

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

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

**C.R.A.59 of 2022
IA NO: CRAN/1/2022**

**Sk. Selim @ Selim Sk. & ors.
VS.**

The State of West Bengal & anr.

For the Appellant : Mr. Kamalesh Chandra Saha
Ms. Payel Mitra

For the State : Mr. Abhra Mukherjee,
Mr. Dipankar Mahata

For the Victim : Mr. Kallol Mondal,
Mr. Krishan Ray,
Mr. Souvik Das,
Mr. Ayan Mondal

Hearing concluded on : 24.03.2023

Judgement on : 24.03.2023

DEBANGSU BASAK, J.:-

1. The appeal is directed against judgment of conviction and order of sentence both dated March 16, 2022, passed by the

Second Additional District & Sessions Judge, Alipore, South 24 Parganas, in Sessions Trial No.05 (04) 2018 arising out of Sessions Case No.231 of 2017.

2. The victim lodged a written complaint with the police on October 22, 2017 complaining that she was a minor. Two of her neighbours insisted her to go to Bangalore with them for the purpose of earning as a domestic help. She was convinced by their proposal as she was passing her days in great poverty. She accepted such proposal. Thereafter, on November 7, 2016, she went out of her residence in order to travel to Bangalore with two neighbours. In the evening of that day, she along with two neighbours went to Howrah Station for boarding a train of Bangalore. At the station, she found another neighbour and his brother who accompanied them. Thereafter, they reached Bangalore and went to a house in Bangalore, and started residing there for few days. She realized that she was trapped and brought for illicit purpose. She stayed in that house with some other girls. She named the person who was responsible for running the racket. She stated that, from such house, girls were sent to different places in

Bangalore for sexual exploitation. On completion of work they were taken back to the house. Such thing continued for a couple of months. Thereafter, she somehow with the help of a well-wisher returned to her house. On her return, she was threatened not to inform anybody. Thereafter, she found two of the appellants in the locality and became frightened and went to the police to lodge the complaint.

3. On the basis of the written complaint, police registered the First Information Report dated October 22, 2017. Police commenced investigation. Police submitted a charge-sheet.

4. On April 24, 2018, Court framed charges as against the appellants under Sections 370/ 372 / 373 / 376 / 363/ 366A/ 120B of the Indian Penal Code, 1860 and under Sections 6/17 of the Protection of Children from Sexual Offences Act, 2012. The appellants pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution examined six witnesses and produced various documentary evidences. On the conclusion of the evidence of the prosecution, the appellants were

examined under Section 313 of the Criminal Procedure Code, where they claimed to be innocent and falsely implicated.

6. On conclusion of the argument of the parties, learned Judge pronounced the impugned judgment of conviction where the learned Judge found the appellants guilty under Sections 372/ 376(2)(i) /109 of the Indian Penal Code, 1860 and under Sections 4/17 of the POCSO Act, 2012. Learned Judge acquitted the appellants from the other charges.

7. By the impugned order of sentence, learned Judge awarded rigorous imprisonment for a term of 10 years and to pay a fine of Rs.10,000/- each for committing offence punishable under Sections 376(2)(i)/109 of the Indian Penal Code, 1860, and in default of payment of fine to undergo further imprisonment for six months. The appellants were also awarded the sentence of rigorous imprisonment of six years and to pay a fine of Rs.10,000/- each for committing the offence punishable under Section 372 of the Indian Penal Code, 1860. Both the sentences of the appellants were directed to run concurrently.

8. Learned advocate appearing for the appellants submits that, the prosecution was unable to prove the charges beyond reasonable doubt. He submits that, there was unexplained delay in the lodgement of the First Information Report. He submits that, the First Information Report was lodged after a lapse of a year from the date of the alleged occurrence of the incident. The incident allegedly occurred on November 7, 2016 while the First Information Report was lodged on October 22, 2017.

9. Elaborating on the aspect of the delay in the lodgement of the First Information Report, learned advocate appearing for the appellants submits that, the victim, on her own saying came back to her residence on her own wish and volition. She was at her residence for a considerable period of time. She however, did not report to the police station immediately on return. This is another aspect according to him, which casts doubts on the case of the prosecution.

10. Learned advocate appearing for the appellants submits that, the investigation was perfunctory and the benefit of such perfunctory investigation should be given to the appellants. He

submits that, allegedly, the place of occurrence was at Andrahalli at Bangalore. No investigation was carried out there. No person was brought from Bangalore to testify at the trial. According to the version of the prosecution, there were a number of other ladies involved at Bangalore. Such ladies were not produced at the trial. The so-called customers were not examined. Persons involved at Bangalore were not named.

11. Learned advocate appearing for the appellants submits that, the victim left voluntarily on her own. Such aspect is borne out from the contents of the written complaint of the victim as also from her testimony at trial. Therefore, once it is established that the victim went voluntarily, it cannot be said that the victim was forced into the acts as claimed by the prosecution.

12. Moreover, learned advocate appearing for the appellants submits that, the age of the victim was not established at the trial. He refers to the attempts of the prosecution to establish the age of the victim at the trial. He submits that, the victim herself, gave out her age at her testimony without producing any evidence with regard to her age. He submits that, a doctor

who testified on behalf of the prosecution placed the age of the victim between 14 to 17 years. The victim claimed herself to be 15 years. The teacher who came to testify also did not establish the age of the victim conclusively. Therefore, according to him, age of the victim not being established conclusively, the provisions of the POCSO Act, 2012 were not attracted. Relying upon Section 35 of the Evidence Act, 1872, he submits that, the age of the victim was not established at the trial.

13. Learned advocate appearing for the appellants submits that, the victim never stated in her testimony that any of the appellants were involved in the penetrative sexual assault on her. Therefore, charge of rape as against the appellants were not proved at the trial.

14. Learned advocate appearing for the appellants relies upon **(1975) 4 Supreme Court Cases 106 (*Anne Nageswara Rao vs. Public Prosecutor, Andhra Pradesh*)**, **(1983) 3 Supreme Court Cases 629 (*Ramji Surjya Padv And Another vs. State of Maharashtra*)** and **(2002) 1 Supreme Court Cases 487 (*Thanedar Singh vs. State of M.P.*)** on the

proposition that, delay in lodgement of the First Information Report was fatal to the case of the prosecution.

15. Learned advocate appearing for the appellants rely upon **1958 Supreme Court Report 749 (*Sidheswar Ganguly vs. State of West Bengal*)** on the aspect of proof of age of the victim at the trial.

16. Learned advocate appearing for the appellants rely upon **(1978) 4 Supreme Court Cases 90 (*Chandran Vs. The State of Tamil Nadu*)** on the aspect of Section 164 statement being correctly recorded.

17. Learned advocate appearing for the State submits that the prosecution proved the charges against the appellants beyond reasonable doubt. He submits that, the victim, as P.W.1 implicated all the appellants in the charge of rape and abetment. He draws the attention of the Court to the testimony of P.W.1. He submits that, the evidence of P.W.1 should inspire confidence of the Court. The testimony of P.W.1 was sufficient to convict the appellants.

18. Learned advocate appearing for the State submits that, P.W.1 was aged about 13 years when the incident occurred.

P.W.1 described the penetrative sexual assault that the victim underwent from time to time. He submits that the testimony of P.W.1 with regard to penetrative sexual assault was corroborated by the testimony of the medical expert being P.W.4. The medical report of P.W.1 being Exhibit-2/1, coupled with evidence of the doctor, P.W.4, established that the victim suffered from multiple old healed tear at 3, 4, 5 and 7 'O' clock position in the hymen conclusively establishing that the victim was subjected to penetrative sexual assault.

19. Learned advocate appearing for the de facto complainant submits that the victim was taken to Bangalore and was sexually abused there. He submits that, the age of the victim stood adequately proved at the trial. He refers to Exhibit-5 being the document produced by the teacher as well as the deposition of the teacher being P.W.6. He submits that, the victim was a minor at the time when the victim was subjected to sexual abuse and penetrative sexual assault at the behest of the appellants.

20. Learned advocate appearing for the de facto complainant refers to the definition of rape appearing in Section 375 of the

Indian Penal Code, 1860 as well as the provisions of the Act of 2012. He submits that, the oral testimony of the victim, the P.W.1, adequately implicates all the appellants in penetrative sexual assault.

21. Learned advocate appearing for the de facto complainant also relies on the medical evidence on record. He refers to Exhibit-2 and notings in Exhibit-2 as also the oral testimony of the doctor being P.W.4. He submits that, oral testimony of P.W.1, P.W.4 and the medical examination report of P.W.1 being Exhibit-2 conclusively establish that P.W.1 was subjected to sexual abuse and penetrative sexual assault.

22. Referring to Section 29 of the Act of 2012, learned advocate appearing for the de facto complainant submits that, the appellants did not discharge their onus and failed to rebut the statutory presumption drawn as against them. He submits that in the conspectus of the facts and circumstances of the present case, the conviction and the sentences should be upheld.

23. As noted above, six prosecution witnesses were examined by the prosecution at the trial. The victim girl deposed as

P.W.1. She stated that, she was taken to Bangalore instead of Mumbai. She identified the appellants who took her to Bangalore. She stated that, she was taken to the house of one of the appellants. She was kept along with other girls. All the appellants stayed in such house. After about two days of her arrival at Bangalore, as per instruction of two of the appellants, she and the other girls were asked to extend sexual favours to male persons. At the instruction of one of the appellants, the auto driver used to take her and the other girls in plain dress to different places with bag containing short dresses. They were usually kept for five days. There the room owners used to call the male persons for them. She stated that as per instruction, she along with other girls were required to disrobe in front of customers. The customers abused the girls by indulging in penetrative sexual assault on them. As she refused, two of the appellants threatened her with murder. Being afraid, she complied with such work. She stated that such state of affairs continued for about two months. P.W.1 stated that her mother informed one of the appellant that she would not spare the mother of such appellant if she did not

release her. Being afraid, two of the appellants brought her back. It was winter at the time she came back. She was not in a position to state the exact date of return. Thereafter, she stayed in her house. She did not go to the police station immediately on her return. She informed the matter to her mother only. She went to the police station when she became afraid and saw two of the accused persons. Her mother accompanied her to the police station. She lodged the written complaint which was typed by a person as per her instruction. She signed the same. The written complaint was tendered in evidence and marked as Exhibit-1. She could not state the name of the persons who typed the complaint. She stated that the person writing the complaint read out the complaint and explained the contents of the written complaint to her and on being satisfied she signed the same.

24. P.W.1 stated that she was sent to the doctor for medical examination where she was examined. She tendered the medical examination report which was marked as Exhibit-2. She went to the learned Magistrate to record her statement.

She recorded her statement and put her left thumb impression on such statement.

25. P.W.1 was cross-examined at length on behalf of the defence. However, the defence was not in a position to extract anything favourable from such cross-examination.

26. A social worker of the locality deposed as P.W.2. She stated that, P.W.1 came to her crying on October 22, 2017 with her mother. On that date, she saw two of the appellants on the road. On being asked, P.W.1 stated to her about the incident involving two of the appellants. P.W.1 named all the appellants as the perpetrators to her. P.W. 2 advised P.W.1 to inform the matter to the police. Then, P.W.1 along with her mother went to the police station. P.W.2 accompanied them. She identified four of the appellants in Court with one of the appellants not being present in Court.

27. P.W.3 is a police personnel who received the written complaint. He tendered his endorsement on the written complaint which was marked as Exhibit-1/1. He started the police case. He tendered the formal First Information Report

which was marked as Exhibit-3. He was the first Investigating Officer. He stated that, during investigations, he interrogated P.W.1 and produced her before the Child Welfare Committee. By the order of the Child Welfare Committee, he handed over the victim to her mother. He held a raid and arrested two of the appellants. He interrogated the accused persons. Thereafter, he handed over the case diary to the Officer-in-Charge. He identified one of the appellants in Court.

28. The Doctor who examined the victim on November 9, 2017 deposed as P.W.4. She stated that, the victim was brought to her by the police personnel. She took the consent of the victim which the victim granted. On examination, she noted two identification marks on her. She opined that the age of the victim was between 14 to 17 years. She stated about the various injuries she found on the victim. She tendered the medical examination report of the victim in evidence and the same was marked as Exhibit-2. She identified the various signatures on such Exhibit-2.

29. The second Investigating Officer deposed as P.W.5. He narrated the course of investigations. He stated that, in order

to verify the age of the victim, he went to the primary school where the victim studied. He stated that, he perused the Admission Register of the school and found that, the date of birth of the victim was recorded to be of the year 2015. He arrested some of the appellants and produced them before Court. He collected the medical examination report of the victim. He sent the victim for recording her statement under Section 164 of the Code of Criminal Procedure. He submitted the charge sheet against the appellants. He identified the appellants in Court.

30. A teacher of the school where the victim studied deposed as P.W.6. Such teacher produced the original Admission Register of pupils of the school for the period of 2015/2016. He stated, that as per the Admission Register, the date of birth of P.W.1 was June 14, 2004. He tendered one attested copy of the relevant page of the Admission Register in evidence which was marked as Exhibit-5.

31. On conclusion of the evidence of the prosecution, all the appellants were examined under Section 313 of the Code of Criminal Procedure, where the appellants claimed to be

innocent and falsely implicated. They declined to examine any defence witness.

32. Exhibit-5 is the Admission Register of pupils of the school where P.W.1 studied. The date of birth given in Exhibit-5 so far as P.W.1 is concerned is June 14, 2004. P.W.1 consistently described her age to be within the time-frame as of the date of birth appearing in Exhibit-5. Medical opinion of P.W.4 with regard to the age of P.W.1 is between 14 to 17 years. Date of birth of P.W.1 appearing in Exhibit-5 falls within the bracket of time opined by the medical expert. Child Welfare Committee exercising jurisdiction under the provisions of the Juvenile Justice Act assumed jurisdiction over P.W.1 when P.W.1 was produced before them.

33. In such circumstances, we are of the view that the age of the victim stood conclusively proved at the trial. Taking the date of birth of the victim as appearing from the Admission Register of the school where the victim studied, being Exhibit-5, the victim was about 13 years of age at the time of the occurrence of the incident. According to the victim, the incident occurred on November 7, 2016.

34. In **Sidheswar Ganguly (supra)** an unanimous verdict of guilt returned by the Jury holding the accused guilty under Section 376 of the Indian Penal Code, 1860, for committing rape on a girl aged about 14-15 years of age was upheld by the High Court and on an appeal on a certificate under Article 134(1)(c) of the Constitution of India was upheld.

35. In the facts of that case, the Hon'ble Supreme Court noted that, conclusive piece of evidence for the date of birth, that is, the birth certificate, unfortunately in a country such as ours, was not ordinarily available. A Court is required to base its conclusion upon all facts and circumstances disclosed on examining all the physical features of the person whose age was in question, in conjunction with such oral testimony as may be available. It noted that the father of the girl was dead. Her mother apparently left the girl to her own fate and the mother's whereabouts was not traceable. It was also noted that, according to the medical evidence available, the girl was between 13 to 14 years on the relevant date. In such factual matrix, the Hon'ble Supreme Court did not find any error in the two Courts finding the victim to be a minor even in

absence of a birth certificate of the victim or the parents of the victim deposing at the trial on the aspect of the age of the victim.

36. Absence of or failure of the prosecution to produce the birth certificate of the victim at the trial does not *ipso facto* is not catastrophic to the case of the prosecution. Notwithstanding the birth certificate of the victim not being produced at the trial, the age of the victim can be established by the prosecution by leading cogent and reliable evidence with regard thereto.

37. **Anne Nageswara Rao** (supra) deals with a case where, there was delay in filing of the First Information Report. In the facts and circumstances of that case, the Hon'ble Supreme Court found that the delay in lodgment of the First Information Report and its non-explanation seriously affected the credibility of the case of the prosecution. Moreover, benefit of doubt was extended to the accused on the premise that where two views are possible the view which favours the accused should be accepted.

38. **Ramji Surjya Padvi & Anr.** (supra) is a case which was based on the testimony of the sole eye-witness. The delay in the lodgment of the First Information Report was found not be explained properly. The Court also found that there were other inherent inconsistencies in the evidence of the sole eye-witness and that such evidence could not be considered to be sufficient to hold the accused guilty.

39. **Thanedar Singh** (supra) found that, the learned Sessions Judge put the prosecution on notice that, adverse inference would be drawn if the records were not produced to explain why the certified copy of the First Information Report was produced before the learned Magistrate on a particular date. The prosecution failed to produce the original record. Consequently, the Supreme Court found that the prosecution failed to clear the doubt regarding the date and time of recording of the First Information Report.

40. The facts and circumstances of the present case are entirely different than the three authorities noted above. In the facts and circumstances of the present case, the victim was lured to go to Bangalore on November 7, 2016. She was

sexually abused and subjected to penetrative sexual assault for a period of two months, as appearing from her testimony, till her return to her house at Kolkata. She returned to her house and did not approach police immediately, which she explained as due to the threat held out to her. Upon seeing two of the appellants in and around her house, she went to P.W.-2 along with her mother and, thereafter, went to the police. P.W.2 is a social worker. P.W.-2 corroborated the conduct of P.W-1 and her mother with regard to P.W.-1 coming to P.W-2 and confiding to her about the trauma.

41. The victim being a minor and being subjected to serious penetrative sexual assault and sexually abused, did not lodge the police complaint immediately on her return. She explained the circumstances under which, she could not go to the police at the first instance. She also explained the circumstances under which, she approached the police. She approached the police on seeing two of the appellants and fearing for her life. Therefore, the delay in the lodgment of the First Information Report, taking the date of the first occurrence to be November 7, 2016 and the F.I.R. being lodged on October 22, 2017,

stood adequately explained by the victim and her testimony as also in the contents in the written compliant.

42. It is the contention of the appellants that, the victim left her home voluntarily. Learned trial Judge, acquitted the appellants from the charge under Sections 363/366A of the Indian Penal Code, 1860. The victim was a minor, when she was taken to Bangalore. She was not capable of giving consent to her movement. However, since there are no appeals at the behest of either the victim or the State on such aspect, we refrain from commenting on the same. We, however, hasten to add that, acquittal from a charge of kidnapping does not necessarily mean an acquittal from other charges including those of penetrative sexual assault on a minor.

43. It is the contention of the appellants that, the prosecution did not produce any evidence from Bangalore and that no investigation was carried on at Bangalore, quantity of evidence adduced at the trial is more important than the quantity. Here, the oral testimony of the victim, P.W-1, is cogent, reliable and trustworthy. Her testimony of sexual abuse and penetrative sexual assault stand corroborated by

medical evidence, being Exhibit-2, as well as the oral testimony of the Doctor examining her, P.W.-4. Exhibit-2 discloses that she suffered from old heal injuries on her private parts. Such injuries permit an interference of penetrative sexual assault being committed on her.

44. **Chandran** (supra) is a case where, the learned Magistrate recording the statement under Section 164 of the Criminal Procedure Code certified that the Magistrate hoped that the statement of the person making the same was made by him voluntarily. In such context, statement recorded under Section 164 of the Criminal Procedure Code in the facts of that case was commented upon. Such factual scenario is not obtaining in the present case.

45. It is the contention of the appellants that since P.W-1 did not identify any of the appellants to sexually abuse her or committed the offence of penetrative sexual assault, the charge under Section 376(2)(i) of the Indian Penal Code, 1860 was not proved. Section 376(2)(i) of the Indian Penal Code, 1860 was amended with retrospective effect from July 21, 2018. The date of occurrence is from November 7, 2016.

Therefore, the incident being the subject matter of the police case is governed by Section 376(2)(i) prior to its omission with retrospective effect from April 21, 2018.

46. Section 376(2)(i) of the Indian Penal Code, 1860 is required to be read in conjunction with Section 375 of the Indian Penal Code, 1860. Relevant portion of the definition of 'rape', in the facts and circumstances of the present case, is as follows :-

“375. Rape.- A man is said to commit “rape” if he –

(a)

(b)

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person.”

47. P.W.-1 in her evidence stated that, she was forced to extend sexual favour to different males on the threat held out by the appellants as to her life. She stated that she was unwilling to do so and succumbed to such demand at the behest of the appellants on the threat of her life. Her oral testimony is corroborated by her medical examination report being Exhibit-2 and the testimony of the doctor examining her being P.W.-4.

48. In view of such testimony of P.W.-1, P.W.-4 and the evidence on record, the learned trial Judge correctly found the appellants guilty under Sections 109/376(2)(i) of the Indian Penal Code, 1860 and Section 372 of the Indian Penal Code, 1860.

49. On behalf of the de facto complainant, the quantum of sentence imposed by the learned trial Judge was commented upon. However, neither the State nor the de facto complainant preferred any appeal with regard to quantum of sentence imposed by the learned trial Judge as against the appellants. The quantum of sentence imposed by the learned trial Judge is within the band of punishment prescribed. In such circumstances, we do not find it necessary to enter into the quantum of sentence imposed by the learned trial Judge.

50. By the impugned order of sentence, the learned Judge directed payment of compensation of Rs.6 Lakhs under the Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes, 2018. In response to a query of the Court, learned advocate appearing for the victim submits that the victim did not receive such compensation.

51. It is a sad state of affairs that a victim of sexual assault is yet to receive compensation in terms of a judgment of a Court passed on March 16, 2022. A period in excess of 1 year has elapsed since the judgment of conviction.

52. It is expected that the appropriate authorities including the relevant District Legal Services Authorities take appropriate steps to ensure that the compensation awarded by the learned trial Judge is made over to the victim expeditiously. Member Secretary, State Legal Services Authorities, Kolkata, is requested to take appropriate measures for ensuring that the order of the Court is complied with by the appropriate authority.

53. Impugned judgment of conviction is upheld. Impugned sentences awarded by the learned trial Judge are affirmed. The sentences will run concurrently. Period of detention of the appellants, pre and post trial will be set off against the sentences awarded.

54. Copy of this judgment and order along with trial Court records be remitted to the appropriate Court, expeditiously. A

copy of this judgment and order be sent to the Member Secretary, State Legal Services Authority also.

55. CRA (DB) 59 of 2022 is, accordingly, **dismissed**.

56. With the dismissal of the appeal, nothing survives in the application being CRAN 1 of 2022, seeking suspension of the sentence. Accordingly, CRAN 1 of 2022 is also dismissed.

57. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Debangsu Basak, J.)

58. I agree.

(Md. Shabbar Rashidi, J.)