

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 192 of 2020

Zakiruddin Sk

Vs.

The State of West Bengal

For the Appellant : Mr. Mainak Bakshi, Adv.

For the State : Ms. Amita Gaur, Adv.

Heard on : July 13, 2022

Judgement on : July 19, 2022

DEBANGSU BASAK, J.:-

1. The appellant has assailed the judgement and order of conviction dated September 5, 2019 and the order of sentence dated September 6, 2019 passed by the learned Additional Sessions Judge cum Judge, Special Court (POCSO) Act, Alipore, South 24 Parganas in Special S T No. 12(11) 16 arising out of Special Case No. 45/2016.
2. By the impugned judgement and order of conviction dated September 5, 2019, the appellant has been found guilty of

committing offence punishable under Section 376 (2) (i)/ 506 of the Indian Penal Code, 1860 and Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. By the impugned order of sentence, the appellant has been sentenced to suffer rigorous imprisonment of fifteen years and to pay fine of Rs. 20,000/- and in default to suffer rigorous imprisonment of one year more. Under Section 6 of the POCSO Act, 2012, the appellant has been sentenced to suffer rigorous imprisonment of five years and pay fine of Rs. 10,000/- and in default to suffer rigorous imprisonment of six months more for the offence under Section 506 of the Indian Penal Code. The sentences have been directed to run concurrently.

3. No separate sentence has been passed against the appellant for committing offence punishable under Section 376(2)(i) of the Indian Penal Code in terms of Section 42 of the POCSO Act, 2012. 50 per cent of the amount of fine, if realized, has been directed to be paid to the victim child. In addition thereto, an amount of Rs. 3,00,000/- has been directed to be paid to the victim under the West Bengal Victim Compensation Scheme, 2017.

4. Briefly stated, the prosecution has claimed that, the prosecution witness (PW)-2 lodged a complaint with the Nadial Police Station on December 9, 2016. In such police complaint, the PW-2 had stated that, in the morning of December 9, 2016, his elder sister went to Khaderi Hospital for the eye operation of his mother. The brother in law of PW-2 had gone to his place of work. During such period, the two nieces one of whom was the victim were alone at her sister's house. At around 11.30 A.M, the sister of PW-2 had instructed her to go to her house to look after his nieces. In terms of such instructions, PW-2 had visited the house and found the appellant lying in a naked condition upon the victim with the trouser and under garment of the appellant being lowered. Immediately after PW-2 had entered the room, appellant stood up leaving the victim on the floor. The victim had confided in PW-2 that the appellant was committing obscene deeds with her. Immediately, PW-2 had called his sister over the phone. His sister informed the father of the victim.
5. The police had registered the complaint of the PW-2 as Nadial Police Station Case No. 20/16 dated February 19, 2016 under Section 376(2)(i)/506 of the Indian Penal Code,

1860 read with Section 6 of the POCSO Act, 2012. The police had submitted a charge sheet against the appellant being Nadial Police Station charge sheet No. 49/16 dated April 20, 2016 for offence punishable under Section 376(2)(i) of the Indian Penal Code, 1860 read with Section 4 of the POCSO Act, 2012.

6. By an order dated July 29, 2021 the High Court Legal Services Committee was requested to appoint a Counsel to represent the appellant in the present appeal. Mr. Mainak Bakshi, Advocate, had been appointed as the Counsel for the appellant by the High Court Legal Services Committee.
7. Mr. Mainak Bakshi, learned Advocate for the appellant, has taken us through the deposition of the prosecution witnesses and to the evidence on record. He has submitted that, the appellant was charged with sexual assault on the victim. He has referred to the medical examination report of the victim being exhibit 4 and 8. He has submitted that, neither exhibit 4 nor exhibit 8 has conclusively proved any sexual assault on the victim. He has referred to the evidence of the doctor produced as a prosecution witness. He has contended that, the doctor stated in his evidence that, the hymen could be ruptured due to reasons other than sexual

assault. According to him, the doctor has not opined that, the hymen of the victim was ruptured due to the sexual assault alleged on the victim by the appellant.

8. Mr. Mainak Bakshi, learned Advocate appearing for the appellant has submitted that, the age of the victim is doubtful. He has referred to the deposition of the various prosecution witnesses. He has submitted that, the age of the victim varies from one deposition to the other and it is anywhere upwards of 11 years of age. He has submitted that, no documentary evidence had been produced by the prosecution to establish the age of the victim.
9. Mr. Mainak Bakshi, learned Advocate appearing for the appellant has referred to the statement of the victim girl recorded under Section 164 of the Criminal Procedure Code and to the evidence of the prosecution witness No. 2. According to him, the prosecution witnesses have not corroborated each other. He has contended that, the prosecution did not produce any independent witness to establish the incident although the place of occurrence was located in a congested area. He has referred to the quality of the investigations. He has contended that, although the mobile phone of the appellant was seized, the prosecution

did not take the trouble of adducing any evidence with regard to such mobile phone. In fact, the prosecution has failed to produce any electronic evidence. He has contended that, the order of sentence is not informed with reasons as to the quantum of the sentence awarded. He has submitted that, the appellant should be acquitted.

10. Ms. Amita Gaur learned advocate appearing for the State has referred to the evidence on record. She has submitted that the prosecution proved beyond reasonable doubt that, the appellant was guilty of the offence as rendered by the impugned judgement and order of conviction. She has submitted that, the medical examination report of the victim being exhibit 4 read with the evidence of the doctor being prosecution witness (PW-4) establishes that the victim was sexually assaulted. She has referred to the evidence of the victim being PW-1 who has implicated the appellant. She has also referred to the evidence of PW-2 who had witnessed the incident. She has submitted that the Prosecution Witnesses had corroborated each other in their depositions. According to her, the prosecution through the evidence of the victim, PW-1, her uncle PW-2, the doctor examining the victim PW-4 and

exhibit 4 has established beyond reasonable doubt that the appellant ravished the victim. The age of the victim has been proved by the evidence of the parents of the victim. The sentence that has been awarded is just and proper in the facts and circumstances of the present case. According to her, the appellant has not made out any ground for interference with impugned judgement and orders.

11. The appellant had been tried in respect of Nadial Police Station Case No. 20/16 dated February 9, 2016 under Section 376(2)(i)/506 of the Indian Penal Code, 1860 read with Section 6 of the POCSO Act, 2012. The police after investigations had submitted a charge sheet against the appellant being Nadial Police Station Charge Sheet No. 49/16 dated April 20, 2016 for offences punishable under Section 376(2)(i) of the Indian Penal Code, 1860 read with Section 4 of the POCSO Act, 2012. The Trial Court had framed charges against the appellant under Section 376(2)(i)/506 of the Indian Penal Code, 1860 and Section 6 of the POCSO Act, 2012. The appellant had pleaded not guilty to such charges.

12. At the trial, the prosecution had examined six witnesses. The prosecution had also relied upon ten

documents which were marked as exhibits from exhibit 1 to exhibit 10. The appellant in defence had chosen not to examine any witness nor adduce any evidence.

13. The appellant had been tried for an incident of rape alleged to have happened on February 9, 2016 which is prior to the amendment of Section 376(2)(i) with retrospective effect from April 21, 2018. Section 376(2)(i) of the Indian Penal Code, 1860 as it had stood prior to the amendment with retrospective effect from April 21, 2018 is as follows :-

“376 Punishment for rape. - (1)

.....

(2) Whoever, -

(a)

(i) Commits rape on a woman when she is under sixteen years of age ; or

.....shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extent to imprisonment for life, which shall imprisonment for the reminder of that person’s natural life, and shall also be liable to fine.

.....”

14. Rape has been defined in Section 375 of the Indian Penal Code, 1860. Section 375 of the Indian Penal Code 1860 is as follows :-

*"1P[375. Rape.-- A man is said to commit "rape" if he--
 (a) penetrates his penis, to any extent, into the vagina,
 mouth, urethra or anus of a woman or makes her to
 do so with him or any other person; or*

*(b) inserts, to any extent, any object or a part of the
 body, not being the penis, into the vagina, the urethra
 or anus of a woman or makes her to do so with him or
 any other person; or*

*(c) manipulates any part of the body of a woman so as
 to cause penetration into the vagina, urethra, anus or
 any part of body of such woman or makes her to do
 so with him or any other person; or*

*(d) applies his mouth to the vagina, anus, urethra of a
 woman or makes her to do so with him or any other
 person,*

*under the circumstances falling under any of the
 following seven descriptions:*

First. Against her will.

Secondly. Without her consent.

*Thirdly. With her consent, when her consent has been
 obtained by putting her or any person in whom she is
 interested, in fear of death or of hurt.*

*Fourthly. With her consent, when the man knows that
 he is not her husband and that her consent is given
 because she believes that he is another man to whom
 she is or believes herself to be lawfully married.*

*Fifthly. With her consent when, at the time of giving
 such consent, by reason of unsoundness of mind or
 intoxication or the administration by him personally or
 through another of any stupefying or unwholesome
 substance, she is unable to understand the nature
 and consequences of that to which she gives consent.*

Sixthly. With or without her consent, when she is under eighteen years of age.

Seventhly. When she is unable to communicate consent.

Explanation 1. For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. A medical procedure or intervention shall not constitute rape.

Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape"

15. Under Section 375 of the Indian Penal Code, 1860 has provided an elaborate definition of rape and has laid down the circumstances the presence or happening of which would constitute rape. It has also noted two exceptions the acts constitution rape. One can say rape to have occurred where there is an unlawful sexual intercourse or any other sexual penetration of the vagina, anus, or mouth of another person, by a sex organ, body part or foreign object without the consent of the victim. The sixth description in Section

375 of the Indian Penal Code, 1860 has rendered the consent of the victim under eighteen years of age as irrelevant.

16. In this case, the prosecution has examined the victim as the first prosecution witness. In her evidence, the victim as PW-1 has stated that, she was raped by the appellant. She has identified the date of occurrence being February 9, 2016. She has identified the place of occurrence. She has identified her statement recorded under Section 164 of the Criminal Procedure Code. She has stated that she was examined by a doctor. She has stated that, the appellant inserted his penis into her vagina. She has stated that, the appellant told her not to tell about the incident to her mother or to anyone else. In cross-examination, she has stated that, the wife of the appellant was a friend of her mother. The house of the appellant was situated at some distance from her house and that it would take about five to ten minutes by walking to reach her house from the house of the appellant. She has stated in cross-examination that, her mother was out of the house for the surgical operation of her grandmother. The incident had occurred during day time around noon.

17. The uncle of the victim has been examined as PW-2 by the prosecution. In his evidence, PW-2 as the uncle of the victim has stated that, he received a phone call from the mother of the victim on February 9, 2016 at about 11/11.30 A.M with the request to visit her house to look after her two daughters. Consequently, he had gone to the house of the victim. On reaching the house of the victim, he had found that such house was lying open. He had entered the house where he found the two daughters including the victim. He had found the victim to be lying on the floor of the room with the appellant being top of her. He had found the trouser and the under garment of the appellant to be removed at that point of time. The appellant had raised himself from the victim on seeing the PW-2 entering the room. The PW-2 had asked the appellant as to what he was doing in that condition with the victim when the appellant told him that the appellant had got carried away. PW-2 had told the appellant that it was bad for the appellant to commit such an act upon a child. PW-2 has stated that the victim was crying at that time. PW-2 had asked the victim as to what happened. The victim was initially not telling the appellant as she had been only crying. However, the victim

managed to tell the PW-2 that the appellant had tortured her and had threaten her that the appellant would kill her if the victim would tell the incident to her mother.

18. In his evidence, PW-2 had stated that, he had called upon the mother of the victim and informed her about the incident. The mother of the victim stated that she could come only after the surgery of her mother-in-law was over. The father of the victim had returned after the work was over.

19. PW-2 has stated in his evidence that he informed the incident to the Nadial Police Station. The police officer had recorded his statement. He has identified his statement and his signature which was appearing in such statement and they were marked as exhibit 3 and exhibit 3/1 respectively. He has also identified the appellant in Court. PW-2 has been cross-examined. There is no material in the cross-examination of the PW-2 so as to demolish the case of the prosecution. Appellant has not been able to elicit anything favorable to himself from the cross-examination of PW-2.

20. The doctor before whom the victim was taken at the first instance had been examined as PW-4. In his examination, the doctor being PW-4 has stated that, on

February 10, 2016, at about 1.30 A.M, he medically examined the victim after the victim and her mother gave consent for the medical examination. He has stated that, the victim had confided in him that the appellant had come to her house in absence of her mother made her naked and then did penetrative sexual assault on her. The victim had also confided in him that, the appellant threatened her about complaining with regard to the incident to her mother.

21. The doctor as prosecution witness No. 4 has stated that, he found the hymen of the victim to be ruptured at 5 O' clock position. He could not introduce his finger into the vagina of the victim. In cross-examination, he has stated that, generally, menstrual cycle starts in a girl at the age of 11/12 years. He has stated that it was not compulsory to find bleeding injury in all cases of penetrative sexual assault upon a girl of 8 or 9 years by a full grown man. He has also stated that hymen may be ruptured by reasons of swimming and cycling etc. He has also stated that the rupture of hymen is an injury to the private organ of a victim.

22. The mother of the victim had been examined by the prosecution as PW-3. The father of the victim had been

examined as prosecution witness No. 5. The investigating officer had been examined as prosecution witness No. 6. In his examination-in-chief the investigating officer as prosecution Witness No. 6 has stated that he had taken of the victim for medico legal examination and collected the report thereof which was marked as exhibit 8. The appellant had declined to cross-examination prosecution witness No. 6. The appellant had been examined under Section 313 of the Criminal Procedure Code where he has denied his involvement in the incident. He has denied to say anything on his own. He had denied to examine any witness on his behalf.

23. Oral evidence of PW-1, the victim has not been established to be unreliable. The Learned Judge passing the impugned judgement and order of conviction has noted the demeanor of the victim being PW-1 during her deposition. At the examination-in-chief, the victim as PW-1 had cried when she was asked about the incident. The Learned Trial Judge has taken into account such demeanor of PW-1, the victim. He has held that, such a demeanor of PW-1, the victim, establishes that, the victim underwent the trauma she was

deposing about and was, therefore, reacting in the manner during the evidence as noted.

24. Demeanor of a witness and its assessment by the presiding officer has an impact on the credence of the deposition of the witness. When a victim of the age as involved in the facts of the present case is called upon to narrate the unfortunate incident on the witness box, it is but natural to react in the manner as the victim had reacted. Such demeanor has only enhanced the creditability and reliability of the deposition of the victim.

25. Prosecution witness No. 2 has adduced evidence as the ocular witness to the incident of rape. He had entered into the place of occurrence and found the appellant upon the victim in the compromising position. He has described the position in which he had found the appellant on the victim. In the cross-examination, nothing has been elicited to disprove any of the statements made by the PW-2 with regard to the situation in which the PW-2 found the appellant and the victim at the material point of time. Exhibit 4 is the first medical examination of the victim which was conducted by the doctor who had adduced evidence as PW-4. Exhibit 4 has noted that, there was a

rapture of the hymen at 5 O' clock position. The Learned Judge had taken into consideration various authorities on medical jurisprudence and arrived at the finding that a rapture of hymen establishes penetrative sexual assault. Nothing has been placed before us to suggest to the contrary.

26. It has been contended on behalf of the appellant that, there is exhibit 8 which is a medico legal examination report of the victim containing an opinion that there was no sexual assault on the victim. Therefore, the prosecution has not been able to prove the factum of sexual assault on the victim beyond reasonable doubt.

27. The Supreme Court has observed that proof beyond reasonable doubt is an unmistakable subjective element in the evolution of degrees of probability and the quantum of proof. Proof beyond reasonable doubt has to be understood to mean that, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty. In **2013 Volume 12 SCC 395(Ramakant Rai vs. Madank Rai And Others)** the Supreme Court has observed that

“23. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to “proof” is an exercise particular to each case. Referring to (sic) of probability amounts to “proof” is an exercise, the interdependence of evidence and the confirmation of one piece of evidence by another, as -learned author says: [see The Mathematics of Proof II: Glanville Williams, Criminal Law Review, 1979, by Sweet and Maxwell, p. 340 (342)]

“The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other.”

24. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than the truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused

persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

25. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimisation of trivialities would make a mockery of the administration of criminal justice. This position was illuminatingly stated by Venkatachaliah, J. (as His Lordship then was) in State of U.P. v. Krishna Gopal."

28. The medico legal examination report had been conducted on February 29, 2016. One has to keep in mind the date of the incident which is February 9, 2016 and the date of the medico legal examination which is February 29, 2016. A period of twenty days had lapsed between the date of the incident and the date of the medico legal report.

29. The Learned Judge passing the impugned judgement and order of conviction has taken the age of the victim as

eleven years. Healing of the human body is a natural course of action which has been medically recognized to be more pronounced when human being is at the adolescent stage. In the facts of the present case, there has been a substantial lapse of time between date of the incident and the date of the medico legal examination allowing the body to heal. In fact, the medical examination report of the victim being exhibit 4 held on February 10, 2016 at 1.30 A.M with the incident occurring on February 9, 2016 between 11 to 12 noon, has established the penetrative sexual assault on the victim. Exhibit 4 has corroborated the deposition of the victim PW-1 and her uncle PW-2 on the factum of penetrative sexual assault on the victim.

30. The Learned Judge passing the impugned judgement and order of conviction has taken the evidence on record into consideration and has rendered a finding of penetrative sexual assault by the appellant on the victim. The appellant has not been able to draw our attention to any material on record to suggest otherwise.

31. Exhibit 8 has to be discounted in view of the lapse of time between the date of the incident and the date on which the exhibit 8 was prepared. Exhibit 8 has to be read in the

context of the natural healing process of a human body. Exhibit 8 cannot be held to have raised a fair doubt based upon reason and common sense.

32. In such circumstances, penetrative sexual assault by the appellant on the victim has been established beyond reasonable doubt by the prosecution.

33. It has been contended on behalf of the appellant that the age of the victim has not been established by appropriate documentary evidence. True the age of the victim has not been established by a documentary evidence but, there are sufficient materials on record to subscribe to the view of the Learned Trial Judge that the victim was eleven years of age at the time of the incident. The age of the victim has been stated by the parents of the victim being PW-3 and 5. It has been contended on behalf of the appellant that there was no independent witness examined on behalf of the prosecution although the place of occurrence was at a congested place. As noted above, the prosecution has examined six witnesses in which victim herself had narrated the incident. The appellant has not been able to draw the attention of this Court to anything on record so as to disbelieve any prosecution witnesses or the

deposition of the victim. The evidence of the victim in the facts of the present case has been of such quality so as to prove the offence of the appellant beyond reasonable doubt. The evidence of the victim has been corroborated by her uncle, the PW-2 who is a witness to the incident and exhibit 4. PW-2, the uncle of the victim had found the appellant on top of the victim with his trouser and his under garment being lowered. Again the appellant has not been able to draw the attention of this Court to any material so as to disbelieve or disregard any of the evidence of the PW-2. The evidence of PW-1 and 2 corroborate each other. Exhibit 4 has corroborated the evidence of PW-1 and PW-2. Therefore, the absence of any other witness or so called independent witness according to us has not vitiated the conviction.

34. On the parity of the reasoning as noted above, the failure of the prosecution in bringing forth any electronic evidence with regard to the mobile phone seized is not fatal to the case of the prosecution.

35. The order of sentence dated September 6, 2019 has awarded a sentence of fifteen years against the appellant with attendant fine for the offence under Section 6 of the POCSO Act, 2012. The appellant had been awarded a

sentence of five years for the conviction under Section 506 of the Indian Penal Code and the attended fine. No sentence had been awarded under Section 376(2)(i) of the Indian Penal Code in view of Section 42 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. It has been contended on behalf of the appellant that, there is no reason as to why the Learned Judge had awarded the quantum of punishment as recorded in the impugned order of sentence.

36. The order of sentence has been passed subsequent to the order of conviction where, the entire gamut of the case has been discussed including the age of the appellant. The appellant has been found to be 37 years of age. The Learned Judge has taken into consideration the entire facts and circumstances of the case while awarding the sentence as recorded in the impugned order of sentence dated September 6, 2019. The maximum sentence that has been awarded is 15 years which according to us, taking the entire facts and circumstances of the case and particularly the age of the appellant, would sub serve the ends of justice.

37. In view of the discussions above we have found no ground to interfere with the impugned judgement and order

of conviction and the impugned order of sentence and affirm the same. We place on record the valuable assistance that has been rendered by Mr. Mainak Bakshi, learned Advocate for the appellant and Ms. Amita Gaur learned Advocate for the State to the Court.

38. CRA 192 of 2020 is dismissed. Let a copy of this judgement along with the Trial Court's records be send back forthwith.

[DEBANGSU BASAK, J.]

39. I Agree.

[BIBHAS RANJAN DE, J.]

Later :-

Learned advocate appearing for the State has submitted that the victim is yet to be paid the victim compensation as directed by the learned Trial Court. She has relied upon a communication dated July 8, 2022 to such effect.

The Judgement of conviction is of September 6, 2019. The victim should have been paid by this time.

The Member Secretary, State Legal Services Authority is requested to ensure that the victim is paid the amount of compensation directed by the learned Trial Judge as expeditiously as possible.

Let a copy of this order be communicated to the Member Secretary, State Legal Services Authority for compliance.

[DEBANGSU BASAK, J.]

I Agree.

[BIBHAS RANJAN DE, J.]