

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

Present:

The Hon'ble Justice Tirthankar Ghosh

***C.R.A. (SB) 120 of 2024
with
CRAN 2 of 2024***

***Biswajit Mondal
versus
The State of West Bengal & Anr.***

For the Appellant : Mr. Dipanjan Chatterjee,
Mr. Kalyan Kumar Bhattacharjee,
Ms. Rimpa Adhikari,
Ms. Kakan Das.

For the State : Mr. Debasish Roy, Ld. P.P.,
Mr. Arijit Ganguly,
Mr. Koushik Kundu.

For the Victim/O.P.No.2. : Ms. Sreyashee Biswas.

Heard On : 22.08.2024 and 06.09.2024.

Judgement On : **10.09.2024.**

Tirthankar Ghosh, J. :

The present appeal has been preferred against the judgment and order of conviction and sentence dated 20.12.2023 passed by the learned Judge, Special Court (POCSO), Alipur, South 24 Parganas in connection with Special Case (POCSO) No. 51 of 2021 corresponding to S.T. No. 06(09)/2021 arising out of Sundarban Coastal P.S. Case No. 52 of 2021 dated 18.03.2021, wherein the learned trial court was pleased to convict the appellant under Section 10 of

the POCSO Act and sentenced him to suffer rigorous imprisonment for five years along with fine of Rs.5,000/- i.d., to suffer R.I. for one month.

The genesis of the present case was an information being furnished by 'X'/the victim girl to the officer in charge of Sundarban Coastal Police Station, wherein the informant/victim aged about 14 years complained that on 15.03.2021 (Monday) after dinner she (the victim) went to her bed at night when her father came to her bed, touched her breast, undressed her pant and tried to make physical relationship with her. Due to shame and fear, she kept quiet and, again on 17.3.2021 at dawn, approximately, at about 4.30 am, when she was sleeping on her bed at her room, her father came to her bed, touched her body, pressed her breast, undressed her pant and wearing apparels and hugged her.

It is alleged that her father tried to rape her against her will but he could not succeed and, as such, he left her. She/the victim, thereafter, went to her maternal uncle's house at Madhupur village after narrating the incident to Ms. Rina Mondal - a member of the Gram Panchayat. She, therefore, requested the police authorities to take legal steps against the accused, who is her father, so that he is severely punished.

On the basis of the aforesaid information, Sundarban Coastal P.S. Case No. 52 of 2021 dated 18.03.2021 was registered for investigation under Section 354B of the IPC read with Section 10 of the POCSO Act. The investigation of the case was endorsed to the Sub-Inspector of Police Goutam Adhikary (P.W.8).

The investigating officer on conclusion of investigation submitted charge-sheet before the learned jurisdictional Court being the learned Special Court and the learned Special Court on consideration of the materials available on records framed charges against the accused under Sections 376/511 of the IPC, Section 4/18 and Section 10 of the POCSO Act, 2012. 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 eight witnesses which included P.W.1-'X', the Victim Girl; P.W.2 -'Y', aunt of the victim girl' P.W.3-Rina Mondal, Panchayat Member of the locality; P.W.4-Biswajit Mondal, Neighbor of the victim; P.W.5- Bholanath Mondal, the scribe of the FIR; P.W.6 - Tapan Mondal, neighbor of the victim; P.W.7 - Gopal Gayen, relative of the victim; P.W.8- Sub-Inspector Goutam Adhikary, Investigating Officer of the case.

P.W.1, 'X' is the victim. In her deposition before court she stated that she was born on 03.07.2007 and in her house she used to stay along with her grandfather, grandmother, her father, step mother along with her elder brother. Her biological mother was residing at Sonarpur and she contacted a second marriage. She claimed that she lodged a written complaint against her father as the incident took place on 15.03.2021 and 17.03.2021. According to her, on 15.03.2021 she was sleeping in her bed and in the early morning she felt cold and, as such, she went closer to her father. At that time, her father

pressed her breast and touched her private parts. On 17.03.2021, again, her father touched her breast, disrobed her and attempted to rape her when she pushed her father and left the place and went to the Panchayat Member, namely, Rina Mondal and disclosed the incident. She, thereafter, left for her matrimonial uncle's house at Panikhali. She, however, did not disclose the matter to any of her family members and went to Sundarban Coastal P.S. along with her aunt and uncle (P.W.2 & P.W.7). She lodged the written complaint. She identified the written complaint which was drafted by a person who was sitting outside. She signed the same and identified her signature which was admitted in evidence. She disclosed the incident to the police and, as such, she was sent to the hospital for medical examination but she refund medical examination as her father only tried to rape her but could not penetrate her. She further deposed that she narrated the incident to one Judge, who recorded her statement and she signed the same. She identified the document with her signatures. Accordingly, her signatures in the statement recorded under Section 164 of the Cr.P.C. were marked in evidence. She identified the accused in court virtually. Although the said identification, according to the court, was in respect of a different accused. In cross-examination she replied that all the family members used to reside at the same room. She narrated in cross-examination that she stated to the Magistrate that the incident took place on 15.03.2021 and 17.03.2021 regarding her father having touched her private parts and attempted to rape her. On further cross-examination she stated that in her written complaint as well as to the police station and the learned

Magistrate she stated that she pushed her father and left the place. To a specific query on behalf of the accused, she stated that her biological mother left her when she was too young and denied that the written complaint was filed against her father at the behest of her biological mother. She denied of the incident not having taken place on 15.03.2021 or 17.03.2021. When she was questioned and confronted, the victim replied as follows:

‘Not a fact I deposed falsely that “on 15.03.2021 I was sleeping in my bed and in the early morning I was feeling cold. I became closure to my father. At that time my father pressed my breasts and touched my private parts. On 17.03.2021 again my father touched my breasts, disrobed me and attempted to commit rape upon me.”

To a specific query from the defence/accused she stated that she had good relation with her grandfather, grandmother and also with her stepmother. She used to share her problems with them but they did not care about her problems. She also claimed that she informed all her problems to her biological mother. Lastly, she denied of such incident not having taken place and, as such, she refused to undergo medical examination.

P.W.2, ‘Y’ is the Aunt of the Victim, who deposed that the victim girl was the daughter of her sister and they were residing at Dayapur, Sundarban Coastal Police Station. According to her, the incident happened two years ago and on the said date her niece/victim went to her parent’s house at 11 No. Sadhupur and started crying in front of her parents. Her father called her and she had been to her parent’s house. The victim used to reside with her brother, father (accused), grandparents in their house. At her residence the victim was

molested by her father, where the accused pressed her breasts and also attempted to rape her but could not succeed. She further stated that the accused and her sister (mother of the victim) both contacted second marriage and her sister was residing at Sonarpur with her second husband. At the time of the incident, her sister was physically ill and, as such, requested her to look into the matter and the victim was taken to Sundarban Coastal P.S., where the complaint was lodged by the victim girl. The police also interrogated her in respect of the case. She identified the accused in court virtually. In cross-examination, she stated that there is only one bed room in the house of the accused where the accused along with his wife, children and his parents slept. She denied in respect of the incident relating to the accused having molested and/or touched the victim indecently, not having taken place. On a specific query, she replied that the relationship between her niece/victim girl and the grandparents and her brother was good and she used to share everything with them.

P.W.3, Rina Mondal is a gram Panchayat Member of Satjali Gram Panchayat. She deposed that on the date of the incident she was working at a garden. At that time, the victim girl came to her and when she was weeping and reported that her father molested her by pressing her breasts and by disrobing her attempted to rape her. She informed the matter to party workers and they were advised to go to the police station for taking appropriate steps. The police subsequently came to her and interrogated her. She identified the accused in court through virtual mode. In her cross-examination, she stated

that she is an elected member of the Gram Panchayat. At the time of incident, the accused was a supporter of her political party. She denied that the victim was annoyed with her father as he contacted a second marriage. In further cross examination she stated that, earlier, the accused was a member of a different political party. She denied of having implicated the accused in a criminal case out of grudge and mala fide intention. She also denied that the facts relating to sexual assault as stated by the victim was falsely narrated by her in court.

P.W.4, Biswajit Mondal is a neighbor of the victim, who identified the accused in court through virtual mode and deposed that the accused has one son and one daughter out of his first marriage and his daughter, i.e., the victim is 17-18 years old. He stated that he heard from the local people that the accused did some bad things with his daughter. However, police did not interrogate him. In cross-examination, he deposed that he had no personal knowledge regarding the incident.

P.W.5, Bholanath Mondal is the scribe of the FIR, who drafted the written complaint and deposed before the court that he drafted the same as per request of the victim girl which was read over and explained to her and being satisfied, the victim signed the same. The said written complaint was admitted in evidence. In cross-examination, he stated that he had no personal knowledge regarding the incident.

P.W.6, Tapan Mondal is a neighbour of the victim, who deposed that after returning from market he found that there were gathering in front of house of the Panchayat member, namely, Rina Mondal, who told her that that the accused Biswajit committed rape upon her own daughter aged about 13 years. He further stated that the accused along with his parents and the victim girl were residing at his house and the mother of the victim girl had left the accused. However, in cross-examination, he stated that he had no personal knowledge regarding the incident and he heard it from the Panchayat Member (Rina Mondal).

P.W.7, Gopal Gayen is the uncle-in-law (husband of P.W. 2) of the victim. He deposed that the father of the victim girl attempted to rape her and she (the victim) lodged written complaint at Sundarban Costal Police Station. The written complaint was lodged on 18.03.2021. He identified the accused in court through virtual mode. He stated that, previously, he visited the premises with the accused but after matrimonial discord in between the accused and his sister-in-law, he never visited the house of the accused. He further stated that there was lockdown during *COVID pandemic* at the time of the incident and the victim, as such, was staying with her father and grandparents in the house of the accused. The witness, additionally, deposed that Rina Mondal called her wife and informed her about the above incident. He, therefore, accompanied the victim girl to the P.S. along with his wife and another friend. In cross-examination, he replied that Rina Mondal happens to be the Panchayat Member of the locality where the accused was residing and he narrated the

incident to the police as he heard from the Panchayat Member as also the victim girl. However, he admitted the fact that he did not state to the police that the accused attempted to rape the victim.

P.W.8, SI, Goutam Adhikary is the investigating officer of the case. He deposed that he was endorsed with the case by the officer-in-charge of Sundarban Coastal P.S. According to him, FIR was filled up by the ASI, Sanjit Das. He identified the handwriting and the signature in the said formal FIR, which was admitted in evidence. He deposed that as the victim girl lodged written complaint against her father, on the basis of such written complaint, the instant case was started. He took the victim girl to a lady constable Anamika Saha of Sundarban Coastal P.S. and in her presence the statement of the victim girl was recorded. She was then sent to the hospital for medico- legal examination. He visited the place of occurrence, examined the available witnesses and recorded their statement under Section 161 of the Cr.P.C. He also visited the place of occurrence, prepared the rough sketch map along with index of the place of occurrence. The victim girl was also sent to the learned Magistrate for the statement being recorded under Section 164 of the Cr.P.C. The witness, thereafter, stated that he collected the medico-legal examination report, the statement of the victim girl under Section 164 of the Cr.P.C. and after collection of the birth certificate of the victim girl, he submitted charge-sheet under Section 354B of the IPC and Section 10 of the POCSO Act. He identified the accused in court. In cross-examination, the investigating officer categorically stated that the victim girl did not state to him that she pushed her

father and left the place. He also admitted the fact that the victim refused to get herself-examined by the doctor. The investigating officer/witness denied that the charge-sheet was submitted without proper investigation.

Mr. Chatterjee, learned advocate appearing for the appellant submitted that the victim had been throughout inconsistent in her version and a reading of her evidence in the FIR, statement recorded under Section 164 of the Code of Criminal Procedure before the learned Magistrate as well as the deposition before the court would on the face of it reflect that there are overtones of falsely implicating the appellant as the version of the victim is at variance. Learned advocate draws the attention of the court to the specific part of the evidence wherein there was admission by PW-3 that the present appellant was earlier attached to a different political party. It was thus contended that the issue relating to political vendetta in the present case by using the victim cannot be ruled out. Learned advocate further submitted that majority of the witnesses in this case deposed that there was a single room in the house and in the said single room, it was not only the father of the victim, but her grandparents, her stepmother and her brother who were available. The investigating authorities, according to the appellant, did not examine the grandparents or the stepmother and the brother knowing fully well that the facts which have been narrated by the victim for falsely implicating the appellant would before a court of law be reduced to an improbable story. It was further pointed out that having regard to the trend of the cross-examination, it cannot be ruled out that the mother who has already contracted a second marriage may have all the

intention to implicate the present appellant. It was, therefore, contended that the nature of the evidence so relied upon by the prosecution do not create a foundational fact to attract the presumptions as available under the POCSO Act for convicting the present appellant. As such, the judgement and order of conviction so passed by the learned trial court should be set aside and the appellant acquitted of the charges.

Ms. Biswas, learned advocate appearing for the victim/opposite party no.2 has submitted short written notes of argument wherein she claimed that the prosecution by way of exhibit 'P-7' i.e. birth certificate of the victim has come up with a case that at the relevant point of time, the victim was a minor which is corroborated in the evidence of the victim herself. Learned advocate submitted that there was consistency in the version of the prosecution particularly the victim, although the same may be attended with minor inconsistencies because of passage of time. The factum of sexual assault being inflicted upon the victim by her father is corroborated by PW-2, aunt of the victim, PW-3, panchayat member and PW-7, uncle-in-law of the victim. The victim was also tendered for medico-legal examination and the report has been duly exhibited. Non-examination of mother of the victim girl is not fatal in the present case. It was emphasised that incidents of such nature do not happen publicly. Therefore, non-examination of the grandparents, the brother or the stepmother is not relevant in the factual background of the present case. The only defence which the appellant has taken up in his examination under Section 313 of the Code of Criminal Procedure relates to question no. 5

wherein in response to the query relating to the evidence of PW-3, the appellant replied that as he belonged to a different political party, the panchayat member also supported his erstwhile wife. Learned advocate thereafter emphasised on Sections 9(l) and 9(b) of the POCSO Act and submitted that an offence under Section 10 of the POCSO Act being made out from the version of the victim, there is no scope for interference with the judgement and order of conviction so passed by the learned trial court. As such, the order of conviction and sentence should be affirmed.

Learned advocate appearing for the State submits that the sole testimony of a victim in a case of sexual assault is of paramount importance as the nature of offences complained of are committed at places where the witnesses may not be available to support the version and the court has to infer from the attending circumstances. In this case, according to the State, the evidence of the prosecution particularly the victim has been consistent. As such, there is no scope for interference with the judgement and order of conviction so passed by the learned trial court and the same should be affirmed.

I have considered the submissions advanced on behalf of the learned advocates for the appellant, the victim and the State and before proceeding further, I would prefer to quote the statement of the victim recorded under Section 164 of the Code of Criminal Procedure.

“Q.10: Tell whatever you want to say ?

Ans: My mother resides at Kolkata. I was sleeping with my father. That happened on Monday and Tuesday. After the 1st day night, at the dawn, I was feeling cold, so I went closer towards my father. Then father hugged me and pressed breast (Dudh) (showing her breast) and undressed my pant. 1st day I could not sleep. On the next day at night he again pressed my breast (Dudu), and by undressing pant tried to force. I went out of the room after wearing pant. In the morning, I came back house from outside. I dressed wearing apparels and thereafter went to my maternal uncle's (mama's) house after telling the incident to the Pradhan of Panchayet, Rina Mondal."

Before further appreciating the evidence of the present case, the principles relating to sole testimony of the prosecutrix in cases of sexual assault is to be taken into account. In **Rai Sandeep Vs. State (NCT of Delhi)** reported in (2012) 8 SCC 21, the Hon'ble Supreme Court while dealing with the statement of a prosecutrix found that there were material inconsistencies and as such, opined as follows :

"22. In our considered opinion, the 'sterling witness' should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever

strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

Further in **Krishan Kumar Malik Vs. State of Haryana** reported in (2011) 7 SCC 130, it was held that although the victim's solitary evidence in matters relating to sexual offences is generally deemed sufficient to hold an accused guilty, but the conviction cannot be sustained if the prosecutrix's version is found unreliable and insufficient due to identified flaws and lacunae.

In the present case, the victim has narrated the incident of sexual assault in the letter of complaint as the accused her father on the night of 15.03.2021 and 17.03.2021 came to her bed and committed the sexual offence while in her statement recorded under Section 164 of the Code of Criminal

Procedure, she stated before the Magistrate that at night on the first day and at the dawn as she was feeling cold, she went closer to her father. In court also while deposing, she narrated that on 15.03.2021, she was sleeping in her bed and in the early morning, she felt cold and when she went closer to her father, at that time her father touched her breasts and her private parts. On 17.03.2021, again her father touched her breasts, disrobed her and attempted to rape her when she pushed her father and left the place and went to the panchayat member. There is a material difference in the narration of facts to the extent that while her version at one instance is as if her father came from a different room or place to commit the offence, in the second occasion, she narrates in a manner as if, she was sleeping next to her father.

The aforesaid fact assumes relevance as the victim is sufficiently matured as she is able to understand the consequences of the medical examination as in her deposition before the court she stated that she refused medical examination as her father only tried to rape her, but could not penetrate. The maturity of the victim being of such standard, then in that case, if any incident happened on 15.03.2021, then in ordinary course of events she should not have been there on 17.03.2021. The evidence of the case also reflects certain unnatural features as the victim girl was staying with her grandparents, brother and stepmother, but she did not complain that on any earlier occasion her father had inappropriately behaved with her. Very vaguely she has replied in cross-examination that she used to share her problem with her grandfather, grandmother and stepmother but they did not care about her

problem. The other feature of the present case which strikes the foundational fact is the behaviour of the victim as she without complaining to any of her relations, according to her version, reported the incident to the panchayat member and it is the panchayat member who informs it to her aunt and her uncle.

Having regard to the manner in which the prosecution has tried to establish the foundation of the present case, I am of the view that there are material discrepancies and the same do not qualify the victim as a 'sterling witness' for relying upon her sole testimony to arrive at a finding which would be adverse to the appellant. To this effect, it would be worthwhile to rely upon the judgement of the Hon'ble Supreme Court in ***Nirmal Premkumar and Another Vs. State Rep. by Inspector of Police*** reported in 2024 SCC OnLine SC 260 wherein the Hon'ble Apex Court in paragraph 15 was pleased to hold as follows :

“15. in cases where witnesses are neither wholly reliable nor wholly unreliable, the Court should strive to find out the true genesis of the incident. The Court can rely on the victim as a “sterling witness” without further corroboration, but the quality and credibility must be exceptionally high. The statement of the prosecutrix ought to be consistent from the beginning to the end (minor inconsistencies excepted), from the initial statement to the oral testimony, without creating any doubt qua the prosecution's case. While a victim's testimony is usually enough for sexual offence cases, an unreliable or insufficient account from the prosecutrix, marked by identified flaws and gaps, could make it difficult for a conviction to be recorded.”

Having considered the flaws present in the instant case, I am of the view that the sole testimony of the prosecutrix along with the attending circumstances do not inspire this Court to arrive at a conclusion of guilt. As such, the order of conviction and sentence so passed by the learned trial court calls for interference. Accordingly, the judgement and order of conviction and sentence dated 20.12.2023 passed by learned Judge, Special Court (POCSO), Alipore, South 24-Parganas in Special Case (POCSO) No. 51/2021 corresponding to S.T. No. 06(09)2021 arising out of Sundarban Coastal Police Station Case No. 52/2021 dated 18.03.2021 is hereby set aside.

The appellant is acquitted of the charges.

Accordingly, the appellant be released forthwith, if he is not wanted in connection with any other case.

The appeal being CRA (SB) 120 of 2024 is, thus, allowed.

Pending connected application is consequently disposed of.

Department is directed to send back the lower court records immediately to the learned trial court and also communicate this order to the learned trial court as well as the concerned jail authorities.

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.)