

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.A 550 of 2019

Chitta Biswas

Vs.

The State of West Bengal & Anr.

For the appellant: Mr. Prabir Majudmer, Adv.,
Mr. Snehansu Majumder, Adv.

For the State: Ms. Sreyashee Biswas, Adv.,

Heard on: 16 March, 2022

Judgment on: 13 May, 2022

BIBEK CHAUDHURI, J. : –

1. The appellant faced conviction under the charge of Section 10 of the Protection of Children from Sexual Offences Act (hereafter described as the POCSO Act) and sentenced to suffer rigorous imprisonment for six years with fine of Rs.20,000/-, in default rigorous imprisonment for six months for the aforesaid offence passed in Sessions Trial No.III (X) of 2018 arising out Sessions Case No.7(08) of 2018 passed by the learned Additional Sessions Judge, 2nd Court at Krishnagar, Nadia. In the instant appeal, the convict/appellant has challenged the legality and correctness of the aforesaid judgment and order of conviction and sentence.
2. On the basis of a written complaint submitted by one Parimal Biswas alleging, inter alia, that on 18th August, 2018, his minor daughter

aged about nine years went to the house of his brother Rahul Biswas to defecate as they had no toilet in their house at the relevant point of time. On her way to the house of her uncle, accused Chitta Biswas forcibly took her, behind the latrine situated beside the house of one Manoka @ Mannoda Patwary and pulled down her pant. The accused then opened his pant, touched the breast of the daughter of the defacto complainant and also touched her private part with finger. When he tried to commit rape upon her, the said minor girl cried out attracting local villagers. The villagers apprehended the accused in such condition and manhandled him. Then he was sent to Saktinagar Hospital for medical treatment.

3. On the basis of the said complaint police registered Kotawali P.S Case No.374 dated 18th August, 2018 under Sections 4/6/8 of the POCSO Act and also under Section 376(2)(i) of the IPC.

4. After charge-sheet being filed, the accused appeared before the trial court to face trial. Charge under Section 376(2)(i) of the IPC and Section 6 of the POCSO Act were framed against the accused. He pleaded not guilty. Accordingly trial of the case commenced. During trial, prosecution examined ten witnesses. The accused was also examined under Section 313 of the Code of Criminal Procedure.

5. Defence case as disclosed from the trend of cross examination of the witnesses on behalf of the prosecution and examination of the accused under Section 313 of the Cr.P.C appears to be complete denial of the prosecution case.

6. The learned trial judge on careful perusal of the evidence on record, both oral and documentary convicted and sentenced the accused in the manner aforesaid. Hence the instant appeal assailing the impugned judgment and order of conviction and sentence.

7. Out of the ten witnesses, the victim girl deposed before the trial court as PW1. It appears from her evidence that at the relevant point of time she was student of class-IV. She stated in her evidence that on 18th August, 2018 at about 8 am when she was going to the house of his uncle Rahul Biswas to use their lavatory, accused came from behind, covered her mouth by his hand and took her to the house of Mannoda Patwary @ Manoka who is the aunt of the victim girl. Then the accused pulled down her pant, touched her breast and inserted his finger into her vagina. In the mean time, her aunt came to the spot. Seeing the accused and the victim in such condition she raised hue and cry. The victim also cried out. Then the accused tried to flee away but the local villagers apprehended and assaulted him. She also stated that she narrated the incident to the learned Magistrate when she was produced before him. She identified her signature on her statement recorded under Section 164 of the Cr.P.C. she further stated that she was medically examined by the doctor. Her signature on the Medico Legal Examination Report is marked as Exhibit-2/1. In cross examination, PW1 stated that their house is situated in front of the road by the side of their uncle's house. The houses of his uncle's are situated and at the last on the row, there is a house of her uncle Rahul Biswas. She also stated that there was no lavatory and

latrine in their house at the relevant point of time and they used the lavatory and latrine of Rahul Biswas. From her evidence it is also ascertained that the incident took place on the varanda of Manoka Patwary. The accused forcibly laid her down on the ground.

8. PW2 Parimal Biswas is the father of the victim girl. He corroborated the evidence of the victim girl that on the date of occurrence at about 8 am her daughter went to the house of his youngest brother to defecate. At that time the appellant gagged her mouth and took her to his cousin brother's house. At that time the sister-in-law of the defacto complainant was not present in the house. The accused tried to commit rape upon his daughter. At that point of time his sister-in-law (boudi) entered into the room and seeing the accused and victim in such condition she raised hue and cry which attracted local people they apprehended the accused and assaulted him. PW2 further stated in his evidence that at the time of occurrence he was plying Toto in their village. His brother informed him about the incident over phone and he rushed to his house. PW2 lodged an FIR against the accused in the police station. One Ramen Bapari wrote the complaint as per his instruction. Thereafter he put his signature on the said written complaint. The signature of the PW2 on the written complaint was marked as Exhibit-3/1. During investigation police seized the wearing apparel of the victim under a seizure list and he put the signature on the said seizure list which was marked as Exhibit-4/1.

9. PW3 Manoka @ Mannoda Patwary claimed herself to be the eyewitness of the occurrence. From her evidence it is ascertained that the

incident took place on the verandah of her house. At the relevant point of time she was not present in her house. When she returned, she saw the victim girl lying on her verandah in naked condition and the accused was sitting behind the victim girl. Seeing PW3, the victim girl cried out and the accused tried to flee away. However hearing cry of the victim, relatives staying adjacent to the house of PW3 rushed to the place of occurrence and apprehended the accused. Statement of PW3 was also recorded during investigation under Section 164 of the Cr.P.C.

10. PW4 Ramen Bapari, PW5 Rinku Biswas and PW7 Jyotirmoy Biswas came to know about the incident after it happened from local people. Therefore, the evidence of the above named witnesses are not of much importance being hearsay in nature.

11. PW6 Dr. Swadesh Garai is the Medical Officer attached to Nadia District Hospital on 18th August, 2018. He medically examined the victim girl on examination, he did not find any injury in the private part of the victim or any other part of her body. PW8 Dr. Anirban Pal is the Medical Officer who conducted examination of the accused to ascertain as to whether he was sexually capable or not and on examination he submitted a report informing, inter alia, that there is nothing to suggest that the accused was incapable of performing sexual act in normal circumstances.

12. PW10 is the Investigating Officer of this case.

13. Learned Advocate for the appellant submits that the appellant was falsely implicated by the defacto complainant because of a landed dispute. He did not commit any offence as alleged. From the cross examination of

PW3 Manoka Patwary it is found that she saw the victim lying on her varanda in naked condition and the accused was sitting by her side. The accused did not commit any offence of sexual assault or aggravated sexual assault. PW3 did not see the accused touching the private part of the child or made the child to touch the private part of the accused. Therefore, the accused cannot be held guilty for committing offence under Section 9 of the POCSO Act, punishable under Section 10 of the said Act.

14. Learned P.P-in-Charge, on the other hand, submits that in an offence of sexual violence or sexual assault, the evidence of the victim girl is of utmost importance. In her evidence the victim girl stated that the accused forcibly took her to the house of PW3, pulled down her pant, touched her breast and vagina. When PW3 appeared at the spot she found the victim lying on her varanda in naked condition and the accused was sitting beside her. If the evidence of PW1 and PW3 are taken together there would be no ground to raise any doubt in the evidence of the victim girl.

15. The appellant/accused is prosecuted for the charge aggravated penetrative sexual assault. During trial the learned judge found that the accused did not commit any offence of penetrative sexual assault and therefore he held that the accused is liable to be convicted for the charge of aggravated sexual assault within the meaning of Clause (m) of Section 9 of the POCSO Act. As per the definition of sexual assault, "physical contact with sexual intent without penetration" is the essential ingredient for the offence. The definition of Sexual Assault starts with the words:

Whoever with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus, or breast of such person or any other person or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

The words 'any other act' encompasses with itself, the nature of the acts which are similar to the acts which have been specifically mentioned in the definition on the premise of the principle of "Ejusdem-generis". The act should be of the same nature or close to that.

16. In the instant case it is found from the evidence of the victim girl that when she was going to her uncle's house to defecate, the accused caught hold of her from behind, gagged her mouth and forcibly took her to the house of PW3. Then he pulled down the pant of the said minor girl, touched her breast and vagina. PW3 saw the victim lying on the varanda in naked condition and the accused was sitting by her side. The surrounding circumstances like the accused having taken the victim to the house of PW3 when she was not present, pulling down her pant, making her naked amply prove culpable mental state of the accused and in such a case, the court is entitled to raise statutory presumption about the culpable mental state of the accused as permitted under Section 30 of the POCSO Act. The said presumption has not been rebutted by the

accused by proving that he has no such mental state. Therefore, sexual intent of the accused is established beyond any shadow of doubt.

17. Learned Advocate for the appellant submits that nobody saw the accused touching private part of the victim and from the evidence of PW3 it is found that the accused was sitting by the side of the victim girl who was lying on the varanda of PW3 in naked condition, the accused ought to have been convicted under Section 11 of the POCSO Act for the offence of sexual harassment. I am not in a position to accept such submission made by the learned Advocate for the appellant because there was no reason for not to treat the specific acts by the appellant as the acts of sexual assault within the meaning of Section 7 of the POCSO Act.

18. For the reasons stated above, I do not find any ground to interfere with the judgment and order of conviction and sentence passed by the learned court below. For the reasons stated above the instant appeal is dismissed on contest.

19. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 2nd Court at Krishnagar in Sessions Trial III(X) of 2018 arising out of Sessions Case No.07(08) of 2018 (Special) is affirmed.

20. Let a copy of this judgment be sent along with the lower court record.

(Bibek Chaudhuri, J.)