

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

Present:

The Hon'ble Justice Tirthankar Ghosh

C.R.A. 293 of 2019

***Gamo Hossain
versus***

The State of West Bengal

For the Appellant : Ms. Rituparna De Ghose.

For the State : Ms. Sreyashee Biswas,
Mr. Rahul Ganguly.

For the Victim : Mr. Saryati Datta.

Heard On : 30.08.2024 & 03.09.2024.

Judgement On : **03.09.2024.**

Tirthankar Ghosh, J. :

The present appeal has been preferred against the Judgment and Order of Conviction and Sentence dated 26.02.2019 and 27.02.2019 passed by the learned Additional Sessions Judge, 2nd Court, Krishnanagar, Nadia in connection with the Sessions Trial No. VI (IV) of 2018, Sessions Case No. 01(02) of 2018 (Special), thereby holding the appellant guilty and convicting him under Section 10 of the POCSO Act and sentencing him to suffer rigorous imprisonment for five years and also to pay a fine of Rs. 10,000/-, in default, to suffer rigorous imprisonment for six months.

That Nabadwip P.S. Case No. 49 of 2018 dated 08.02.2018 was registered for investigation under Section 376(2)(i) of the IPC and Section 6 of

the POCSO Act on the basis of a complaint addressed to the Inspector in charge of Nawadwip P.S. by 'Y' – the mother of 'X' (aged about 3 years).

The allegations made in the written complaint were to the effect that on 07.02.2018, the daughter of the complainant was playing with the son of Badar Sk. at his house. After sometime the accused/appellant/Gamo Hossain came to the house of said Badar Sk. to make quilt. When Gamo Hossain was in the process of preparing quilt at the roof of the house of Badar Sk, he offered a packet of biscuit to the son of Badar Sk., who took the same and came down from the roof. After that Gamo Hossain removed the under garment of 'X' and inserted his penis in her vagina. Being unable to tolerate the same, the child shouted loudly when complainant rushed to the spot i.e., at the roof of the house of Badar Sk. Then her child i.e., 'X' in fear embraced her and informed the incident. The child was immediately taken to Mayapur Hospital, where she was medically treated. Complainant, therefore, prayed before the authorities to investigate the case and punish the offender.

On receipt of the complaint and after registration of the FIR, the investigation of the case was endorsed to one Gouranga Roy, ASI of Police of Nabadwip P.S., who investigated the case and, on conclusion of investigation, submitted charge-sheet before the learned Special Court under the provisions of Section 376(2)(i) of the IPC and Section 6 of the POCSO Act.

The learned Trial Court/Special Court was pleased to take cognizance of the offence and, thereafter, on 18.04.2018 was pleased to frame charges under

Section 376(2)(i) of the IPC and/or alternatively, under Section 6 of the POCSO Act. The contents of the charges 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 as many as 12 witnesses, which included P.W.1-‘X’ (the Victim); P.W.2 –‘Y’ (the mother of the Victim/complainant); P.W.3/Jaman Molla (an acquaintance); P.W.4 –Mombej Chowdhury (an acquaintance); P.W.5– Kalyani Biswas (Lady Constable), who produced the victim before the doctor; P.W.6-Dr. Sakti Prasad Biswas, who examined the accused; P.W.7-Dr. Supratim Mitra, a Medical Officer of Nadia District Hospital, who examined the victim girl; P.W.8-Dr. Subrata Biswas, a Medical Officer of Mayapur PHC, who also examined the victim girl; P.W.9-Ratan Kumar Biswas – ASI of Police, Nabadwip P.S., who received the written complaint and prepared formal FIR; P.W.10-‘Z’ (Father of the Victim Girl); P.W. 11-S.I. Gouranga Roy (Nabadwip PS.)- the investigating officer of the Case; P.W.12-learned Judicial Magistrate, who recorded the statement of the victim under Section 164 of the Code of Criminal Procedure.

P.W.1- ‘X’ is the victim girl, who is aged about three years. She was first examined by the Court to assess regarding her capacity and willingness to give her deposition voluntarily and after being satisfied that she was fit to depose, the learned Court allowed her examination. The witness identified the accused on dock and stated that the accused took her on the roof and inserted his penis in her vagina (at this stage, the witness showed her own private part as is

recorded in her deposition). She further stated that as a consequence of such act she sustained injury. She was taken to the learned Magistrate where her statement was recorded and she put her L.T.I therein. She was also examined by the doctor and there also she put her L.T.I on the medical papers. The outdoor ticket of the patient was marked as exhibit-1. In cross-examination, she denied of not having sustained injury or that the accused did not commit any wrong against her or that she did not receive any injury at the instance of the accused.

P.W.2- 'Y' is the mother of the victim and complainant who deposed that 'X' is her daughter and they are residents of Mayapur, Bamunpukur. According to her, the incident took place five months ago at about 10 a.m. and at the relevant point of time the child of Badar Sk. was playing with her daughter at the roof of Badar Sk. At that time the accused was preparing quilt at the roof and called her daughter, she was offered biscuit when she was sitting with Ajijul. Ajijul got down from the roof as his mother called him and at the same time, she also called her daughter but the accused restrained her. She returned to house and after a while she heard a sound of crying from the roof of Badar Sk., when rushed towards the roof and she found her daughter was weeping and getting down from the roof. On being asked she told her that the accused inserted his penis in her vagina, as a result, she sustained pain and injuries. She called her husband and again rushed to the roof of Badar Sk. when her daughter identified the accused and told her father as to what happened to her. She then assaulted the accused and thereafter accused fled

away. The child was taken to the district hospital when her mother-in-law accompanied her. The doctor duly examined her and advised them to file a case otherwise he could not proceed. The complaint was lodged at Nawadwip Police Station. She put her L.T.I on the written complaint. She also gave her statement before the learned Judicial Magistrate where she also put her L.T.I. Additionally, she stated that the victim girl was first brought at Mayapur Primary Health Centre wherefrom the doctor referred her daughter to Sadar hospital for treatment. She identified the accused who was present in court. In course of cross-examination she stated that her daughter did sustain pain and she on inspection found that there was a swelling at her private parts and while the child was discharging urine there was burning sensation. In cross-examination she denied the fact that the accused raised objection against the selling liquor by her so she implicated him in a false case. She also denied that the local people rushed to their house and ransacked their house and such act was done under the leadership of the accused along with the local people and so she has falsely implicated the accused.

P.W.3 is Jarman Molla, an acquaintance, who deposed that he knew both the parties and he did not have any knowledge regarding the case. He was declared hostile by the prosecution and cross-examined. On behalf of the accused the witness was also cross-examined when he deposed that PW2 used to sell liquor at their area and some people of the local area along with the accused served a deputation before the police station against PW2. But in

cross-examination, he further stated that he is unable to say whether for the said reason, PW 2 has falsely implicated the accused.

PW-4 is Mombej Chowdhury who was an acquaintance. The witness identified the accused in court and deposed that she had no knowledge about the case, as such she was declared hostile. The prosecution cross-examined her, however the accused declined to cross-examine the witness.

PW-5, is lady constable, Kalyani Biswas attached to Nabadwip Police Station. She produced the victim girl before the doctor for her medical examination and signed on the medical documents. She identified her signature which was marked in evidence. Additionally, she deposed that on 08-02-2018, the Investigating Officer seized a red colour undergarment of the victim girl under a proper seizure list, in her presence where she signed, her signature in the seizure list was admitted in evidence.

PW-6 is Dr. Sakti Prasad Biswas who deposed that on 09-02-2018, he medically examined the accused, Gamo Hossain in connection with Nabwadip P. S. Case No. 49 of 2018. He was identified by Constable, Uttam Kumar Biswas and on examination he found that the accused is capable of sexual intercourse. He identified the report which was prepared and signed by him and the same was admitted in evidence.

PW-7 is Dr. Supratim Mitra, Medical Officer attached to District Hospital, Nadia who deposed that on 08-02-2018, he examined the victim girl when her

father was present along with a lady constable. The medical examination was done in connection with Nabadwip PS Case No. 49 of 2018 dated 08-02-2018. He deposed that on examination no injury mark could be detected on her genitalia including surrounding area. According to the doctor, it was not possible to take vaginal swab of the victim who was aged about three years. He on examination found the hymen to be intact and no digital examination was conducted and only examination of the genitalia was done. He referred to her mother's statement wherein it was stated that one Gamo Hossain inserted penis into her daughter's genitalia on 07-02-2018 at 11 a.m in the house of Badal Sk. On questioning the baby (victim girl) pointed to her genitalia. The child stated that one person inserted '*nongra jinish*' in her genitalia. The witness being a doctor referred her to a psychiatrist. He identified the report which was prepared and signed by him which was admitted in evidence. In cross-examination he replied that he did not find any injury on the genitalia of the victim or any other parts of the body. It was further replied by the doctor that if there is any forceful intercourse or penetration to any girl child of such a nature, there must be some injury on her genitalia organ.

PW-8 is Dr. Subrata Biswas, Medical Officer attached to Mayapur PHC who deposed that on 07-02-2018 he examined the victim who was a female, aged about three years one month. He opined that on examination he did not find any swelling injury, no cut injury, no bleeding in external genitalia and no bleeding in other parts of the body. He also commented, that other organs in the system were found to be normal. However, the patient had a history of

traumatic injury in external genitalia. He identified the report which was prepared and signed by him and as such, the same was admitted in evidence. In cross-examination, he replied that he did not find any injury after superficial examination of the patient and also opined that if anybody penetrates forcefully on such type of victim, there must be some injury.

PW-9 is ASI Ratan Kumar Biswas who received the written complaint of PW-2 and on the basis of the same started Nabadwip P. S. Case No. 49 of 2018 dated 08-02-2018 under Section 376(2)(i) of the Indian Penal Code and Section 6 of the POCSO Act. He endorsed on the written complaint which was admitted in evidence. He also filled up the formal FIR and identified the same which was admitted in evidence.

PW-10 is 'Z', father of the victim girl who deposed that one year ago while he was busy at his work, at that time his wife rang him at about 9 o'clock and asked him to come immediately. He returned back and saw that his daughter was lying and on being asked she told him that the accused misdeed with her private parts. Additionally, he deposed that the accused was working for the purpose of making quilt and mattress and while he had been there the accused fled away by crossing the wall of the said house. He took his daughter at Mayapur hospital wherefrom she was transferred to Krishnagar hospital where the doctors gave her medical treatment. A complaint was lodged at Nabadwip Police Station and police seized one red colour undergarment of her daughter under seizure list where he signed. He identified his signature in the seizure list

which was admitted in evidence. He also identified the accused in court. In cross-examination he replied that on inspection he found that his daughter sustained swelling and bleeding injury on her private parts and so he and his wife both attended the doctor for medical examination of his daughter. The medical examination of her daughter was reduced in writing on a paper where he also signed. He denied in cross-examination that as he and his wife is involved in a country liquor business at the area and the accused persons along with others raised objection for such illegal business, they have implicated the accused in a false case.

PW-11, Gouranga Roy, is the Investigating Officer of the case who deposed that on 08.02.2018 after he was endorsed and assigned the investigation of Nabadwip Police Station Case No. 49 of 2018 dated 08.02.2018, he visited the place of occurrence, prepared rough sketch map along with index, examined the available witnesses and recorded their statement under Section 161 of the Code of Criminal Procedure. He seized the undergarment of the victim girl under proper seizure list. He arranged for the victim girl to be examined by the doctor for medical examination and also placed the victim girl and her mother before a learned Magistrate for their statements to be recorded under Section 164 of the Code of Criminal Procedure. The accused was also placed before the doctor for medical examination. After collection of the injury report of the victim and accused as well as the statement recorded under Section 164 of the Code of Criminal Procedure, he submitted charge-sheet under Section 376(2)(i) of the Indian

Penal Code and under Section 6 of the POCSO Act. In cross-examination, the Investigating Officer replied that PW-2 did not state to him that after knowing the incident from her daughter, she had been to the roof of Badar Sk. and assaulted the accused Gamo Hossain. It was also replied by the Investigating Officer that the witness 'Z' did not state to him during examination that while he was busy at his work, at about 9 a.m. his wife informed over telephone about the incident and asked him to come back home hurriedly and after return, the witness found that his daughter was weeping.

PW-12, Sanghamitra Debnath, is the Judicial Magistrate who recorded the statement of the victim girl as also that of her mother i.e. PW-1 and PW-2. Learned Magistrate identified her signature with official seal in both the statements which were admitted in evidence.

Learned advocate appearing for the appellant submitted that the prosecution witnesses have constantly changed their version and as such it would be difficult to rely upon them to arrive at a just and proper conclusion. According to the learned advocate, the victim girl was three years old and she was tutored for the reason that there was a resistance in the locality for her parents selling liquor illegally. Learned advocate has drawn the attention of the Court to the relevant part of the evidence wherein there were replies in cross-examination. Attention of the Court was also drawn to the part of the deposition and/or answers which were by way of reply at the stage of cross-examination that it was under the leadership of the accused, the local people

raised their voice against such illegal trade and because of such fact, he has been falsely implicated in the instant case.

On behalf of the appellant it was submitted that the version of the child was not believable in view of the fact that she was unable to understand the consequences of her version, as consistent medical opinion in this case is that, in such type of sexual assault there is bound to be swelling and injuries at the private parts of the victim considering her age. The reliability of the evidence of P.W.2 was also questioned in respect of the fact of accused fleeing away from the spot. It was pointed out that P.W.2 has three different versions, which are as follows:

1. *"Then I called my husband and we again rushed to the roof of Badar along with my husband and again my daughter identified the accused and told her father, what happened. Then I assaulted him and thereafter, the accused fled away".*
2. *"While we go to the roof of Badar Sk. Along with para people. Prior to that the accused was fleeing away from this spot".*
3. *"My husband was also there. We failed to restrain him but he fled away".*

It was pointed out that the independent witnesses i.e., P.W.3 and P.W.4 did not support the prosecution's case and the version of the doctors, who treated the victim would go to show that there were exaggeration in the version of the child as well as the mother which is not supported by any iota of medical evidence.

Consequently, it was prayed on behalf of the appellant that the order of conviction and sentence so passed by the learned trial Court be set aside.

On the other hand, the learned advocate appearing for the victim, Mr. Datta, tried to impress this court by addressing on the core issue of the version of the victim and, thereafter, submitted that although the charges were framed under Section 376(2)(i) of the IPC and/or alternatively, under Section 6 of the POCSO Act, but, having considered the materials which surfaced in course of the evidence, the learned trial court has rightly convicted the appellant under Section 10 of the POCSO Act, which do satisfy the requirement of Section 7 of the POCSO Act.

According to the learned advocate of the victim no interference should be made in respect of the order of conviction and sentence passed by the learned trial court and the Judgment and Order of conviction and sentence should be affirmed.

Learned advocate for the State supported the version of the victim/de facto complainant and addressed the court that once the prosecution has made out a case, which reflects that there has been a sexual assault, the provisions of Section 9(m) of the POCSO Act is attracted. Therefore, it was incumbent upon the learned Trial Court to attract the presumptions under Section 29 & 30 of the POCSO Act. Thus, the order of conviction and sentence under Section 10 of the POCSO Act is justified according to the State and the same as such should not be interfered with by the Appellate Court.

I have considered the submissions advanced by the respective parties and I am of the view that firstly the medical evidence is to be taken into account in this case and the documents which have been marked as exhibit-2 i.e. Report of District Hospital, Nadia and exhibit-5 i.e. Report of Mayapur PHC do require consideration.

In exhibit-2 it has been recorded by the doctor that no injury was detected on her genital including surrounding area (taking vaginal swab is not possible of such a small baby). Her hymen is intact. (no digital examination done on her, only genital inspected).

In exhibit-5 it is reflected superficial examination but no active bleeding or no swelling or cut injury seen in external genital. No bleeding of other parts of the body. Other system NAD referred to NDH (pediatrician + Gynecology).

In this case in the letter of complaint, the mother of the victim girl, 'Y' (PW-2) categorically stated that the accused has inserted his penis in the vagina of the victim girl who is 3 years old. She has repeated her version in her deposition and the victim child has also deposed the same.

Such corroboration is also found in the statements made under Section 164 of the Code of Criminal Procedure. In fact, the PW-10, "Z" father of the victim girl and PW-2, 'Y' mother of the victim girl added that there were swelling, burning sensation and bleeding injury in the private part of the victim girl. The medical evidence by two doctors runs contrary to the oral deposition

of 'X', 'Y' and 'Z' and the time period in respect of the incident and the medical examination was done within close proximity of time.

Considering the oral deposition of the witnesses and the medical evidence which was by way of medical examination of two doctors, I am of the view that there has been an exaggeration and embellishment in the version made by the prosecution witnesses which would question the ring of truth in their version and as such shakes the foundation to such an extent that it would be difficult for this court to attach importance or to attract the provisions of Sections 29 and 30 of the POCSO Act for presuming the state-of-affairs as incorporated in the relevant provision. Without entering into the correctness of defence which the accused in cross-examination confronted to different witnesses, I am of the view that the prosecution has failed to create a foundational fact of sexual assault which would inspire confidence of this Court to hold the appellant guilty of offence even with the aid of presumptions available under Section 29 & 30 of the Act.

As such, the judgement and order of conviction and sentence so passed by the learned Additional District and Sessions Judge, 2nd Court, Krishnagar, Nadia in Sessions Trial No. VI(IV)/2018 calls for interference and the same as such is hereby set aside.

The appellant is acquitted of the charges.

He is on bail and as such, he is discharged from the bail bonds.

The appeal being CRA 293 of 2019 is, thus, allowed.

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 judgment immediately to the learned trial court.

All concerned 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.)