
(2016) 09 CAL CK 0006
In the Calcutta High Court
Case No : C.R.A. No. 482 of 2015

Paresh Mondal

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 09-09-2016

Acts Referred:

Protection of Children from Sexual Offences Act, 2012 — Section 29, Section 7, Section 8

Citation : (2017) 172 AIC 331 : (2017) 1 AICLR 751 : (2017) ALLMRCri 99 : (2016) 4 CalCriLR 551 : (2017) 1 CalLT 26 : (2016) CriLJ 5091

Hon'ble Judges : Mr. Siddhartha Chattopadhyay, J.

Bench : Single Bench

Advocate : Ms. Minoti Gomes, Advocate, for the Appellant; Mr. Manjit Singh and Mr. Anjan Datta, Advocate, for the State

Final Decision : Partly Allowed

Judgement

Siddhartha Chattopadhyay, J. - Doubting the correctness of the judgment dated 22.06.2015 and order of conviction dated 23.06.2015 the appellant has preferred this appeal and prayed for setting aside the judgment and order of conviction.

2. According to the appellant, learned Trial Court did not consider the evidence of the prosecution witnesses in its proper perspectives. The Learned Court below failed to appreciate that there are enormous exaggeration and embellishment in the evidence, which are not in conformity with the F.I.R. If the evidence would have been correctly considered, in that case acquittal would be the only answer.

3. As against this learned Counsel on behalf of the state had contended that the impugned judgment does not suffer from any infirmity and the learned Trial Court had considered all the material aspects in its proper perspectives. Espousing the finding of the learned Trial Court, the respondent submitted that the impugned judgment and order of conviction do not require any interference.

4. With a view to appreciating the prosecution case, need of the hour is to

consider of factual aspects of the case. Prosecution case in a nutshell such that on 09.08.2014 at or about 17:00 hours the victim went to the house of the appellant, who happens to be his grandfather, and at that time the appellant kissed the child and touched are vagina and thereafter, he inserted his finger in her vagina. He had threatened the victim lest she disclosed this incident to anybody. After a few while her mother called her and at that time she came back. After coming to her own house she had ventilated her distraught mental agonies to her mother. Be it mentioned, that the victim's father resides at Malaysia. On the next morning the mother took the child to a local Dr. named S.N. Das, and thereafter, the victim was taken to Ranaghat S.D. Hospital. After giving proper treatment she was released.

5. After lodging of F.I.R. the Investigating Officer has started investigation. In course of investigation, the Investigating Officer has recorded the statement of the available witnesses under Section 161 of Code of Criminal Procedure, prepared rough sketch map with index, sent the victim and her mother to Court for recording their statements under Section 164 of the Code of Criminal Procedure. He has also collected the medical reports of the victim as well as potency test report of the appellant and, thereafter, he has submitted charge-sheet.

6. On the basis of the charge-sheet so filed by the Investigating Officer under Section 4 of the Protection of Children From Sexual Offences Act, 2012, the learned Trial Court had framed the charge. The said charge was read over and explained to the appellant to which he pleaded not guilty and claimed to be tried.

7. In such circumstances, the duty of this Court is to assess the evidence along with its credibility and also this Court is to see if there is any exaggeration or embellishment.

8. P.W. 1, is the victim herself. In her evidence in chief she has very categorical stated regarding the incident and had stated that the appellant had touched her vagina in the said afternoon. She was also asked to twist the penis of the appellant, who happens to be her grand-father (father's uncle). She had also admitted that she had given statement under Section 164 of Criminal Procedure Code before the Magistrate. Her such evidence has to be assessed with the statement made by her before the Trial Court along with the contents of the F.I.R. In the F.I.R. it has been specifically mentioned that the appellant had put his finger in to her vagina. In her statement, she has stated that the appellant disrobed her and put his finger in to her vagina. She also categorically stated that the appellant had sucked her breasts and also kissed her. She has made another statement that the appellant wanted twist his penis which she refused. Her such was made before the learned Magistrate. On 04.09.2014 in her cross-examination, she had admitted that she never stated that she was asked to twist the penis of the appellant. She also admitted that there was a family dispute between the parties and off and on there was quarrelling between his father and the appellant over the property. Not only that she has also stated that she was

tutored by her mother. She also admitted that no blood was oozing out from her vagina. Therefore, the question may peep in my mind that if there was really penetration of finger into the vagina of a girl, who was just six years of age, certainly there would be some sort of bleeding or at least reddishness in her private parts. In such circumstances, evidence of Dr. S.N. Das (private doctor) and medical officer of Ranaghat S.D. Hospital have to be considered. Dr. S.N. Das had treated the victim on 10.08.2014 and he had made some prescriptions holding that she was suffering from cough and cold. In Exhibit 7, there is nothing that the victim her told about the incident or as to how it occurred. On the contrary, at the very outset of her cross-examination the victim made a specific statement "I have never tacked with doctor-babu about the incident. Doctor-babu never asked me anything. Therefore, she had no occasion to say anything to the Dr. Mr. S.N. Das. Now I am to consider the injury report of Ranaghat S.D. Hospital. She was medically examined on or about 2:00 A.M. on 11.08.2014 i.e. almost within 36 hours from the time of alleged incident. The said doctor has mentioned in the injury report that "a person took her to his room and gossiped with her, and kissed her on her head, face, and chest he put his hand over her private part, without pulling her panty down." The victim was taken before the doctor by her mother Binapani Mondal (P.W.2) who had given consent for medical examination of the victim. The said doctor after examining the victim contended "no injury over any part of body found, no tenderness over her private parts." Therefore, as per doctor there was neither any injury in her body nor even any tenderness in her private parts. If really the appellant had penetrated her vagina with finger then chance of bleeding injury was certainly there or at least reddishness and tenderness would be there. But so far medical examination is concerned these are lacking.

9. Now, I am to consider the evidence of P.W. 2 i.e. mother of the victim in her examination in chief has made a bold statement that the appellant put off her pant and pushed his finger in the vagina of her daughter and due to such act, her daughter was suffering pain in her vagina. But the victim herself never stated that the appellant put off her pant. This apart, doctor of Ranaghat S.D. Hospital has clearly mentioned in his report that the appellant had tacked her vagina without disrobing her pant. So this is nothing but a desperate attempt on the part of mother. In course of her statement recorded under Section 164 of Criminal Procedure Code, she never stated that the victim told her that the appellant disrobed her. Such statement was given before the Magistrate after 25 days. Evidence of other witnesses are not at all significant on the ground that the P.W. 3 heard that rape case was started against the appellant. The P.W. 4 is a witness to the seizure by which the police has seized one pant from the defacto complainant. The P.W. 5's evidence is replicated version P.W. 4. The P.W. 6 is a lady S.I. who had recorded the statement of the victim under Section 161 of Criminal Procedure Code. The P.W. 7, is the doctor whose evidence I have already discussed. The P.W. 8, is the scribe of the F.I.R. The P.W. 9, is the doctor who had done the potency test of the appellant. The P.W. 10, is another doctor

whose evidence I have already discussed earlier. The P.W. 11 and 12 are the police personnels.

10. On a careful analysis of the evidence recorded by the Trial Court, I am of the view that touching the vagina over the pant of the victim has been established. But there is an exaggeration that the appellant had put his finger into her vagina is not at all established.

11. This Court is not oblivious to Section 29 of the Protection of Children From Sexual Offences Act, 2012 wherein there is a legislative mandate that the Courts shall presume that the accused had committed an offence unless the contrary is proved. Since there is a long standing dispute over a landed property so some sort of exaggeration and embellishment have been made. But simply because of land dispute the main allegation would not be evaporated. Touching the private parts comes within the purview of Section 7 of POCSO Act which speaks "Sexual assault.-Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault." The learned Trial Court had sentenced the appellant to suffer rigorous imprisonment for five years for the offence punishable under Section 8 of POCSO Act and also to pay fine of Rs.5,000/- in default of payment of fine he will undergo rigorous imprisonment for three months more. The learned Counsel appearing on behalf of the appellant has contended that punishment should be proportionate to the offence committed and the learned Trial Court failed to consider that aspect. There is no sentencing policy in our country, in spite of repeated direction given by our Hon"ble Apex Court. Considering entire gamut of the crime and as the learned Trial Court has come to a finding that was penetration of finger so it has awarded that punishment. I am of the view that the sentence as awarded by the learned Trial Court be reduced to some extent because there is no penetration of finger into her vagina. Accordingly, while maintaining the judgment I am of the view that there should be reduction of sentence to some extent. Accordingly, the appellant is sentenced to undergo rigorous imprisonment for three years for the offence punishable under Section 8 of POCSO Act also to pay fine of Rs.5,000/- in default to suffer simple imprisonment for three months more, instead of serving five years rigorous imprisonment.

12. Accordingly, the criminal appeal is partly allowed. The sentence is modified to the extent as above. Period of detention already undergone shall be set off accordingly.

13. Let a copy of this judgment and LCR be sent to the learned Court below for information and taking necessary action.

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