

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajoy Kumar Mukherjee

C.R.A. 162 of 2017

Goutam Ghosh

-Vs-

State of West Bengal

For the Appellant :

Mr. Prabir Majumder, Adv.
Mr. Debraj Shil, Adv.

For the State :

Mr. Saswata Gopal Mukherji, Id. PP
Mr. Partha Pratim Das, Adv.
Mrs. Manasi Roy, Adv.

Heard on :

18.09.2023

Judgment on:

18.09.2023

Joymalya Bagchi, J. :-

1. The appellant has assailed the judgment and order dated 10.01.2017 and 11.01.2017 passed by the learned Additional District and Sessions Judge, 2nd Court, Krishnagar, Nadia, in connection with Sessions Case No. 2(06) of 2016 corresponding to Sessions Trial Case No. V(XI) of 2016 convicting the appellant for commission of offence punishable under Section 6 of the POCSO Act and sentencing him to

suffer rigorous imprisonment for ten years and to pay a fine of Rs.20,000/- only, in default to suffer rigorous imprisonment for six months more for the offence punishable under Section 6 of the POCSO Act.

Prosecution case:-

2. The prosecution case as alleged against the appellant is as follows:

Victim is a 12 year old girl. It is alleged on 02.06.2016 at 9.30 P.M. her grandmother had gone to the house of a neighbour to hear devotional songs i.e. *kirtan*. Appellant dragged the victim away and took her to a field and raped her. When the victim returned she informed her grandmother.

3. She lodged written complaint at the police station resulting in registration of Krishnaganj Police Station Case No. 200 of 2016 dated 03.06.2016 under Section 6 of the POCSO Act against the appellant. During investigation victim was medically treated and her statement was recorded before the Magistrate.

4. Appellant was arrested, medically examined and charge-sheeted. Charge was framed under Section 6 of POCSO Act. To prove the charge prosecution examined ten witnesses including the minor, PW 1. Defence of the appellant was to the effect that there was an altercation between the appellant and the minor over playing of loud speaker during the soiree. On the next day, he was falsely implicated.

Arguments at the Bar:-

5. Mr. Prabir Majumder, learned Counsel for the appellant submits during her cross-examination, minor, PW 1 had admitted there was an altercation over playing of loud speaker. She was tutored by police to make statement before Magistrate and doctor. Her version is also admitted by her grandmother, de facto complainant, PW 2. Appellant has probalised the circumstances which led to his false implication and rebutted the presumption under Section 29 of the POCSO Act. Medical examination was done seven days after the incident. Age of the injury on the right thigh of the victim has not been proved. Prosecution has failed to prove its case.

6. Mr. Partha Pratim Das, learned Counsel with Mrs. Manasi Roy, learned Counsel for the State submits PW 1 is a minor girl. Her deposition ought to be appreciated bearing in mind her tender age and nature of crime. In chief she supported the prosecution case of sexual intercourse. Medical officer, PW 9, found her hymen absent and an injury on her right thigh. He opined there was possibility of sexual intercourse.

Evidence on record:-

7. PW 1 is the minor victim. She stated that she had been taken to a bamboo orchard and raped. She made statement before Magistrate and doctor. She proved her signature on the statement before Magistrate. In cross-examination, she admitted there was hot

altercation over playing of loud speaker during '*namkirton*' (singing of devotional songs). Police tutored her to make the statement before Magistrate and doctor.

8. Evidence of the minor victim must be treated with due care and sensitivity. While assessing her evidence due latitude, must be given bearing in mind her tender age and the agony of secondary victimisation during deposition. Defence plea that the appellant was falsely implicated over the issue of playing of loud speaker during the soiree ought to be tested against other evidence on record and attending circumstances. Similarly, statement of the minor that she was tutored by police to make the statement before Magistrate should also be examined against attending circumstances of the case. In order to do so, let me delve into the other evidence on record.

9. PW 2 is the grandmother of the victim. Though she admitted her signature on the written complaint during cross-examination she deposed the contents had not been explained to her and she had put the signature in the presence of the police. She also admitted there was hot exchange between the appellant and the minor during '*namkirton*'. She clarified apart from hot exchange nothing had occurred. Her evidence corroborates defence version that there was a dispute with the appellant over playing of loud speaker during the devotional soiree.

10. Devotional soiree had been organised in the house of PW 3 and PW 4. They admitted the victim was present in their house.

Findings of the Court:-

11. Analysis of the evidence of the witnesses shows in the evening of 02.06.2016 a programme of devotional songs were organised in the house of PW 4. Victim was present there. Over the issue of playing of loud speaker hot exchange took place between the appellant and the victim. On the next day FIR came to be registered. PW 2 who lodged the FIR, while admitting her signature, stated that she was not aware of its contents. She reiterated apart from hot exchange nothing had occurred. Prosecution case in the FIR is that the victim had been abducted from the road beside the house of PW 4 where singing of devotional songs had been organized organised. But evidence on record shows during the programme appellant was present in the house of PW 4 and there was hot exchange between the appellant and the victim. This improbabilises the manner and circumstance in which the victim is alleged to have been abducted from the road and raped. On the other hand, it probabilises the defence plea that there was a hot altercation in the evening prior to the registration of FIR.

12. Mr. Das, learned Counsel argues version of the victim finds corroboration from the medical evidence.

13. PW 9 (Dr. Suprotim Mitra) examined the victim on 09.06.2016. He found her hymen absent. During cross-examination he admitted absence of hymen may be due to various reasons. He also noted an injury on the right thigh. Victim had been examined by the medical

officer more than seven days after the incident. Age of the injury on the right thigh of the victim has not been stated. Findings in the injury report (Exbt.-4) as well as the evidence of the medical officer are ambivalent and do not probabalise a case of forcible intercourse. Opinion of the medical officer with regard to forcible sexual intercourse appears to have been prompted by the statement of the victim that she had been forcibly raped. It is important to recount, the victim in Court stated that she made such statement on the tutoring of the police. Under such circumstances, I am not inclined to give credence to the medical opinion as corroborative evidence to prove the prosecution case of rape.

14. Evidence of the victim in Court is also contradictory. While in chief she supported the prosecution case, during cross-examination she stated she had been tutored by police and there was hot altercation with the appellant on the previous night. As discussed earlier defence plea of hot altercation between the parties finds corroboration from her grandmother, the de facto complainant. In the FIR, PW 2 alleged victim was dragged from the road and raped but the said witness as well as PWs. 3 and 4 stated in Court the victim was present in the house where the musical programme was organised. This improbabilises the manner and circumstance in which the prosecution alleges the incident occurred. These circumstances not only improbabilise the prosecution case but also lend credence to the possibility of false implication owing

to hot altercation with the appellant on the previous night over playing loud speaker during the musical programme.

15. Prosecution has failed to lay the fundamental facts with credibility to implicate the appellant. On the other hand, appellant has been able to rebut the statutory presumption under Section 29 of the POCSO Act and is entitled to an order of acquittal.

Conclusion:-

16. Appellant is accordingly acquitted. Appeal is allowed.

17. Appellant shall be released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the learned trial court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

18. Copy of the judgment along with Lower Court Records be sent down to the trial Court at once for necessary compliance.

19. Urgent Photostat Certified copy of this judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I agree.

(Ajoy Kumar Mukherjee)

(Joymalya Bagchi, J.)