

Form No.J(1)

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

Present:

The Hon'ble Justice Tirthankar Ghosh

C.R.A.(SB) 3 of 2023

***Md. Mustakin*
versus
The State of West Bengal and another**

For the appellant : Mr. Angshuman Chakraborty,
Mr. S.S. Saha.

For the State : Mr. Saswata Gopal Mukherjee, Ld.P.P.,
Mr. Sandip Chakraborty.

For the de facto complainant: Mr. Saryati Datta.

Heard On : 16.05.2023, 10.05.2023 and 04.05.2023.

Judgement On : 16.05.2023

Tirthankar Ghosh, J. :

The present appeal has been preferred against the judgment and order of conviction and sentence dated 10.12.2019 passed by the learned Additional Sessions Judge-cum-Special Judge under POCSO Act, 2012, First Court, Sealdah, South 24 Parganas in connection with Special Case No.4(11) of 2019 wherein the learned trial court was pleased to convict the appellant under Section 10 of the POCSO Act and sentenced him to suffer imprisonment for

five years and to pay fine of Rs.50,000/-, in default rigorous imprisonment for six months more.

Ultadanga Women Police Station Case No.12 dated 15.10.2019 was registered for investigation under Sections 8 and 12 of the POCSO Act, 2012. The fact of the case as is reflected from the formal FIR which was registered on the basis of complaint of 'Y' father of the victim girl aged about 7 years were to the effect that on 15.10.2019 at about 3.30 hrs. on the bank of canal near Jhupri, 14, Canal West Road, Kol-09 P.S. Narkeldanga the accused Mustakin with sexual intent touched the vagina of the minor girl 'X' and made the child exhibit his private parts.

On the basis of the aforesaid complaint, investigation commenced and on conclusion of investigation charge-sheet was submitted before the jurisdictional special court under Section 8/12 of the POCSO Act. Learned trial court after supply of the papers on which the prosecution intended to rely framed charges as follows:

“Firstly, That you on 15.10.2019 at about 3.30 hours near a khaldhar under Ultadanga PS committed aggravated sexual assault upon the minor victim and thereby committed an offence punishable u/sec.10 of POCSO Act and within the cognizance of this Court.”

The said charge was read over to the appellant to which he pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon nine witnesses which included PW 1 Dr. Ankita Upadhyay; PW 2 'X' victim girl; PW 3 'Y' father of the victim girl; PW 4 Suraj @ Kurban, a neighbour; PW 5 Amina Bibi, a neighbour; PW 6 Sekhar Roy, A.S.I. of Police, DD Lalbazar photography section; PW 7 Keya Sarkar, lady constable who took the victim to the Judicial Magistrate; PW 8 Riya Roy, lady constable who took the victim to R.G. Kar Hospital for treatment; PW 8 Ratna Sarkar, Investigating Officer of the case.

The prosecution in support of its case relied upon number of documents which will be dealt with in course of the discussion relating to the evidence which surfaced in course of the trial.

PW 1 is Dr. Ankita Upadhyay who was attached to R.G. Kar Medical College and Hospital. In her deposition, she stated that she examined 'X' aged about 7 years who was produced before her by the Investigating Officer, namely, Ratna Sarkar. The history in the report reflected that on 15.10.2019 at about 3.30 hours accused Md. Mustakin with sexual intent touched the vagina of child and made her exhibit his private parts on the bank of canal near their residence. She further deposed that on examination she did not find any visible external injury, bite mark, no bleeding or any discharge from private parts, hymen was intact. She identified the medical report which was prepared and signed by her.

PW 2 is the victim girl 'X', she deposed that when she was sleeping outside her house when Mustakin gagged her face and took her near the

Khaldhar under a tree and removed her pant but did nothing. The person named Suraj saved her and took her to their house, she informed the incident to her father who lodged the case. She was subsequently taken to doctor or to the hospital. She identified the accused Mustakin in court.

PW 3 'Y' is the father of the victim girl who deposed that her daughter 'X' is aged about 7 years. On 15.10.2019 the incident took place at 03.00 a.m. in front of the Gate of Gas company within the jurisdiction of Narkeldanga Police Station. At the relevant time he was sleeping at his home and his daughter was also sleeping with her, when she had been to bathroom for nature's call, one Mustakin took her daughter after gagging her face under the Khal. The accused thereafter engaged himself in removing her pant and Suraj @ Kurban saw the incident and rescued his daughter from him. The incident was narrated by her daughter to him when he filed the case at Narkeldanga Police Station. Police authorities scribed the written complaint wherein he signed. He identified his signature which was marked as Exhibit 2. Witness also identified the accused in court.

PW 4 Suraj @ Kurban deposed that he knew the victim 'X' and narrated that on the date of incident at about 03.00 a.m. he was sleeping near Khaldhar. When he woke up for drinking water at that time he saw that Mustakin was taking 'X' by gagging her face and as he shouted the accused Mustakin left the child, he rescued the child and handed her to her father. Witness identified the accused in court and further stated that he narrated the

incident which he saw to learned Magistrate who wrote it down as per his dictation where he inserted his LTI.

PW 5 is Amina Bibi, an acquaintance of the family. She stated that she was working at the fish market and was acquainted with the victim girl. However, she knew nothing about the incident and only took the victim to hospital as the mother was not available at that time.

PW6 is Sekhar Roy, an ASI of Police attached to Photography Section, D.D. Lalbazar and on 08.03.2014 he had been to Ultadanga Women Police Station and according to verbal direction of the Officer-in-Charge, scientific wing, he took snaps in respect of the place of occurrence in connection with Ultadanga Women Police Station Case No.12 dated 15.10.2019 under Sections 8 and 12 of the POCSO Act. He identified the seven photographs along with chip.

PW 7 is Keya Sarkar, a constable attached to Ultadanga Women Police Station who produced the victim before the learned Magistrate for recording her statement under Section 164 of the Code of Criminal Procedure.

PW-8 is Riya Roy, a constable attached to Ultadanga Women Police Station who produced the victim for her medical examination at RG Kar Medical College.

PW-9 Ratna Sarkar, LSI attached to Ultadanga Women Police Station and the investigating officer of the case who narrated the chronology of events in course of the investigation relating to recording of statement of the father of

the victim which on being identified was marked as Ext.2/1. Preparation of the formal FIR by her which was signed and on being identified was marked as Ext.4. There was a direction of the Officer-in-Charge, Ultadanga Women Police Station for investigation of the case. She also narrated regarding the visit at the place of occurrence along with recording of statements of the available witnesses under Section 161 Cr.P.C., sending the victim to the hospital and collection of the medical report. She also sent the victim and another witness for their statements to be recorded under Section 164 Cr.P.C. She identified the statements under Section 164 Cr.P.C. of both the victim as well as the witness which was marked as Exts.5 and 6 respectively. She also sent requisition to the photography section of Lalbazar for taking photographs of the place of occurrence and also arrested the accused and produced him before the Court and on completion of investigation submitted charge-sheet under Sections 8/12 of POCSO Act.

Before dealing with the evidence for the purpose of the present case, Exts. 5 and 6 which are statements under Section 164 Cr.P.C. are required to be assessed. Ext.5 is the statement of Sk. Kurban. He in his statement before the Learned Magistrate stated that at about 3 am when he woke up for drinking water he had to go near Narkeldanga Police Station for collecting water, as the bottle was empty. At that time he saw Mustakin was carrying a child after gagging her face. He tried to get hold of Mustakin. However, the accused escaped when he took the child and handed over her to her father. Ext.6 is the statement of the victim under Section 164 Cr.P.C. The victim

stated that she was sleeping under the tree when a boy came and gagged her face and took her at a distance and opened her pant when another person came down, the accused left her and ran away.

Mr. Chakraborty, learned advocate appearing on behalf of the appellant submitted that the appellant has been falsely implicated in connection with the instant case and there were no independent witnesses who supported the case of the prosecution. According to learned advocate, the present appellant has been victimised because of social uproar and there are no medical document supporting the claim of any sexual assault being inflicted upon the victim. As an alternative relief, learned advocate prayed for consideration of the sentence which has been excessively imposed by the learned trial court.

Mr. Mukherjee, learned Public Prosecutor appearing on behalf of the State opposed the contentions advanced by the appellant and submitted that in this case there is an independent eyewitness who has seen the occurrence. The provisions of Sections 29 and 30 of POCSO Act would come into aid of prosecution because of the no explanation being advanced on behalf of the accused regarding the custody of the child at 3 am in the midnight.

Learned Public Prosecutor additionally submitted that the nature of the crime complained and the evidence which surfaced in the present case reflects perversion and the present appellant under no circumstances is amenable to correction thereby warranting any leniency in the sentence so imposed by the learned trial court.

Mr. Dutta, learned advocate appearing for the de facto complainant submitted that the age of the child at the relevant point of time was about 7 years. Records reflect that the accused has committed a heinous offence as the act complained of falls within the definition of “sexual intent” as appearing in the explanation to Section 11 of the Act. The conduct of the accused also falls within the definition of Section 9(m) and as such the accused is liable to be punished under Section 10 as held by the learned Special Court. Learned advocate supported the judgment and sentence so imposed by the learned trial court.

I have considered the evidence as a whole including the statements of the victim and Sk. Kurban/Suraj (PW4). On an assessment of the overall evidence of the case, I find that in the Ext.5 (statement of Sk. Kurban) who had been an eyewitness stated only to the extent that the girl child was being taken by Mustakin while gagging her face/mouth. On the other hand, the victim has alleged in a statement regarding the removal of her pant.

Having considered the totality of the circumstances particularly with regard to the contents of the statements of the victim and the other witness (eyewitness), I am of the opinion that the case made out by the prosecution is under Section 18 read with Section 10 of POCSO Act.

Consequently, the finding of guilt of the learned Special court is not interfered with but the same would be altered to an attempt to commit an offence under Section 10 of POCSO Act.

In view of the aforesaid observations, the sentence so imposed requires to be considered afresh.

Records of the trial court reflects that the appellant was arrested on 15.10.2019 and he faced custody trial and was released by the appellate court on 13.02.2023 which amounts to the appellant having served sentence for a period of 3 years 4 months.

In view of the period of custody which has been suffered by the accused/appellant in this case, I am of the opinion that further detention of sentence of the appellant is not required. Accordingly, the sentence is modified to the extent which has already been undergone or served out by the appellant.

Thus, CRA(SB) 3 of 2023 is partly allowed.

Pending application, if any, is consequently disposed of.

Department is directed to send back the lower court records and inform the outcome of the appeal to 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 photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Tirthankar Ghosh, J.)

