

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

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA (SB) 162 of 2022

With

CRAN 1 of 2021

Md. Alamgir

-vs.-

The State of West Bengal & Anr.

Mr. Kazi Safiullah,
Ms. Nayab Mulla.

...For the Appellant

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

... For the State

Mr. Dipanjan Dutt,
Mr. Surojit Saha.

... For the Respondent No.2

Reserved on : 02.05.2023.

Judgment on : 18.05.2023

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order of conviction and sentence dated 28.09.2022 passed by the learned Additional Sessions Judge, 2nd Court, Hooghly in Sessions Trial (Spl.) Case No. 90 of 2016 arising out of Sessions Case (Spl.) Case No. 113 of 2015, wherein the learned

Trial Court was pleased to convict the appellant for commission of offence punishable under Section 354A of Indian Penal Code and under Section 8 of the Protection of Children from Sexual Offences Act and sentenced him to suffer as follows:

- (i) Rigorous Imprisonment for one year to pay a fine of Rs.2,000/- in default additional Simple Imprisonment for one month for offences punishable under Section 354A of IPC;
- (ii) Rigorous Imprisonment for a period of three years and fine of Rs.5,000/- in default to suffer additional Simple Imprisonment for three months for the offences punishable under Section 8 of the POCSO Act.

The genesis of the present case relate to Balagarh Police Station Case No. 189/15 dated 27.08.2015. On the basis of a letter of complaint by 'Y' addressed to the Officer-in-charge, Balagarh Police Station the present case was initiated. The allegations made in the said letter of complaint were to the effect that on 27.08.2015 at about 9.30 am the complainant's daughter namely 'X' (aged about 10 years 6 months) was called by Hafeez Sahib of a mosque situated near her residence for giving a Tabij (amulet). The complainant's daughter went to the adjoining house of the mosque where Hafeez Sahib resided, when at the time of tying the tabij at the neck accused touched the breast of the complainant's daughter thereby outraging her modesty. The complainant's daughter after returning started crying and thereafter narrated the incident.

The complainant as such requested the police authorities to take action against the accused.

On the basis of the aforesaid complaint Balagarh police station case no. 189/15 dated 27.08.2015 was registered for investigation under Section 354 of the Indian Penal Code and Section 7/8 of the POCSO Act. The investigating agency after completion of investigation submitted charge-sheet under the same act and sections. After supply of copies, charge was framed against the accused person under Section 354A of the Indian Penal Code and Section 8 of the POCSO Act. The contents of the charge were read over to the accused to which he pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon eight witnesses which included PW1, 'X', victim girl; PW2, 'Z', father of the victim girl; PW3, 'Y' mother of the victim girl/complainant; PW4, Mahadev Karfa, scribe; PW5, Dr. Tultul Mukherjee, Medical Officer of Ahmedpur BPHC; PW6, Sujit Debnath, uncle of the victim girl; PW7, Dr. Koushik Banerjee, Medical Officer of District Hospital, Hooghly and PW8, S.I. Somnath Dey, Investigating Officer of the case. Prosecution in order to substantiate its case also relied upon number of documents which would be dealt with while discussing the evidence. The accused on the other hand did not tender any witness or relied upon any documents.

PW1, 'X', victim girl deposed that the de facto complainant is her mother and stated that the alleged incident took place on a Thursday at about 9.00 am

while she was returning from her tuition classes and the accused called her and asked her to come inside his room and he wanted to give her one tabij (amulet). The accused tied the said tabij around her neck with the help of a black string, at that time he intentionally touched her breast and outraged her modesty. She thereafter returned to their/her residence and narrated the facts to her mother who thereafter lodged the instant case at Balagarh Police Station against the accused. She stated that she had been to the Court and gave her statement before the learned Magistrate who recorded her statement, she signed on each and every page of the said statement. The signatures of the witness in the statement under Section 164 of Cr.P.C on being identified by her were marked as Ext.1 series. She deposed that she had been to Ahmedpur BPHC for her medical examination. She identified her signature in the injury certificate issued by the Medical Officer of the Ahmedpur BPHC, Hooghly which was marked as Ext.2. She identified the accused in Court. The tabij (metal amulet) along with black string was seized by the Investigating Officer by way of seizure list which she signed. She identified her signature in the carbon copy of the seizure list dated 29.08.2019 which was marked as Ext.3. She represented that she could have identified the seized tabij (metal amulet) if the same was produced before her. On a subsequent date the said Tabij (metal amulet) was produced and which on being identified by her was marked as MAT Ext.I. A label was prepared at the time of seizure where she signed. Her signature on the said label being identified was marked as Ext.4.

PW2, 'Z' is the father of the victim girl, who deposed that the victim is his daughter and the de facto complainant is his wife. He stated that fourteen months ago one day at about 10.00/10.30 am he received a call from his wife when he was at his work place. His wife asked him to return immediately at his residence, when he expressed his inability to go and asked her to take assistance of a member of the gram panchayat who is a neighbour. He returned around 6.30 pm at his residence and learnt that his wife and daughter had already been to the police station. He thereafter along with his brother-in-law had been to the police station. Later he came to know from his wife that his daughter in order to bring tabij (amulet) went to the mosque and she returned from there and stated to his wife that the accused touched the body of her daughter on the pretext of curing her. He identified the accused in Court. During investigation police collected the birth certificate of his daughter and prepared paper to the said effect which he signed.

PW3, 'Y' is complainant and mother of the victim girl, she alleged that on the date of the incident at about 9.00 am when her daughter was returning from her tuition classes the accused called her inside the room as he intended to give her a tabij (amulet) and on the pretext of giving her tabij he intentionally touched the breast of her daughter and outraged her modesty. However, when the victim cried the accused left her and she came back to her residence and stated everything to her. She identified the accused in Court. She stated that she lodged a written complaint and identified her signature which was marked as Ext.5. In course of investigation police seized the said tabij (amulet) from her

which was tied with black colour thread. She identified her signature in the carbon copy of the seizure list which was marked as Ext.3/1. The amulet being shown to the witness was identified by her. She identified her signature on the label prepared by the police officer at the time of seizure. Her signature on the label was marked as Ext.4/1. She produced the birth certificate of her daughter which was marked as Ext.6.

PW4, Mahadev Karfa is the scribe of the FIR who deposed that he was presently having a shop near Balagarh Police Station. He is a retired Sub-Inspector of Police. On 27.08.2015 'Y' approached him with a requested to draft a written complaint and as such he drafted the written complaint as per her instructions. The contents of the same were read over and explained to 'Y' who signed the same. The witness also signed as a scribe. He identified the written complaint which was marked as Ext.5/1.

PW5, is Dr. Tultul Mukherjee, she deposed that she was posted at Ahmedpur BPHC as Medical Officer and on that date 'X' aged about 10 ½ years was produced before her in connection with Balagarh police station case no. 189/15 dated 27.08.2015. 'X' was accompanied by her mother and as per statement of the victim she was sexually assaulted by one Hafeez Sahib. On examination she did not find any injury mark or tenderness on both breasts. She identified the injury report which was in her own hand writing and signed by her, the same was marked as Ext.2/1.

PW6, is Sujit Debnath, he deposed that the victim is her niece and three years back when she was suffering from fever she went to a nearby Masjid to bring tabij from Kajisaheb and when she had been there Kajisaheb molested her. The victim returned home and disclosed the matter to her mother. Subsequently her mother informed him about the incident, after that he had been to their house and thereafter the victim and complainant accompanied him to the Balagarh Police Station to lodge a written complaint. Police seized the tabij from the complainant by proper seizure list and he also signed on the seizure list. He identified his signature on the seizure list which was marked as Ext.3/2. He identified the tabij (amulet) as also the label on which he signed, he identified his signature on the label which was marked as Ext.4/2. Police seized the birth certificate of the victim by way of proper seizure list and he signed on the said seizure list, his signature on the seizure list was marked as Ext.7.

PW7 is Dr. Koushik Banerjee, the medical officer of District Hospital, Hooghly who deposed that on 28.08.2015 he was posted there and on that date the victim 'X' aged about 10 years 6 months was produced before him in connection with Balagarh PS case no. 189/15 dated 27.08.2015 by L/C Baisakhi Bhattacharya and she was also accompanied by her mother. He obtained the consent of the victim as well as her mother before her medical examination. Her mother signed on the medico legal examination report. On examination he did not find any mark of violence either on her private parts or anywhere in her body. The victim stated that on 27.08.2015 at about 9.30 am

Hafeez of local mosque called her to his room and while tying the amulet on her neck he touched her breast deliberately with intent to outrage her modesty. He identified the medical examination report which was prepared and signed by him with his official seal. The medico legal examination report was marked as Ext.8.

PW8, S.I. Somnath Dey, is Sub-Inspector of police and Investigating Officer of the case who deposed that on receipt of the complaint, the Officer-in-charge, Balagarh Police Station started Balagarh Police Station case No. 189/15 dated 27.08.2015 and endorsed the case to him. He identified the endorsement on the written complaint. The said endorsement was marked as Ext.5/2. The Formal FIR was filled up by the Officer-in-charge with whose hand writing and signature he was acquainted as such the Formal FIR was marked as Ext.9. During investigation he recorded the statement of the victim girl and her parents at the police station and also that of other witnesses who were present. He took the victim to Ahmedpur BPHC for medical examination. He investigated the place of occurrence as shown by the victim girl and drew rough sketch map along with index. The rough sketch map along with index on his identification was marked as Ext.10. He collected the birth certificate of the victim girl as produced by her father. On the following date the victim girl was sent being accompanied by her mother to the Court for her statement being recorded under Section 164 Cr.P.C. After the said statement was recorded he collected the statement under Section 164 Cr.P.C. On 29.08.2015 he seized the amulet under a proper seizure list and on 07.12.2015 he arrested the accused

and forwarded him to Court. On completion of investigation he submitted charge-sheet before the learned Court under Section 354 IPC read with Section 7/8 of POCSO Act.

Mr. Kazi Safiullah, learned Advocate appearing for the appellant submitted that the narration of facts in the written complaint/First Information Report and the deposition of the prosecution witnesses in this case are varying, contradictory and full of inconsistencies. Learned Advocate submitted that a retired police officer wrote the written complaint for which there are exaggerations and the fact that the child alone had been to mosque for wearing the amulet/tabij raises suspicion as she was ill, as stated by her mother. Learned Advocate also submitted that the appellant has been falsely implicated because of local rivalry and considering the age of the child as stated by the prosecution and the age of the accused it is very doubtful as to whether such a child's physique would be attracted by a person who is 26 years old, having a family and associated with a mosque.

Mr. Dipanjan Dutt, learned Advocate appearing for the private opposite party/respondent no.2 submitted that the facts as has been narrated by the victim and her mother are consistent. According to him there is nothing on record to suggest that there is any scope of false implication of the present appellant. Learned Advocate drew the attention of the Court to Section 7 of the POCSO Act and submitted that the act of the accused satisfied the requirements of 'sexual assault' as defined in the act. It was also emphasised that the appellant has argued as if reverse onus presumptions are to be drawn

in favour of the appellant in this case, the same was never the intention of the legislature. The ground so assigned on behalf of the appellant regarding rivalry or for that purpose the child had been alone in the mosque was never confronted with either to the victim or her mother who were examined as witnesses. A new case is tried to be developed in the Appeal Court which do not have its root in the evidence which has surfaced in this case. It was insisted that there is no scope for interference with the judgment and order of conviction and sentence passed and the same should not be interfered with.

Mr. Saswata Gopal Mukherjee, learned Public Prosecutor appearing on behalf of the State drew the attention of the Court to the evidence of PW1 (the victim girl) and PW3 (the mother of the victim girl) and submitted that the versions of both these witnesses who are vital to the prosecution case have been consistent regarding the sexual intent of the accused which would lay the factual foundation in this case to attract the provisions of Sections 29/30 of the Act. By drawing the attention of the Court to the scribe (PW4) it was further submitted that no cross-examination was conducted regarding the veracity of the contents in the written complaint, in fact the witness in cross-examination has stated that he has no personal knowledge regarding the incident. Additionally he stated that the written complaint or FIR is not a substantive piece of evidence and the cumulative circumstances unerringly point to the guilt of the accused. It was also contended that the statement of the victim appearing in the injury report adds to the consistency of her version. Lastly he stated that the prosecution has proved its case which could not by way of any

cross-examination be diluted by the accused/defence and as such the judgment and order of conviction and sentence should not be interfered with.

Before analysing the issues raised by the learned Advocate for the appellant, the State as well as that of the de facto complainant, the statement of the victim before the learned Judicial Magistrate under Section 164 of Cr.P.C. which has been marked as Ext.1 should be considered.

In her statement under Section 164 of the Code of Criminal Procedure before the Judicial Magistrate the victim girl 'X' stated that last Tuesday being accompanied by her mother she had been to a mosque near Hasimpur School when Hafeez Sahib asked them to come on the next day. On the next day at about 9.30 am she alone had been to the mosque as the same is situated across the road. After she met Hafeez Sahib he sealed the amulet with paraffin and tied the same on her neck and at that time he touched and pressed her breast. She immediately fled away and returned to her residence where she could not control her emotion while narrating the incident to her mother.

The statement under Section 164 of Cr.P.C. of the complainant 'Y' before the learned Judicial Magistrate was that her daughter was suffering for quite some time and as such on last Tuesday she had taken her daughter to the mosque. On Wednesday her brother took her daughter/victim to the mosque and on that day Hafeez Sahib told her brother that an amulet would be required for the child and asked her to come on the next day. At 9.30 am on the next day when her daughter was returning after studying then the accused

told her daughter to bring the amulet when her daughter returned home, kept the bicycle and after taking the amulet went to the mosque. After some time her daughter returned and at that time she was crying when the accused represented that there is nothing to be afraid of as he has tied the amulet. She returned home along with her daughter when her daughter started crying and on enquiry her daughter/victim represented that the accused not only touched her but pressed her intensely. Hearing the same she immediately rushed to the accused and protested against his act when many people assembled there and she thereafter returned.

I have considered the series of incidents and the manner in which the same was represented in the letter of complaint addressed to the Officer-in-charge Balagarh Police Station, the statement of the victim under Section 164 of Cr.P.C. before the learned Judicial Magistrate as well as her deposition in Court as also the deposition of PW3/ 'Y' / complainant of the case and her statement under Section 164 of Cr.P.C. and on an assessment of the same, I am of the view that at each stage of narration of facts there has been a development in the factual circumstances. The same would be much more clear from a comparison of the reading of the letter of complaint/FIR wherein the contents were limited to the factum of the accused calling the victim to the mosque and offering her an amulet for the purpose of which the victim had been to the mosque, but in her statement under Section 164 of Cr.P.C. the same complainant stated that the accused asked the victim to bring the amulet from her residence for which the victim returned home and took the amulet to

the accused. On the other hand the complainant in her statement under Section 164 of Cr.P.C. has alleged that the accused of having pressed very intensely and touched the victim's body, while in her complaint she stated that the accused touched the breast and thereby outraged the modesty of the child. The victim on the other hand stated that after she had been to the mosque accused sealed the amulet with paraffin and at the time of tying the amulet touched her breast.

The core incident in the present case revolves on the issue relating to the tying of the amulet and at the relevant point of time of touching the breast or pressing the breast. In her deposition before the Court the victim who is a child of 10 years 6 months stated that at the time of tying the Tabij with a black string accused intentionally touched the breast and outraged her modesty. The subject matter of the case relates to POCSO Act so there must be emphasis in the phrase "sexual intent". There is a difference of terminology appearing in the evidence and which is inconsistent, that is "touching" and "pressing". This assumes importance in this case because at the time of tying the amulet there is a possibility of an accidental touch which cannot be ruled out. Further the brother i.e. PW6 in his deposition did not state that he on any date took the victim to the accused, which was narrated by PW2 (complainant).

Having regard to such inconsistencies in the statement of the victim and her mother, I am of the view that it would be unwise to convict a person and sent him to prison wherein the foundational facts are doubtful.

Accordingly the judgment and order of conviction and sentence dated 28.09.2022 passed by the learned Additional Sessions Judge, 2nd Court, Hooghly in Sessions Trial (Spl.) no. 90/2016 corresponding to Sessions Case (Spl.) no. 113/2015 is interfered with and the same is set aside.

Thus, Criminal Appeal being CRA (SB) 162 of 2022 is allowed.

The appellant is on bail he is discharged from the bail bonds.

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 and order of acquittal passed by this Court.

The translation which has been prepared in this case from the original records makes out a different set of meaning as is found in the Paper Book. The learned District and Sessions Judge, Hooghly as also the learned Special Court of Hooghly is directed to monitor and inspect whenever a translation is prepared, as the same should adhere to the meaning of the subject which is translated. In this case the letter of complaint which has been treated to be the FIR, as also the statement under Section 164 of the Code of Criminal Procedure which were translated and made part of the Paper Book are different from those which are appearing in the original records of the trial Court. There are other cases in the district of Hooghly where similar set of mistakes are appearing. Learned Registrar (Judicial Service), High Court, Calcutta is

directed to inform the same to the learned District and Sessions Judge, Hooghly as well as the Special Court to see that the translation which are sent to the High Court do carry the same meaning as that of the original records.

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.)