

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

C.R.A. 69 of 2018

PRAKASH SHAW
VS
STATE OF WEST BENGAL & ANR.

For the Appellant : Mr. Kushal Kumar Mukherjee, Adv.
Mr. Diptangshu Basu, Adv.

For the State : Mr. Joydeep Ray, Adv.
Ms. Sujata Das, Adv.

Hearing concluded on : 16th June, 2023

Judgement on : 21st June, 2023

Siddhartha Roy Chowdhury, J.:

1. This appeal challenges the judgement and order of conviction passed by the learned 2nd Court of Additional Sessions Judge, Special Court under POCSO Act, Howrah in Sessions Trial No. 45 of 2015 on 06.01.2018 and 08.01.2018 respectively.
2. Briefly stated, Mrs. Nitu Prasad of 18 Hem Bose Lane, Shibpur, Howrah set the criminal proceeding into motion by informing Inspector-in-Charge of Howrah Police Station that on 28.9.2014 she along with her daughter went to a market near Mallick Fatak. On their way back at about 9.30 PM while they were walking down the foot path a boy came and pawed her daughter. She screamed and managed to catch hold of

the boy. Within a few minutes police arrived there and took the boy to their custody. The informant came to know that boy as Prakash Shaw of Hut Lane, Mallick Fatak, Howrah.

3. The information since disclosed offence cognizable in nature Howrah P.S. Case No. 610 of 2014 dated 28.9.2014 was registered under Section 354(A) of the I.P.C. read with Section 8 of the Protection of Children from Sexual Offences Act, 2012. Police took up investigation which culminated into submission of charge sheet against the accused person.
4. On 03.12.2015 trial commenced under Section 8 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act') when the accused person stood the trial by pleading his innocence.
5. To bring home charges, prosecution examined three witnesses. The de facto complainant Nitu Prasad adduced evidence as P.W. 1. The victim girl was examined as P.W. 2 and P.W. 3 is the S.I. Soubhik Majumder who submitted charge sheet after investigation.
6. Mr. Mukherjee, learned counsel representing the appellant assails the impugned judgement. According to Mr. Mukherjee, learned Trial Court ought to have considered the discrepancies apparent between the testimony of the de facto complainant and the victim girl. In her written information the informant P.W. 1 stated that the boy came and caught her daughter by hand from behind and placed his hand on the chest of her daughter. While adducing evidence as P.W. 1 she stated that the boy came from the opposite side and thus she contradicted herself.
7. While adducing evidence, P.W. 2 the victim also stated that boy came from the opposite side and pawed her. In her oral testimony P.W.1 the

informant drifted away from her maiden statement that she disclosed in the written information. While adducing evidence as P.W. 1 she stated that the boy came from the opposite side and thus she contradicted herself.

8. It is further contended by Mr. Mukherjee that the victim girl was neither examined by the I.O. nor by Doctor.
9. According to Mr. Mukherjee, it was a crowded place and the alleged touched could have been taken place accidentally. There is nothing to hold that with the criminal intent the accused person committed the act, therefore, learned Trial Court had no reason to record an order of conviction under POCSO Act.
10. The testimony of P.W. 2 indicates that after the boy touched her breast, he was nabbed by her as well as her mother and he was slapped. The place was crowded and soon after the incident police arrived there. The accused person did not utter anything indicating his lack of intention to commit offence. Though the victim was not examined by the I.O. she was produced before the learned Judicial Magistrate and her statement was recorded under Section 164 of the Evidence Act. Subsequently she adduced evidence before the Court on oath. There is no discrepancy between her previous statement before the learned Magistrate and her testimony before the Court. There is nothing to impeach her credibility. When a ring of truth is found in what has been stated by the victim girl before the learned Trial Court, non examination of the victim girl by police is of no consequence and in this regard we can profitably rely upon the Judgement of the Hon'ble Apex Court in the

case of **ALAMGIR VS. NCT DELHI** reported in **AIR 2003 SC 282** wherein it is held :-

“The second limb pertains to the statement under Section 161 Cr.P.C. Admittedly, this piece of evidence was not available in the statement of witness under Section 161 of the Cr.P.C. but does it take away the nature and character of the evidence in the event there is some omission on the part of the police official. Would that be taken recourse to as amounting to rejection of an otherwise creditworthy and acceptable evidence, the answer, in our view cannot but in the negative.”

11. It is rightly adverted by Ms. Sujata Das, learned counsel appearing on behalf of the State that in a case of Section 8 of POCSO Act examination of doctor is not at all required in the given facts and circumstances.
12. Under such circumstances, I do not find any reason, to interfere with the order of conviction.
13. It is submitted by Mr. Mukherjee, learned counsel for the appellant that the appellant was in his teen when the offence was committed and with the passage of time he has become a responsible young man who earns bread for the family. Considering the nature of offence, age of the appellant and also considering the fact he has no criminal antecedent, he may be given benefit of the Probation of Offenders Act, 1958 without subjecting him to the deleterious effect of jail life.
14. To buttress his point Mr. Mukherjee, relies upon judgement of Hon'ble Apex Court in the case of **LAKHVIR SINGH & ORS. VS. STATE OF PUNJAB & ANR.** reported in **(2021) 2 SCC 763.**

15. The Protection of Children from Sexual Offences Act, 2012, is meant to protect children from offences of sexual assault and sexual harassment etc. Preamble of the act indicates that sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.
16. Section 8 of the POCSO Act prescribes three years imprisonment as minimum punishment.
17. Hon'ble Apex Court in **SUPERINTENDENT, CENTRAL EXCISE VS. BAHUBALI** reported in **(1979) 2 SCC 279** held that 1958 Act may not apply in cases where a specific law enacted after 1958 prescribes a mandatory minimum sentence.
18. In **STATE VS. RATAN LAL ARORA** reported in **(2004) 4 SCC 590** it is held by Hon'ble Apex Court inter alia :-

“that in cases where a specific enactment, enacted after the [Probation Act](#) prescribes a minimum sentence of imprisonment, the provisions of [Probation Act](#) cannot be invoked if the special Act contains any provision to enforce the same without reference to any other Act containing a provision, in derogation of the special enactment, there is no scope for extending the benefit of the [Probation Act](#) to the accused.”
19. Probation of offenders Act, 1958, therefore cannot be made applicable in this case in derogation of such special enactment of 2012.
20. In *Lakhvir Singh (supra)* the convicts were found to have committed offence under Section 397 of the I.P.C. Therefore, said judgement is not applicable in this case at hand.

21. The appeal merits no further consideration and is dismissed. Judgement and order passed by learned Trial Court stands affirmed. The convict appellant shall serve out the sentence of rigorous imprisonment for three years subject to the provision as laid down under Section 428 Cr.P.C.
22. The convict shall surrender to the jurisdiction of the learned Trial Court within thirty days from date to serve out the sentence.
23. Let a copy of the judgement be sent down to the learned Trial Court along with the Lower Court record for information and necessary compliance.
24. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)