

Form J(2)

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side

Present :
The Hon'ble Justice Bibek Chaudhuri

CRA 243 of 2017

Sushen Sarkar
-Vs.-
The State of West Bengal

For the Appellant	:	Mr. Shibaji Kumar Das, Mr. Samrat Choudhury, Mr. Ahshan Ahmed, Ms. Rupsa Sreemani.
For the State	:	Mr. Saswata Gopal Mukherjee, Ms. Faria Hossain, Mr. Anand Keshari.
For the Opposite Party no. 2	:	Mr. Kaushik Gupta, Ms. Nipa Sarkar.
Heard on	:	06.04.2022,07.04.2022
Judgment on	:	07.04.2022.

Bibek Chaudhuri, J.

This is an appeal against the judgment and order of conviction and sentence dated 29th March, 2017 and 30th March, 2017 passed by the learned Additional Sessions Judge, 2nd Court at Krishnagar, Nadia

in Sessions Trial No. V(XII) of 2016 arising out of Sessions Case No. 3(08) 2016 convicting the appellant under Section 354 of the Indian Penal Code and under Section 8 of the Protection of Children from Sexual Offences Act and sentencing him to suffer imprisonment for three years on both the amounts and also to pay a fine of Rs. 10,000/-, in default, to undergo imprisonment for further six months.

The prosecution case was initiated on the basis of a written complaint submitted by one Madhumangal Adhikari on 1st August, 2016 alleging, inter alia, that his daughter is completely blind. She used to take her studies at a residential institution, under the name and style of "Andha Alok Samity" at Subhas Pally, Kalyani. The complainant further stated that when he used to visit his daughter in her school, she used to make allegation against the appellant that the appellant used to molest her. He did not pay importance to his daughter's complaint. But after completion of her examination, she returned to her house and refused to stay in the said school only at that time the daughter of the de facto complainant told her mother in detail that the appellant used to touch her body inappropriately with sexual intent. The de facto complainant narrated the incident to the local people and also to the local Councilor. The local Councilor advised him to take legal step against the accused, so is the written complaint filed by the de facto complainant on 1st August, 2016.

The investigation of Kalyani Police Station Case No. 485/2016 ended with filing charge-sheet under Section 354 of the Indian Penal Code and Section 8 of the POCSO Act against the accused. The accused duly appeared before the Trial Court to face trial. The Learned Trial Judge on appreciation of evidence on behalf of the prosecution and examination of the accused under Section 313 of the Code of Criminal Procedure and also on due consideration of the argument advanced by the prosecution and defence held the accused convicted under Section 354 of the Indian Penal Code and Section 8 of the POCSO Act. The Learned Trial Judge handed down sentence of imprisonment for three years for the offence under Section 354 of the Indian Penal Code as well as Section 8 of the POCSO Act with fine and default clause by passing the impugned judgment. The said judgment and order of conviction and sentence is under challenge in the instant appeal. Learned Advocate for the appellant at the outset submits that neither in the written complaint nor in the formal FIR the de facto complainant and the Police Officer receiving the written complaint and recorded FIR could not mention the date and time of the alleged occurrence. Column No. 3 of the formal FIR remains blank. On this score, it is submitted by the Learned Advocate for the appellant that Section 212 of the Code of Criminal Procedure stipules that the charge shall contain such particulars as to the time and place of the alleged

offence and the person against whom, or the thing in respect of which, it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. Referring to the above provision, Learned Advocate for the appellant led me to the charges framed by the Learned Trial Judge against the appellant. In the charge the Learned Trial Judge did not specify any date and time in respect of commission of the alleged offence. According to him, the omission or irregularity in framing charge is not a curable defect which may be overlooked under Section 464 of the Code of Criminal Procedure. This is a serious defect in framing of the charge because the accused did not have the opportunity to understand on which date he allegedly committed such offence upon the victim girl.

Mr. Das, Learned Advocate for the appellant has produced a Photostat copy of disability certificate issued in the name of the accused to contend that the accused was 100 per cent visually disabled and he is fully blind person. The accused established 'Andha Alok Samity' at Kalyani to impart education to the blind children.

The victim girl used to stay in the hostel of the said Samity to take her studies. The building of Andho Alok Samity was constructed on a vested land at Gayeshpur. Therefore, the accused incurred displeasure of the local councillor at Gayeshpur Municipality. From the written complaint it is ascertained that the councillor of Gayeshpur

Municipality advised the de facto complainant to lodge a complaint against the appellant. That the school of Andho Alok Samity is situated on the vested land of the Government was admitted by P.W.5 Mintu Mukherjee. P.W.6 Amitava Mitra clearly deposed that the local councillor was trying to evict the accused from the school premises and grab the building of the Samity as it was constructed on the vested land. Therefore, it is submitted by Mr. Das, learned advocate for the appellant that the local councillor advised the de facto complainant and his blind daughter to institute a false case against the appellant. They found that making an aspersion upon the founder teacher of the school on sexual assault would be the easiest way to evict him from the school and Samity.

It is further submitted by Mr. Das, learned advocate for the appellant that according to the victim the incident took place in the month of December during day time and also at night. The victim girl alleged that the appellant inappropriately touched different parts of her body. The appellant was 100 per cent blind. A blind person can identify another only by hearing her voice or feeling her identity by touching her. Therefore, even assuming that the appellant touched the victim to feel her identity. Such act was not with sexual intent. The victim girl stated that in the absence of other girls the appellant visited their room where she along with other boarders used to sleep

and touched her body and threatened her that if the matter be disclosed to anybody, she would be killed. So, out of fear, she did not inform the matter to his family members. Subsequently, she returned to her home and narrated the incident to her mother. It appears from the evidence of the witnesses that the alleged incident took place in the month of December, 2015 and the F.I.R. was lodged on 1st August, 2016. There is no explanation of such inordinate delay in filing the F.I.R. in the instant case.

It is further pointed out by the learned advocate for the appellant that from the evidence of the de facto complainant (P.W.3) it is ascertained that P.W.2 Arjun Das wrote the written complaint on behalf of P.W.3. From the evidence of P.W.9 Rathindra Nath Das, the Investigating Officer of this case it appears that Arjun Das is the Savapati of Ward No.18 of Gayeshpur Municipality. Therefore, the written complaint was prepared by a close associate of the councillor of Gayeshpur Municipality. So far as the initiation of the case against the appellant is concerned, active role of the local councillor and his machinery cannot be ruled out. In view of these circumstances, the learned counsel for the appellant submits that the accused ought to be entitled to the benefit of doubt.

The learned P.P.-in-charge, on the other hand, submits that the delay in lodging the complaint in the instant case proves that the

prosecution case is not tainted. The victim girl was threatened by the appellant after commission of offence. Therefore, she could not state anything to her family members. From the evidence of her father P.W.3 Madhu Mongal Adhikary it appears that she tried to disclose the incident to her father when he visited her but her father did not pay any importance to her grievance. After she returned to her home, she disclosed the matter elaborately to her mother. It is submitted by the learned P.P.-in-charge that the girls are closer to their mothers and a girl can without any hesitation narrate her problem and difficulty to her mother. When her mother heard the incident, she could understand the gravity of the offence and then only written complaint was lodged. In an offence of sexual assault delay per se cannot vitiate the trial.

The learned P.P.-in-charge further submits that under the POCSO Act conviction can be based on sole testimony of the victim if the evidence is found to be reliable and trustworthy. It is further submitted by the learned P.P.-in-charge that while adjudicating a case under Section 7 or 8 of the POCSO Act, the Court should examine the broader probability of a case and not get swayed by minor contradictions or indiscrepancies in the statement of the prosecutrix, which are not of fatal in nature, to throw out and otherwise reliable prosecution case. If the evidence of the prosecutrix inspires

confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, sort of corroboration required in the case of an accomplished testimony of the prosecutrix must be appreciated in the background of the entire case and the trial must be alive to its responsibility and be sensitive while dealing with cases involving sexual assault. In support of her contention the learned P.P.-in-charge has referred to a decision of the Hon'ble Supreme Court in the case of Ganesan vs. State represented by its Inspector of Police reported in 2020 (10) SCC 573.

It is not in dispute that both the victim girl and the appellant are blind. The appellant is 100 per cent visually handicapped. Though no disability certificate was produced on behalf of the appellant during trial of the case, the learned P.P.-in-charge has not raised any objection against the submission made by the learned advocate for the appellant that the appellant was 100 per cent disabled as a result of his blindness. The prosecution came up before the trial Court alleging that the incident took place about 8/9 months before lodging of the complaint. It is not in dispute that even after the alleged occurrence the victim girl used to stay for quite long time in the hostel of the said school. No allegation of molestation or sexual assault was

made against the appellant during the said period of time. The appellant is the founder member of Andho Aloke Samity. He runs Gayeshpur blind school. He is a teacher of English and Mathematics.

I have already recorded that a blind person can identify another only by his/her voice and by touch. If the victim girl was touched by the accused in order to know her identity and the victim girl was of the view that such touch was inappropriate, charge under Section 8 of the POCSO Act cannot be said to be proved against the appellant.

It is important to note that during cross-examination the victim girl stated that the appellant committed similar types of misbehaviour with other girls. Surprisingly enough no other complaint was lodged against the appellant. Even the Investigating Officer of this case did not examine other students of the said school to ascertain the moral character of the appellant and his dealings with other girl students.

In absence of such evidence, I am not in a position to concur with the findings made by the learned trial Judge convicting the appellant for committing offence under Section 354 of the Indian Penal Code read with Section 8 of the POCSO Act.

For the reasons stated above, the instant appeal is **allowed**.

The judgment and order of conviction and sentence is set aside.

The appellant be discharged from his bail bond.

Let a copy of this judgment along with the lower Court record be sent down to the Court below forthwith for information.

[Bibek Chaudhuri, J.]

**Sikha/Srimanta/Suman
A. Rs. (Court)**