

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.A 534 of 2019

Tarak Das

Vs.

The State of West Bengal & Anr.

For the Appellant:

Mr. Manjit Singh, Adv.,
Mr. Gaganjyot Singh, Adv.,
Mr. Biswajit Mal, Adv.,
Mr. Rishan kumar Singh, Adv.

For the Respondent No.2/de facto complainant:

Mr. Amitabha Ghosh, Adv.,
Ms. Nabanita Chatterjee, Adv.,
Sk. Sajauddin, Adv.

For the State:

Mr. Ranabir Roy Chowdhury, Adv.,
Ms. Faria Hossain, Adv.,
Ms. Baisali Basu, Adv.

Heard on: 23 February, 2022.

Judgment on: 02 March, 2022.

BIBEK CHAUDHURI, J. : –

1. The accused suffered conviction and sentence in Special T.R Case No.28 of 2006 under Section 10 of the Protection of Children from Sexual Offences Act (hereinafter POCSO Act for short). The learned trial judge

passed the order of sentence of imprisonment for six years and fine of Rs.20,000/-, in default of payment of fine, further imprisonment for five months.

2. The said judgment and order of conviction and sentence is assailed in the instant appeal. On 24th September, 2015 at about 10.20 pm at night, one Pradip Das lodged a complaint stating, inter alia, that his minor daughter aged about 11 years was a student of class-VI of a local school. She used to take tuition with other students from Tarak Das who used to reside at Das Para near Shani Temple. On 24th September, 2015 at about 10 am in the morning his daughter went to her private tutor to attend tuition class. At about 12 noon, the wife of the defacto complainant went to the house of the accused to bring her back, she found her sobbing and terrorized. On being asked, the daughter of the defacto complainant initially did not state anything. On repeated persuasion, at about 4 pm she informed that on that very date four girls went to take tuition to the accused. After imparting tuition for a while, the accused/teacher told other three girls to go home and asked the daughter of the defacto complainant to stay with him on the pretext that he would teach mathematics to her. Suddenly the accused embraced her daughter from behind, removed the cloth from her chest and kept on pressing her recently developed immature breasts and went on telling, “are you feeling anything, did you have your period”. The victim cried out loudly and he left her after threatening her not to inform about the incident to anyone. The mother of the victim informed the matter to the defacto complainant

who was working at the relevant point of time at Belgachia. Hearing such incident he returned to home and then went to the house of the accused and made a complaint against the accused to his mother Durga Das. But she misbehaved with the defacto complainant and helped her son to flee away. Then he lodged a written complaint in the local Police Station.

3. On the basis of the said complaint Domjur P.S Case No.927 dated 24th September, 2015 under Sections 354/506/109 of the IPC and 10/12 of the POCSO Act was registered against the accused.

4. Investigation of the case ended in filing charge-sheet against the appellant under Section 10 of the POCSO Act.

5. Learned trial judge on careful consideration of the evidence on record convicted the accused under Section 10 of the POCSO Act and sentenced him accordingly.

6. It is submitted by Mr. Manjit Singh, learned Advocate for the appellant that the facts and circumstances of the instant case clearly shows that the appellant was a victim of circumstance. It is alleged by the defacto complainant in his written complaint that the appellant partially disrobed the victim and pressed her immature breasts. It is on record that the appellant used to stay in his house with his mother, wife and one child at the relevant point of time. Mr. Singh has raised the question as to whether it is possible for a person to disrobe a girl aged about 11 years in his house where his wife and mother and a child also used to reside with the appellant. The defacto complainant stated in his written complaint that at the time of the alleged incident the victim reportedly cried out

loudly. Surprisingly enough, no other inmate of the same house heard her cry when she was allegedly abused by the appellant.

7. Mr. Singh next submits that in a case sexual abuse, the evidence of the victim girl is of much importance. If the court is of the opinion that the evidence of the victim is believable, trustworthy and unblemished, an accused can be convicted on the basis of sole testimony of the victim. It is also an established principle of law that the victim's evidence cannot be equated with the evidence of an accomplice. On the other hand, the victim is to be treated as an injured witness and much importance is to be given to her evidence. With this introduction, learned Counsel for the appellant draws my attention to the evidence of the victim girl. It is ascertained from her evidence that on 24th September, 2015 at about 10 am, she reached the house of the appellant to take private tuition. It is also stated by the victim girl that 6/7 others students used to read under the appellant privately along with the victim. On the date of occurrence the appellant completed imparting tuition at about 10.30/11 am. Then he asked all students except the victim girl to go to their respective houses. He asked the victim to wait stating that he would show some to her.

8. At the time of private tuition, the students were discussing about their body weight. When the victim was staying alone in the room the appellant asked her whether her body weight was only 36 kg. He also told that seeing her nobody can believe that her body weight was 36 kg. Then, he took her to the terrace of the house to show her flowering plants. Then they came to the ground floor and the appellant took her to the

Thakurghar of the house. Thereafter, the appellant closed the window of the *Thakurghar* from inside, the victim was standing outside the main door of the *Thakurghar*. Suddenly the appellant embraced her from her backside and lifted her. She raised objection. The appellant told her that nothing would happen. Thereafter, he started to press her breasts by his hand. The victim girl requested him repeatedly to leave her but the appellant did not. On the contrary, he asked her about her feelings. He also asked her whether her menstruation was started or not. When the appellant was pressing her breast by his hands, she raised alarm. She told him that she wanted to go to her home. Then the appellant again took her to the roof to show flowering plants so that she would forget the incident. She also told her not to disclose anything to others. Then the appellant brought her to the ground floor of the house. At that time the wife of the appellant came to the place and told her that her mother had come to take her back. She immediately left the house of the appellant with her mother. After she reached the home, the victim started weeping. The mother of the victim asked her as to why she was crying. She disclosed the entire incident to her mother. Her mother informed the incident to her father over phone. Her father returned home on that date at about 7 pm and went to the house of the appellant. The appellant was present in his house. The father of the defacto complainant asked about the incident to the appellant. Initially he denied the incident. At that time mother of Tarak entered into the scene and helped him to flee away.

9. It is submitted by Mr. Singh, learned Advocate for the appellant that the FIR is not an encyclopedia. It is not necessary to narrate every minute detail of the incident in the FIR but the FIR was conspicuously silent about the manner of incident that allegedly took place. It is not stated in the written complaint that the victim girl and other students were discussing in their class about their body weight and the appellant told the victim girl that nobody could believe that her body weight was 36 kg at the relevant point of time seeing her. If the above incident is believed, the sexual intent of the accused to abuse the victim started hearing her body weight. This is an important circumstance which should have been found place in the written complaint. The narration of the story that the victim was initially taken to the terrace of the house by the appellant to show her flowering plants and thereafter brought her to the ground floor in front of the Thakurghar and she was sexually abused there is also not stated in the written complaint. According to the learned Counsel for the appellant these are material omissions amounting to contradiction and the trial court ought to have considered the said circumstances to ascertain the veracity of the case. It is further submitted by the learned Counsel for the appellant that the other students who went to the house of the appellant to take private tuition were also not cited as witnesses in the instant case.

10. It is further submitted by the learned Advocate for the appellant that the evidence of parents of the victim girl as well as PW4 and PW5 are in the nature of hearsay and their evidence cannot be relied upon. The

learned Advocate for the appellant next draws my attention to the evidence of PW7 Dr. Mala Chatterjee who examined the victim girl on 25th September, 2015 at about 9.30 pm. She did not find any mark of injury on her body, but she was mentally depressed. The patient stated that her private tutor first touched her breast and abdomen by hands. The learned Counsel for the appellant calls upon the court to consider as to whether breast of a minor girl aged about 11 years is developed or not. When the allegation against the appellant is that he was pressing the breast of the victim repeatedly, there ought to be some marks on the said part of the body because of the fact that the victim was a girl of tender age.

11. It is submitted by the learned Advocate for the appellant that other students are still taking tuition under the appellant. The students of the appellant and their fathers submitted representations stating, that the incident dated 24th September, 2015 was palpably false and concocted for the purpose of the case. The appellant is a person of good character and decent manner. They raised doubt against such allegation. He also draws the attention of this court of the order dated 3rd December, 2021 granting bail to the appellant by this court where this court observed that the petitioner is transformed to a responsible citizen of the country considering the service rendered by him in the Correctional Home. Considering such aspect of the matter Mr. Singh has prayed for acquittal of the accused.

12. Learned P.P-in-Charge, on the other hand, submits that there is no reason to disbelieve the evidence of the victim girl in the instant case. It is

in evidence that after the incident the mother of the victim went to take her back to their house. At that time she saw her sobbing and terrorized. Returning home on repeated persuasion the victim narrated the incident. Though the victim did not commit any wrong, she was suffering from guilty feeling. Considering such aspect of the matter the evidence of the victim girl should be treated as trustworthy and unblemished. It is also submitted by the learned P.P-in-Charge that the Medical Officer examined the victim girl on 25th September, 2015. Of course she did not find any injury on her body but found her mentally depressed. The said fact was written in the injury report which was marked in the trial court as exhibit. Mental depression of the victim was due to the reason of abuse which was perpetrated upon her on 24th September, 2015 when she went to the appellant to take her private tuition.

13. It is also contended by the learned Advocate for the state-respondent that the FIR discloses only commission of cognizable offence. It is not necessary to be encyclopedia where every minute detail is required to be stated. The FIR disclosed a incident dated 24th September, 2015 involving the victim and the appellant with the allegation that the appellant being her private tutor sexually abused her. Thus, the FIR does not suffer from any contradiction or material omission.

14. In order to prove charge under Section 10 of the POCSO Act, evidence of the minor victim is of absolute importance. It is needless to say that the POCSO Act has been enacted to protect children from offences of sexual assault, sexual harassment and pornography. The

incidents of child sexual abuse demonstrate the inhumane mindset of the abuser who have been barbaric in their approach towards child victim. Children are becoming easy prey because of their tender age, physical vulnerability and inexperience of life and society. Children are abused on various pretexts. Sometimes the offender poses to be an innocent friend of the victim and during their interaction they abuse sexually the innocent children who often do not know or understand the specific act of the accused. In the instant case, it is found from the evidence of the victim girl who was aged about 11 years that the offender did not want to believe that her body weight was 36 kg at the relevant point of time and he being a man of 38 years lifted the victim presumably to ascertain her body weight. Then he pressed her breasts. The learned Advocate for the appellant repeatedly urged if the breasts of the victim, aged about 11 years, were developed at all or not. The answer to this question lies in the nature of offence itself. Incidents of sexual abuse upon children below 18 years of age show acute perversity of the offender.

15. It is needless to say that the victims of the offence of sexual abuse are the little children. The principal witness being a child, the law recognizes the child as a competent witness but a child particularly of tender age who is unable to form a proper opinion about the nature of incident because of immaturity of understanding is not considered by the court to be a witness whose sole testimony can be relied without other corroborative evidence. The evidence of a child is therefore required to be evaluated carefully because she is an easy prey to tutoring. So, the court

always looks for adequate corroboration from other evidence to his/her testimony. The above principle regarding appreciation of evidence of a child witness is laid down in **Vhagwan Singh vs. State of MP** reported in **(2003) 3 SCC 21**.

16. At the same time, considering the peculiar nature of the offence the court must be sensitive that the offence of sexual abuse is committed in secrecy. The offender takes all sorts of precaution for commission of such offence secretly.

17. Thus, while appreciating the evidence of a child victim qua the offence, the court must strike a balance between the principle laid down by the Hon'ble Supreme Court with regard to appreciation of evidence of a child witness and the fact that the offence is committed in secrecy.

18. Under the above backdrop if the evidence of the victim girl (PW2) is assessed and evaluated it would be found that the accused first took her to the terrace of the house to show her flowering plants. Then they came down. The accused then took her to the Thakurghar of the house and closed the window. The victim was standing in front of the door of the Thakurghar. Then he embraced her from behind and lifted her while telling that he did not believe what she stated about her body weight. Up to this point, the victim did not understand anything about foul play of the accused. Then he started to press her breast and asked her how she was feeling. He also asked her whether her menstruation was started or not. From the evidence of mother of the victim (PW3) it is found that she saw her daughter sobbing and terrorized. When she was taken to the

house and asked by her mother as to whether anything had happened she did not initially disclose the incident and was weeping subsequently she narrated the incident to her mother. The evidence of the mother of the victim is admissible on the principle of *res gestae*. On 25th September, 2015 the victim was medically examined. The Medical Officer obviously did not find any injury on her person but the doctor (PW7) recorded that she was mentally depressed at the time of her medical examination. The above evidence of the mother and the Medical Officer coupled with the specific conduct and behaviour of the minor are the instances of corroboration of victim's evidence and there cannot be any reason to disbelieve her evidence about the incident.

19. In view of the above discussion, I do not find any reason to interfere with the order of conviction passed by the learned trial judge against the appellant.

20. For the reasons stated above I am of the view that the prosecution was able to prove the foundational fact of the case and the reverse burden was upon the accused to prove the contrary. The appellant failed to prove the contrary under Section 29 of the POCSO Act.

21. Now comes the question of sentence. The learned trial judge sentenced the appellant to suffer imprisonment for six years and to pay fine Rs.20,000/-, in default to suffer further imprisonment for five months.

22. Learned Advocate for the appellant draws my attention to an order dated 3th December, 2021 wherein this Court, while granting bail to the

appellant recorded that in the correctional home the appellant has been working as E-Prison Writer and managers to upload and transmit various data regarding the number of prisoners, their conditions, medical status etc. in E-Prison system. Moreover, he is working as a teacher of inmates of the correctional home and he has been rewarded with a certificate by the Welfare Officer of the Presidency Correctional Home on Teachers day for his contribution as a teacher. He is pursuing his studies as a student of Zoology Honours. Therefore the appellant is transformed to a responsible citizen of the country while in Correctional Home.

23. In view of such changing circumstances, it is submitted by the Counsel for the appellant that the appellant may be directed to suffer minimum sentence of imprisonment as prescribed under Section 10 of the POCSO Act.

24. I have duly considered the submission made by the learned Counsel for the appellant. The sentence of imprisonment passed by the learned trial judge is reduced by one year and the appellant is sentenced to suffer imprisonment for five years for committing offence under Section 10 of the POCSO Act. Remaining portion of the sentence with the direction of set off under Section 428 of the Code shall remain unaltered.

25. The appeal against conviction is therefore set aside. The order of sentence is modified as hereinabove.

26. Let a copy of this judgment be sent to the learned court below along with the lower court record.

27. Let a copy of this judgment duly countersigned by the ACO of this Court be also handed over to the appellant through the learned Advocate on record.

(Bibek Chaudhuri, J.)