

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. 420 of 2019

with

C.R.A.N. 2 of 2022

with

C.R.A.N.3 of 2023

Chinibas Karmakar

-Vs-

The State of West Bengal & Anr.

For the Appellant : Mr. Ranjan Kr. Roy, Sr. Adv.
Mr. Proloy Bhattacharya, Adv.
Mr. Tapas Kr. Saha, Adv.
Ms. Tanusree Ghosh, Adv.
Mr. Koushik Roy, Adv.

For the Appellant : Mr. Debasis Roy, Ld. P.P.,
Ms. Amita Gaur, Adv.

Heard on : 26.11.2024

Judgment on : 26.11.2024

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 18.04.2019 & 22.04.2019 passed by learned Additional Sessions Judge, 2nd Court, Bankura in Sessions Trial No.01(03)15 arising out of the

Special Case No.09 of 2014 convicting the appellant for commission of offence punishable under Section 376(2)(i) of Indian Penal Code and under Sections 4/12 of POCSO Act and sentencing him to suffer imprisonment for life and to pay a fine of Rs.30,000/-, in default, to suffer simple imprisonment for one year for the offence punishable under Section 4 of POSCO Act to suffer imprisonment for one year and pay a fine of Rs.5,000/-, in default, to suffer simple imprisonment for the offence punishable under Section 12 of the POCSO Act; both the sentences to run concurrently. No separate sentence was awarded under Section 376(2)(i) of the Indian Penal Code.

Prosecution case against the appellant is as follows:-

2. On 26.11.2014 at 4.00 PM the victim a 10 year old girl was playing with her friends. At that time, appellant came on his bi-cycle and took her away to Nischindapur forest. There he disrobed her and committed rape. Victim returned home and informed the incident to her mother (PW 5). She lodged written complaint at the police station resulting in registration of Bakirul Police Station Case No.90 of 2014 dated 27.11.2014 under Section 376(2)(i) of the Indian Penal Code and Sections 4/12 of the POCSO Act.

Proceedings before the trial Court:-

3. During investigation, the child was medically treated. Her statement was recorded before Magistrate. The appellant was arrested and charge sheet was filed. Charges were framed under

Section 376(2)(ii) of the Indian Penal Code and Sections 4/12 of the POCSO Act. Appellant pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 18 witnesses to prove its case. Defence of the appellants was one of innocence and false implication.

4. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 18.04.2019 & 22.04.2019 convicted and sentenced the appellant, as aforesaid.

Arguments at the Bar:-

5. Mr. Ranjan Roy for the appellant contends the prosecution case suffers from various infirmities. Though the victim alleged she had been raped, medical opinion does not support a case of penetrative sexual assault. Evidence of the minor is unreliable. During cross-examination, she stated she had deposed on the instruction of the Public Prosecutor. She admitted she had signed on blank papers and had not stated the facts before the Magistrate. He also contended the relationship between appellant and family of the victim was not good. Possibility of false implication due to prior enmity cannot be ruled out. Hence, he prayed for acquittal.
6. Learned Advocate for the State submits evidence of victim (PW 3) is reliable. Her deposition is corroborated by her friend (PW 4), her parents (PWs 1 and 5) and uncle (PW 15). PW 18 is the medical officer who examined her. He found her hymen congested which

corroborates the prosecution case. Accordingly, she prayed for dismissal of the appeal.

Analysis of evidence and finding:-

7. PW 3 is the minor victim. She was 10 years old at the time of her deposition. Trial court put questions to her to test her capacity and competence to depose. Being satisfied her deposition was recorded. In her deposition she stated she was playing with her friends. Appellant came to the spot on a bi-cycle. He forcibly took her on the bi-cycle to Nischindapur forest. There he forced her to take off her clothes and raped her. He threatened her not to disclose the incident and handed over Rs.10/-. She fled away from the spot. She informed the incident to her mother. Her mother took her to hospital where she was medically treated. Her statement was recorded before Magistrate and she proved her signature. During cross-examination she stated she had deposed on the instruction of Public Prosecutor. She had put signature at the hospital. She put signature on a blank paper. She was unable to read her statement recorded before Magistrate and stated that she did not state the facts before Magistrate.
8. Relying on these pieces of evidence, Mr. Roy strongly contends the victim is an unreliable and tutored witness. She deposed in court on the instruction of Public Prosecutor and stated she had not disclosed the facts before Magistrate.

9. Evidence of a minor victim of sexual offence must be appreciated with due care and sensitivity. One ought not lose sight of the tender age and the trauma suffered by a 10 year old girl who had been raped. Taking into consideration the trauma suffered by a minor victim in sexual offences, law provides for her special protection and support.
10. Combined reading of Sections 36 and 37 of the POCSO Act states, a child witness shall not be exposed in any way to the accused when her evidence is being recorded and the same shall be recorded in presence of her parents and any other person on whom the child has trust and confidence.
11. The statement of the minor that she deposed in court as per instruction of the Public Prosecutor must be read in light of the aforesaid legislative mandate. Her parents and Public Prosecutor were persons in whom the minor rested confidence when she deposed in court with regard to the most horrible incident in her life. Her tender age and vulnerability is further exposed by the fact that she was unable to read the statement recorded by the Magistrate and incorrectly stated that she had not narrated such facts before the Magistrate. We have examined her statement before the Magistrate, (Ext.4). PW 7 (Sima Karmakar) Judicial Magistrate has proved the said statement. The statement corroborates her version in Court.

12. In such view of the matter, we are unable to accept Mr. Roy's submission that the child had given false evidence in court on the instruction of the Public Prosecutor or that her deposition is at variance to her earlier statement before the Magistrate.
13. The next issue raised by Mr. Roy is that there was pre-existing enmity between the two families. In support of his contention he refers to the cross-examination of the minor (PW 3) and her mother (PW 5) who stated there was no good relation between them and the family of the accused.
14. On the first blush, the argument appears attractive. But other evidence on record squarely corroborates the victim's version and improbabilises a case of false implication. Firstly, one may refer to PW 4, the friend of the victim. She corroborated the victim and deposed at the time of occurrence they were playing on the field. Appellant came to the spot and dragged away the victim to a nearby jungle. During cross-examination, she reiterated the jungle i.e. the place of occurrence is near the road side.
15. This sterling evidence of an independent witness clearly establishes the credibility of the victim's version that on the day of the incident, she had been forcibly kidnapped on a bi-cycle and taken to a nearby jungle and raped. Secondly, her version is also corroborated by her parents (PWs 1, and PW 5,) who claimed soon after the incident victim came crying and narrated the incident to them. PW 5 lodged written complaint which was scribed by PW 1. Finally,

other relations i.e. PWs 8, 10, 12, 15 and 16 also stated that they heard that the victim had been raped by the appellant.

16. The aforesaid pieces of evidence particularly the version of PW 4 who stated that the victim was kidnapped by the appellant and taken to the jungle where she was raped clearly improbabilises the defence theory of false implication of the appellant.
17. Prosecution also contends the medical report proved by PW 18 shows hymeneal congestion which supports a case of penetrative sexual assault.
18. Mr. Roy disputes this and refers to the doctor's opinion that there is probability of injury on *labia majora*. It is trite opinion evidence of a medical officer would not render a convincing version of a victim of sexual offence improbable. Only when the medical opinion renders the victim's version patently absurd or inherently impossible can the court disregard her version and give precedence to the expert's opinion. Reading of the medical evidence as a whole would not make out such a case. Absence of injury on *labia majora* may be due to inability of the minor to resist the sexual act. Absence of injury per se does not rule out rape. Doctor also stated, hymen congestion may be because of disease or insertion of foreign body by the victim. These hypotheses do not fit into the broad probabilities of the case. It is nobody's case the victim was suffering from disease.

19. Considering her tender age, it is improbable if not merely impossible that the victim would insert a foreign body. On the other hand, the aforesaid opinion gives rise to the irresistible inference that one of the causes of hymenal congestion is insertion of a foreign body. This corroborates the prosecution case of penetrative sexual assault.

Conclusion: -

20. In light of the aforesaid discussion, we are of the opinion conviction of the appellant has been proved beyond reasonable doubt.
21. Coming to the issue of sentence, we note the appellant has been imposed upon the maximum sentence of life imprisonment for the offence punishable under Section 4 of POCSO Act. Keeping in mind the facts and circumstances of the case including the absence of any prior criminal antecedent, the fact that appellant was in his 20's and there is high possibility of reformation, we are inclined to modify the sentence imposed upon him and we direct that the appellant shall suffer rigorous imprisonment for ten years and to pay a fine of Rs.30,000/-, in default, to undergo simple imprisonment for three months for the offence punishable under Section 4 of the POCSO Act. Other sentence shall remain unaltered and run concurrently.
22. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence

imposed upon them in terms of Section 428 of the Code of Criminal Procedure.

23. With the aforesaid modification as to sentence, appeal is disposed of.
24. In view of the aforesaid, connected applications are also disposed of.
25. Trial court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.
26. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)

as/pa