the fine and paying the compensation to the victim.

Pending Applications, if any, are consequently disposed of.

Department is directed to send back the Lower Court Records to the respective Courts and communicate this judgment, so that effective steps are taken by the learned trial Court.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

**(Tirthankar Ghosh, J.)**