

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandopadhyay

C.R.A. 427 of 2018

Laltu Ghosh

-Vs-

The State of West Bengal & Anr.

For the Appellants : Ms. Minoti Gomes, Adv.
Mr. Shibaji Kumar Das, Adv.
Ms. Rupsa Sreemani, Adv.

For the State : Mr. Partha Pratim Das, Adv.
Mrs. Manasi Roy, Adv.

Heard on : 11.05.2022 & 18.05.2022

Judgment on : 18.05.2022

Joymalya Bagchi, J. :-

Appeal is directed against the judgment and order dated 07.07.2018 passed by the learned Additional District & Sessions Judge, First Court, Sealdah, South 24-Paraganas in Special Case No.10 of 2018 convicting the appellant for commission of offence punishable under Section 6 of the POCSO Act alternatively under Section 376(2)(n) of the Indian Penal Code and sentencing him to suffer rigorous

imprisonment for ten years and to pay fine of Rs.50,000/-, in default, to undergo rigorous imprisonment for six months more, with a further direction 90% of the fine amount, if realised, shall be paid to the victim as compensation.

Prosecution case as alleged against the appellant is to the effect that on 07.02.2018 at 9.30 P.M. the victim, a 13 year old girl had gone to the residence of her sister (P.W.8) at 12/H/35, Kalitara Bose Lane, Kolkata-700 010. Her sister went out for work. When she returned around 10.00 P.M., the victim was missing. P.W.8 informed the matter to their mother. They searched for the victim but could not find her. On the next day, around 8.00 P.M. P.W.8 received phone call from the victim that she was at Tarapith. Two days thereafter, she remained untraced. Under such circumstances, her father (P.W.3) lodged written complaint at Beliaghata Police Station resulting in registration of Beliaghata Police Station Case No.33 dated 10.02.2018 under Sections 120B/363/366A IPC against unknown accused person. In course of investigation, the victim was recovered on 13.02.2018 from the residence of the appellant. She was medically examined. Ossification report shows her age was between 16-18 years. Her statement was recorded before the Magistrate and charge sheet was filed against the appellant. Charges were framed under Section 6 of the POCSO Act and under Section 376(2)(n) of the Indian Penal Code. Appellant pleaded not guilty and claimed to be tried. In course of trial, prosecution examined

nine witnesses including the victim as P.W.1. Victim was brought to the court to adduce evidence on 14.05.2018. Although charges had been framed earlier, the appellant presumably to avoid her examination preferred a vexatious application praying for discharge which came to be rejected and the victim was directed to be produced on the next day i.e. on 15.05.2018 for examination. On that day, the appellant again prayed for adjournment. Learned Judge refused such prayer and proceeded to examine the victim and other witnesses. Lawyer for the accused refused to cross-examine them. Accordingly, the victim was discharged. Subsequently, the appellant made prayer to recall the victim for cross-examination which was disallowed referring to Section 33(7) of POCSO Act which interdicted repeated attendance of child witness for deposition. Appellant preferred revisional application against such order before this Court being CRR 1221 of 2018. No stay was granted by this Court and the trial proceeded. However, lawyer for the appellant chose not to cross-examine the witnesses of the prosecution. In conclusion of trial, the trial Judge by the impugned judgement and order dated 07.07.2018 convicted and sentenced the appellant, as aforesaid.

Ms. Minoti Gomes, learned Advocate for the appellant argued that her client was not given adequate opportunity to cross-examine the witnesses including the victim (P.W.1). Subsequent prayer for recall of P.W.1 and other witnesses for cross-examination was unjustly

disallowed. As the appellant had been denied his fair trial rights, the order of conviction ought to be set aside and the matter be remanded for retrial. Referring to the evidence of the Medical Officer (P.W.4), it is argued the victim stated she had voluntarily eloped with the appellant and cohabited with him. Her subsequent statement before Magistrate and in court with regard to forcible kidnapping and rape is out and out false. Age of the victim has also not been proved. Hence, the appellant is entitled to an order of acquittal.

Mr. Partha Pratim Das, learned Advocate for the State submits ample opportunity was given to the appellant to cross-examine the victim and other witnesses. Appellant sought to delay and dilate the proceeding by taking out a vexatious application for discharge even after framing of charge. In view of statutory mandate engrafted in law, trial Judge has rightly rejected the unjustified prayer for adjournment particularly in course of examination of the minor victim. There is no denial of fair trial rights to the appellant. Evidence of the father of the victim (P.W.3) shows she was 16 years old at the time of occurrence. Ossification report corroborates such fact. P.W.1 stated she had been forcibly detained at the residence of the appellant and had been raped. Prosecution case is proved beyond doubt and the appeal is liable to be dismissed.

Every accused has a right to be effectively defended. Fasciculi of rights available to an accused to defend himself against a criminal

charge forms the foundation of the basic human rights engrafted in the international covenants like Universal Declaration of Human Rights and International Covenant of Civil and Political Rights which have been read into the fundamental right enshrined under Article 21 of the Constitution of India. Right to cross-examine a witness is not only a basic human right but also a statutory right as per Section 137 of the Evidence Act¹. Unjust and unfair denial of such right would impinge on the fairness of the trial procedure and vitiate the conviction.

Keeping in mind the aforesaid proposition of law, I have made an endeavour to test whether the right of cross-examination of the appellant had been unjustly denied in the facts of the case. To do so, it is necessary to narrate the chronology of events in course of trial.

On 13.04.2018, the charge was framed against the appellant and date for recording evidence was fixed on 14.05.2018, 15.05.2018 and 16.05.2018 respectively. As per trial schedule, minor victim (P.W.1) was produced before the court on 14.05.2018. In order to avoid her examination, the appellant resorted to a vexatious application for discharge which was patently not maintainable after the charge had been framed in the case. Naturally the trial Court rejected such prayer and fixed the next date i.e. 15.05.2018 for examination of the victim girl. On 15.05.2018 the appellant conjured a new excuse for adjournment. His lawyer contended he had been newly appointed and,

¹ Jayendra Vishnu Thakur Vs. State of Maharashtra And Another, (2009) 7 SCC 104 [para 24]

therefore, the matter be adjourned. Section 35(1) of the POCSO Act requires the examination of a child to be conducted within 30 days of taking cognizance of the case. In view of such statutory mandate, the trial Judge rejected the prayer of the appellant and proceeded to examine the witnesses. Subsequently, the appellant resorted to repeated subterfuges, like application for recall of the witness for cross-examination, which came to be rejected by the trial Judge in the light of Section 33(5) of the POCSO Act which provides the child shall not be repeatedly called to testify in court.

Right of fair trial is not an exclusive premise of the appellant. It takes within its fold, the rights of the victim particularly that of a minor victim. Section 33 of the POCSO Act enumerates the rights of a minor victim of sex crime and ensures that the minor is not subjected to unnecessary harassment, humiliation and secondary victimisation by being repeatedly summoned to testify in a Court of Law. A child who is a victim of sexual offence suffers from severe and deep trauma due to the crime. It is extremely painful for her to recount such trauma and depose in Court, though such deposition is essential to come to a just decision in the case. In order to minimize the agony of a minor victim of sex crime, law mandates a humanised procedure for her examination in Court. She is not required to be repeatedly summoned at the whim of an accused to testify. A fine balance must be struck between the right

of the victim to depose under just and humane circumstances and the fair trial right of the accused to effectively cross-examine her.

In the facts of the present case, upon framing of charge, minor was summoned to testify on 14.05.2018. Appellant resorted to a wholly vexatious application to scuttle her examination. When she was again summoned on the next day, her examination was sought to be avoided on the ground that the appellant's lawyer was unprepared. It is nobody's case that the appellant was unrepresented in course of trial. On the other hand, he had resorted to various subterfuges and unjustified excuses to delay, dilate and scuttle the prompt examination of the child witness. This was rightly resisted by the trial Court and the deposition of the witness was recorded.

Under such circumstances, I am unable to hold there was denial of adequate opportunity to the accused to cross-examine the victim or other witnesses. On the other hand, a whimsical stance was taken by the learned lawyer representing the appellant to decline his cross-examination. Under such circumstances, appellant can only blame himself for not having examined the prosecution witnesses. Refusal of the trial court to adjourn proceedings as no stay order had been granted by the High Court in the revisional application, is wholly just and appropriate. It may be apposite to note trials under POCSO Act require to be concluded at an early date preferably within one year from the date of taking cognizance. In deference to such statutory mandate,

trial Court proceeded with the case when no order of stay had been granted by the superior Court. Thus, I am of the opinion there is no violation of any fair trial right of the appellant including his right to cross-examine witnesses which would justify a remand of the case.

Coming to the merits of the case, I find P.W.1 stated she was forcibly taken away by the appellant. He put vermilion on her forehead. She was initially been kept at her maternal uncle's house. Thereafter, she was detained at the residence of the appellant where she was raped. She came to know the appellant was a married person and had three wives. She was not allowed to talk to her elder sister. Finally she was rescued and examined at the hospital. She put signature on the medical report. She made statement before the Magistrate.

Her deposition is corroborated by her father (P.W.3). He stated the victim was 16 years old. She was missing from 07.02.2018, when she had gone to the house of her elder sister at 9.30 P.M. Since then she was missing. On 13.02.2018 she was recovered from the house of the appellant. P.W.3 lodged complaint at Beliaghata Police Station which was treated as first information report. He stated his daughter disclosed that the appellant had forcibly married and had sex with her.

P.W.8, Rukshar Das, elder sister of the appellant, however, did not support the prosecution case and was declared hostile.

Referring to the evidence of P.W.4, Medical Officer who examined the victim girl, Ms. Gomes submits the appellant had not forcibly

kidnapped or raped her. She had voluntarily left with the appellant and cohabited with him.

P.W.4, Dr. Sanjib Kumar Mondal deposed he examined the victim girl on 13.02.2018. Victim had stated to him she left her house on 08.02.2018 at 9.00 P.M. on her own with the appellant and stayed with him for five days and voluntarily had sexual intercourse on 11.02.2018. She came back to her residence on 13.02.2018. On examination he found no scratch marks over her face, breast and abdominal wall. He found hymen absent and sign of recent injury. Reddish discoloration was found in hymenal ring. He proved the injury report, vide Exhibit 5.

Juxtaposing the evidence of the victim in Court against her previous statement before the Medical Officer (P.W.4), it appeared the victim had initially stated she had voluntarily left her home and stayed with him for five days. She had voluntarily cohabited with him once on 11.02.2018. However, in court she changed her stance and deposed she had been forcibly kidnapped and raped by the appellant.

In view of the inconsistent stance of the victim (P.W.1) vis-a-vis her consent to cohabit with the appellant, I am unable to hold that the prosecution case for forcible rape of the victim has been established.

But evidence has come on record that the victim was below the age of consent, i.e., 18 years. Her father (P.W.3) deposed she was 16 years old, when the incident occurred. Ossification report produced

during trial shows that she was above 16 years and below 18 years at the time of her examination i.e. on 23.02.2018.

From the aforesaid materials on record, I am of the opinion that the victim was below the age of consent and cohabitation between the appellant and the victim even if voluntary would amount to statutory rape. There is also no evidence that the victim had repeatedly cohabited with the appellant. In her first statement before the doctor she stated she had voluntarily cohabited on 11.02.2018. Even the charge framed in the instant case does not refer to repeated acts of rape on the minor.

Under such circumstances, I am of the opinion ingredients of the graver offence punishable under Section 6 of the POCSO Act or Section 376(2)(n) of the Indian Penal Code are not satisfied but the ingredients of the offence punishable under Section 4 of the POCSO Act and under Section 376(1) of the Indian Penal Code are proved beyond doubt.

Conviction of the appellant is converted to one under Section 4 of the POCSO Act and under Section 376(1) of the Indian Penal Code. Accordingly, the sentence of the appellant is modified and he is directed to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.50,000/-, in default, to undergo rigorous imprisonment for six months more with a direction of 90% of the fine amount, if realised, shall be paid to the victim as compensation.

Appeal is partly allowed.

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Ananya Bandopadhyay, J.)

(Joymalya Bagchi, J.)