

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 946 of 2013

Sri Dilip Barua

-Vs-

The State of West Bengal

For the Appellant : Mr. Santanu Talukdar
(*Amicus Curiae*)

For the State : Mr. Bidyut Kumar Roy
Ms. Sujata Das

Heard on : 19.09.2023, 06.10.2023, 13.10.2023

Judgment on : 17.01.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is directed against a judgment dated 19.09.2013 and order dated 19.09.2013 passed by Learned Additional Sessions Judge, Fast Track 4th Court, Barrackpore in Sessions Trial No. 4(12) 2007 (Sessions Case No. 12(4) 2007) under Sections 376/511 of the Indian Penal Code, thereby acquitted the accused/appellant from under Sections 376/511 of the Indian Penal Code and convicted the accused/appellant under Section 354 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for one year and to pay a fine of Rs. 5000/- for the offence punishable under

Section 354 of the Indian Penal Code and in default of payment to suffer simple imprisonment for six months more.

2. The prosecution case in brief was inter alia to the effect that on 11.01.2007 one Rama Mallick Wife of Sri Kajol Mallick of Kaugachi, Rathtala, Jagaddal lodged complaint at the local police station alleging that on 11.01.2007 at about 10:45 a.m. her daughter namely Trisha Mallick aged about 7 years went to the house of their neighbor Dilip Barua for taking prosad of Buddha Purnima. It is alleged that said Dilip Barua with an intention to rape her laid her and entered his finger in her private part. It is alleged thereafter giving “prasad” in a bowl told her to come in the evening as he would give her banana and told her to return the bowl. It is alleged that after returning home Trisha refused to go to return the bowl and being asked her she told the incident to the complainant.
3. On the basis of complaint Jagaddal Police had started a case under Section 376/511 of the Indian Penal Code against the appellant.
4. The prosecution examined 10 witnesses to prove the guilt of the accused person. There are medical witness, police witness and Judicial Magistrate witness to prove the same.
5. Learned Advocate for the appellant submitted that –
 - i. The Learned Trial Judge had failed to appreciate the facts and circumstances of the alleged incident and also failed to appreciate the evidence of the PW-1 and PW-2 and PW-4 and PW-8 which were totally contrary to each other and same did not attribute the appellant liable for the offence. The statement in respect of class in which the victim girl

studied did not corroborate with PW-1 and PW-2. The statements of the PW-1, PW-2, PW-3 & PW-8 in respect of time of commission of offence did not corroborate each other rather made a different opinion.

- ii. The Learned Judge has failed to appreciate the facts incident. None of the witnesses stated in chief and/or in cross that when and where the incident took place. All are passive witnesses.
- iii. The Learned Judge has failed to appreciate the facts and statements as well as the circumstances of the alleged incident and also failed to appreciate the evidence of witnesses where prosecution has failed to prove the commission of offence made under Section 354 of the Indian Penal Code. Whether the statement of the victim girl i.e. PW-8 made under Section 164 of Criminal Procedure code is acceptable where in cross-examination she stated that she could not read the statement of the under Section 164 of Cr.P.C.
- iv. The Learned Judge has failed to apply his judicial mind and convicted the accused/appellant under Section 354 of the Indian Penal Code by sentencing him for one year. The conviction and as well as the sentence are totally improper and liable to be set aside.
- v. The Learned Trial Judge has failed to appreciate that there are so many variations in the testimony of the witnesses. The statements of PW-8 made in chief and in cross did not corroborate with the statement made under Section 164 of the Code of Criminal Procedure.
- vi. The Learned Trial Judge has failed to appreciate that there are variations in the testimony of the witnesses. Because no one has

witness the offence. Question of admissibility of the statements based on hearsay evidence has not rebuttable.

- vii. The Learned Trial Judge has failed to appreciate that there are variations in the testimony of the witness no. 1 statements PW-2 & PW-10.
 - viii. The Learned Trial Judge erred in totally ignoring the defence case. Articles were seized (wearing apparels). But in this regard neither any witness was examined nor the article was produce before the Learned Court.
 - ix. In view of the contradiction between the evidence of PWs in Court regarding the exact time of commission of offence and their statements make the entire proceeding doubtful and the Learned Judge erred in convicting the accused on the basis of the same.
 - x. The Learned Judge has failed to consider that the whole prosecution story is concord fabricated and also after thought.
6. The Learned Advocate for the State submitted that the statement of the victim recorded under Section 164 of the Code of Criminal Procedure, the medical report of the victim girl marked as Exhibit-11 and the statement of the S.I. of Police were sufficient to prove the prosecution case and the appeal shall be dismissed. Bereft of certain inconsistencies in the evidence of the prosecution witnesses, the fact of the offence committed upon a minor child is irrefutable.
7. The Learned Amicus Curiae appearing on behalf of the appellant submitted an instance of enmity between the parties whereby the appellant being

affluent in comparison to the victim's family and the victim's father being implicated in a theft case provoked the institution of a fabricated criminal case against the appellant with an ulterior motive to display vengeance.

8. A circumspection of the prosecution witnesses revealed as follows:-

- i. PW-1 was the de facto complainant. She deposed that the alleged incident occurred on the 11.01.2007 at 10:45 am. The victim, her daughter, was purportedly 7 years old at the time of the incident. It was brought to the attention of PW-1 that on the day of the incident, the appellant's son had requested her son to obtain 'prasad' from the appellant's residence. During this time, the victim, who had just returned from her tuition class, expressed hunger, prompting PW-1 to send her to the appellant's house to procure 'prasad'. Subsequently, upon her return, the victim complained of itching in her private parts. Advised to drink water by PW-1, the victim was then prepared for school. However, the victim resisted attending school and, upon persistent inquiry, disclosed to PW-1 that the appellant had taken her to a room, undressed her, and inserted his finger into her private parts in an attempt to assault her. The victim, in tears, pleaded with the appellant to release her, stating the consequences of her mother's potential scolding. In response to this disclosure, PW-1 proceeded to the appellant's residence to protest the alleged illegal act, leading to the gathering of onlookers upon her outcry. Subsequently, PW-1 and her daughter sought medical treatment at B.N. Bose Hospital and later

lodged a complaint at the police station, which was documented as Ext.1.

- ii. During cross-examination, PW-1 attested that she observed the victim's private parts in a swollen condition while undressing her for school, noting nail scratches in the same area. Furthermore, PW-1 confirmed that the victim, accompanied by her and PW-3, was taken to the hospital.
- iii. PW-2, identifying himself as the father of the victim, deposed that his wife filed the complaint against the appellant, alleging that the incident occurred on the aforementioned date at 10:25-10:30 am. Although PW-2 was not present during the incident, he became aware of it through a neighbor and subsequently learned of the incident from the victim. PW-2 asserted that the appellant had promised the victim one rupee if she visited his house again.
- iv. During cross-examination, discrepancies were noted in PW-2's statements regarding the time he received information about the incident. He stated that he had accompanied his wife to the police station to lodge a complaint against the appellant. Thereafter, the police seized the clothes of the victim and transported them to Golghar Hospital at 3:30-4pm.
- v. PW-3, claiming to be the victim's uncle, reported that he heard PW-1's outcry on the day of the incident, prompting him to rush to the scene. The victim, upon inquiry, disclosed that the appellant had invited her

to his house, promising bananas, after which the alleged incident transpired. His signature on the seizure list was marked as Ext.2.

- vi. PW-4, the victim's grandmother and PW-1's mother-in-law, stated that she overheard the appellant calling the victim to his house. On the day of the incident, the victim returned home crying, and upon inquiry, PW-4 learned of the alleged assault. The victim further disclosed that the appellant was alone in his house at the time of the incident.
- vii. PW-5, though unaware of specific incident details, affirmed the existence of a commotion on the day of the incident. PW-5's signature on the seizure list was marked as Ext.3.
- viii. PW-6, a neighbor of the appellant, recounted a mob forming in response to the appellant's reprehensible actions. He corroborated by signing the seizure list and confirming awareness of the seized items.
- ix. PW-7 was serving as the M.O. at Bhatpara State General Hospital. He examined the appellant and opined that:-

“...the patient was capable of intercourse. There was no injury in the private parts of the accused nor any foreign body.”

The examination report was marked as Ext.5.

- ix. PW-8, the victim, in her deposition, detailed the incident, asserting that the appellant, following a religious ritual at his house, made inappropriate advances towards her. She mentioned the appellant was in his underwear when he requested her to lie down, after which he pressed his penis against her private parts. Then he gave her a bowl of 'prasad' and asked her to visit again and next time he would give her bananas

and Rs.1/-. The victim, in tears, narrated the incident to her mother. Thereafter her mother visited the appellant's house to return the bowl where she accompanied her. Her mother raised hue and cry at the house of the appellant. Subsequently, she was taken to the doctor for examination and to the police station. Her signature was identified as Ext.6.

x. PW-10, serving as the S.I. of police at Jagaddal Police Station on 11.01.07, lodged the F.I.R. marked as Ext.7. He stated that he had examined the complainant and seized the wearing apparels of the victim. The signature of PW-10 on the seizure list was marked as Ext.8. He visited the place of occurrence and prepared the sketch map. The sketch map was marked as Ext.9. He arrested the appellant and seized his wearing apparel. The seizure list was marked as Ext.10. He took the appellant and the victim to the hospital for medical examination. He collected their medical report. The medical report of the victim was marked as Ext.11.

xi. During cross-examination, PW-10 stated the he did not send the vaginal swab for forensic examination.

9. Though the doctor who examined the victim in his chamber was not examined and several lapses on the part of the Investigating Officer the foundational fabric of the prosecution case did not get vitiated since the evidence of the victim is reliable to have been molested sexually by the appellant aged enough to be her father. The statement recorded under Section 164, Cr.P.C. is not deviated by the evidence of the victim during her

deposition before the Court. Such a malicious, baneful and pernicious act by the appellant upon a child who is of the age of his child to be nurtured, protected and cared by any sensible adult subjecting the child to such a reprehensible act is condemned and accordingly, the conviction pronounced by the Learned Trial Court is upheld.

10. In view of the above discussions, the prosecution cannot be said to have proved its case beyond reasonable doubt and accordingly the instant criminal appeal is allowed.
11. Under such facts and circumstances, the judgment and order of conviction dated 19.09.2013 passed by Learned Additional Sessions Judge, Fast Track 4th Court, Barrackpore in Sessions Trial No. 4(12) 2007 arising out of Sessions Case No. 12 (4)2007 is set aside.
12. The instant criminal appeal being CRA 946 of 2013 stands disposed of.
13. There is no order as to costs.
14. I record my appreciation for the able assistance rendered by Mr. Santanu Talukdar, Learned Advocate, as *Amicus Curiae* in disposing of the appeal.
15. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
16. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)