

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 30 of 2019

Tarak Biswas

Versus

The State of West Bengal & Anr.

For the appellant : Mr. Anjan Bhattacharya, Adv.
Mr. Anita Shaw, Adv.

For the Respondent No. 2 : Ms. Sreyashee Biswas, Adv.

For the State : Mr. Saswata Gopal Mukherjee, Ld. P.P.
Mr. Parthapratim Das, Adv.
Mrs. Manasi Roy, Adv.

Heard on : 30.01.2023

Judgment on : 13.02.2023

Ajay Kumar Gupta, J:

1. The instant appeal has been assailed by the appellant against the judgment and order dated 10th July, 2018 and 11th July, 2018 whereby convicted and sentenced the appellant by Learned Additional Sessions Judge, 2nd Court-cum-Special Court under POCSO Act, 2012 at Barasat, North 24-Parganas, in connection with Sessions Trial No. 03 (12) of 2017 arising out of Computer No. 961 of 2017 to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 10,000/-, in default, to suffer further imprisonment for 1 year for offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012.

2. The complainant being the grand-mother of the victim lodged a complaint against the appellant to the effect that her grand-daughter lives with her since her childhood. On 14.10.2017 at about 7 p.m. in the evening, her sister-in-law told her to enquire about why victim girl was weeping. When she asked her the reason for weeping, she disclosed that in the evening of Laxmi Puja i.e. on 05.10.2017 appellant called her and took her to his own house where no one else was present. Appellant took off her pant and laid her on the bed and slowly penetrated his male organ into her female organ. When she tried to shout, appellant pushed her

mouth and after spending some time he told the victim to go home. Having heard all these, she went to appellant's house and asked what he had done with the victim he replied that it was a mistake on his part. He asked for apology and quickly left his house. On her complaint Ashoknagar P.S. Case No. 961/2017 dated 14.10.2017 under Section 376(2)(i)(g)/506 I.P.C. and 4 POCSO Act was registered against the appellant.

3. After completion of investigation, charge sheet was submitted against the Appellant. Accordingly, charge was framed under Section 376 (2) of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012. The appellant pleaded not guilty and claimed to be tried.

4. In course of trial, prosecution examined 17 witnesses and exhibited number of documents as Exhibit Nos.1 to 13 respectively.

5. Defence of the Appellant was that he is innocent and has been falsely implicated. No evidence, however, was led on behalf of the defence.

6. After appreciation of the oral evidence and considering the documents exhibited by the prosecution, the Trial Judge, by impugned

judgment and order, convicted and sentenced the appellant as mentioned above. Consequently, the present appeal.

7. At the time of argument, learned counsel appearing on behalf of the appellant submitted that the prosecution case is full of doubts. Complainant lodged a complaint after delay of 9 days from the date of alleged incident without any explanation. Identification of the appellant by the witnesses' during trial bears no significance as he is close neighbour and had acquaintance with the complainant. Appellant has been falsely implicated into this case as there was a long dispute over a path way between the appellant and the grand-mother of the victim girl and Salishi was held between the parties on several occasions. Therefore, all the circumstances as projected by the prosecution are false and fabricated. Victim girl herself admitted during cross-examination that the appellant resides opposite to her house so question of identification does not arise at all. P.W. 7 also admitted that there was a long standing dispute between the appellant and grand-mother of the victim over a path way and there was Salishi held over that dispute between them many times in the village. There are various contradictions amongst the prosecution witnesses. So allegation of rape is out and out false and fabricated due to previous

dispute. All these circumstances would give sufficient reason to acquit the appellant. Therefore, the appellant may be acquitted.

8. Per contra, learned counsel appearing on behalf of the State submitted that the prosecution case is based on direct evidence and it is fully established by the prosecution witnesses especially the victim girl herself. She disclosed appellant took her to his house from the road. He removed her wearing apparel, put his hand on her body and also penetrated his male organ in her female organ. After coming home she was weeping as she was suffering from pain while urinating. Doctor examined her. She narrated the occurrence to her dida (grand-mother), dadu (grand-father), mami (maternal aunt), doctor, police and Magistrate in similar manner. Her version is also corroborated by other witnesses without any contradictions. Medical evidence also supported the prosecution case as such there is no scope to acquit him from the charges because no iota of doubt emerges to give him benefit. Therefore, appeal is liable to be dismissed.

9. I have gone through the oral and documentary evidence brought on record meticulously. which reveals as follows:

P.W. 1, the victim girl narrated appellant took her to his house from the road. He removed her wearing apparel put his hand on her body and his male organ in her female organ. After coming home she was weeping as she was suffering from pain. Doctor examined her. She narrated the occurrence to her dida, dadu, mami, doctor and police and Court. She put LTI before Magistrate. She is afraid on seeing the appellant. During cross examination she admits she does not know Tarak Mama but when Learned Court put question to her where does Tarak reside, she replied Tarak resides opposite to her house. In such situation question of unknown does not arise.

P.W. 2, grand-mother of the victim girl deposed on the night of Laxmi Puja she heard from Mousumi Das that her daughter-in-law i.e. victim girl was weeping. Then she asked her why she is weeping? She told her that appellant took her from road to his house and put his hand all over her body. She also told her that appellant then removed her pant, and put her on cot and also put his male organ into her female organ. He gagged her mouth when she was crying. After sometime he left her saying go to home threatening her to kill her if she disclosed anything to anyone. She went to house of appellant and asked what he did on the said night of Laxmi puja with her grand-daughter. Appellant begged to be pardoned

admitting he committed mistake and fled away. Thereafter, she went to police station where Dipankar Das scribed complaint as dictated by Mejo babu of thana. She narrated occurrence to mejo babu. She put L.T.I. on the complaint. Police took her grand-daughter to hospital accompanied by her. Her grand-daughter was examined by doctor. She produced birth certificate before police marked as Ext. 1.

P.W. 3, deposed victim girl is daughter of his sister-in-law. De facto complainant is his pisi sasuri. In the middle of October last year, de facto complainant came to his house and said that they were ruined. She told appellant Tarak Biswas raped victim girl on day of Laxmi puja 2017. Victim girl was weeping and complained of pain while urinating. Appellant was detained by para boys and confessed his guilt. Police was informed. They went to P.S. and he scribed the complaint in his handwriting. His Pisi put her L.T.I. on his presence after it was read over and explained. He made complaint as per instruction of de facto complainant. Complaint is marked as Ext. 2. He was interrogated by police.

P.W. 4 is aunt of the victim girl and P.W. 5 is uncle of the victim girl. They stated in similar manner on 14.10.2017 victim was weeping. On asking she told that on the day of Laxmi puja on 05.10.2017 appellant

took her into his house put his hand on her body and raped her. Appellant also threatened her by saying that he would kill her if she disclosed anything to anyone. She told occurrence to her sasuri, de facto complainant. They went to the house of appellant. Appellant confessed his guilt. His father offered money for treatment of victim girl which they declined.

P.W. 6, Subodh Das, grand-father of the victim deposed occurrence took place with his grand-daughter on Laxmi puja. His grand-daughter was weeping. On asking her they came to know that appellant raped her. His wife confronted appellant saying why did he do such mischief. Appellant confessed and pleaded for mercy. Para boys collected and detained the appellant when he tried to flee. Police came and took appellant.

P.W. 7, a neighbour of the grand-mother of the victim girl deposed she heard that appellant raped victim girl. Police interrogated her. During cross examination she admitted there was a long standing dispute between Tarak and de facto complainant over a path way. Salishi was held over the disputes many times in the village.

P.W. 8, another neighbour deposed she heard hue and cry from the house of victim girl. Grand-mother of the victim girl told her that victim was raped by appellant. She made statement before the Magistrate. She put signatures on statement marked as Exts. 3/1 and 3/2.

P.W. 10, Dr. Aparna Bhattacharya deposed that on 14.10.2017 she was posted in Ashoknagar State General Hospital. On that date she examined victim girl brought by L.C. 3970 Antara Adhikari of Ashoknagar P.S. She found *“vulva was reddish, clitoris normal, hymen partly torn, fourchette tender, vagina could not be palpated because of tenderness. Uterus could not be examined because hymen was partially torn and two fingers could not be inserted. Vaginal discharge not found. Materials were preserved. No injury found on body. No other abnormality found. She opined that the victim girl might have been handled by someone.”* The report in her hand writing bearing her seal and signature marked as Ext. 5.

P.W. 9, another Dr. Niranjana Biswas deposed on 15.10.2017 he was posted in Ashoknagar State General Hospital. On that date he examined appellant. The patient was capable of sexual intercourse. No injury mark present in his private part. Seminal fluid collected and handed over to police personnel. Report prepared by his own hand writing

bearing his signature marked as Ext. 4. He obtained signature of the patient. The signature of the patient marked as Ext. 4/1.

P.W. 11, Robi Adhikari deposed he know de facto complainant, Rupa Singh and her daughter (victim girl) aged about 6/7 years. Occurrence took place with victim girl on last Laxmi puja day. He heard from para people that appellant raped victim girl. Police visited his house and had a talk with him. He told police that he knew nothing.

P.W. 12, Manik Das deposed on 15.10.2017 he was posted in P.S. Ashoknagar as A.S.I. On that date he escorted the victim girl to Ashoknagar S.D. Hospital accompanied by Lady Constable Antara Adhikari. After medico legal examination of the victim girl, doctor handed over swab to him in a container and semen of the accused in another container. I.O. seized those two containers in his presence and prepared seizure lists marked as Ext. 6/1 and 7/1 respectively.

P.W. 13, Antara Adhikari deposed on 15.10.2017 she was posted in P.S. Ashoknagar as Lady Constable. On that date she escorted the victim girl to Ashoknagar S.D. Hospital. After medico legal examination of the victim girl, doctor handed over swab and semen of the appellant in two

different containers. I.O. seized those two containers in her presence. She was interrogated by I.O.

P.W. 14, Balai Das Sen deposed on 14.10.2017 he was posted in P.S. Ashoknagar as A.S.I. On that date he received original complaint from De facto complainant and made an endorsement on it. This endorsement with his signature marked as Ext. 2/1. The formal F.I.R. filled up by him in his handwriting marked as Ext. 8. The L.T.I. of de facto complainant on the formal F.I.R. was written by his pen marked as Ext. 8/1. He registered Ashoknagar P.S. Case No. 961 dated 14.10.2017 under Section 376(2)/506 I.P.C. and 4 of POCSO Act.

P.W. 15, Atri Chanda deposed on 16.10.2017 she was posted as Judicial Magistrate, 1st Class in 1st Court at Barasat. On that date victim girl was produced before her by L.H.G. 95 Maya Das Baishnab of Ashoknagar P.S. in connection with Ashoknagar P.S. Case No. 961 dated 14.10.2017. She recorded statement of the victim girl in her own handwriting. She obtained her L.T.I. on three sheets marked as Exts. 9/1 to 9/3. The statement bearing her signature in three sheets marked as Ext. 10. She appended certificate after the statement.

On 24.10.2017 she was posted on the same post. On that date Bithika Biswas was produced before her identified by L.H.G. 95 Maya Das Baishnab of Ashoknagar P.S. in connection with Ashoknagar P.S. Case No. 961 dated 14.10.2017. She recorded statement of Bithika Biswas in her handwriting and obtained her signature on each sheet. She appended certificate after the statement. The statement bearing her signature in one sheet marked as Ext. 3.

On 24.10.2017 Tarak Roy was produced before her identified by Constable 1235 Gautam Chatterjee of Ashoknagar P.S. in connection with Ashoknagar P.S. Case No. 961 dated 14.10.2017. She recorded statement of Tarak Roy in her handwriting and obtained his signature on each sheet. She appended certificate after the statement. The statement bearing her signature in one sheet marked as Ext. 11.

P.W. 16, Tarak Roy deposed he knows Apurba who resided in the same locality in which he resided. Mother of Apurbo came to his house on a day in 2017. She told him that appellant committed rape on daughter of sister of Apurbo. He had seen the girl. He know appellant. He made statement before the Magistrate. The signatures on the statement marked as Exhibit Nos. 11/1 and 11/2.

P.W. 17, Sujit Das deposed on 14.10.2017 he was posted as S.I. in Ashoknagar P.S. On that date he received Ashoknagar P.S. Case No. 961 dated 14.10.2017 for investigation as endorsed by the then O/C of the P.S. He recorded statement of complainant. He left P.S. and reached place of occurrence Guma, Kalinagarpally, prepared rough sketch map with index, recorded statement of witnesses. He held raid to apprehend appellant but could not find. He required the guardian of the victim girl to produce wearing apparel of victim girl which she was wearing at the time of occurrence. On production he seized the wearing apparels in P.S. He sent victim as well as complainant under escort of lady constable to Hospital for medical examination. Medical examination report was seized by him. He seized swab in container handed over by lady constable to him in P.S. On information he again raided and arrested appellant on 15.10.2017. He interrogated appellant and forwarded him to Court. He recorded his statement. He sent victim girl and other two persons to Court for recording their statements by Magistrate. He collected statements of witnesses recorded by Magistrate. The sketch map with index in two sheets marked as Ext. 12. The seizure lists under which box containing semen of appellant, glass tube containing vaginal swab of victim girl and wearing apparel of victim girl were seized and prepared in his handwriting

on 15.10.2017 which bearing his signatures marked as Exhibit Nos. 6, 7 and 13. After collecting evidence he submitted charge-sheet consulting his superior against the appellant under Section 376 (2) I.P.C. and 4 of POCSO Act.

Here victim girl clearly narrated that she was raped by the appellant. Her version was also corroborated by the prosecution witnesses P.Ws. 3 to 8. Doctor, who examined victim girl i.e. P.W. 10 found vulva was reddish, clitoris normal, hymen partly torn, fourchette tender, vagina could not be palpated because of tenderness. Uterus could not be examined because hymen was partially torn and two fingers could not be inserted. Vaginal discharge not found. Materials were preserved. No injury found on body. No other abnormality found. She opined that the victim girl might have been handled by someone.

10. So considering the entire evidence of prosecution as well as submission of the parties, I do not find any contradiction amongst the witnesses. It is true that the appellant was identified by the witnesses in Court as he was neighbour at the time of incident but that is not only the criteria for convicting the appellant. There are other ample evidence transpires from the record that the accused had committed the offence as

alleged by the de-facto complainant. The victim girl herself narrated the entire episode which was taken place on the day of Laxmi Puja in the year 2017. She could not bear the pain while urinating and started weeping. On hearing such weeping, the de-facto complainant came to know about the incident of rape. On enquiry, the appellant had confessed his guilt before her and other witnesses. Other circumstances like medical evidence also supported and corroborated the prosecution case. However, several points have been raised by the defence lawyer at the time of argument on the plea of getting benefits for acquittal.

11. Now, let me discuss those points raised by the defence one by one hereunder:-

Firstly, there was a long standing dispute over the path way between the appellant and de facto complainant as such he was falsely entangled into this case but this argument will not help the defence in any way because Salishi was held in the village for such dispute but result of such salishi has not been brought on record by the appellant. The dispute is trifling one and it is not clear whether such dispute continued till the date of incident or not. Moreover, it is evident from the medical report that the minor was raped. It is most improbable that the grand mother would

falsely implicate the appellant over such a trifling issue and screen the real offender who committed such a heinous crime on her granddaughter.

Secondly, it is contended delay in lodging FIR is not explained. It is true there is some delay in lodging FIR. But in rape cases particularly involving minors, delay in knocking the doors of justice is neither unnatural nor uncommon. There are many factors like hesitancy of the minor to come out, fear of social stigma etc. Which cause delay. It might have taken some time to consult her parents and others to decide whether or not, the matter should be reported to the police. Furthermore, overwhelming evidence brought on record probabalise the commission of offence of rape upon the victim girl by the appellant so nine days' delay in lodging FIR is immaterial.

In this context, the Hon'ble Supreme Court in the landmark decision in the case of **State of Punjab v. Gurmit Singh**¹, held as follows:-

*"In **sexual offences delay in lodging** of the FIR can be due to variety of reasons, particularly the reluctance of the prosecutrix or her*

¹(1996) 2 SCC 384: AIR 1996 SC 1393

*family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought a complaint of **sexual offence** is generally lodged. Hence, even if there is some **delay in lodging FIR** in respect of offence of rape would not matter.”*

Thirdly, the victim herself could not identify the appellant during her cross examination creates a serious doubt about the prosecution case. But this point raised by the learned counsel appearing on behalf of the appellant is also feeble and not acceptable in the instant case because Court ought to have scanned whole evidence led by the prosecution. If one goes through the entire evidence, it would appear the victim girl during cross-examination clarified Tarak Mama i.e. appellant resides in front of her house. This clarify proves the appellant as the predator who raped the minor.

I would like to refer well known observation of the Apex Court made in **Appabhai vs. State of Gujarat**²:

² (1988) Supp (1) 3 SCC 241; AIR 1988 SC 696

*“The Court while appreciating the evidence must not attach undue importance to **minor discrepancies**. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance”.*

12. Under such circumstances, this Court fully satisfies with the evidence of the prosecution, which has been proved without any shadow of doubt.

13. In the strength of aforesaid discussion and findings, I held prosecution case against the appellant have been proved beyond reasonable doubt. Conviction and sentence of the appellant is upheld.

14. Appeal is, thus, dismissed.

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

16. Lower Court records along with copies of this judgment are to be sent down at once to the learned Trial Court as well as the Superintendent of Correctional Home for necessary compliance.

17. Photostat certified copy of this judgment, if applied for, is to be given to the parties on priority basis on compliance of all formalities.

I Agree.

(Joymalya Bagchi, J)

(Ajay Kumar Gupta, J)

P. Adak (P.A.)