

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 644 of 2018

RABI DAS

VS.

THE STATE OF WEST BENGAL & ANR.

For the Appellant : Mr. Ujjal Roy, Adv.

For the State : Mr. Bibhasan Bhattacharya, Adv.

Hearing concluded on : 17th February, 2023

Judgement on : 23rd February, 2023

Siddhartha Roy Chowdhury, J.:

1. This criminal appeal challenges the judgement passed by learned Special Judge under POCSO Act, Darjeeling in Special (C) 43 of 2015, whereby learned Trial Court was pleased to convict Rabi Das, the appellant before this Court for committing offence under Section 8 of the POCSO Act, 2012 and sentenced him to suffer rigorous imprisonment of three years and to pay fine of Rs. 5000/-, in default to suffer imprisonment for six months.
2. Fact of the case in short is that on 9th November, 2014 Manju Mondal informed the Officer-in-charge of Siliguri Women Police Station in writing that on 8th November, 2014 at about 10.00 a.m. Rabi Das, her next door neighbour, came to the house of the father of informant where she has been residing after the demise of her

husband with her three daughters. Rabi Das induced her second daughter aged about 8 years with money, put her under fear and established sexual relation with the child by force. Suddenly cousin of the informant entered into the room and saw the incident. Rabi Das somehow fled away. After coming back home the informant was told about the incident and her daughter, the victim child disclosed that for some days, taking advantage of her absence, Rabi Das used to take the child either to his house or to any deserted place or in the house of the de-facto complainant and would ravish her.

3. The information since disclosed offence cognizable in nature Siliguri Women P.S. Case No. 136 of 2014 dated 9th November, 2014 was registered. Police took up investigation which culminated into submission of charge sheet against Rabi Das. The accused person stood the trial by pleading his innocence.
4. To crown success prosecution examined as many as 8 witnesses. Learned Trial Court after taking into consideration the evidence adduced by prosecution witnesses was pleased to pass the impugned judgement.
5. Mr. Ujjal Roy, learned Counsel assails the impugned judgement and submits that learned Trial Court passed the impugned judgement upon misreading of evidence. The de-facto complainant who set the criminal proceeding into motion was not witness to the occurrence. So is the testimony of P.W. 4, grandmother of the victim girl and mother of the de-facto complainant P.W. 5. P.W. 6 is the doctor who examined the victim on 12th November, 2014 and P.W. 7 is also the

doctor of North Bengal Medical College and Hospital who examined the victim. They are not witnesses to the occurrence. P.W. 8 is the Investigating Officer. Therefore, entire prosecution case primarily rests on the testimony of P.W. 2, the victim and P.W. 3, the so-called eye witness. Testimony of both the aforesaid witnesses is not worth credence.

6. Drawing my attention to the testimony of the victim girl Mr. Roy submits that according to victim the accused person came to her residence when she was alone, took her inside the room and opened her panty. Her aunt Alo Das saw the same. She came and while she was talking to the victim girl, Rabi Das left the place. P.W. 3, Alo Das in her testimony stated that she found the accused person standing in naked condition in the room of her niece and her niece was lying upon the bed, and she was also naked. Having noticed her accused Rabi Das "hid himself on the other side of the bed after wearing his lower pant". Her niece came to her, she was crying and accused fled away from the spot. She informed the mother of the victim. The victim girl told her that accused threatened her, allured her by giving money. She scribed the written information submitted by Manju Das, her cousin. The written information was admitted as Exhibit-4. During cross-examination she stated that grandfather of the victim girl was only in the house, there is only one door in the room where the accused person was found with the victim girl. According Mr. Roy, evidence of P.W. 3 suffers from exaggeration and if her testimony is considered from the point of view of human probability it would be

very difficult for any man of ordinary prudence to accept that a man aged about 30/32 years, with a criminal intent entered inside the room and without closing the door disrobed himself as well as the child. The first thing he would do is to close door from within. The absurdity in the narrative of P.W. 3 takes the sting out of the prosecution case and this testimony of P.W. 3 alone is sufficient to rebut the presumption as laid down under Section 29 of the POCSO Act. To buttress his point Mr. Roy relies upon the judgement of Co-ordinate Bench pronounced in the case of ***Sahid Hossain Biswas vs. State of West Bengal*** reported in **(2017) 180 AIC 294: (2017) 3 Cal LT 243 : (2017) SCC OnLine Cal 5023**.

7. According to Mr. Roy, presumption of innocence is the golden principle of adversarial system of criminal administration of justice and it pertains to a basic human right. The statutory presumption is an exception to the mandatory rule of presumption of innocence available to an accused. Therefore, provision of Section 29 should always be considered in the light of Section 3 of the Evidence Act. Negative cannot be proved. It is, therefore, an essential pre-requisite that foundational fact of the prosecution case must be established by leading evidence before statutory presumption is drawn. In this case the patent absurdities in the testimony of P.W. 3 should lead the Court to draw inference of falsehood in the prosecution case while determining whether the accused had discharged his onus and proved his innocence. Mr. Roy further submits that the grandfather of the child admittedly was in the house apart from the victim girl as

stated by P.W. 3. Prosecution did not examine the grandfather and by withholding the man prosecution has paved the avenue to draw adverse presumption. It is to be presumed that had the old man been examined, he would not have supported the prosecution case. Drawing my attention to the provision of Section 7 of the POCSO Act, Mr. Ujjal Roy submits that the core ingredient to constitute sexual assault is to have physical contact. Without physical contact an offence under Section 7 of the POCSO Act cannot be said to have been committed and learned Trial Court could not have punished the appellant under Section 8 of the POCSO Act. Mr. Roy further drawing my attention to the testimony of P.W. 1 submits that the husband of the de-facto complainant died of an accident. Accused Rabi Das used to work with her husband and he was held responsible for the accidental death of her husband. That could be a reason for implicating Rabi Das in this criminal case falsely. According to Mr. Roy the witness P.W. 7 who examined the victim girl did not find any mark of injury on her genital area. No injury was found on her person though she was examined on 9th November, 2014 at about 1.30 p.m. Therefore, medical evidence is also not lending support to the case of prosecution.

8. Refuting such argument of Mr. Roy, Mr. Bibhasan Bhattacharya, learned Counsel representing the State submits that the victim girl as P.W. 2 stated that Rabi Das took her inside the room and opened her pant. He could not advance further because of the advent of her aunt. During cross-examination only mere suggestions were given to the

victim girl touching the innocence of the accused person and him being falsely implicated. The victim girl was found to be aged about 11 years by the doctor who conducted ossification test her age, according to P.W. 6, was more than 10 years and less than 11 years. Learned Trial Court, however, considered the victim girl to be of the age of 13 years. She had no reason to implicate Rabi Das falsely.

9. Mr. Roy stated that by no stretch of imagination it can be said that victim is a sterling witness. Therefore, Court should always insist for corroboration and in this particular case prosecution fails to bring on record clinching evidence to saddle the accused person with criminal liability. In support of his contention, Mr. Roy relies upon the judgement of Hon'ble Apex Court pronounced in the case of ***Santosh Prasad @ Santosh Kumar vs. State of Bihar*** reported in **(2020) 3 SCC 443** is of no help.
10. True it is the testimony of P.W. 3 does not lend support to the testimony of P.W. 2. There may be exaggeration in the narrative of P.W. 3. But such exaggeration cannot be said to have caused dent to the case of prosecution. Upon careful perusal of the evidence of the witness P.W. 3, it is found that accused Rabi Das was inside the room with the victim girl and having found the witness P.W. 3 he fled away. This evidence undoubtedly lends support to the statement of victim girl as P.W. 2.
11. Drawing my attention to the oral testimony of P.W. 4 Renu Das, Mr. Bhattacharya submits that P.W. 4 is the grandmother of the victim girl who during cross-examination stated that Rabi Das on the

date of incident was in her house. Her husband was ill. May be illness of the man was the reason for which he could not be brought to the witness box. However, grandfather of the victim girl since is not the best witness in this case, non-examination of grandfather of the victim girl cannot be said to have any impact on the prosecution case. Victim girl alone stood the test of cross-examination and her testimony is sufficient to record an order of conviction. Therefore, the impugned judgement does not warrant any interference.

12. People love to romanticise, it is an inherent quality. P.W. 3 is not an exception. She made exaggeration by claiming to have found Rabi Das, the appellant before the Court in the room in naked condition. The victim girl was also lying on the bed in naked condition. *Falsus in uno falsus in omnibus* is not the accepted principle in our criminal administration of justice. The victim girl as P.W. 2 stated that Rabi Das took her inside the room while she was alone in the house and he opened the pant of the victim girl which her aunt Alo saw. P.W. 3, Alo intervened and while she was engaged in conversation with the victim girl, the accused fled away. P.W. 3 also stated to have found accused person Rabi Das in the room with the victim girl. If we ignore the exaggeration made by P.W. 3 in her oral testimony we find that P.W. 3 is supporting the prosecution case to the extent that the victim and the accused person were inside the room. P.W. 2 further stated that her pant was removed by Rabi Das.

13. Evidence of a victim of sexual assault is to be given due credence and should be examined with sensitivity. She cannot be treated like

an accomplice, rather her statement should be considered with due care as if she is an injured witness. Seeking corroboration of her testimony would amount to adding insult to her injury. Hon'ble Supreme Court in **STATE OF PUNJAB VS. GURMIT SINGH & ORS.** reported in **AIR 1996 SC 1393** held:-

“The testimony of victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict and accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence on an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a

guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formual and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.”

14. Mr. Ujjal Roy, though in course of argument stated that considering the testimony of prosecution witness, assuming and not admitting the same to be correct, at best it can be said that the victim girl was sexually harassed for which the accused person could be punished under Section 12 of the POCSO Act and not under Section 8. Section 8 of the POCSO Act envisages:-

“Section 8 Punishment for sexual assault.

Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.”

15. Section 7 has two parts. The first part pertains to the act of touching the sexual part of the body with sexual intent or making the child touch certain sexual organs of the accused and the second part pertains to ‘any other act with sexual intent which involves physical

contact without penetration'. The surrounding circumstances like presence of the accused in the house of victim girl, taking the victim girl inside the room by holding her hand, removing the pant of the victim girl, etc. having been proved by the prosecution, gives birth to the statutory presumption about the culpable mental state of the accused person as could be presumed under Section 30 of the POCSO Act which enunciates:-

"Presumption of culpable mental state.

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.--In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."

16. Section 11 of the POCSO Act speaks of sexual harassment which envisages:-

Section 11 POCSO Act (The Protection of Children from Sexual Offences Act, 2012): Sexual harassment.

Sexual harassment. – A person is said to commit sexual harassment upon a child when such person with sexual intent,--

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) shows any object to a child in any form or media for pornographic purposes; or

(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi) entices a child for pornographic purposes or gives gratification therefor.

Explanation.--Any question which involves '[sexual intent]' shall be a question of fact.

17. The attending facts and circumstances of this case do not bring the act of the accused person within the purview of Section 11 of POCSO Act. The accused person is found to have committed offence of sexual assault and has rightly been punished by learned Trial Court. The judgement pronounced in the case of *Sahid Hossain Biswas (supra)* and *Santosh Prasad (supra)* is of no help to the appellant.

18. True it is P.W. 5 the de-facto complainant did not have direct knowledge about the incident. Her evidence is hearsay. In her written information which is admitted as Exhibit-4, she stated that the victim girl told her that she was subjected to sexual assault by the accused person for quite a number of times. The evidence of P.W. 7, the doctor indicates that there was rupture of hymen which is old and he opined that the victim girl might have had sexual intercourse. This information of doctor is lending support to the narrative of the mother of the victim as made in her written information. However, in absence of any whisper from the end of the victim girl being sexually assaulted

by penetration, I am ignoring such statement made by the doctor corroborating the written information Exhibit-4. However, the testimony of victim girl inspires confidence in me. It is argued at the bar that the accused person has been falsely implicated as he refused to pay money consequent upon death of the father of the victim which was denied by P.W. 5 the de-facto complainant and the accused stated that because of land dispute he has been implicated falsely. This mutually contradictory statement only establishes the plea of false implication is but a baseless claim.

19. In my humble opinion, appeal cannot be accepted as the impugned judgement passed by learned Trial Court does not warrant any interference. Consequently the appeal is dismissed, however, without cost.
20. The appellant is directed to surrender to the jurisdiction of learned Trial Court within four weeks from date to serve out sentence.
21. Let a copy of this judgment along with LCR be sent down to the learned Trial Court for information and necessary compliance.
22. 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.)