

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

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA 434 of 2019

Raja @ Raju @ Manab Bose

-vs.-

The State of West Bengal

For the Appellant : Mr. Biplab Mitra,
Ms. Trina Mitra

For the State : Mr. Arijit Ganguly,
Ms. Mousumi Sarkar
Ms. Debjani Sahu

Heard on : 05.07.2022, 27.07.2022, 05.08.2022,
08.08.2022 & 23.08.2022.

Judgment on : 04.11.2022

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order of conviction and sentence dated 28.06.2019 passed by the Learned Additional District & Sessions Judge, Fast Track 7th Court, Alipore, South 24 Parganas, in Sessions Trial No.12(04)09 arising out of Sessions Case No. 82(09)08 convicting the appellant under Section 354 of the Indian Penal Code and sentencing him to undergo Rigorous Imprisonment for two years.

Jadavpur police station case no. 160 dated 23.03.2008 was registered for investigation under Section 376(2)(f)/511 of the Indian Penal Code pursuant to a complaint lodged by Saima Alam (hereinafter referred to as the complainant) with the Officer-in-charge, Jadavpur Police Station on 23.03.2008. The complainant namely, Sanchita Bhattacharjee alias Saima Alam in her complaint stated that her daughter aged about 5 years was staying with her grand-mother at her house. One Raja alias Manab Bose used to un-naturally abuse her daughter by touching private parts of her body and threatening her that in case she divulged such incident he would kill her along with her mother. It is further alleged that the accused used to take her daughter to the roof top and assaulted her sexually and physically. The complainant stated that she is an employee of a Call Centre and her husband is engaged in his shop till late night and it is only her grand-mother who stayed there. Taking undue advantage of such situation accused tortured her daughter both physically and sexually with scale (Ruler). Complainant alleged that her daughter felt unusual and on being asked she stated that Raja grandfather used to threaten her by putting her on the wall of the terrace and stated that if she divulged the incident of touching the private parts to anyone she would be thrown away from there. The complainant requested the Officer-in-charge to take action against Raja @ Manab Bose son of late Subhas Chandra Bose of 3/9 WIB (R) Phase IVA Golf Green.

On the basis of the aforesaid complaint the case was registered at Jadavpur Police Station and the investigating agency on completion of

investigation submitted charge-sheet under Section 376(2)(f) of the Indian Penal Code. The learned CJM, Alipore on receipt of the charge-sheet was pleased to take cognizance and after compliance of Section 207 of the Code of Criminal Procedure was pleased to transfer the case to the learned Sessions Judge and finally the case was made over to the learned Additional District & Sessions Judge, Fast Track 7th Court, Alipore, South 24 Parganas for trial and disposal. The trial Court vide its order dated 23.04.2009 on consideration of the material placed by the prosecution and after hearing the case was pleased to frame charges against the accused/appellant under Section 376(2)(f) of the Indian Penal Code.

The prosecution in order to prove its case relied upon 9 witnesses being PW1, Saima Alam @ Sanchita Bhattacharjee, mother of the victim; PW2, 'X', victim girl; PW3, Seemab Alam, father of the victim; PW4, Jane Alam, grand-father of the victim; PW5, Nazia Afshan, aunt of the victim; PW6, Yeasmin Parveen, grand-mother of the victim; PW7, Sasanka Sekhar Majee, police personnel who filled up the FIR; PW8, Dr. Sisir Kr. Chakrabarti, who examined the victim and PW9, S.I. Pronoti Saha, Investigating Officer of the Case.

PW1, Saima Alam @ Sanchita Bhattacharjee, complainant and mother of the victim deposed that she complained against her maternal uncle Manab Bose alias Raja and identified him in Court. She deposed that 'X' is her daughter and in the year 2008 she was aged about 5 years. At that time she was employee of a Call Centre at Park Circus and used to leave her with great-

grand-mother at around 9.30 a.m. for office and returned back at night. She was residing at Golf Green with her husband and daughter. Towards the end of March, 2008 at about 8/8.30 p.m. she received telephone call from her husband who told her to rush to her matrimonial home and on repeated asking he did not divulge anything. On reaching at her matrimonial home at 2nd Lane, 6, Md. A.K. Siddique Lane, Kolkata-16 she found that all the persons/relations were weeping over there and she came to know from her sister-in-law Nazia that her daughter told her that when her parents left residence for work, Manab used to molest her daughter and attempted to rape her and also threatened her of dire consequences in case she disclosed anything to her parents. The witness also alleged that he had habit of assaulting her daughter with scale. The witness stated the complaint was written by her father-in-law and she signed the same and lodged it with Jadavpur Police Station. She identified her signature on the compliant which was marked as Ext.1.

PW2, 'X' is the victim, she stated that she is a student of St. John Diocesan Girls H.S. School and is a student of Class-IV and the school hour is between 08.00 am to 12.00 noon. She on being asked stated that Nandita Singh happens to be her class teacher and her roll number is 7. She deposed before the Court that the person standing in the Court room is maternal uncle of her mother and as such he is her grand-father from her mother's side. She stated that 5 years ago an incident happened between her and her said grand-father which took place at the house of her maternal grand-mother situated at Golf Green. On that day she was taken to the roof by her grand-father to see

pigeons in the evening when it was dark at the roof and the said grand-father removed his pant and using force he removed her pant also and put his private part in her private part as such she screamed when her grand-father threatened that in case she disclosed the incident he would kill her. She also stated that this incident took place only on a single day. Subsequently, after one day of the incident she disclosed the matter to her paternal aunt Nazia who informed her parents. She was examined by the doctor at hospital but cannot recollect the name of the hospital. She also stated that she narrated the incident to a Judge. He wrote down her version and she signed the same. She identified her signature which was marked as Ext.2 and stated the name of her grandfather as Raja, who is present in Court and was responsible for the misdeed.

PW3, Seemab Alam, is father of victim 'X'. He stated that the incident took place about 6 years back in her father-in-law's house situated at Golf Green, Kolkata-45. At that time his daughter was staying along with her great grand-mother-in-law. The incident took place in between 12 noon to 2.00 p.m. at the roof of the said house where accused Manab alias Raja raped his minor daughter. Additionally it was deposed that his daughter narrated the incident to his sister and his mother, who narrated the facts to him. His wife lodged complaint with the O/C Jadavpur police Station, when police came to their house took away her daughter to hospital and got his daughter medically examined.

PW4, Jane Alam is grand-father of the victim. He deposed that his grand-daughter used to reside in the house of her great-grand-mother at Golf Green, Kolkata-45. At the time of incident the age of the victim was about 7 years. The victim narrated the facts to his wife and his daughter on 22.03.08 when she came to their house along with her parents. His grand-daughter/victim stated to his wife that she was suffering pain on her vagina and on an enquiry by his wife the victim stated to her that Raja alias Manab rubbed his male organ over her female organ on the roof in a standing position. The victim also stated to his wife that the accused threatened her of dire consequences if she disclosed such facts to others. The witness identified the accused in Court and stated that he has heard the incident from his wife.

PW5, Nazia Afshan, is the aunt of the victim who deposed that at the relevant time the victim/her niece used to reside at Golf Green along with her parents and great-grand-mother. According to her the incident took place 7 years ago and she heard the fact from the mouth of her niece/victim. The victim came to their house along with her parents at Park Street on 22.03.2008 and told her that accused Raja alias Manab used to take her to the roof and used to touch and rub his penis on her vagina. She further stated that during the absence of her parents the accused took her at the roof and committed such misdeed. The witness identified the accused Manab Bose in Court.

PW6, Yeasmin Parveen, is the paternal grand-mother of the victim. She deposed that at the time of incident her grand-daughter resided at Golf Green

with her great-grand-mother, although her mother used to reside along with her at 6, A.K. Md. Siddique lane, Kolkata 16. At the time of incident the victim was aged about 6 years and now she is 12 years old. Victim once came to her house and stayed with her mother when she narrated the fact to her. She told her that maternal grand-father accused Manab Bose alias Raja used to take her on the roof and rubbed his male organ on her female organ forcibly. The accused used to do such bad act with her several times. Victim told her mother that her private part was irritating but she did not disclose the actual fact to her mother for shame. Her mother applied medicine to reduce such irritation. The victim disclosed her after she came to their house. The witness stated she knows Manab alias Raja who was not present in Court and could have identified him if he was present in Court.

PW7 is Sasanka Sekhar Majee, a police personnel attached to Jadavpur Police Station who deposed that on 23.03.2008 he received a written complaint from one Saima Alam. He identified his endorsement and the signature and the written complaint which was marked as Ext.1/1. He further stated that he filled in the Formal FIR also on the same date. The Formal FIR was marked as Ext.3. According to him after receiving the FIR he filled up the Formal FIR as per instruction of the then Officer-in-charge, Jadavpur Police Station.

PW8, Dr. Sisir Kr. Chakrabarti, deposed that in the year 2008 he was posted as Medical Officer, Gynaecologist at M.R. Bangur Hospital, Tollygunge. On 23.03.2008 he came to know that the victim is aged about 5 years and

happened to be the daughter of Seemab Alam of 3/9, W1B(R) Phase IV(A) Golf Green, Kolkata-95. According to him there was an allegation that one Raja alias Manab tried to commit rape as per police report. Victim did not tell anything to him. On examination he found no external injury and hymen was intact. The report was signed by him. He identified the same which was marked as Ext.4. However, in cross-examination he stated that tear in the fourchette might occur even by falling.

PW9, Pronoti Saha is the Investigating Officer of the case. She stated that after taking over charge of investigation she visited the place of occurrence, recorded the statement under Section 161 of the Code of Criminal Procedure, arranged for recording statement of the victim girl under Section 164 of the Code of Criminal Procedure. She collected the statement and arranged for medical examination of the victim girl, arrested the accused and produced him before the learned Court and on completion of investigation she submitted charge-sheet against the accused person.

Mr. Mitra, learned Advocate appearing for the appellant contended that it would be dangerous to rely upon the evidence of a child witness, whose version was inconsistent to arrive at a finding of guilt in the backdrop of the factual circumstances of the present case as there are already materials available in the record that there was a dispute regarding property. Additionally learned Advocate submitted that there were no eye-witness to the incident, the parents and other relations who were prosecution witnesses are not eye-witnesses and

their version which they heard from the alleged victim child were different. According to him the nature of the evidence of the majority of prosecution witnesses would go to show that they were trying to settle a score rather than eliciting the truth. In support of his contention he relied upon *Digambar Vaishnav & Anr. -Vs. - State of Chhattisgarh* reported in (2019) 4 SCC 522. Attention of the Court was drawn to paragraphs 21, 22 & 23 which are set out as follows:

“21. *The case of the prosecution is mainly dependent on the testimony of Chandni, the child witness, who was examined as PW 8. Section 118 of the Evidence Act governs competence of the persons to testify which also includes a child witness. Evidence of the child witness and its credibility could depend upon the facts and circumstances of each case. There is no rule of practice that in every case the evidence of a child witness has to be corroborated by other evidence before a conviction can be allowed to stand but as a prudence, the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that witness must be a reliable one.*

22. *This Court has consistently held that evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. Therefore, the evidence of a child witness must find adequate corroboration before it can be relied upon. It is more a rule of practical wisdom than law. [See *Panchhi v. State of U.P.* [*Panchhi v. State of U.P.*, (1998) 7 SCC 177 : 1998 SCC (Cri) 1561] , *State of U.P. v. Ashok Dixit* [*State of U.P. v. Ashok Dixit*, (2000) 3 SCC 70 : 2000 SCC (Cri) 579] and *State of Rajasthan v. Om Prakash* [*State of**

Rajasthan v. Om Prakash, (2002) 5 SCC 745 : 2002 SCC (Cri) 1210].]

23. In *Alagupandi v. State of T.N.* [*Alagupandi v. State of T.N.*, (2012) 10 SCC 451 : (2013) 1 SCC (Cri) 1027] , this Court has emphasised the need to accept the testimony of a child with caution after substantial corroboration before acting upon it. It was held that : (SCC p. 463, para 36)

“36. It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and that there exists no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable.””

Learned Advocate also relied upon *Radhu –Vs. – State of Madhya Pradesh* reported in (2008) 2 SCC (Cri) 207 and referred to paragraph 12 as also a part of paragraph 16 of the said judgment which are as follows:

“12. Dr. Vandana (PW 8) stated that on examination of Sumanbai, she found that her menstrual cycle had not started and pubic hair had not developed, and that her hymen was ruptured but the rupture was old. She stated that there were no injuries on her private parts and she could not give any opinion as to whether any rape had been committed. These were also recorded in the examination report (Ext. P-8). She, however, referred to an abrasion on the left elbow and a small abrasion on the arm and a contusion on the right leg of Sumanbai. She further stated that she prepared two vaginal swabs for examination and handed it over along with the petticoat of Sumanbai to the police constable, for being sent for examination. But no evidence is placed about the results of the examination of the vaginal swabs and petticoat. Thus, the medical evidence does not corroborate the case of sexual intercourse or rape.

16. The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other circumstances make it highly improbable that such an incident ever took place. The learned counsel for the respondent submitted that the defence had failed to prove that Mangilal, father of the prosecutrix was indebted to Radhu's father Nathu and consequently, defence of false implication of the accused should be rejected. Attention was invited to the denial by the mother and father of the prosecutrix of the suggestion made on behalf of the defence that Sumanbai's father Mangilal was indebted to Radhu's father Nathu and because Nathu was demanding money they had made the false charge of rape to avoid repayment. The fact that the defence had failed to prove the indebtedness of Mangilal or any motive for false implication does not have much relevance as the prosecution miserably failed to prove the charges. We are satisfied that the

evidence does not warrant a finding of guilt at all, and the trial court and the High Court erred in returning a finding of guilt.”

Learned Advocate for the appellant lastly contended that on an overall appreciation of facts and circumstances of the case the finding of guilt as held by the learned trial Court calls for interference and prayed for setting aside the order of conviction and sentence.

Mr. Arijit Ganguly, learned Advocate appearing for the State on the other hand refuted the claims of learned Advocate for the appellant and submitted that cases of such nature where a child is sexually abused by a senior person are at places where eye-witnesses are never available. It was further contended that the accused being a relation shattered the confidence which was reposed upon him and the version of the child witness in the facts of the present case is corroborated by the medical evidence available in the record. According to him there are overwhelming materials supporting the finding of guilt and the order of conviction so passed by the learned Trial Court itself is a leniency in view of the same being under Section 354 of Indian Penal Code. Learned Advocate submits that there is no scope for interference with the order of conviction and sentence so passed and as such the appeal should be dismissed.

To appreciate the facts of the present case, the observations of the Hon'ble Apex Court in Nawabuddin –Vs. – State of Uttarakhand reported in (2022) 5 SCC 419 requires consideration. In this judgment, it has been observed as follows:

“18. *Children are precious human resources of our country; they are the country's future. The hope of tomorrow rests on them. But unfortunately, in our country, a girl child is in a very vulnerable position. There are different modes of her exploitation, including sexual assault and/or sexual abuse. In our view, exploitation of children in such a manner is a crime against humanity and the society. Therefore, the children and more particularly the girl child deserve full protection and need greater care and protection whether in the urban or rural areas.*

19. *..... Most crimes against minor victims are not even reported as very often, the perpetrator of the crime is a member of the family of the victim or a close friend. Therefore, the child needs extra protection. Therefore, no leniency can be shown to an accused who has committed the offences under the Pocso Act, 2012 and particularly when the same is proved by adequate evidence before a court of law.”*

Further in Satya Pal –Vs. – State of Haryana reported in (2009) 6 SCC 635 referring to Modi’s Medical Jurisprudence, 23rd Edition it has been quoted that,

“In small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum.”

In this case PW2 victim even after five years could not come out of the trauma and narrated the incident which happened at the roof of the house of her great-grand-mother, where the present accused/appellant who happen to be a grand-father of the victim by relation committed the misdeed. The medical

report prepared by the doctor PW8 clearly reflected, “one tear at fourchette”. On this point the defence only advanced a suggestion and there was no confrontation with regard to the accusations reflecting in the medical report. Further the medical examination report was marked without any objection being made by the defence regarding its contents.

Having regard to the facts of the present case, the age of the child, the medical evidence appearing in this case and the settled proposition of law, I am of the opinion that each case is to be considered on its own factual foundation and the plea of the learned Advocate for the appellant that the appellant has been falsely implicated in the present case because of property dispute is hardly of any relevance because of the overwhelming materials appearing in the oral evidence of the victim which is consistent regarding the factum of sexual abuse appearing in her evidence before the Court and contents of the FIR, there is no scope for dis-believing the child who was a victim in this case. The decisions relied upon by the learned advocate i.e. Digambar Vaishnav (Supra) and Radhu (supra) do not apply to the facts of the present case which were based on the facts of those individual cases. As such there is no scope for interference in the judgment and order of conviction and sentence dated 28.06.2019 passed by the learned Trial Court.

Thus, CRA 434 of 2019 is dismissed.

Pending Applications, if any, are consequently disposed of.

The appellant is on bail, his bail bond stands cancelled and he is directed to surrender before the learned trial Court immediately, in the alternative the Trial Court would pass necessary orders for executing the sentence.

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.)