

HIGH COURT OF CALCUTTA

BENCH : Justice Bibhas Ranjan De

Date of Decision: 14th June 2024

Case No.:

C.R.A. (SB) 45 of 2023

IA No. CRAN 1 of 2023

APPELLANT: GOPAL SARDAR ...Appellant

VERSUS

RESPONDENT: THE STATE OF WEST BENGAL & ANR. ...Respondents

Legislation:

Section 354B of the Indian Penal Code (IPC)

Section 10 of the Protection of Children from Sexual Offences Act, 2012
(POCSO Act)

Section 313 of the Code of Criminal Procedure (Cr.P.C.)

Subject: Appeal challenging the conviction under Section 354B IPC and Section 10 of POCSO Act for sexually assaulting a minor girl (X), based on the judgement and order of conviction passed on 01.02.2023 & 02.02.2023 in Sessions Trial Case No. 14(07) 2015 arising out of Sessions Case No. 32 (8) 14 and Special Case No. 82/15.

Headnotes:

Criminal Law – Sexual Assault – Conviction under Section 354B IPC and Section 10 of POCSO Act – Appeal against conviction by the Trial Court – Accused argued lack of medical evidence of penetrative assault, investigation lapses including failure to seize mobile phone showing obscene images to the victim – Court upheld conviction, citing consistent testimony of the victim and corroborative evidence from other witnesses, despite investigative lapses [Paras 1-48].

Witness Testimony – Credibility and Corroboration – Victim’s testimony found credible and consistent across statements to police, magistrate, and during trial – Court emphasized that a victim of sexual assault is not an accomplice

but a competent witness whose testimony need not be corroborated in material particulars if found credible [Paras 17-35].

Investigative Lapses – Impact on Prosecution Case – Investigating Officer’s failure to seize crucial evidence criticized – However, Court held that lapses do not necessarily discredit the prosecution’s case if witness testimony is found reliable – Directed departmental enquiry against the Investigating Officer for negligence [Paras 47-48].

Sentence and Section 222(2) Cr.P.C. – Minor Offence Conviction – Conviction under Section 10 of POCSO Act sustained despite lack of specific charge, under the provision allowing conviction of a minor offence if major offence charge not proven – Sentencing deemed appropriate and within judicial discretion [Paras 36, 45].

Decision: Appeal dismissed – Conviction and sentence upheld – Court directed the appellant to surrender to serve the sentence – Ordered departmental enquiry against the Investigating Officer [Paras 50-51].

Referred Cases:

- Zahira Habibulla H. Sheikh & Anr. Vs. State of Gujarat & Ors., (2004) 4 SCC 158
- Vishal Singh v. State of Rajasthan, (2009) Cri. LJ 2243

Representing Advocates:

For the Appellant: Mr. Chitra Ranjan Chakraborty, Mr. Mostaffijur Rahaman, Ms. Afreen Begum, Md. Apzal Ansari, Mr. Dip Joty Chakraborty

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

For the de facto complainant: Mr. Sumanta Chakraborty

J U D G E M E N T

Bibhas Ranjan De, J.

Preface:-

1. Challenge in this appeal is the judgement and order of conviction dated 01.02.2023 & 02.02.2023 respectively passed by the Ld. Judge in Sessions Trial Case No. 14(07) 2015 arising out of Sessions Case no. 32 (8) 14 and Special Case No. 82/15 wherein the accused/appellant was convicted under Section 354B of the Indian Penal Code (for short IPC) and Section 10 of the Protection of Children from Sexual Offences Act, 2012 (for short POCSO Act).
2. In view of the guidelines set by the Hon'ble Apex Court Governing this kind of scenarios, I will consciously avoid to divulge into the particulars of the survivor (for short X), witnesses and the Police Station, Hospital, other places including place of occurrence.
3. The appellant has been convicted by the Ld. Trial Judge as under:-

Particulars of Accused/Appellant			
Section	Sentence	Fine	Sentence in default of fine
10 of POCSO Act	7 years of rigorous imprisonment	Rs. 25,000/-	Six months of rigorous imprisonment
354B of the IPC	5 years of rigorous imprisonment	Rs. 10,000/-	Six months of simple imprisonment

Background:-

4. The facts as reflected in the judgment of the Trial Judge stand as follows:-
 One written complaint made by the father of X on 09.09.2013 was registered at the concerned Police Station under specific FIR dated 09.09.2013 under Section 354B of the IPC.
5. The father of X alleged inter alia that on 08.09.2013 at about 23.00 hours suddenly X came to him and hugged her aunt who was standing next to the father of X trembling in fear. On being asked, X told that the accused (for short A) who is a next door tenant called X in his room and made some sexual gestures. A also showed X some obscene pictures and sexually assaulted

her. Father of X also came to know from X that A on previous occasions also committed similar type of acts. On receipt of such news local people got agitated and assaulted A.

6. On the basis of the said complaint Police took up investigation and upon completion of investigation submitted charge sheet under Sections 354B/376 of the IPC against A.

Charges:-

7. Ld. Trial Judge framed charge under Section 354B/376(2) (f) (i) (j) of the IPC read with Section 6 of POCSO Act against A. To which A pleaded not guilty.

Evidence of the Case:-

8. To prove the charge the prosecution side examined as many as seven (7) witnesses which stand as follows:-

X	as PW1
Father of X	as PW2
Mother of X	as PW3
Aunt of X	as PW4
Medical Officer	as PW5
Recording officer of the concerned P.S	as PW6
Investigating Officer	as PW7

9. In course of evidence a good number of documents were admitted in evidence which are summarized as below:-

A. Prosecution:-

Sl. No.	Exhibit No.	Description
1.	Exbt.1	Statement of X recorded under Section 164 of Code of Criminal Procedure (for short Cr.P.C.)
2.	Exbt.1/1	Signature of PW1 on statement under Section 164 of Cr.P.C.
3.	Exbt.2	Doctor's report
4.	Exbt.2/1	Signature of PW1 on Doctor's report
5.	Exbt. 3/1	Signature of PW2 on the written complaint
6.	Exbt.3/2	Endorsement of PW6 on written complaint.

7.	Exbt. 4	Formal FIR
8.	Exbt. 5	Sketch map along with index
9.	Exbt. 6	Report of Medico legal exam
10.	Exbt. 7	OPD ticket of A

10. After completion of recording of evidence, the accused/appellant was examined under Section 313 of the Cr.P.C. wherein he pleaded that he was innocent. But, he did not adduce any evidence.

11. The Trial Court relying on the evidence of the prosecution witnesses and other available materials on record opined that the prosecution case was successfully proved beyond any reasonable doubt and accordingly held the accused guilty of committing offences punishable under Section 354B of the IPC and Section 10 of the POCSO Act.

12. At the time of imposing sentence under Section 10 of the POCSO Act, Ld. Trial Judge assigned the reason that if an accused is charged of a major offence but is not found guilty there under then the Trial Court is empowered to convict the accused of a minor offence even if charge is not framed under that specific Section as per provision of Section 222 (2) of Cr.P.C.

Argument Advanced:-

13. Ld. Counsel, Mr. Chitra Ranjan Chakraborty appearing on behalf of the appellant relying on the evidence of the medical examination report has contended that there is no proof that X was subjected to any kind of penetrative sexual assault. Mr. Chakraborty further added that there were several latches in investigation conducted by the I.O. which clearly shows that the prosecution story is highly improbable and without any basis. The appellant has been falsely implicated in this case which is nothing but an extremely exaggerated version without corroboration by any independent witness.

14. Before parting with, Mr. Chakraborty has stated that the story made by the prosecution that X was forcibly shown obscene materials on the phone of A is false as in order to prove this allegation the mobile phone of A was not seized by the I.O which clearly shows that the prosecution has failed to establish commission of any offence by A against X.

15. Per contra, Ld. Counsel appearing on behalf of the State has refuted the arguments made on behalf of the appellants and contended that PW1/X is not a tutored witness. Even if the version adduced on behalf of the appellant

regarding latches on part of the I.O. in conducting investigation is to be considered, still there is no reason to disbelieve the prosecution case as there is consistency in the evidence of X to prove the commission of alleged offences by A.

- 16.** Before parting with, Ld. Counsel appearing on behalf of the State has contended that there was no enmity or dispute between the parties prior to the incident so the allegation made on behalf of the accused regarding false implication does not arise at all.

Analysis:-

- 17.** PW1/X has testified that she used to reside in the adjacent house of A. On the relevant date A called her in his room and asked her to do some immoral acts and even threatened her that in case of non-compliance he will throw acid on her. He even showed her some obscene pictures on his phone. X identified her signature on her statement under Section 164 of Cr.P.C (exhibit 1/1) as well as her medical examination report (exhibit2/1). She identified the accused in Court.

18. In her cross-examination X admitted that there are many other houses surrounding their house. Previously the house of A was side by side with her house wherein A used to reside alone. She has also stated that when she tried to raise alarm by shouting, her mouth was gagged by A. She has admitted the same thing before the Police and Ld. Magistrate that she listens to her parents and obeys their instructions. She denied suggestion that she deposed as per tutoring of her parents and also denied suggestion of long standing dispute between A and her father.

19. PW2/father of X deposed that X narrated the entire incident to him that on the relevant date A called his daughter to his rented room and did some immoral acts with her and showed her some obscene pictures. Afterwards the neighbours came to his house and he went to the concerned Police Station and lodged the complaint. He identified his signature on the written complaint (exhibit 3/1) and also identified the accused.

- 20.** In his cross-examination PW2 stated that A lives in a tenanted room. He could not recollect whether in the complaint he stated that A called his daughter. At the time of occurrence he was in his room and as he was a cobbler his financial condition was not good. PW2 further denied suggestion that he took loan from A and he filed this case when A demanded back his money.

- 21.** PW3/mother of X has testified that on the date of occurrence A called her daughter to his room. Thereafter, A showed her some obscene pictures on his phone and did some immoral acts with her and threatened her not to disclose this incident to anyone else otherwise she will have to face dire consequences but her daughter narrated the whole thing to her. Her daughter was taken to the hospital by the sister of her husband (PW4).
- 22.** In her cross-examination, PW3 admitted that she stated to the police that A did some immoral acts with X. She admitted that she along with her family used to reside in adjoining houses as tenants. Her daughter used to visit room of A very often. Her husband was a cobbler and their financial condition was not good. She denied all the suggestions regarding false implication of A just because PW2 could not repay the loan amount of A as demanded.
- 23.** PW4/Aunt of X corroborated the sequence of events as already deposed by PW 2 & 3 on the relevant date and deposed that A committed some immoral acts against X. X ran out of his house weeping and upon reaching she narrated the entire incident to her. She identified the accused present in the Court.
- 24.** In her cross-examination, PW4 stated that house of X is two three houses away from her house and she stated that two individuals used to reside in the same house where A used to reside. There is a club near house of A where the local boys used to play till midnight but she was unable to tell whether any of those club members came to the place of occurrence on the relevant date. In reply to the question put forth by the Ld. Counsel appearing on behalf of the appellant during her cross examination, She was unable to ascertain whether there was any dispute regarding payment of rent between her brother/PW2 and A or any advance was given by A to her brother/PW2
- 25.** PW5/ Medical Officer has deposed that during the relevant point of time he was working at the concerned Hospital where X was medically examined after obtaining consent. According to the statement of X, A did some immoral acts with her but did not commit any penetrative assault on her. On examination PW5 found that except torn hymen nothing abnormal was found. In his opinion he concluded that no conclusive evidence was given regarding intercourse but he suggested medico legal examination of vulva vagina swab and smear in order to get a more clear conclusion about commission of the alleged act. He identified the report & his seal and signature on it(exhibit 2).

- 26.** In cross-examination PW5 stated that he did not note the time of examination and also X did not put any date. He further opined that forchette can be torn by fall on hard substance or climbing tree.
- 27.** PW6/ recording officer received the complaint and registered the case after preparing formal FIR and identified his signature on the formal FIR (exhibit 4).
- 28.** In course of cross examination, he stated that he did not obtain any LTI or signature of the complainant on the formal FIR.
- 29.** PW7/I.O. has testified that after being endorsed he visited the place of occurrence and prepared a rough sketch map with index (exhibit 5). He examined the available witnesses and recorded their statements under Section 161 of Cr.P.C. Thereafter he arrested the accused and forwarded him before the Court and made a prayer for recording the statement of X and collected the same. He also made a prayer for medico legal examination of A & X. Thereafter, he collected the said report and outdoor ticket of A which have been marked as exhibit 6 & 7 respectively. He also sent samples of semen for forensic examination but he could not collect the report. After completion of investigation he submitted charge sheet.
- 30.** In his cross examination PW7 admitted that neither the Lady N.V.F. of the concerned police station who accompanied X to the hospital nor the scribe who reduced the complaint into writing were made a witness in the charge sheet. He admitted that he did not seize any wearing apparels in connection with the case. He also did not seize the mobile phone of A.

Evaluation of evidence:-

- 31.** After dissection of evidence of X (PW1) it appears that she disclosed the fact by giving statement before the police and Ld. Magistrate prior to giving evidence before the Ld. Trial Court. With regard to statement before police she was not cross examined on behalf of the appellant. The statement recorded under Section 164 of Cr.P.C reveals that X stated all the facts alleged in this case before the Ld. Magistrate who recorded the statement on 10.09.2013 just after the incident on 08.09.2013 at night while she was aged about 9 years. Thereafter, on 24.02.2016 she deposed before the Trial Court where she also stated all the facts identical to that of the statement under Section 164 of Cr.P.C, I do not find any material discrepancies between her statement under Section 164 of Cr.P.C and the deposition made by her during trial.

- 32.** From the evidence of PW 2, 3, 4 & 5 (parents, aunt & medical officer respectively) it appears that immediately after the incident X disclosed all the facts alleged in this case to her parents and aunt. From the evidence of PW2, 3, 4 & 5 it further appears that X disclosed the fact to them identical to that of the statement given under Section 164 of Cr.P.C and the evidence given before the Trial Court. There is no material inconsistency in disclosure of the sequence of facts by X to her parents and aunt and also before the doctor during her medical examination.
- 33.** It is settled proposition of law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and therefore her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of the Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. She stands at a higher pedestal than an injured witness.
- 34.** Therefore, I am unable to disbelieve the version of X further corroborated by PW2 to PW5 in material particulars.
- 35.** From the evidence of Doctor (PW5) it appears that he did not opine about the sexual intercourse and he reserved his findings subject to Medico Legal Examination of vulva vagina swab and smear. Accordingly, doctor suggested for examination of swab by the competent expert. But, unfortunately investigating officer (PW7) of this case ignored the same advice of the doctor (PW5). Rather it is found from the record that investigating officer only concentrated on collecting medico Legal Examination report of A regarding his capacity.
- 36.** In that view of the matter, Ld. Trial Judge rightly refrained himself from convicting A for the offences under Section 376 (2) (f) (i) (j) of the IPC as well as Section 6 of the POCSO Act.
- 37.** Mr. Chakraborty emphasized on the issue of latches on the part of the investigating officer who neither seized the wearing apparels nor the mobile phone of A to justify the allegation of A showing X obscene pictures through mobile in order to commit certain immoral acts. Accordingly, Mr. Chakraborty tried to make this Court understand that prosecution could not establish the basic allegation made against A regarding commission of acts attracting the alleged offences.

- 38.** I am not agreeable with Mr. Chakraborty. It is true that the investigating officer committed grave irregularity in omitting to seize either the mobile phone of A or the wearing apparels in connection with this case to lend corroboration to the evidence. Mere fact that the I.O committed irregularity or illegality during the course of investigation does not caste any doubt on the prosecution case nor trustworthy and reliable evidence can be ignored to record an order of acquittal.
- 39.** In the case at hand, Ld. Trial Judge found A guilty of committing offence punishable under Section 354B of the IPC read with Section 10 of the POCSO Act instead of Section 376 (2) (f) (i) (j) of the IPC as well as Section 6 of the POCSO Act relying on the evidence of PW1 to PW5 particularly as I have already discussed in paragraphs 31 to 33.
- 40.** From the trend of cross examination on behalf of the appellants it is found that a specific defence has been taken attributing the false implication of A though all the witnesses denied the suggestions put forth to that effect.
- 41.** Surprisingly, A did not take any plea of such defence during his examination under Section 313 of Cr.P.C.
- 42.** The scope of Section 313 of Cr.P.C is extremely wide and not a mere formality. It is obligatory on the part of the accused, while being examined under Section 313 of the Cr.P.C to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation, even in a case of circumstantial evidence, so as to decide, whether or not the chain of circumstances is complete.
- 43.** In dealing with matters of similar nomenclature, the Hon'ble Apex Court has clearly taken a view through a plethora of decisions that if an accused is given the freedom to remain silent during the investigation, as well as before the Court, then the accuse may choose to maintain silence or even remain in complete denial, even at the time when his statement under Section 313 of Cr.P.C is being recorded. In such an event, the Court would be entitled to draw an inference, including such adverse inference against the accused, as may be permissible in accordance with law.
- 44.** Though reply given to the question during examination under Section 313 Cr.P.C is not a substantial piece of evidence but utter silence to all the questions relating to incriminating materials against him may lend a support to the fact proved by the corroborative evidence adduced on behalf of the prosecution.

- 45.** Now coming to the question of sentence imposed on A in connection with the instant case, in my opinion, the Ld. Trial Judge rightly pry into the track of the provision of Section 222 (2) of Cr.P.C by pronouncing sentence for the lesser offence under Section 10 of the POCSO Act even if no specific charge was framed for that particular offence against A.
- 46.** In the above conspectus, I find hardly any reason to interfere with the impugned judgment and order of conviction.
- 47.** Before parting with, I would like to discuss about the lacklustre performance of investigation officer of this case. In view of careful scrutiny of the entire investigation it is obvious to me that the I.O. has seriously failed in properly investigating into the crime of such heinous nature. I have no hesitation in observing that I.O. is supposed to investigate the crime in accordance with the Cr.P.C or the procedure applicable, as the case may be, and to the best of his ability. He is not supposed to indulge in any such act during investigation, which would have a semblance or a flavor of the I.O. deliberately leaving loopholes in the investigation, so as to tacitly create an advantage in favour of the accused.
- 48.** I am therefore directing the Commissioner of Police, Bidhannagar Police Commissionarate to issue an appropriate show cause notice and follow the procedure as is laid down in view of the law and applicable service conditions, for conducting a Departmental Enquiry against the I.O of this case. Needless to mention, if he is found guilty, appropriate punishment should be awarded to him since this is the only way through which the faith and trust of the common people and the society at large could be reposed in the police machinery, which otherwise is facing a flak for it's role in dealing with such cases which adversely affect the equilibrium of the society. The direction given by this Court must be complied with by the Commissioner of Police, Bibhannagar, forthwith.
- 49.** The Registrar General of this Court is requested to communicate the Order to the Commissioner of Police, Bidhannagar.
- 50.** As a sequel, the present appeal being no. CRA (SB) 45 of 2023 stands dismissed with the aforesaid direction.
- 51.** Convict/appellant is directed to surrender before the Ld. Trial Judge within 3 (three) weeks from date to serve out the sentence.
- 52.** Trial Court Record along with a copy of this judgment be transmitted back immediately.
- 53.** All connected applications, if there be any, stand

disposed of accordingly.

54. All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.

55. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

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