

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

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA (SB) 125 of 2022

Gobinda Bag (Buro)

-vs.-

The State of West Bengal & Anr.

Mr. Jayanta Narayan Chatterjee,
Ms. Moumita Pandit,
Ms. Nandini Chatterjee,
Mr. Supreem Naskar,
Ms. Jayashree Patra,
Ms. Sreeparna Ghosh,
Ms. Ritushree Banerjee,
Ms. Pritha Sinha,
Ms. Dipanwita Das.

...For the Appellant

Mr. Saswata Gopal Mukherjee, Ld. P.P.,
Mr. Sandip Chakraborty,
Mr. Saryati Datta

... For the State

Mr. Dipanjan Dutt

...For the de facto complainant/victim

Reserved on : 01.05.2023.

Judgment on : 04.05.2023

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order of conviction and sentence dated 25.07.2022 passed by the learned Special Court - Cum – Additional Sessions Judge, 1st Court, Serampore, Hooghly in Sessions

Trial No. (POCSO) 19/2017 corresponding to Special (POCSO) No. 06/2016 wherein the trial Court was pleased to hold the appellant guilty under Section 8 of the Protection of Children from Sexual Offences Act and sentenced him to suffer Simple Imprisonment for three years and fine of Rs.5,000/- in default to undergo additional Simple Imprisonment for one month.

The genesis of the present case was on the basis of complaint lodged by 'Y' father of 'X' who alleged that his 13 year old daughter was returning home on 26.06.2016 at about 5.30 pm when the accused Gobinda Bag (Buro) of their village stood in front of her and brought her down and with an ill-motive tried to cover her face. However, some villagers noticed when he fled away. The complainant as such requested the police authority to take appropriate steps against the accused.

On the basis of the aforesaid complaint dated 26.06.2016 addressed to the Officer-in-charge, Chanditala Police Station case no. 304/16 dated 26.06.2016 was registered for investigation under Section 8/12 of the POCSO Act and Section 354 of the IPC. After completion of investigation charge-sheet was submitted before the jurisdictional Court under the same Act and Sections. After supply of copies charge was framed against Gobinda Bag under Section 354 of IPC and Section 8/12 of POCSO Act. The contents of the charge were read over to the accused to which he pleaded not guilty and claimed to be tried.

Prosecution in order to prove its case relied upon 6 witnesses which included PW1, 'X', victim girl; PW2, Dr. Dibyendu Dutta, who examined the victim girl; PW3, 'Y' father of the victim girl; PW4, 'Z' mother of the victim girl; PW5, Debasish Chatterjee, SI of Police; PW6, Nilkantha Mondal, Investigating Officer of the case. Prosecution in this case also relied upon number of documents which will be dealt with subsequently while discussing the evidence. However, the defence neither adduced any oral or documentary evidences but only emphasised on the foundation of the prosecution case.

PW1, 'X' is the victim girl who deposed that the de facto complainant is her father who filed the written complaint with Chanditala Police Station on 26.06.2016, as on that day at about 5.30 pm when she was returning from her tuition classes in her bicycle then all on a sudden a person standing by the side of the road pounced upon her and put his hand on her mouth and as a result of which she fell on the earth. She raised alarm and after hearing her hue and cry local people came to her rescue when the accused fled away. After returning to her residence she informed the incident to her parents. She came to Court and gave statement before the learned Judicial Magistrate. She identified her signature in the statement recorded by the learned Judicial Magistrate who read over the same to her when she signed the same. Her signature in the statement was marked as Ext.1 and Ext.1/1. Subsequently she came to know that the accused is Gobinda Bag and she identified the accused in Court.

PW2, Dr. Dibyendu Dutta is the medical officer attached to Walsh Hospital, Serampore and on 30.06.2016 the victim 'X' was produced before him for medical examination but she refused to extend her consent for medical examination. The endorsement of the mother of the victim girl who accompanied her regarding the refusal was made in his presence, he identified the medical report which was prepared and signed by him. The same was marked as Ext.2 and his signature was marked as Ext.2/1. The witness also identified the endorsement of the mother of the victim which was marked as Ext.2/2.

PW3 is 'Y' complainant, who deposed that on 26.06.2016 at around 5.30 pm an incident occurred with his daughter. At the relevant point of time the victim was aged about 13 years. On that date at the relevant point of time his daughter was returning home from her tuition by bicycle and at that time the accused caused his daughter to fall from the cycle and pull down the wearing pant by pressing hand on her mouth and also put his hand on her breast and vagina. At the relevant point of time his wife was busy in attending a meeting beside their house and the local boy informed her. Thereafter his wife informed him about the incident over phone. Witness stated that the incident occurred on the road which leads to Chanditala from Beler Math village. After getting such information he returned to his house and came to know about the incident from his wife and daughter and he complained to Chanditala Police Station on the same date. He identified the complaint which was written by him, the same was marked as Ext.3 and his signature was marked as Ext.3/1.

He identified the accused in Court and stated that he knew him as he is a co-villager and neighbour.

PW4 is 'Z' mother of the victim girl. She stated that on 26.06.2016 at around 5.30 pm an incident occurred with her 13 years old daughter when she was returning home from her tuition by a bicycle, at that time Gobinda Bag caused her daughter to fall down from her cycle dragged her on the road side bush by pressing his hand on her mouth and put hand on her breast and vagina. At the relevant point of time she was busy in attending one meeting of self help group in her house and a local boy rushed and informed her regarding the incident. She returned to her house and saw her daughter who was crying and came to know regarding the incident from her daughter. She informed her husband over phone when her husband came down to their home and thereafter having knowledge regarding the incident complained to Chanditala police station. The birth certificate of her daughter was handed over to the Investigating Officer which was returned to her. She identified the original birth certificate of her daughter which was marked as Ext.4. She identified the accused in Court.

PW5, Debasish Chatterjee, at the relevant time was Officer-in-charge of Chanditala Police Station. On receipt of the complaint from 'Y', he started Chanditala Police station case no. 304/16 date 26.06.2016 under Section 8/12 of POCSO Act and Section 354 of IPC. He identified his endorsement with signature on the complaint which was marked as Ext.3/2. He thereafter filled

up the formal FIR and endorsed the case to SI. Nilkanta Mondal for investigation. He also deposed that the formal FIR was filled up and signed by him. The Formal FIR as such was marked as Ext.5.

PW6, Nilkanta Mondal is Investigating Officer of the case, who on receipt of the assignment was pleased to visit the place of occurrence, prepared rough sketch map of the place of occurrence with index which was identified by him and as such marked as Ext.6. He also examined available witnesses and recorded their statements under Section 161 of Cr.P.C. He sent the victim girl for her statement being recorded by the learned Judicial Magistrate under Section 164 of Cr.P.C. The statement of the victim girl was marked as Ext.1/2. He also made arrangement for sending the victim girl to the hospital for medical examination. He conducted raid at the house of the accused, however, he was not available. However, on 01.07.2016 he was arrested from Noity Manasatala under P.S. Chanditala and produced before the Court. He identified the accused and submitted that he collected the birth certificate for ascertaining age of the victim and after completion of investigation he submitted charge-sheet against the accused.

Mr. Jayanta Narayan Chatterjee, learned Advocate appearing for the appellant submitted that no case has been made out from the evidence appearing in the records of the case and the appellant has been falsely implicated. The prosecution witnesses are contradicting each other and there are exaggerations which do not support the case of the victim. Learned

Advocate also emphasised that the concept of 'sexual intent' is to be inferred and from the series of circumstances appearing in evidence they do not support such conduct of the accused in this case. The evidence of the victim nowhere reflects gestures, overacts or overtones which would bring the act of the accused within the concept of 'sexual intent' so as to implicate the present appellant under the relevant provisions of the POCSO Act or under Section 354 of the Indian Penal Code. The appellant according to the learned Advocate has been falsely implicated. The learned trial Court convicted the appellant on reasons which are not available in the records of the case.

Mr. Dipanjan Dutt, learned Advocate appearing for the complainant submitted that in this case it is an admitted fact that an incident happened which would be transparent from the answer given by the accused under Section 313 of the Code of Criminal Procedure. The provisions of Section 7 of the POCSO Act is satisfied to make out an offence in respect of the act complained of. Learned Advocate to that effect draws the attention of this Court to the second part of Section 7 of the POCSO Act which define 'sexual act' and submits that in this case the phrase "does any other act with sexual intent which involves physical contact without penetration" is satisfied and as such the order of conviction and sentenced may not be interfered with. Learned Advocate for the opposite party relies upon ***Attorney General for India -Vs. - Satish & Anr.*** reported in ***(2022) 5 SCC 545*** and draws the attention of the Court to paragraphs 66, 68, 81 and 82 which are set out as follows:

“66. To gather the mischief which Parliament wished to eliminate, it would be necessary to briefly trace the history of the law, which existed before Pocso was enacted. The Penal Code (“IPC” hereafter) criminalises assault or use of criminal force which outrages a woman's modesty (by Section 354). The expression “criminal force” is defined in Section 350 and “assault” is defined in Section 351. These require an element of application of physical force, to women. The expression “modesty” was another limitation as older decisions show that such a state was associated with decorousness [Rupan Deol Bajaj v. Kanwar Pal Singh Gill, (1995) 6 SCC 194 : 1995 SCC (Cri) 1059] of women. This added a dimension of patriarchy and class. [Section 354 (or any other provision of IPC) does not offer a statutory definition of the term “modesty”, and over time, was interpreted broadly, contemporaneously with the developing and acknowledged role of women in society, to overcome its inherently colonial and patriarchal origins. Yet, there were hangovers, as noticed as recently as in Kailas v. State of Maharashtra, (2011) 1 SCC 793 : (2011) 1 SCC (Cri) 401, wherein the abhorrent argument that a tribal woman's “modesty” was distinct owing to the “inferiority” of tribal people who live in torn clothes or no proper clothes was rejected for being totally unacceptable in modern India.] One cannot be unmindful of the circumstances in which these provisions were enacted by a colonial power, at a time, when women's agency itself was unacknowledged, or had limited recognition. Further, women in India were traditionally—during the time of enactment of IPC, in the mid-Nineteenth Century—subordinated to the care of their fathers, or their husbands, or other male relatives. They had no share in immovable property; notions of gender equality were unheard of, or not permitted. Women had no right to vote. Quite naturally, the dignity of women—or indeed their autonomy, was not provided for.

68. *The limitations in law in dealing with acts that undermined the dignity and autonomy of women and children, ranging from behaviour that is now termed “stalking” to pornography, or physical contact, and associated acts, which were not the subject-matter of any penal law, were recognised and appropriate legislative measures adopted, in other countries. [Sections 2, 3, 6, 7 and 78 of the UK Sexual Offences Act, 2003; Part V : Sexual Offences, Public Morals and Disorderly Conduct (Sections 151-153), Criminal Code, 1985 of the Dominion of Canada; Sections 5, 6, 7, 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, enacted by the Republic of South Africa and amendments to laws enacted by the New South Wales, Victoria and New York Penal Laws by their legislatures.] These have been alluded to in Trivedi, J.'s judgment, in detail. These laws contain nuanced provisions criminalising behaviour that involve unwanted physical contact of different types and hues, have the propensity to harass and discomfit women and minors (including minors of either sex), or demean them.*

81. *Parliamentary intent and emphasis, however, is that the offending behaviour (whether the touch or other act involving physical contact), should be motivated with sexual intent. Parliament moved beyond the four sexual body parts, and covered acts of a general nature, which when done with sexual intent, are criminalised by the second limb of Section 7. The specific mention of the four body parts of the child in the first limb, and the use of the controlling expression “sexual intent” mean that every touch of those four body parts is prima facie suspect.*

82. *The circumstances in which touch or physical contact occurs would be determinative of whether it is motivated by “sexual intent”. There could be a good explanation for such physical contact which*

include the nature of the relationship between the child and the offender, the length of the contact, its purposefulness; also, if there was a legitimate non-sexual purpose for the contact. Also relevant is where it takes place and the conduct of the offender before and after such contact. In this regard, it would be useful to always keep in mind that “sexual intent” is not defined, but fact-dependent—as the Explanation to Section 11 specifies.”

Learned Advocate for the opposite party also relied upon ***Additional District and Sessions Judge ‘X’ –Vs. – Registrar General, High Court of Madhya Pradesh & Ors.*** reported in **(2015) 4 SCC 91**, attention of this Court was drawn to paragraph 26 which is set out as follows:

“26. Every day is a matter of learning. Hearing of submissions in this case, we may say, was a matter of further understanding the sensitivities involved in a controversy of the present nature. We may venture to demonstrate this, by noticing a verbal exchange, during the course of hearing, between the counsel for the petitioner and that for the High Court. While the learned counsel representing the High Court was on “his” legs, the learned counsel for the petitioner interjected to express “her” point of view. All through, during the process of hearing, submissions were advanced in a lively and respectful manner, and pointedly on the subject under consideration. Feeling that the thought being projected by the learned counsel was being disturbed by the intervention, the Bench accordingly exhorted the learned counsel, to go on unmindful of the interruption. The learned counsel for the High Court, well meaning and deferential as he always is, responded by observing, “The interjections by the learned Senior Counsel for the petitioner, are always delightful”. The learned Senior Counsel for the petitioner, had serious objection to

the term, “delightful” used, with reference to “her”. She questioned, the use of the term, “delightful” by posing to the learned Senior Counsel, whether similar interjections by men, were also considered by him as delightful. Why then, she questioned, should “her” interjection be found “delightful”. In expressing her view, she went on to describe the response of the learned Senior Counsel as “sexually coloured”. Having given our thoughtful consideration to the response of the learned counsel for the petitioner, we may only say, that she may well be right. There is a lot to be learnt, from what she innocuously conveyed. Her sensitivity to the issue, one may confess, brought out to us, a wholly different understanding on the subject. It is, therefore, that we have remarked above, that the evaluation of a charge of sexual harassment, would depend on the manner in which it is perceived. Each case will have to be decided on its own merits. Whether the perception of the harassed individual was conveyed to the person accused, would be very material in a case falling in the realm of oversensitivity. In that, it would not be open to him thereafter, to defend himself by projecting that he had not sexually harassed the person concerned, because in his understanding the alleged action was unoffending.”

Learned Advocate for the opposite party also relied upon **Ganesan –Vs. – State Represented by its Inspector of Police** reported in **(2020) 10 SCC 573** and emphasised that it is a settled proposition of law that if the statement of the victim is found to be trustworthy unblemished and is of sterling quality then the conviction can be based on her sole testimony.

Mr. Saswata Gopal Mukherjee, learned Public Prosecutor drew the attention of the Court to the evidence of the prosecution witness justifying the

stand of the State. It was submitted that having regard to the provisions of Section 29 and Section 30 of the POCSO Act and the evidence which has surfaced in the present case the same do not call for any interference in respect of the judgment and order of conviction and sentence passed by the learned trial Court.

Before dealing with the contents advanced by the appellant, private respondent and the State, the statement of the victim under Section 164 of Code of Criminal Procedure, as also before the learned Trial Court is to be taken into account. It was stated by the victim in her statement under Section 164 Cr.P.C. that on a Sunday she was returning from her tuition by a cycle when the accused was standing at the road. She was unable to recollect the name of the accused, however, the accused pushed her from cycle and put his hands on her face and neck. The victim thereafter removed his hand when the local people on hearing hue and cry approached when the accused fled away.

In this case the evidence of PW1, PW3 and PW4 assumes importance. PW1, victim girl in respect of the incident has stated that the accused pounced upon her and put his hand on her mouth and as a result of which she fell down on the ground. There is no allegation relating to any physical contact or touch on any of her private parts of her body or attempting to disrobe her or pulling her towards the bush with an ill-motive. PW1, victim in her cross-examination stated that she for the first time on that day saw the accused and in Court she saw him for the second time. PW3, father of the victim girl

deposed that when his daughter was returning home from her tuition in a cycle the accused forced her to fall down from her cycle and pulled down her wearing pant by pressing hand on her mouth and putting hand on her breast and vagina. PW4, mother of the victim in her evidence before the Court stated that at the relevant point of time when her daughter was returning from tuition on a cycle the accused forced her to fall from cycle, dragged her at the road side by pressing his hand putting hand on her breast and vagina. Although the statement under Section 164 of the Code of Criminal Procedure was considered by this Court but the said statement was produced in Court through the Investigating Officer of the case under Section 80 of the Evidence Act. Adopting such procedure may be sufficient for admission of the document in evidence but if the said statement was introduced in evidence and admitted through the victim the opportunity to cross-examine the victim in respect of the contents thereof could have created a better evidentiary value.

Assessment of the evidence of PW3 and PW4 reveal that they have exaggerated their versions so that the provisions of the POCSO Act can be attracted and that is why in the complaint it was alleged by the father of the victim girl that with an ill-motive the accused tried to cover her face and subsequently while deposing before the Court he narrated in respect of pulling down of the wearing pant and touching the sensitive parts of the body of the victim. The same reiteration was made in evidence by the mother of the victim girl. Thus there is a difference in the nature of allegations made by the victim girl and that made by her parents. The accused in his examination under

Section 313 of Cr.P.C. in response to a specific question answered ‘I have no knowledge about age of his daughter. I did not know the girl. Suddenly she fell down due to dash’.

The prosecution evidence on being scrutinised should inspire the confidence of the Court regarding the factum of sexual intent being involved which is to be inferred with reference to the circumstances under which touch or physical contact occurs. The accused has accepted that he dashed with the girl who fell from the cycle. This somewhat is in tune with the version of the victim girl who stated that a boy appeared and forced her to fell down on the ground, she added that to that effect he put his hand on her mouth. In cases under the POCSO Act and related offences the statement of the victim assumes importance. Considering the evidence of the victim which lays the foundational facts of this case, I am unable to satisfy myself as to whether any case is made out from the touch or physical contact which would attract the basis of “sexual intent” as is referred to in the explanation to Section 11 of the POCSO Act and also elaborated by the judgment of ***Attorney General for India (supra)***.

In view of the observations made above, the judgment and order of conviction and sentence dated 25.07.2022 passed by the learned Special Court - Cum – Additional Sessions Judge, 1st Court, Serampore, Hooghly in Sessions Trial No. (POCSO) 19/2017 corresponding to Special (POCSO) No. 06/2016 do call for interference and the said judgment is hereby set aside.

The appellant is acquitted of the charges.

Thus CRA (SB) 125 of 2022 is allowed.

Pending applications, if any, are consequently disposed of.

Appellant is discharged from the bail bonds.

Department is directed to send back the Lower Court Records to the Trial Court and communicate this judgment for further reference.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)