

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

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA (SB) 136 of 2022

Chandan Das alias Shibu

-vs.-

The State of West Bengal

Mr. Asimesh Goswami,
Ms. Paulomi Banerje

...For the Appellant

Mr. S.G. Mukherjee, Ld. P.P.,
Mr. Sandip Chakraborty,

... For the State

Mr. Saryati Datta

... For the respondent no.2

Reserved on : 28.04.2023.

Judgment on : 04.05.2023

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order of conviction and sentence dated 01.09.2022 and 02.09.2022 passed by the learned Additional Sessions Judge, 2nd Court, Chinsurah, Hooghly in Sessions Trial (SPL) No. 24/19 arising out of Sessions Case (SPL) No. 29/18 wherein the learned Trial Court was pleased to convict the appellant under Sections 341/354/354B of the Indian Penal Code and Section 8 of the

Protection of Children from Sexual Offences Act and sentenced him to suffer as follows:

- 1) Rigorous Imprisonment for five years and fine of Rs.5,000/- in default to suffer additional Rigorous Imprisonment for three months for offence punishable under Section 354B of the Indian Penal Code;
- 2) Simple Imprisonment for one month for commission of offence under Section 341 of the Indian Penal Code.

Mogra P.S. case no. 245/18 dated 05.09.2018 was registered for investigation under Section 341/354/354B of the Indian Penal Code and Section 8 of the POCSO Act on the basis of a letter of complaint by one 'Y' addressed to the Officer-in-charge of the said Police Station. It was alleged that elder daughter of 'Y' namely 'X' (aged about 12 years) went to a shop for purchasing cake and other food stuffs along with her younger sister. 'X' came across accused Chandan Das (Shibu), who provoked her to lie on bed with him. He compelled her to be naked and touched on sensitive parts of her body by removing her clothes/dress. Such incident took place at about 05.00 pm on 05.09.2018. 'X' revealed such humiliating act to her and also to her grandmother. Victim expressed to 'Y' (mother) that she was feeling pain at her breast which she subsequently informed to her husband and neighbours, who became aware regarding such untoward incident. She therefore, requested to take action against Chandan Das (Shibu).

On such complaint, investigation commenced and on conclusion of investigation charge-sheet was submitted on or about 30.10.2018 under Section 341/354/354B of the Indian Penal Code read with Section 8 of POCSO Act against Chandan Das alias Shibu. After supply of copies the learned trial Court was pleased to frame charges against the sole accused under the same Sections. The contents of the charge were read over to the accused person to which he pleaded not guilty and claimed to be tried.

Prosecution in order to prove its case relied upon 13 witnesses which included PW1, 'X', victim girl; PW2, 'Y', the complainant and mother of victim girl; PW3, Mithu Das, neighbour of the complainant; PW4, Archana Das, neighbour of the complainant; PW5, 'Z' father of the victim girl; PW6, 'A', grandmother of victim girl; PW7, 'B', grandfather of the victim girl; PW8, Siru Mandi, Constable and seizure list witness; PW9, Arup Bhowmick, Constable and seizure list witness; PW10, Dr. Partha Bose, Medical Officer, Chinsurah Sadar Hospital; PW11, Anindita Mukherjee, Constable; PW12, S.I. Nilmadhab Pal, Investigating Officer; PW13, Dr. Umapada Mondal, Medical Officer, Chinsurah Sadar Hospital. The prosecution also in order to substantiate its case relied upon number of documents which were admitted as Exhibits and 3 material exhibits. These are Ext.1, signature of PW1 on the seizure list dated 05.09.2018; Ext.2, Signature of PW1 on the medico legal examination report; Ext.3, Signature of PW1 on the statement under Section 164 of Cr.P.C.; Ext.4, written complaint; Ext.5, signature of PW3 on seizure list dated 06.09.2018; Ext.6, carbon copy of zimmanama; Ext.7, xerox copy of birth certificate proved

by PW2; Ext. 3/4, Ext.3/5, Ext. 3/6 and Ext.3/7, signatures of PW2 on the statement under Section 164 Cr.P.C.; Ext.4/1, signature of PW3 on the written complaint; Ext.5/1, signature of PW5 on the seizure list dated 06.09.2018; Ext. 1/1, signature of PW5 on the seizure list dated 05.09.2018; Ext.8, signature of PW8 on the seizure list dated 06.09.2018 proved by PW8; Ext.9, medical report of accused; Ext.2/1, signature of PW11 on the medico legal examination report of the victim girl; Ext.4/2, endorsement of the R.O. Debanjan Bhattacharya on the written complaint; Ext.10, formal FIR; Ext.1/2, seizure list dated 05.09.2018; Ext.11, rough sketch map with index; Ext.8/2, seizure list dated 06.09.2018; Ext.5/2, seizure list dated 06.09.2018; Ext.2/2; Medical report of the victim girl; Ext.3/8, statement of victim girl under Section 164 of Cr.P.C.; MAT Ext.I, pink coloured top (proved by PW1); MAT Ext.II, violet coloured hot pant (proved by PW1); MAT Ext. III, lungi of the accused (identified by PW8).

PW1, 'X' is the victim girl. She deposed before the Court that her mother 'Y' lodged a written complaint at Mogra PS against Chandan Das alias Shibu. She called the accused as "Dadu". She was born on 29.10.2006 and the incident took place on 05.09.2018 at about 05.00 pm. She narrated that at the relevant time she was going to a shop for buying some cake for her sister who was in her lap. At the time of returning from the said shop, Shibu called her in his house and after giving some snacks to her sister she asked her to go inside the room for bringing some more snacks. When she went inside the room she compelled her to lay on bed and thereafter pressed her breast and after disrobing her when he noticed that she had period he left her and then she

returned home. After returning home she narrated the entire fact to her mother and grandmother. She alleged that due to such act of the accused she suffered chest pain and informed the matter to her mother. Her mother took her to Mogra police station for lodging complaint. On the same date police came to their house and interrogated her regarding the incident. Her mother handed over a pink top and violet colour hot pant which belonged to her to the police authorities. Police seized the same on proper seizure list and she also signed therein. Beside her, her parents also signed on the seizure list. She identified her signature on the seizure list which was marked as Ext.1. She deposed that the wearing apparels were handed over by the police by her mother because she were wearing those clothes on that day. She identified both the clothes which were shown to her and the same was marked as MAT Ext.I and Ext.II respectively. She also identified the accused Chandan Das alias Shibu in Court. The victim girl deposed that she was sent to Chinsurah Hospital for medical examination where she was accompanied by her father. She identified her signature on the medical report which was marked as Ext.2. She was also produced before the learned Magistrate for recording her statement under Section 164 Cr.P.C. She made the statement voluntarily and she was never tutored for the same. After she made her statement to the learned Magistrate, the learned Magistrate read over the contents to her and thereafter she signed on every page of the statement. She identified her signatures which were marked as Ext.3 series.

PW2, 'Y' is the mother of the victim girl. She deposed that she lodged the written complaint at Mogra Police Station against Shibu alias Chandan Das, the said written complaint was drafted by one Mithu Das as per her instructions. The contents of the same were read over to her and thereafter she put her signature. She identified the written complaint which was marked as Ext.4. She deposed that her elder daughter 'X' was aged about 12 years and her younger daughter was aged about 2 years. On 05.09.2018 at about 05.00 pm 'X' went to a shop along with her younger sister to purchase some cake, at that time the accused Chandan Das called her in his house. The accused Shibu gave the younger sister some snacks and called 'X' inside his bedroom. After that the accused disrobed her and touched various parts of her body. Her daughter suffered pain on her chest. After returning home 'X' disclosed the entire facts to her and her grandmother. She thereafter informed the matter to her husband over phone. She lodged written complaint. In course of investigation she was interrogated by the police and during investigation police seized violet colour hot pant and pink colour half sleeves top from her by way of a proper seizure list and she signed the same. She identified her signature in the seizure list which was marked as Ext.1/1. She stated that police also seized birth certificate of her daughter and she signed the said seizure list as a witness. She identified her signature in the seizure list dated 06.09.2018 which was marked as Ext.5. Police also returned the birth certificate to her by executing zimmanama. She identified carbon copy of the zimmanama which was marked as Ext.6. she produced the original birth certificate along with

Photostat copy of the said birth certificate before the Court, after comparing the Photostat copy with the original the same was marked as Ext.7. She also stated that she had been to the Court along with her daughter where her statement under Section 164 of Cr.P.C. was recorded. The statement was shown to the witness when she identified her signature on four pages which were marked as Ext.3/4, Ext.3/5, Ext. 3/6 and Ext.3/7. She identified the accused Chandan Das in Court.

PW3, Mithu Das is a neighbour of the complainant who deposed that she drafted the written complaint as per the instructions of PW2. She read out the contents of the written complaint and explained to her after which PW2 signed on the written complaint. She deposed that she knew the daughter of 'Y'/complainant and in the year 2018 at about 05.00 pm one day 'Y' stated to her that Shibu took her in his house and after disrobing her sexually assaulted the victim girl. At that time she was a member of Gram Sava and subsequently she became Pradhan of Chandrahati-I Panchayat. She also inquired the matter from the victim girl who told her that accused sexually assaulted her after disrobing. Being a member of Gram Sava she took 'Y' and 'X' to Mogra Police Station for lodging written complaint. As the complainant was illiterate lady, she drafted the written complaint as per her instructions and she signed the same also. She identified her signature in the written complaint which was marked as Ext.4/1. She stated that police interrogated her during investigation. The accused was also identified by her in Court.

PW4, Archana Das is also neighbour of the complainant. She deposed that she knew the victim girl 'X'. She deposed that two years back on a particular date at about 05.00 pm she heard hue and cry in her locality and some persons gathered near the bank of pond of the village. She heard that Shibu took 'X' in his house and sexually assaulted her. She also found that the local people were assaulting Shibu in the locality. At the relevant time the victim was about 11 years old. Police interrogated her in course of investigation. She also identified the accused in Court.

PW5, 'Z' is father of the victim. He deposed that his wife lodged a written complaint at Mogra Police Station against Chandan Das. 'X' is his elder daughter and at the relevant time she was 12 years old and studying in Class-VI at Bishpara High School. He came to learn about the incident from his wife at about 4.30 - 5.00 pm on 05.09.2018. On that day he had been to Kalitala where his wife called over phone, by profession he is Toto driver and on receiving the phone call he found that his wife requested him to return to his house immediately. He rushed to his house and after reaching home he was informed regarding the incident by his wife who stated that her daughter 'X' along with younger daughter had been to a nearby shop to buy cake and when they were returning Chandan called them in his house and asked the younger daughter to wait outside the room. The accused also asked his elder daughter to enter the room and he was also informed by his wife that the accused touched on various parts of her body after disrobing her and also pressed her breast. As a result of the act of the accused victim felt pain on her chest and

narrated the incident to his wife after returning home. He also came to know from his wife that at the relevant time the accused was alone in his house. After the incident he along with his wife, mother and daughter had been to Mogra Police Station and lodged written complaint. Police interrogated him in course of investigation and also seized the birth certificate of his daughter. He signed on the seizure list and identified his signature which was marked as Ext.5/1. Police also send the victim to Chinsurah Medical Hospital for medical examination in his presence. During investigation, police also seized the wearing apparels of his daughter. He signed the seizure list and identified his signature therein which was marked as Ext.1/1. He also identified the wearing apparels of his daughter in Court which were marked as MAT Ext.I and MAT Ext.II. The witness also identified the accused in Court.

PW6, 'A' is the grandmother of the victim and mother of PW5. She deposed that her daughter-in-law 'Y' lodged a written complaint at Mogra P.S against the accused Shibu. She identified the accused in Court. She narrated that the incident took place on 05.09.2018 at about 05.30 pm when she was in her house. Her grand-daughter told her that she and her younger sister had been to a shop to buy some food stuff when accused Chandan called them in his house and asked the younger sister to wait at the verandah. Accused called the victim in his room and after that he touched various parts of the body after disrobing her undergarments. The accused also pressed her breast and when the elder grand-daughter/victim felt pain on her breast she narrated the incident to her. After hearing the incident she informed the same to her

daughter-in-law 'Y', who informed it to the neighbours and called her son 'Z' over phone. She identified the accused in Court and stated that police interrogated her in course of investigation.

PW7, 'B' is grandfather of the victim girl 'X' and father of 'Z'. The witness identified the accused in Court and deposed that he heard from his wife 'A' that on one occasion when her grand-daughter had been to the shop of one Narayan Ch. Das at that time the accused Shibu called her grand-daughter in his house and disrobed her. The accused also pressed her breast for which she felt pain on her breast. The incident took place in the year 2018 at about 5.00 pm. According to the witness such incident was reported by 'X' to her mother, who later informed the matter to the neighbours and after that went to the police station for lodging the First Information Report. At the time of going to police station 'Y' was accompanied by her husband 'Z' and 'A' her mother-in-law. However, the witness stated that the police did not interrogate him.

PW8, Siru Mandi is a constable posted at Mogra Police Station, who deposed that Sub-Inspector Nilmadhab Pal, the investigating officer on 06.09.2018 seized one green black, white and yellow printed lungi from the house of the accused under proper seizure list. He identified the said lungi which was seized by the investigating officer and was marked as MAT Ext.III. He identified the seizure list prepared by the investigating officer where he signed, the signature on the seizure list was marked as Ext.8.

PW9, Arup Bhowmick is a constable posted at the relevant time at Mogra Police Station. He deposed that on 06.09.2018 the investigating officer seized one green black, white and yellow printed lungi from the house of the accused. He identified the same which was seized by the investigating officer. He signed on the seizure list prepared by the investigating officer and identified his signature which was marked as Ext.8/1.

PW10, Dr. Partha Bose, who was posted as a Medical Officer at the relevant time at Chinsurah Sadar Hospital. He deposed that one Chandan Das, aged about 36 years old was produced before him by Constable Sisir Kumar Mondal of Mogra Police Station for medical examination in connection with Mogra PS case no. 245/18 dated 05.09.2018. The accused Chandan Das refused to undergo medical examination. He identified the medical report which was prepared by him and bears the signature. The said medical report was marked as Ext.9.

PW11, Anindita Mukherjee is a lady constable, who deposed that as per direction of the Investigating Officer he took the victim to Chinsurah Sadar Hospital for medical examination. She identified her signature on the medical report which was marked as Ext.2/1. On the same date she took the victim girl to learned Magistrate for recording her statement under Section 164 of Cr.P.C. and identified the victim girl to the learned Magistrate.

PW12, Nilmadhab Pal is the Investigating Officer of the case. The Investigating officer narrated before the Court regarding the steps taken by him

in course of investigation. He stated that on receipt of the written complaint he endorsed the same and thereafter filled up the formal FIR. He visited the place of occurrence being accompanied by a lady constable. Recorded the statement of the victim girl, seized the wearing apparels of the victim girl and thereafter arrested the accused, prepared the rough sketch map with index. He also seized the wearing apparels of the accused from his house. The original birth certificate of the victim was seized by him for which a seizure list prepared. He made arrangement for sending the victim girl as well as the accused for medical examination in the Chinsurah Sadar Hospital and subsequently collected the medical report and after completion of investigation submitted charge-sheet no. 270/18 dated 30.10.2018 under Section 341/354/354B of IPC and Section 8 of the POCSO Act. He identified the accused in Court.

PW13, Dr. Umapada Mondal, deposed that on 06.09.2018 he was posted at Chinsurah Sadar Hospital and on that date he examined the victim 'X' who was aged about 12 years and produced by a lady Constable in connection with Mogra PS case no. 245/18 dated 05.09.2018. He deposed that father of the victim accompanied her and opposed/refused medical examination of the victim. The medical report was prepared by him. He identified his signature in the medical report which was prepared by him, the same as such was marked as Ext.2/2.

Mr. Asimesh Goswami, learned Advocate appearing for the appellant submitted that the accused has been falsely implicated in connection with the

instant case as the parents of the victim were attached to an orchestra party and they after accepting money refused to perform. Learned Advocate also submitted that there are inconsistencies in the statement of the victim girl and the prosecution at every stage has improved the case which impeaches the testimony of the prosecution witnesses. According to the learned Advocate the evidence of victim and her mother are contradictory, as such to rely upon such witness for arriving at a finding of guilt with regard to this case is miscarriage of justice. By drawing the attention of the Court to the relevant part of the judgment delivered by the learned trial Court it was pointed out that the learned trial Court not only accepted the prosecution evidence as gospel truth but also presumed certain issues for arriving at its finding which were not available as evidence in the records of the case. Emphasis has been laid on the fact that there are inherent inconsistencies which were ignored by the trial Court and the same calls for interference by this Court.

Mr. S.G. Mukherjee, learned Public Prosecutor appears on behalf of the prosecution and submits that the testimony of the victim has been consistent. It has been submitted that the evidence of the victim girl both before the Court and in her statement under Section 164 of the Code of Criminal Procedure along with the deposition of the attending witnesses do make out a consistent version which do not call for any interference. By supporting the judgment of the trial Court it was prayed on behalf of the State to dismiss the appeal.

Mr. Saryati Datta, learned Advocate appearing for the private opposite party no.2/respondent/complainant submitted that the appellant has tried to magnify minor inconsistencies which do not touch the root of the case. It has also been argued that the version of the victim must be treated at par with as injured witness and her evidence could not be shaken in spite of the same being confronted with a lengthy series of questions in cross-examination. There are no exaggeration in the statement of the victim. It is a settled principle that the sole testimony of the prosecutrix or the victim can be relied upon and in this case the judgment of trial Court do not call for any interference as no major inconsistencies were pointed out by the accused/appellant to overturn the decision of the trial Court. It was emphasised that in this case the only question with which the prosecution witness was confronted is that the accused had advanced for performance of orchestra party which belonged to her parents and in spite of accepting the advance they did not perform and foisted the appellant with a criminal case. Learned Advocate for the complainant prayed for not interfering with the well reasoned verdict of the trial Court.

Before proceeding further the statement of the victim under Section 164 of the Code of Criminal Procedure which was recorded by the learned Judicial Magistrate requires to be taken into consideration. It is reflected from the said statement that the learned Magistrate after assessing the voluntariness and the capacity of the victim to understand the events asked her to state the facts. The victim as such narrated before the Magistrate that at 05.00 pm at the

earlier date she along with her sister proceeded to a shop for purchasing cake and while returning Shibu dadu called her, when she went at that time the accused gave her sister some snacks at the varandah where she sat. The accused thereafter took her to his bedroom and laid her on his bed, thereafter he pressed her breast and disrobed her, however, as she had her period the accused could not rape her. She felt pain on her breast and on returning home she divulged the incident to her mother.

In this case on an assessment of the records it is found that defence did not adduce any evidence and when specific questions were asked, by the Special Court/trial Court to the accused he did not answer any incriminating materials which were appearing against him. Accused's three answers being 'false', 'I am innocent' and 'I do not know'. Therefore only material which the accused tried to confront with the prosecution witnesses for rebutting the prosecution evidence was by in respect of PW2 and PW5. In cross-examination the only suggestion which was advanced to PW2 'Y' was that they had taken money from the accused and subsequently they did not repay the same, as such they have initiated the criminal case which was denied by PW2 and PW5. In respect of PW5 the same nature of suggestion was advanced that he took loan from the accused and in order to avoid repayment of loan he instituted the criminal case, which was denied by him.

In this case the deposition of the victim assumes primary importance as has been submitted on behalf of the complainant that the status of such victim

is equivalent to an injured witness. The comparison of her deposition before the trial Court and her statement recorded under Section 164 of the Code of Criminal Procedure before the learned Magistrate are one and the same, although they were recorded after a length of time. The three issues which makes out an offence in the case are that the victim 'X' was called by the accused, he compelled her to lay on the bed and her body parts were touched. So far as this part of the evidence is concerned there are no materials to suggest that the accused by way of cross-examination could dislodge this fact. Having regard to the same and the reasons assigned by the learned trial Court, I am of the view that there is no scope for interfering in the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 2nd Court, Chinsurah, Hooghly in connection with Sessions Trial (SPL) No. 24/19 dated 24.04.2019 corresponding to Sessions Case (SPL) No. 29/18. As such, the said judgment and order of conviction and sentence dated 01.09.2022 and 02.09.2022 is hereby affirmed.

Accordingly CRA (SB) 136 of 2022 is dismissed.

The appellant is on bail, his bail bond stands cancelled and he is directed to surrender before the learned trial Court immediately, in the alternative the Trial Court would pass necessary orders for executing the sentence.

Pending applications, if any, are consequently disposed of.

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.)