

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. 434 of 2017
With
CRAN 2 of 2022

Gobinda Das
-Vs-
The State of West Bengal & Anr.

For the appellant : Mr. Prabir Kumar Mitra, Adv.
Mr. Pinak Kumar Mitra, Adv.
Ms. Ariba Shahab, Adv.

For the State : Mr. Sudip Ghosh, Adv.
Mr. Apurba Kumar Dutta, Adv.

Heard on : 03.04.2023

Judgment on : 03.04.2023

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 19.06.2017 and 20.06.2017 passed by learned Additional District & Sessions Judge, 2nd Court, Purba Medinipur in Sessions Trial No. 8(7) of 2015 arising out of Sessions Case No. 21(6)15 convicting the appellant for commission of offence punishable under section 376(2)(i) of the Indian Penal Code and under section 5 of the POCSO Act and sentencing him to suffer rigorous

imprisonment for ten years and to pay a fine of Rs. 5,000/-, in default, to suffer imprisonment for six months more and a compensation of Rs. 5,000/- to the minor child.

2. Prosecution case as alleged against the appellant is to the effect that on 01.03.2015 at about 04:00 P.M., the appellant allured the minor victim aged around eight years by offering her Rs. 10/- and took her to the bank of Kansai river. There he molested her. After removing her inner garment, he inserted his finger into her vagina. One Swapan Moni (P.W. 9), a neighbour noticed the incident and shouted. Appellant fled away. The minor returned home and revealed the incident to her parents. FIR was registered by her mother (P.W. 2) resulting in registration of Panskura Police Station Case No. 107 of 2015 dated 03.03.2015 under sections 376(2)(i)/506/323 of the Indian Penal Code and under section 6 of the POCSO Act.

3. In the course of investigation, appellant was arrested. Minor child was medically treated. Her statement was recorded under section 164 Cr.P.C.

4. In conclusion of investigation, charge-sheet was filed. Charges were framed under section 376(2)(i) IPC and under section 6 of the POCSO Act. Appellant pleaded not guilty and claimed to be tried.

5. In course of trial, prosecution examined 11 witnesses and exhibited a number of documents to prove its case. Defence of the appellant was one of innocence and false implication.

6. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 19.06.2017 and 20.06.2017 convicted and sentenced the appellant, as aforesaid.

7. Mr. Mitra for the appellant submits there is delay in lodging FIR. Scribe of the FIR was not cited as witness in the charge-sheet. Swapan Moni (P.W. 9) has not supported the prosecution case. There is variation with regard to the genesis of the incident in the statement of the minor recorded under section 164 Cr.P.C. and her deposition in Court. Due to enmity between the parties the appellant was falsely implicated. Therefore he prays for acquittal.

8. Learned Counsel for the State submits the version of the minor (P.W. 1) is consistent with the FIR. In view of the nature of offence i.e. gender violence perpetrated on the minor, delay cannot be a ground to disbelieve the prosecution case. Slight variation in the statement of the minor recorded before Magistrate also does not militate against her truthfulness. Minor victim (P.W. 1) was corroborated by her mother (P.W. 2) and other circumstantial evidence regarding the allegation involving insertion of finger in her private parts. Absence of injuries does not improbabilise such accusation. Hence, prosecution case is proved beyond doubt.

9. P.W. 1 is the minor victim. She was eight years old at the time of incident. She deposed appellant offered her money and took her to the bank of Kansai river. He removed her wearing apparels and inserted his

finger in her private parts. She returned home and informed the matter to her parents. Her parents lodged FIR. She made statement before Magistrate. She proved her signatures (Exhibits – 1/1 to 1/3). She identified the appellant in Court. She remained unshaken during cross-examination.

10. P.W. 2 is the mother of the victim. She deposed she and her husband had gone to the field for cultivation. Her daughter was alone in the house. Appellant took her to the bank of river Kansai and inserted his finger in her private parts. Her daughter disclosed the incident to her, so did P.W. 3 (Archana Maity) and P.W. 9 (Swapan Moni). She and her husband went to the police station and lodged FIR. She proved her signature on the medical report (Exhibit – 3/1).

11. P.W. 7, Bharati Bhunia is associated with Child Line, Contai. She drafted the written complaint as per instruction of P.W. 2. She proved the complaint (Exhibit – 2).

12. P.W. 4 is the father of the victim. He has corroborated her daughter (P.W. 1) and wife (P.W. 2). He further stated they had gone to the house of the appellant but his father misbehaved with them.

13. P.W. 3, Archana Maity deposed she saw the appellant taking the child towards river Kansai. She asked Swapan to enquire. Swapan disclosed the incident to her. Thereafter, the child returned home and disclosed that appellant had stripped her wearing apparels and touched her private parts. She made statement to police.

14. P.W. 5 (Alok Maity) and P.W. 6 (Balaram Bhowmik) are neighbours. They deposed they heard about the incident. They are reported witnesses.

15. P.W. 9, Swapan Moni did not support the prosecution case and was declared hostile. He was confronted with his earlier statement to police. He admitted he was working in the field.

16. P.W. 10, Gourav Sen is a Judicial Magistrate who recorded the statement of the minor (Exhibit – 1).

17. P.W. 11, Deb Prasad Samanta is the investigating officer. He went to the place of occurrence. He prepared rough sketch map with index. He recorded the statement of Swapan (P.W. 9) and Archana (P.W. 3). He arranged for the medical examination of the accused and the minor girl. He obtained the statement of the minor recorded under section 164 Cr.P.C.

18. Appreciation of the evidence on record shows the minor child had been taken by the appellant to the bank of river Kansai on the allurement of giving her Rs. 10/-. Thereafter, appellant removed her wearing apparels and inserted his finger into her vagina. The minor (P.W. 1) has succinctly narrated the incident in Court. Her deposition is corroborated by her parents, P.Ws. 2 and 4. During trial, Swapan Moni (P.W. 9) turned hostile. He resiled from his earlier statement to police and was cross-examined. He admitted his presence at the place of occurrence. Archana Maity (P.W. 3) who was also present near the place

of occurrence stated Swapan was there and she had asked the latter to enquire into the matter. Even the minor child (P.W. 1) stated that one person had come to the spot where she was violated. These circumstances support the prosecution case and expose the falsehood of the hostile witness. Lack of corroboration from Swapan Moni is therefore of little consequence.

19. On the other hand, Archana (P.W. 3) has substantially corroborated the minor. She stated she saw the appellant take the minor to river Kansai. Being suspicious, she had requested Swapan to enquire. Swapan went to the spot and divulged the incident to her. Soon thereafter, the minor returned home and disclosed she had been violated. Appellant during his examination under section 313 Cr.P.C. also admitted he found the child playing alone. She had asked for money. He gave her Rs.10/- and took her to the bank of river Kansai.

20. The aforesaid circumstances including the admission of the appellant during his examination under section 313 Cr.P.C leave no doubt in my mind that the appellant had taken the child to Kansai river where the victim had been subjected to penetrative sexual assault.

21. Mr. Mitra strenuously argues that his client has been falsely implicated due to land dispute. Apart from a desperate plea taken during his examination under section 313 Cr.P.C., there is no whiff of evidence with regard to land dispute between the parties. On the contrary, stance of the appellant during his examination under section

313 Cr.P.C. that on seeing the child playing alone, he gave Rs.10/- and took her to the river bank dispels any perception of inimical relationship between two families.

22. It is also contended there was two days' delay in lodging FIR. In an offence of gender violence there is always some hesitation in approaching the police. Appellant was a neighbour. Minor child told her parents and others that appellant had taken her to the river bank and penetrated his finger into her vagina. Hearing this disturbing news, parents were naturally distressed. They approached the family of the appellant but his father rebuked and slapped P.W. 4, father of the victim. Thereafter, they went to the police station. A member of a non-governmental organisation, 'Child Line', (P.W. 7) scribed the complaint which was lodged as FIR. The aforesaid factual matrix clearly depicts the genesis of the events which led to lodging of the FIR and rules out any possibility of false implication.

23. It is contended the prosecution case as depicted through P.W. 1 in court is at variance with her statement before Magistrate. In her statement before Magistrate, the child stated that she was taken to the bank of river Kansai and made her lie down. Thereafter, the appellant laid on her body. When a person intervened, he took her behind the latrine and touched her private parts. It is true there is some variation in the statement of the minor before Magistrate vis-a-vis deposition in Court. One cannot forget that the victim is an eight year old child and

was compelled to recount a horrible experience repeatedly – firstly, before her parents, neighbours and thereafter, before the police and Magistrate and then in Court. This amounted to secondary victimization and may have led to some variation of her narration before an unknown official e.g. Magistrate. Parents of the child were not present when her statement was recorded before Magistrate. Section 26(1) of the POCSO Act, inter alia, provides a Magistrate shall record the statement of the minor in the presence of her parents. Parents of the child i.e. P.Ws. 2 and 4 do not state that they were present when their daughter's statement was recorded before the Magistrate. In all probability their absence had adversely impacted the child's ability to come out with a cogent version of the events before Magistrate. Statement of the child before Magistrate must be assessed in the light of the aforesaid perspective and any variation therein cannot be a ground to discount the deposition of the minor in Court, more particularly when such deposition is corroborated by her parents as well as neighbours (P.Ws. 3, 5 and 6).

24. It is finally argued the prosecution case of penetrative sexual assault is an exaggeration. Archana Maity (P.W. 3) deposed the child had stated the appellant had touched her private parts. Similar statement was also made before the doctor (P.W. 8) who did not find any injury. He noted hymen was intact.

25. I would have given credence to the aforesaid argument but for the fact that the FIR clearly states the appellant had penetrated his finger into the vagina. Minor (P.W. 1) also makes similar statement in Court. Evidence of Archana (P.W. 3) has to be read in the light of the aforesaid consistent evidence on record. She may have euphemistically described the incident as touching the private parts. Medical report was prepared after the registration of FIR wherein the allegation of penetration by finger is clearly depicted. Absence of injuries or rupture in hymen is also of little relevance in a prosecution case involving insertion of finger into the private parts. Nature and manner of penetration by finger cannot be improbabilised by absence of injuries or breach of hymen.

26. For the aforesaid reasons, I am of the opinion the version of the child regarding insertion of finger in her vagina being corroborated by her parents and also disclosed in the FIR at the earliest opportunity is established beyond doubt.

27. Hence, conviction and sentence of the appellant are upheld.

28. The appeal is, accordingly, dismissed.

29. In view of the dismissal of the appeal, the connected application being CRAN 2 of 2022 stands disposed of.

30. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence

imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

31. Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

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

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)

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