

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 439 of 2019

FULCHAND SK @ FUL BABU SK (MINOR) & ORS.
VS.
THE STATE OF WEST BENGAL & ORS.

For the Appellants	: Ms. Minoti Gomes, Adv. Mr. Hafiz Ali, Adv.
For the Respondents	: Mr. Iqbal Kabir, Adv. Mr. Dipanjan Chatterjee, Adv.
Hearing concluded on	: 14 th December, 2022
Judgement on	: 16 th December, 2022

Siddhartha Roy Chowdhury, J.:

1. This criminal appeal assails the judgement and order of conviction as well as sentence passed on 26th June, 2019 and 27th June, 2019 respectively by the learned Additional Sessions Judge, Kandi Murshidabad in S.T. No. 5(03) 2019 arising out of Berhampore P.S. Case No. 8 of 2019 dated 7th January, 2019, under Section 376/506 of the Indian Penal Code and 04 of the POCSO Act, 2012.
2. Briefly stated, Nargis Bibi informed the Officer-in-charge of Bharatpur Police Station in writing that on 5th January, 2019 her cousin Ful Babu Sk aged about 19 years came to her house at about 7.30 p.m. and took her daughter with him. Ful Babu happens to be the maternal uncle of her daughter. Instead of taking the girl to their

house Ful Babu took the girl behind the stack of bricks by the side of graveyard and ravished the girl. The girl came back to her house crying and disclosed the entire incident to her mother. When the informant went to the house of the accused person, the accused and his parents forbade her not to disclose the incident to anyone even intimidated the informant. On 6th January, 2019 the victim girl was admitted to Kandi Hospital. In her written information Nargis explained delay as well. The information since disclosed offence cognizable in nature Berhampore P. S. Case No. 8 of 2019 dated 7th January, 2019 was registered under Section 376/509 of the I.P.C. and 4 of the POCSO Act. Police took up investigation and submitted charge sheet against Fulchand Sk @ Ful Babu Sk. who stood trial pleading his innocence.

3. Before getting into the merit, I would like to point out some general features as I find from the judgement impugned.
4. Learned Trial Court relied upon Section 42 of the POCSO Act, 2012, while sentencing the convict/appellant to suffer imprisonment for 7 years for committing offence under Section 376 of the I.P.C. and imprisonment of 7 years for committing offence under Section 4 of the POCSO Act. Section 42 of the POCSO Act speaks of alternate punishment which says as follows:-

"42. Alternate punishment.

Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time

being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

42A. Act not in derogation of any other law.

The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

5. On plain reading of the aforesaid provision it is clear that the offender when is found guilty for committing offence within the meaning of Section 376 of the I.P.C. shall be liable to be punished under this Act meaning thereby the Protection of Children from Sexual Offences Act, 2012 or under the Penal Code as provided for punishment, which is greater in degree. Section 42 does not empower the learned Trial Court to punish an offender twice for committing offence within the meaning of Section 4 of the POCSO Act and also under Section 376 of the Indian Penal Code. Learned Trial Court could have punished the convict under Section 4 of the POCSO Act or under Section 376 of the Indian Penal Code. Learned Trial Court committed error while sentencing the convict. Learned Trial Court directed the convict to undergo imprisonment for 7 years for committing offence under Section 4 of the POCSO Act and 7 years of imprisonment for offence committed under Section 376 of the I.P.C. which is not

permissible and punishment imposed was much below the prescribed limit.

6. Hon'ble Supreme Court in **STATE OF MAHARASHTRA & ANR. VS. SAYYED HASSAN SAYYED SUBHAN & ORS.** reported in (2019) 18 SCC 145 held:-

“7. Where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under IPC and at the same time, an offence under any other law.”

7. Section 33 (2) of the POCSO Act, 2012 says:-

“Section 33 of Protection of Children from Sexual Offences Act, 2012 : Procedure and powers of Special Court

(1) xxxxxx

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) xxxxxx

(4) xxxxxx

(5) xxxxxx

(6) xxxxxx

(7) xxxxxx

(8) xxxxxx

(9) xxxxxx”

8. There is no reflection that minor girl, in this case was examined as witness, in consonance with the statutory mandate as laid down under

Section 33 (2) of the POCSO Act, 2012. Learned Trial Court, it appears, allowed the Public Prosecutor and learned Defence Counsel to put question to the victim directly which is impermissible. When a statute requires a thing to be done in a particular manner, it must be done in that manner only and not otherwise.

9. Now the facts of the case:- To bring home charges prosecution examined as many as 6 witnesses. It is pertinent to mention here though at the time of incident the appellant was a child in conflict with law, the Juvenile Justice Board opined that the accused should be treated as an adult as defined under Section 2 (20) of the Juvenile Justice Act.
10. Drawing my attention of the oral testimony of Unmesh Mukherjee, P.W. 1 happens to be the Medical Officer who examined the victim on 10 January, 2019, found old rapture in her hymen. The doctor did not find any mark of external injury or any sign of forceful vaginal intercourse. Such finding of attending physician negates the allegation that the victim girl was ravished by P.W. 1. The mother of the victim stated that she took her daughter to the house of Ful Babu after she came to know about the incident. Initially Ful Babu denied the allegation but being chased by the victim girl he started weeping without giving any reply. But according to victim the boy was caught hold of by her mother and brother on the spot. According to Ms. Gomes, learned Counsel representing the appellant, the delay in informing the police indicates inherent falsehood. The victim by no stretch of imagination can be said to have been ravished by the

accused person. Drawing my attention to the testimony of the victim as P.W. 3, Ms. Gomes adverted that the girl accompanied the boy behind the brick stack and she raised hue and cry after the alleged incident. During her cross examination she stated that her mother and brother came to spot and caught hold of Fulbabu but he was released. Police ought to have been informed. There would have been some kind of external mark of injury on the person of the girl. But nothing, as expected, was found.

11. P.W. 4, Dr. Tapas Kr. Ray did not find any injury on the genital organ of the victim. P.W. 5 Dr. Anindya Kr. Goswami conducted the examination of Ful Babu and according to doctor he was capable of sexual intercourse. P.W. 6, Utpal Ghosh is the Investigating Officer who submitted charge sheet.
12. Ms. Gomes stated that the prosecution case is shrouded with shadow of suspicion and learned Trial Court failed to appreciate evidence on record in its proper perspective. The victim girl is aged about 14 years and the accused was a juvenile at the time of incident. He cannot be said to have over powered the girl single handedly. The finding of P.W. 1, upon examination of victim girl clearly indicates that she was habituated to such physical union and, therefore, learned Trial Court ought to have disbelieved the prosecution story regarding application of force by the accused in absence of any mark of injury. May be it was a fall out of two immature minds perhaps for that reason for the mother of the victim to let the boy go. Subsequently being instigated by some other persons the lady informed the police.

13. Ms. Minoti Gomes, thereafter, highlighted the testimony of the mother of the victim who adduced evidence as P.W. 2 and a fatal to have sold a piece of land to Fulchand and Lal Babu Sk in the month of August, 2018 and subsequently they went to the father of the accused person to transfer the land in their favour, as a result, dispute cropped up between the two families. She initiated the proceeding at a belated stage with an intention to use the authority of the Court as a tool to oppress the accused and his family members. There are discrepancies between the testimony of P.W. 2 and testimony of P.W. 3 the victim girl.
14. Refuting such contention Mr. Dipanjan Chatterjee, learned Counsel for the victim submits that evidence of P.W. 3 is consistent and free from any embellishment. A minor girl narrated her experience. Court should not look for corroboration of her evidence. Even if she is presumed to be a consenting, being a minor, her consent is of no consequence.
15. Normally the Court should not insist for corroboration of evidence of victim in a case of sexual assault upon a victim girl. It would add insult to her injury already suffered. But in certain circumstances in order to unveil the truth, it becomes imperative to look for corroboration. This is one such case., where allegedly on 5th January, 2019 at about 7.30 p.m. the victim girl came out of her house to meet her maternal grandmother being told by the accused Ful Babu Sk. Ful Babu Sk while accompanying the victim instead of going to house took the victim to a place near the graveyard behind a stack of bricks and

committed 'rape' upon the victim. As P.W. 3 the victim stated that after the incident was over she raised alarm which attracted his mother and brother and they caught hold of the accused person. The victim at the relevant point of time was aged about 14 years. While the accused was aged about more than 16 close to 17. According to victim, the perpetrator was caught red handed by her mother and brother but they did not do anything with the boy.

16. Mother of the victim P.W. 2 stated that being attracted by the cry of her daughter she along with her son Raj Sk rushed to the spot and saw that her daughter was lying on the field and appellant was by her side. P.W. 2 caught hold of Ful Babu, the perpetrator. She brought her daughter back to home let off the accused person and informed the mother of Ful Babu after two days. Ful Babu at the first instance denied the allegation and started weeping, being challenged by her daughter two days after the incident.

17. The attending Medical Officer as P.W. 4 stated that on 6th January, 2019 the victim was admitted to Kandi Sub-Divisional Hospital with a history of trauma on vulva region. But on examination no vaginal or cervical injury was found, no external injury was seen. The patient was complaining of chest pain. P.W. 1 the other Medical Officer who examined the victim at Kandi Sub-Divisional Hospital also did not find any sign of forceful vaginal intercourse and no mark of injury. According to doctor the victim was habituated to sexual intercourse. Had there been forceful sexual intercourse the victim would have sustained injury.

18. From the testimony of the victim girl as well as her mother P.W. 2 and P.W. 3 we find that immediately after the incident mother of the victim along with her son came and caught hold of the perpetrator. But she went to the mother of the accused person after two days. Even police was informed on 7th January, 2019 before that the mother of the victim was about to take the victim girl to Konnagar. The testimony of the victim and her mother if considered from the point of view of human probability it really becomes difficult to hold that there was penetrative sexual assault upon the minor girl. When the boy was found by the side of the victim who was lying on the ground, the reaction of mother obviously would have been different, more aggressive and she would have reported the matter not only to the parents of the perpetrator but to others as well including the police but she decided not to do so. A petition of complaint was filed after two days of incident and there the informant Nargis Bibi, the mother of the victim gave a different narrative altogether. In her complaint the mother of the victim stated that after being ravished by the accused person her daughter somehow came to her house, she was crying and being asked by the informant she narrated the incident. Even in her complaint mother of the victim stated that when she brought the matter to the notice of the parents of the accused person, the accused person and his parents and other family members abused her and threatened her with dire consequences in case of disclosure of the matter to anyone. Thus the content of the information which set the criminal administration of justice into motion gave a narrative

altogether different from her oral testimony on oath. The attending circumstances do not inspire confidence in my mind to hold that the victim was ravished by the accused person. The prosecution case suffers from discrepancies. I do not find a ring of truth in what has been stated by the victim girl. In absence of any clinching evidence, suggesting penetrative sexual assault upon the victim, and taking into consideration the testimony of the mother of the victim, who found her daughter lying on the ground and accused was by her side, I am inclined to hold that the appellant at best can be said to have committed an offence within the meaning of Section 8 of the POCSO Act and not under Section 4 of the Act.

19. In the light of aforesaid observation while maintaining order of conviction but under Section 8 of the POCSO Act, I modify the sentence. The convict is in custody for 3 years 11 months. He has no criminal antecedent. Balancing the aggravating and mitigating factors I am of the view that ends of justice would be met, if he is sentenced to suffer substantive imprisonment for the period already undergone.
20. Mr. Chatterjee, learned Counsel for the victim submits that during the pendency of the appeal, when this fact came to the knowledge of the husband of the victim, he drove out the victim of her matrimonial home with her child. The victim is now in need of adequate compensation. Under such circumstances, I would have enhanced the compensation to the tune of Rs. 1,50,000/-, as prayed for but Section 375 A of the Cr.P.C. empowers the State Legal Services Authority to determine the quantum, no jurisdiction has been conferred upon the

Court is circumvent it. In my view the victim is in need of compensation for the purpose of rehabilitation of victim. West Bengal State Legal Services Authority is to determine the adequate quantum as per schedule appended to West Bengal Victim Compensation Scheme, 2017.

21. The appeal is thus disposed of and in view of disposal of appeal connected application if any stands disposed of.
22. Let the lower Court record together with copy of judgement be sent down to learned Trial Court at once.
23. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)