

Form J(1)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

CRA 213 of 2020

**Anukul Bajaj
Vs.
The State of West Bengal and Anr.**

Mr. Manjit Singh
Mr. Biswajit Mal
Mr. Abhishek Bagal
..for the appellant

Item No. 06

Heard & Judgment on: 31.08.2023

Bibek Chaudhuri, J.

This is an appeal under Section 374(2) of the Code of Criminal Procedure assailing the judgment and order of conviction and sentence dated 12th March, 2020 and 13th March, 2020 respectively passed by the learned Additional Sessions Judge, First Court, Sealdah-cum-Special Judge under POCSO Act, 2012 in Special Trial No.1(1) of 2020 thereby convicting the appellant under the charge of Sections 12

and 14 of the POCSO Act and sentenced him to suffer rigorous imprisonment for three years each, for each of the offences and to pay fine of Rs.20,000/- each for each of the offences with default clause.

Tala P.S. Case No. 98 dated 20th September, 2019 under Sections 120B/354/506/509/419 of the Indian Penal Code and Sections 12/14 read with Section 17 of the Protection of Children from Sexual Offences Act, 2012 was registered on the basis of a written complaint submitted by the de facto complainant alleging, inter alia, that her daughter aged about 16 years came to be acquainted with the appellant who was an inhabitant of either Mumbai or Noida through their instagram. The said person pressurized her daughter to send her nude picture which she refused and account of the accused was blocked. However, the accused was able to decode the instagram account of the daughter of the de facto complainant and threatened her saying that if she did not send nude photographs of her, he would ruin the life of the victim. Under such compulsion and fear the victim sent some nude photographs to him. The accused again put pressure upon her to send more of such photographs which the victim did. Suddenly on 14th September, 2019 the photographs were forwarded to the mobile phone of the de facto complainant from the instagram account of one of the friends of her daughter.

Police conducted investigation of the case, arrested the accused/appellant and his father and submitted charge sheet under the above mentioned penal provision in the trial Court against them.

Suffice it to say that the learned trial Judge examined as many as seven witnesses and on conclusion of the hearing of the case the learned Judge proceeded to writ down judgment against the above named two accused persons being father and son. The father of the present appellant was acquitted from the charge but the appellant was convicted and sentenced accordingly as noted above in the first paragraph of this judgment. It is pointed out by Mr. Manjit Singh, learned advocate for the appellant that the impugned judgment cannot be sustained because of the fact that the accused was not examined under Section 313 of the Code of Criminal Procedure. Without examination of the accused under section 3413 of Cr. P.C. one of the most important and basic human and fundamental right has been violated. The accused could not get an opportunity to explain circumstances of incriminating materials which according to the learned trial Judge appeared and used against him. The concept of examination of the accused under Section 3413 of Cr. P.C. is based on the abode principle of audi alterem parte. If the accused is not examined under Section 313 of the Code of Criminal Procedure, entire trial gets vitiated.

At this stage, it came to the mind of the Court that the father of the present appellant namely Nirmal Bajaj was acquitted by the trial Court without being examined under Section 313 of the Code of Criminal Procedure. Against the order of acquittal the State has not preferred any appeal. When one of the accused is acquitted without his examination under Section 313 of the Code of Criminal Procedure what will be the fate of the order of acquittal. Mr. Singh has his reply on the above query raised by this Court in **Brathi alias Sukhdev Singh versus State of Punjab** reported in **(1991) 1 SCC 519**. Mr. Singh takes me to paragraph 8 of the aforesaid report which runs thus:-

“We shall now examine whether the approach made by the High Court in judging the guilt of the appellant on the premise that the acquitted person also participated in the offence has introduced any error. The powers of the appellate court in dealing with an appeal against an order of conviction are defined under Section 386(1)(b) of the Code of Criminal Procedure, 1973 corresponding to S.423(1)(b) of the Code of 1898. In the matter of appreciation of the evidence the powers of the appellate court are as wide as that of the trial court. It has full power to review the whole evidence. It is entitled to go into the

entire evidence and all relevant circumstances to arrive at its own conclusion about the guilt or innocence of the accused. In *Sunder Singh's case* (supra), this Court has held that the provisions of Section 423(1)(a) do not create a bar against the appellate Court considering indirectly and incidentally a case against the person who was acquitted, if that becomes necessary when dealing with the case in the appeal presented on behalf of the other accused who are convicted. In considering the evidence as a whole, the appellate court may come to the conclusion that the evidence against the person acquitted was also good and need not have been discarded. When several persons are alleged to have committed an offence in furtherance of the common intention and all except one are acquitted, it is open to the appellate court to find out on a reappraisal of the evidence that some of the accused persons have been wrongly acquitted, although it could not interfere with such acquittal in the absence of an appeal by the State Government. The effect of such a finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is

relevant only in invoking against the convicted person his constructive criminality.”

On plain reading of the observation of the Hon’ble Supreme Court recorded herein it appears that when an accused is acquitted, even if the Court finds that such order of acquittal ought not have been made on reappraisal of evidence or any other ground, the Court cannot reverse the order of acquittal by a suo motu finding. This observation is based on the principle that when two views are possible against an accused, one favouring his acquittal and another in favour of his conviction, the Court must accept the view which favours acquittal of the accused.

In the impugned judgment the order of acquittal was made on appraisal of evidence against the father of accused namely Nirmal Bajaj. Non-examination of the said Nirmal Bajaj under Section 313 of the Code of Criminal Procedure may be irregularity but this will not affect the order of acquittal passed in favour of him.

In view of such circumstances and on the basis of what has been stated herein, the impugned judgment passed by the learned Special Judge under the POCSO Act, First Court, Sealdah in Special Trial Appeal No.1(1) of 2020 is set aside as against the appellant Anukul Bajaj only.

The learned trial Judge is directed to examine the appellant Anukul Bajaj under Section 313 of the Code of Criminal Procedure and thereafter hear out the argument afresh and deliver a fresh judgment against the said accused.

The impugned judgment is, however, affirmed as against Nirmal Bajaj. So far as Nirmal Bajaj is concerned, the impugned judgment has reached its finality and he does not require to be brought in trial further.

Lower Court Record be sent down at the earliest.

(Bibek Chaudhuri, J.)