

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

C.R.A. 409 of 2019

Gajendra Ram & Anr.

Vs.

State of West Bengal

Amicus Curiae : Mr. Soumyajit Das Mahapatra, Ld. Adv.

For the State : Ms. Mousumi Sarkar
Ms. Debarshi Brahma

Heard on : 26th November, 2024

Judgment on : 26th November, 2024

Joymalya Bagchi, J. :-

1. Appellants have assailed the judgment and order dated 28th June, 2019 and 1st July, 2019 passed by the learned Judge Special Court under POCSO Act and sentence them to suffer Rigorous Imprisonment for 10 years, and both of them also to pay a fine of Rs. 25,000/- each in default to suffer further Rigorous Imprisonment for six months more

in Special T.R. No. 25 of 2015, arising out of M.P. Ghora (Malipanchghora) P.S. case no. 80/2015 dated 4.3.2015 under Sections 341/354A/354B/324/326/376D/376(h)(2)(i)/307/506 I.P.C. and also Sections 4/6 POCSO Act.

Prosecution Case:-

2. Prosecution case as alleged against the appellants is as follows ;
3. Victim is an 8 year old girl. On 4.3.2015 at around 8 to 8.30 P.M. she had gone out of her residence to call her aunt. When she went to the lane in front of her house she was apprehended by the appellants who pasted tape on her mouth. The appellants inserted finger in her vagina and one of them also inserted an iron rod. They threatened her with dire consequence and showed a *Katari* (a sharp cutting weapon). One girl came near the spot and the appellants fled away. She returned home and narrated the incident to her mother. Her mother informed the matter to police resulting in registration of Malipanchghora P.S. Case No. 80/15 dated 4.3.2015 under Sections 341/ 354A /354B /324/326/376(2)(h)(i)/307/506 of IPC and under Sections 4/6 of POCSO Act. Victim was medically treated. Her

statement was recorded before the Magistrate. Appellants were arrested. In conclusion of investigation charge sheet was filed against the appellants and charges were framed under Section 6 of the POCSO Act.

4. Appellants pleaded not guilty and claimed to be tried. In course of trial prosecution examined ten witnesses including the victim as PW-2. In conclusion of trial learned Trial Judge by impugned judgment and order dated 4.3.2015 convicted and sentenced the appellants as aforesaid.
5. Nobody appears for the appellants.
6. Mr. Soumyajit Das Mahapatra, learned Counsel is requested to assist the Court as *amicus curiae*.

Evidence on record:-

7. We have considered the evidence-on-record. P.W.-2 is the minor victim. She deposed on the fateful evening at 8.P.M. she had gone near the staircase to call her aunt. Then she went to the narrow lane in front of her house. At that time, the appellants apprehended her and pasted tape on her mouth. Both of them inserted finger into her vagina and one of them inserted a small rod. She felt pain but they showed

her a sharp cutting weapon and threatened to kill her. At that time another girl came near the spot and the appellants ran away. She informed the incident to her parents. She made statement before the Magistrate. She identified the appellants in Court.

8. During cross-examination she stated there are other rooms around the lane and people reside there.

9. PW- 1 is the mother of the victim. She deposed on 4.3.2015 around 8-8.30 P.M. her daughter had gone out to call her aunt. Within 5 minutes she returned home weeping. She found blood in her private parts. On enquiry she narrated the appellants had taped her mouth and took her near a meter room by the side of the lane and raped her. She took the victim to a doctor's chamber who informed her to contact the police. Police took the victim to Jaiswal Hospital. She lodged written complaint which was scribed by P.W.-9. She also made statement before Magistrate.

10. P.W. 3 is the father of the victim (P.W. 2). He also corroborated the victim's version.

11. P.W. 5 – is the Medical Officer who examined the victim. He deposed the victim had informed him that two persons had

inserted their finger and iron rod into her vagina. On examination he found injury on the fourchette of the victim. He proved the medical report exhibited. He stated injuries noted may occur if the finger and iron rod are introduced into the vagina of the minor.

12. P.W.-7 is the cousin of the victim who has also corroborated her.

13. P.W.-8 is the Investigating Officer.

Arguments at the Bar:-

14. Mr. Mahapatra, contends the place of occurrence has shifted. While the victim (P.W.-2) stated incident occurred in the lane, her mother (P.W.1) stated victim was taken to a meter place near the lane where she was raped. He further argued the place of occurrence i.e., the lane is surrounded by rooms occupied by the people. Incident occurred in the evening but none of the inhabitants of the rooms protested. This improbabilises the incident. It is also argued the girl who had reached the spot after the incident has not been examined. Neither the tape used to gag the victim nor the iron rod have been recovered. He prays for acquittal.

Analysis & Findings:-

15. We have examined the evidence of the minor victim (P.W.2) in light of the aforesaid submissions. With regard to the place of occurrence, we note the minor has deposed that she came out to the staircase to call her aunt. Thereafter she went to the lane to call her aunt. On her way back she was raped.
16. Her evidence with regard to the place of occurrence is unshaken during cross-examination. P.W.-1, her mother was a reported witness. It is possible that she had erred in stating the correct place of occurrence and claimed the incident occurred in the meter room near the lane which is also a few meters away.
17. In view of the consistent evidence of the minor victim regarding the place of occurrence, we are convinced that the incident occurred in the narrow pathway and the minor variation in the evidence of PW 1 in this regard does not impact the credibility of the prosecution case.
18. Secondly, it has been argued there are rooms on both sides of the lane which are occupied by inhabitants. None of

them protested. Hence, incident could not have occurred in the lane during the evening.

19. Victim is an eight year old child. She was suddenly accosted by the appellants and her mouth was taped. As a result, she could not cry for help when the appellants subjected her to penetrative sexual assault. Incident occurred within few minutes. Suddenness of the incident and its short duration i.e. a couple of minutes explain why she was unable to raise hue and cry which would have attracted the attention of inhabitants in the rooms adjoining the pathway.

20. Thirdly, it is argued the girl who came to the spot soon after the incident has not been examined. The said girl is a post occurrence witness and her non-examination does not affect the unfolding of the prosecution case. Similarly, non-examination of the girl who came soon after the incident does not improbabilise the incident as she is also a post occurrence witness.

21. Finally, non-recovery of tape or iron rod is not fatal as medical opinion corroborates the prosecution case. P.W. 1 the victim's mother noted blood oozing from her private

parts and the Medical Officer, P.W. 5 who soon after the incident examined the girl found injuries in the fourchette and opined such injury may be caused by insertion of finger and iron rod. During investigation, the weapon i.e. *Katari* used to threaten the victim was also recovered.

Conclusion:-

22. From the aforesaid evidence on record, we are of the opinion, the conviction and sentence of the appellants does not call for any interference.

23. Appeal is accordingly dismissed.

24. Let a copy of this judgment along with the trial court records be forthwith sent down to the trial court at once.

25. I record my appreciation for the able assistance rendered by Mr. Soumyajit Das Mahapatra, learned Advocate, as amicus curiae in disposing of the appeals.

26. Photostat certified copy of this judgment, if applied for, shall be made available to the appellant upon completion of all formalities.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)