

**Form No.J(1)**

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

Present:

**The Hon'ble Justice Tirthankar Ghosh**

**CRA(SB) 164 of 2022**

***Debasish Das*  
versus  
The State of West Bengal & Anr.**

For the Appellant : Mr. Sauradeep Dutta,  
Mr. Rajdeep Bhattacharya.  
Mr. S. K. Mondal

For the State : Mr. Saswata Gopal Mukherji, Id. PP  
Mr. Sandip Chakraborty,  
Mr. Saryati Datta

For the victim/O.P.No.2 : Mr. Pratim Priya Dasgupta

Heard On : 13.04.2023, 18.04.2023, 25.04.2023 & 10.05.2023

Judgement On : 16.05.2023

**Tirthankar Ghosh, J. :**

The present appeal has been preferred against the judgment and order of conviction and sentence dated 22.09.2022 and 26.09.2022 passed by the Learned Additional Sessions Judge, Special Designated POCSO 2<sup>nd</sup> Court, Paschim Medinipur in POCSO Case No.09 of 2016

wherein the learned trial court was pleased to hold the appellant guilty and sentenced him to suffer rigorous imprisonment for 5 years (five years) and to pay of fine of Rs. 5,000/- (Rupees five thousand) in default to suffer further simple imprisonment for one month for commission of offence under Section 10 of the POCSO Act.

Daspur PS Case No. 27 of 2016 dated 03.02.2016 under Section 10 of the POCSO Act was registered for investigation on the basis of a complaint lodged by 'Y' with the Officer-in-Charge, Daspur Police Station. The allegations made in the letter of complaint were to the effect that the complainant's daughter 'X' (aged about 6 years) and the daughter of his elder brother namely, 'A' (aged about 7 years) were allured by the accused/appellant Debasish Das by promising to give them chocolate and were called inside his house, where the accused removed the panties of both the child and touched their genitals with ill intention. Both the children returned and complained at their residence. The complainant, as such, requested the police authorities to take action against the accused person.

The Investigating Agency on conclusion of investigation submitted chargesheet under Section 354 of IPC and Section 10 of the POCSO Act against the accused, Debasish Das. After supply of documents on which the prosecution proposed to rely, charge was framed against the accused

under Section 10 of the POCSO Act. The contents of the charge were read over to the accused person who pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 11 witnesses who are as follows:-

PW-1 is the victim girl(aged about 6 years) 'X'; PW-2 is the victim girl (aged about 7 years) 'A'; PW-3 is the father of the victim girl 'X', namely 'Y'; PW-4 is the mother of the victim girl 'X' namely 'Z'; PW-5 is the father of the victim girl 'A', namely 'B'; PW-6 is the mother of the victim girl 'A', namely 'C'; PW-7 is the grand father of victim girl 'X', namely 'S'; PW-8 is Jhantu Gayen, co-villager; PW-9 is Dr. Alok Samanta; PW-10 is SI Pranab Kumar Senapati; PW-11 is Sub-Inspector Krishna Kumar Das.

The prosecution in order to support its case relied upon a number of documents which included, the written complaint, the statement of the victim girls under Section 164 Cr.P.C, the medical examination report of both the victim girls, seizure list, birth certificate of both the victim girls, formal FIR and the rough sketch map with index.

PW-1 is the victim girl 'X' who in her deposition stated that on 26<sup>th</sup> January, 2016 when the National Flag was hoisted she along with her elder cousin sister, 'A' were playing outside the house of Debasish Das.

At around 10 am when they were playing, the accused Debasish offered them chocolates and took them to his factory and opened the panties of both of them and touched their vagina. He thereafter gave them chocolates, pulled up their panties and sent them home. After reaching home, she divulged the incident to her mother and so did victim 'A'. She was produced before the doctor as also before the learned Magistrate and she signed on the said documents.

PW-2 is victim 'A'. She narrated the incident in the same manner regarding the complicity of the accused, as has been stated/deposed by PW-1. She also stated that she was produced before the doctor as well as before the learned Magistrate. Her signature on the statement was also marked as exhibit-2.

PW-3 is the complainant and father of the victim girl, 'X'(PW-1) who deposed that on 26<sup>th</sup> January, 2016 her daughter 'X' along with her cousin's daughter went to play in front of the house of accused Debasish Das. He at the relevant point of time was at his place of work and after returning home in the evening he came to know from his daughter that the accused Debasish took both the girls to his factory on the pretext of giving them chocolates and thereafter opened their panties and touched their private parts with ill motive. After hearing the same, he went to the house of the accused, Debasish who was not available. After 5 to 6

days, he again went to the house of Debasish for settling the matter amicably, but Debasish abused him in filthy languages and as such, he lodged the complaint against him. He identified the accused Debasish Das in court. The witness stated that the complaint was drafted by 'B'(PW-5) as per his instruction. The same was read over to him when he signed the same. The said complaint was marked as exhibit-3. The witness also stated that his daughter was produced before the learned Magistrate for recording her statement and also at the hospital for her medical examination when he gave his consent. His signature in the medico legal certificate was identified by him which was admitted in evidence and marked as exhibit-4.

PW-4 is the mother of the victim girl, 'X', who narrated the incident to Court as she heard from her daughter, in the same manner as PW-3. This witness also stated that initially they tried for settlement but the family members of the accused Debasish were not agreeable to do the same for which they had been to the police station. She additionally stated that her statement was recorded by the learned Magistrate where she signed the same which was admitted in evidence and marked as exhibit -5.

PW-5 is 'B' father of the victim girl 'A'. He narrated the incident in the same manner as PW-3 and PW-4. Additionally, he stated that he

drafted the letter of complaint as a scribe which was identified by him and admitted in evidence and his signature on the complaint was marked as Ext 3/1. He also identified his signature in the medico legal examination report of his daughter 'A' which was marked in evidence and his signature on the report was marked as Exbt-6. His signature on the birth certificate of her daughter along with the seizure list was identified by him which was admitted in evidence and marked as Exbt-7.

PW-6 is the mother of victim girl 'A'. She narrated the incident in the same manner as PW-5. Additionally, she identified his signature on the statement recorded by the learned Magistrate under Section 164 of the Code of Criminal Procedure which was admitted in evidence and marked as Ext. 11.

PW-7 is the grand father of the victim girl 'X'. He deposed that he knew the accused and as such identified the accused in court. This witness deposed that he heard the incident from his grand daughter.

PW-8 is the co-villager who identified the accused in court and deposed that he heard the incident relating to of the victim girls being allured by Debasish by offering chocolates and subsequently the victim girls being sexually assaulted by him.

PW-9, Dr. Alok Samanta identified the report prepared by him after examination of both the victim girls who were examined at Ghatal

S.D Hospital on being identified by the constable of the local police station, which has been admitted in evidence.

PW-10, Pranab Kumar Senapati at the relevant point of time was posted as Officer-in-Charge, Daspur Police Station who on receipt of the complaint endorsed the case to the Investigating Officer, filled up the formal FIR and registered the case for investigation.

PW-11, Krishna Kumar Das is the Investigating Officer of the case. He narrated the chronology in which the investigation was carried out which included recording of the statement of the victim girls under Section 164 of the Code of Criminal Procedure, sending the victim girls for their medico-legal examination at Ghatal SD Hospital, preparing the rough sketch map with index by visiting the place of occurrence, seizure in respect of the birth certificates of the victim girls, arresting of the accused, Debasish Das and on completion of investigation submitting chargesheet under Section 354 of the Indian Penal Code and Section 10 of the POCSO Act.

Mr. Datta, learned advocate appearing on behalf of the appellant submitted that in the present case there is nothing on record to suggest that the victim girls were sexually assaulted, according to him the incident as complained of is of 26<sup>th</sup> January, 2016 and the letter of complaint was addressed to the Officer-in-Charge of Daspur Police

Station on 3<sup>rd</sup> February, 2016, almost after a week. The sole reason which has been assigned by the complainant was that he went for a settlement with the accused when he was abused and thereafter he lodged the complaint.

Learned advocate has also drawn to the discrepancies appearing in the oral evidence and the documentary evidence which has been admitted.

It has been emphasized that the medical reports also do not support the prosecution case and the statement of the victim girls before the learned Magistrate do dilute the case thereby calling upon for interference in respect of the judgement and order of conviction of sentence imposed by the learned special court.

Mr. Mukherji, learned Public Prosecutor appearing for the State resisted the contentions advanced on behalf of the appellants and drew the attention of the court to the tender age of both the victim girls being 6 and 7 years respectively and the accused who is aged about 34 years and having a son of the same age as deposed by the victims.

According to the learned Public Prosecutor, there is nothing to disbelieve regarding the deposition of the victim in court wherein they have been very categorical regarding the act and conduct of the accused which amounts to sexual assault being inflicted upon them and the

provisions of Sections 29 and 30 of the POCSO Act are attracted in the instant case because of sexual intention which is appearing from the evidence of each and every witnesses, who deposed in support of the prosecution. Thus it is his submission that there is no scope for interference in respect of the judgement and order of conviction and sentence imposed by the special court and there is no scope for interference.

Mr. Pratim Priya Dasgupta, learned advocate appearing for the de facto complainant submitted that in this case, the learned trial court assessed both the victim girls who were aged about 6 and 7 years, regarding their capacity to understand the consequences. The victim girls specifically narrated the incident of allurement by way of offering chocolate and taking them to the factory by the accused and thereafter removing their undergarments and sexually assaulted them.

He submits that act of the accused is heinous considering his age and his son being of the same age as that of both the victims.

Learned advocate drew the attention of the factum of the accused being not available immediately after the incident which raised a suspicion regarding his conduct after committing such incident and the same do add to the mens rea/guilty mind of commission of the offence.

Lastly, it has been submitted that the offence having been proved by the prosecution there is no scope for interference in the judgement and order of conviction and sentence so imposed by the learned special court and the trial court's verdict should be affirmed.

Before proceeding further, I am of the opinion that the verbatim translation in respect of the statement recorded by the learned Judicial Magistrate under Section 164 of the Code of Criminal Procedure of both the victim girls are required to be set out.

Exhibit 1 which is the statement under Section 164 of the victim 'X' in response to question no. 11 is as follows:-

*"11. Say, whatever you want to speak?"*

*Ans. I was playing on the courtyard of Debasish. Debashish took me inside the Factory. Debasish urinate me using his hand after removing my pant".*

Ext. 2 is the statement of the victim girl 'Y'. The relevant part in response to a question is as follows:-

*"11. Say, whatever you want to speak?"*

*Ans. Both, myself and Payel were playing outside of the house of Debasish. He called both of us for greediness of chocolate. Urinate us removing pants and touched with hand".*

On an assessment of the oral evidence which is appearing in evidence and the statement of both the victim girls which were recorded, two factors do way heavily against the prosecution in this case. Firstly, the explanation regarding the delay which was offered by the de facto complainant(PW-3) wherein he stated *“he returned home after 5/6 days and upon getting the said information I went to his house to settle the matter amicably but he abused me in filthy languages and as such, I lodged a complaint against Debasish Das”*.

The case is under the relevant provisions of the POCSO Act. The victim happens to be the daughter and there is no scope for settlement if the offence at all has been committed. The statement of the victim girls before the learned Magistrate do not state regarding the accused having touched the private parts. The accused only rendered assistance to the victim girls who were aged about 6 and 7 years when they went for urinating.

Having considered the explanation offered for delay by PW-3, the complainant and the statement of both the victim girls under Section 164 of the Code of Criminal Procedure, I am of the view that the prosecution has failed to lay down the foundational facts for attracting the presumption available under Sections 29 and 30 of the POCSO Act

and as such, the judgement and order of conviction and sentence so delivered by the learned special court calls for interference.

Thus, the judgement and order dated 22.09.2022 and 26.09.2022 passed by the learned Additional Sessions Judge, Special Designated POCSO 2<sup>nd</sup> Court, Paschim Medinipore in connection with POCSO Case No. 09 of 2016 is hereby set aside.

The appellant is acquitted from the charges. Thus, criminal appeal being CRA (SB) 164 of 2022 is hereby allowed.

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

Pending connected application, if any, is consequently disposed of.

Department is directed to send back the lower court records along with a copy of this judgement immediately to the learned trial court.

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

Urgent photostat certified copy of this judgement, if applied for, be given to the parties upon compliance with all requisite formalities.

**(Tirthankar Ghosh, J.)**

