

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 327 of 2018

SITARAM ROY @ DOLU
VS.
THE STATE OF WEST BENGAL

For the Appellant	: Ms. Susmita Saha Dutta, Adv. Mr. Niladri Saha, Adv. Ms. Madhurima Basu, Adv.
For the State	: Mr. Saswata Gopal Mukherjee, Id. P.P. Mr. Ranabir Roy Chowdhury, Adv. Mr. Sandip Chakraborty, Adv.
Hearing concluded on	: 24 th February, 2023
Judgement on	: 3 rd March, 2023

Siddhartha Roy Chowdhury, J.:

1. This appeal challenges the judgement and order of conviction passed by learned Additional Sessions Judge, Raiganj, Uttar Dinajpur on 30th May, 2018 in Raiganj P.S. Case No. 339/2014 dated 9th April, 2014. Sitaram Roy @ Dolu stands convicted and sentenced for committing the offence found to be punishable under Section 6 of the POCSO Act.
2. Gopal Roy set the criminal proceeding into motion by informing the In-charge of Karnajora outpost under the Police Station Raiganj, that on 7th April, 2014 at about 5.30 p.m. Sitaram Roy (Dolu) enticing his differently abled daughter with biscuit and chanachur, took her to

his room and ravished her. His daughter disclosed everything to him and to his wife. Thereafter, both of them went to the house of Sitaram Roy where he was assaulted. He got admitted to Raiganj hospital, and after being discharged from hospital on 9th April, 2014 he could inform the police in writing, about the incident.

3. As the information disclosed offence cognizable in nature Raiganj Police Station Case No. 339 of 2014 was registered under Section 376 of the I.P.C. read with Sections 3, 4, and 6 of the POCSO Act. Police took up investigation which culminated into submission of charge sheet. On 28th August, 2014 charge was framed under Section 376 (2)(i) of the I.P.C. and Section 6 of the POCSO Act against the accused person and pleading his innocence the accused person stood the trial.
4. To crown success prosecution examined as many as 13 witnesses. Learned Trial Court after considering the evidence adduced by the witnesses for the prosecution was pleased to pass the impugned judgement.
5. Ms. Susmita Saha Dutta, learned Counsel representing the appellant impeaches the impugned judgement as it suffers from non-compliance of statutory mandate under Section 119 of the Evidence Act. It is submitted that the statement of the victim girl who is differently abled ought to have been recorded not only with the help of an interpreter or a special educator, but such statement had to be video-graphed as well. Learned Judicial Magistrate, however, did not follow such mandate of the statute and such failure assumes further importance when it is found that the interpreter also did not have the

requisite expertise to interpret the language of the victim as expressed through sign.

6. My attention is drawn to the testimony of P.W. 1, the de-facto complainant, wherein the de-facto complainant disclosed that around 5.30 p.m. the incident took place. Sitaram Roy called his daughter to his house to give chanachur and biscuit. He kissed the girl and committed penetrative sexual assault on her. Chandan Barman came to his house in search of de-facto complainant. Entering into the house of Sitaram Roy, Chandan Barman found that the girl was not wearing her pants. Sitaram Roy left the place having found Chandan Barman. But Chandan Barman as P.W. 7 stated that on the date of incident he went to the house of Gopal and enquired about the victim girl. Mother of the victim girl told him that she went to the house of their adjacent neighbour. He then went to the house of Sitaram Roy and found that the victim girl was playing in front of the entrance door. He brought the victim girl back to her home. This witness was examined by the prosecution in the light of Section 154 of the Evidence Act but nothing came out to the help of the prosecution. Mother of the victim girl P.W. 4 stated that accused person came to their house and called her daughter and took her to his house. Chandan Barman at that point of time came to their house in search of her husband and he enquired about the victim girl and, thereafter, he went outside. He heard the voice of the victim girl, entered into the house of Sitaram Roy and witnessed that both Sitaram and her daughter were wearing pants, but her daughter was crying. Chandan

Barman brought her daughter back to the house while Sitaram fled away. Her daughter told her about the bleeding from her private part and by her sign language indicated the misdeed caused by Sitaram. Drawing my attention to the cross-examination of P.W. 4, it is submitted by learned Counsel that according to P.W. 4, they did not have good relation with the family members of the accused person since 2/3 years before the alleged incident. Therefore, the narrative of P.W. 4 that accused person came to their house and took the victim girl with him sounds improbable. P.W. 4 claimed to have visited the police station two days after the incident and informed the police about the incident but such information as claimed to have been given by P.W. 4 was not produced before the Court. P.W. 5, Ujjal Roy happens to be the younger brother of the de-facto complainant who stated that having heard hue and cry of the mother of the victim girl he rushed to their house and came to know that Sitaram Roy took the victim girl to his house to give her biscuit and lozenge. The victim girl expressed by gesture the incident that happened and thus he came to know that the victim girl was sexually assaulted by Sitaram Roy. He was examined by prosecution in the light of Section 154 of the Evidence Act and during cross-examination by the accused person he stated that de-facto complainant is his elder brother, when he arrived at the house of de-facto complainant he found that 20/22 persons were already there and came to know that his brother Gopal had sustained injury and, thereafter, he along with his brother and others went to Karnajora outpost.

7. Ms. Susmita Saha Dutta, learned Counsel for the appellant, draws my attention to the testimony of the victim girl who adduced evidence as P.W. 3 with the assistance of interpreter, P.W. 2, Smt. Sutapa Nag. As P.W. 3, the victim girl stated to have made a statement before the Magistrate regarding the incident in presence of the teacher of their school, identifying the accused person, the victim girl stated that the accused person committed penetrative sexual assault on her, and due to such penetrative sexual assault there was redness and she felt pain in her genital organ. From the house she was brought to the Court. According to Ms. Saha Dutta, the testimony of the victim girl is not getting support from the testimony of other prosecution witnesses including the testimony of doctor, who attended the victim girl on 9th April, 2014. The doctor, P.W. 6 could not give any definite information as to whether the victim girl suffered penetrative sexual assault. Mere rupture of hymen is not conclusive evidence of penetrative sexual assault. Doctor while adducing evidence opined that menstruation may start within 9 years to 13 years and the victim girl was aged about 12 years. Therefore, mark of blood stain cannot lead one to presume that there was penetrative sexual assault. It is, however, argued that the wearing apparel, particularly, the pants of the victim girl was not seized by the I.O. to prove that she sustained bleeding injury. A vital piece of evidence was withheld by the prosecution.
8. Learned Counsel for the appellant submits further that there was a dispute between the two families which cropped up after the accused person started a grocery shop in the neighbourhood. Relying

upon the document Exhibit A and B, it is submitted by learned Counsel for the appellant, that Kshitish Roy, the father of the appellant, informed the jurisdictional police station after he was assaulted by the de-facto complainant, his brother and other associates on 7th April, 2014 and Raiganj P.S. Case No. 337 of 2014 was registered under Section 448/341/325/324/506 of the I.P.C. against Gopal Roy, Dulal Roy, Kekaru Roy, Goli Roy, Sudhananda Roy & others and the present F.I.R. was lodged subsequent thereto implicating the appellant and the allegation of penetrative sexual assault is but a counter blast to the case registered against the de-facto complainant and his brothers.

9. Refuting such contention Mr. Ranabir Roy Chowdhury, learned Counsel representing the State submits that the testimony of victim who happens to be the best witness of this case and perhaps the sole witness is found to be credible. She has been thoroughly cross-examined and nothing has come out to impeach the testimony of the victim girl. Admitting that provision of Section 119 of the Evidence Act has not been complied with, Mr. Roy Chowdhury submits that for non-compliance of the statutory mandate, a differently abled girl should not be made to suffer. Mr. Roy Chowdhury supports the verdict, handed down by the learned Trial Court. According to Mr. Roy Chowdhury, the injury report Exhibit-3 suggests that hymen was ruptured. Ruptured hymen coupled with tenderness over fourchette indicates the possibility of penetrative sexual assault. The doctor supported the testimony of the victim girl, as he found mark of blood

in the genitalia of the victim. According to Mr. Roy Chowdhury, it was the duty of the I.O. to seize the wearing apparel of the victim which he did not do, but for the lapses of the I.O. prosecution case should not suffer. It is further submitted that mother of the victim girl P.W. 4 claimed to have informed jurisdictional police about the incident. The Investigating Officer ought to have seized such document but he failed to do so. The victim girl since had no control over the situations, she cannot be made to suffer. Even society cannot afford to have such sufferings.

10. I have perused the testimony of prosecution witnesses. Before entering into the matter on merit, I consider it expedient to highlight the statutory provision as laid down under the Protection of Children from Sexual Offences Act as well as Indian Evidence Act. Section 6 of the POCSO Act says:-

“6. Punishment for aggravated penetrative sexual assault.--

(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

11. From plain reading of the statutory provision, it appears that minimum punishment prescribed for committing the offence is 20

years. Learned Trial Court, however, ignored such statutory mandate and imposed punishment for six years.

12. Sub-Section 4 of Section 26 of the Act enunciates that :-

“26. (4) Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video, electronic means.”

13. Sub-Section 2 of Section 33 of the Act enunciates:-

“33. (2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.”

14. The provision of Section 36 of the POCSO Act says:-

“Child not to see accused at the time of testifying

(1) The Special Court shall ensure that the child is not exposed in anyway to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.”

But there is nothing to indicate that aforesaid statutory provision was followed. The order sheet dated 21st January, 2015 does not suggest anything to hold that learned Trial Court took steps to comply with the provision of Section 36 of the POCSO Act. Even the name of

the victim girl has been disclosed while recording evidence by the learned Trial Court.

15. I have already pointed out there was infraction of statutory mandate as laid down under Section 119 of the Evidence Act. It is trite law to say that where the power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. In this regard, we can rely upon the judgement pronounced in the case of ***Nazir Ahmed vs. Emperor*** reported in **AIR 1936 (P.C.) 253**. Learned Trial Court must shun the habit of holding trial without following the mandate of statute.
16. Evidence is to be considered from the point of view of human probability. P.W. 1, being the father of the victim girl, set the criminal proceeding into motion. He came to know about the incident almost immediately after her daughter was brought back to home by his associate Chandan Barman, P.W. 7. He took more than an hour to react and claimed to have gone to the house of the accused person thereafter. According to P.W. 1, he was assaulted by the father of the accused. He informed the police outpost at Karnajora, that he was assaulted and got admitted to the hospital. However, no document was filed to substantiate such claim. This conduct of the de-facto complainant suggests that, he gave priority of his injury over the suffering and injury of his daughter and after two days, he informed police about the alleged penetrative sexual assault on his daughter. Though in the meantime, at the behest of the father of the accused person a case was registered against the de-facto complainant and his

associates, including his brothers for allegedly committing offence under Section 448/341/324/325/506 of the I.P.C. being Raiganj P.S. Case No. 337 of 2014 dated 8th April, 2014. P.W. 7 did not support the prosecution case and during cross-examination he stated that there was quarrel/fighting between Sitaram Roy and complainant 3/4 days prior to registration of this case due to land dispute.

17. In the written information the de-facto complainant told that his daughter was induced by Sitaram Roy who took her to his house. His evidence appears to be hearsay. The testimony of P.W. 3 the victim girl, however, is silent about the place of incident. P.W. 1 during cross-examination stated that he was examined by police on the basis of the second complaint made by him on the same day but the first complaint was never produced by the prosecution. The maiden information about the alleged incident is thus found to have been withheld by the prosecution and it strikes at the very root of the prosecution case. The victim girl did not say as to how and where the accused person committed the offence.

18. It is rightly argued by Ms. Saha Dutta that hymen could be ruptured for many reasons and that cannot be a pointer to the fact that victim girl was ravished by the accused person or that there was penetrative sexual assault. In his statement before learned Judicial Magistrate, recorded under Section 164 of Cr.P.C. Exhibit-13. Chandan Barman a man of 42 years stated that after he came to know victim girl was in the house of the next door neighbour of the de-facto complainant, he went there and when he was about to enter

inside the house he heard the sound of crying and found that near the tube well the victim girl was trying to put on her pants and Sitaram was leaving the scene putting on his pants as well. From the sketch map Exhibit 12, I find that I.O. has indicated dwelling house of the accused person as place of occurrence and tube well on the western side of the place of occurrence is marked with letter 'N'. A man committed an offence allegedly by ravishing a girl, and according to Investigating Officer, the incident took place in the room marked with letter 'A' but Chandan found both the perpetrator and the victim wearing their pants near the tube well. This narrative of Chandan P.W. 7 becomes difficult to swallow for any man of ordinary prudence. The accused cannot be said to have any reason to come out of the room to wear his pant after committing the alleged offence, and the same is with the victim girl.

19. It goes without saying that statement of the victim of sexual assault should be considered with due care and sensitivity. We cannot seek corroboration to her testimony as we can often do in case of an accomplice. She is required to be treated at par with injured witness. But in the backdrop of dispute over land, registration of case against de-facto complainant prior to the registration of case under consideration, absence of any document to show that de-facto complainant was assaulted and admitted to hospital with injury on 7th April, 2014 and inconclusive opinion of doctor or in other words the attending circumstances compel this Court to consider the

testimony of the prosecution witnesses including the victim girl carefully and with circumspection.

20. In view of the discrepancies as indicted hereinabove, I am of the view that prosecution has not been able to prove the charges beyond reasonable doubt and such failure paves the avenue for an order of acquittal extending benefit of doubt to the convict. In my view, the impugned judgement suffers from serious infirmity and warrants interference, which I accordingly do.
21. The order of conviction is set aside and the appellant is acquitted. He be set at liberty and be released at once if not wanted in any other case subject to execution of bond under Section 437 A of the Cr.P.C. for six months.
22. Let a copy of this judgement along with LCR be sent down to the learned Trial Court for information and necessary compliance.
23. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)