

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
CIRCUIT BENCH AT PORT BLAIR

....

PRESENT: THE HON'BLE JUSTICE JOYMALYA BAGCHI
AND
THE HON'BLE JUSTICE GAURANG KANTH

CRA/13/2022

MOHAMMED JAVID ... APPELLANT

VS.

THE STATE ... RESPONDENT

For the Appellant : Mr. Rakesh Pal Gobind

For the State : Ms. A.S.Zinu

Heard on : July 4, 2024

Judgment on : July 9, 2024

JOYMALYA BAGCHI, J.

1. The appeal is directed against judgment and order dated September 29, 2021 passed by the learned Special Judge (POCSO), Andaman and Nicobar Islands, Port Blair in Special Case No. 07 of 2021/ S.T No.21 of 2021 convicting the appellant for commission of offence punishable under section 6 of the POCSO Act and under sections 323 and 506 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for twenty years and pay a fine of

Rs.5000/- (Rupees five thousand only) in default to suffer rigorous imprisonment for 05 months for the offence punishable under section 6 of the POCSO, rigorous imprisonment for one year with fine of Rs.1000/- (Rupees one thousand only) in default to suffer rigorous imprisonment for one month for the offence punishable under section 323 of the Indian Penal Code and rigorous imprisonment for seven years with fine of Rs.2000/- (Rupees two thousand only) in default to suffer rigorous imprisonment of 03 months for the offence punishable under section 506 of the Indian Penal Code. Fine amount if realised, shall be paid to the survivor to meet her medical expenses and rehabilitation and all the sentences are to run concurrently.

PROSECUTION CASE:-

2. Prosecution case as alleged against the appellant is as follows:
3. On 08.02.2021, the maternal aunt of the survivor lodged a written complaint against her husband i.e. the appellant alleging since March 2020 the survivor was residing at her residence. On 01.02.2021, the appellant asked the survivor to take off her clothes, touched her breasts, other parts of her body and forcibly penetrated her. He threatened her with dire consequence, if she informed the matter to her aunt. Out of fear, the survivor was unable to disclose the incident to her aunt. Then, on 08.02.2021, again appellant asked her to take off her clothes and when she refused, he bit her lips and

threatened to kill her. She informed her cousin about the incident. Her cousin disclosed the matter to his mother i.e. her aunt. Then, she told the entire incident to her aunt. Hearing this, appellant assaulted her with broom stick and pipe. Thereafter, on the plea of going to the barber shop, her aunt took the survivor and her cousin out of the house and reported the matter to police.

4. On the basis of her aunt's statement, the criminal case was registered against the appellant.

5. The survivor was medically examined and made statement before magistrate. Her aunt's statement was also recorded before magistrate and charge sheet was filed. Charges were framed under section 6 of the POCSO Act and under sections 376, 323 and 506 of the Indian Penal Code. Appellant pleaded not guilty and claimed to be tried.

6. In course of trial, prosecution examined nine witnesses including the survivor, as PW-1. Defence of the appellant was innocence and false implication. It was his specific defence since he had domestic quarrel with his wife i.e. aunt of the survivor (PW-2) the latter had falsely implicated him through the survivor. During the trial, PW-2 did not support the prosecution case and had been declared hostile.

7. Upon assessing the evidence on record and the documents exhibited during trial including the medical report of the survivor,

trial Judge, by the impugned judgement and order, convicted and sentenced the appellant, as aforesaid.

ARGUMENTS AT THE BAR:-

8. Mr. Rakesh Pal Gobind for the appellant contends that the prosecution case is riddled with contradictions and improbabilities. Age of the survivor has not been proved. Registration number of the birth certificate recorded in the seizure memo does not match with the registration number in the birth certificate produced in Court. Most vital witnesses, namely, the cousin to whom the survivor had first disclosed the incident and her friend had not been examined. Parents of the survivor have also not been examined. PW-2, defacto complainant did not support the prosecution case. No CSFL report with regard to the samples collected from nail clippings of the appellant had been produced. Survivor was medically examined on two occasions. Injuries noted on those occasions are not consistent with one and another. Accordingly appellant is entitled to the benefit of the doubt.

9. *Per contra* Ms. Zinu argues survivor is the niece of the appellant. Her parents used to reside at a different place. Taking advantage of her vulnerable status, on 01.02.2021, appellant raped her. Out of fear, she could not disclose the incident. When on 08.02.2021, appellant tried to commit the same act, survivor protested and was assaulted, thereupon she disclosed the incident to her Aunt and the matter was

reported. Medical report exhibited during trial shows injuries in her private parts and other parts of the body establishing the prosecution case beyond doubt.

EVIDENCE ON RECORD:-

10. PW-1 is the survivor. She deposed she used to reside with her mausa (uncle) and mausi (aunt) and as she used to call her mausa i.e. the appellant as her father. On 01.02.2021, her mausa asked her to remove her clothes. Thereafter, he committed rape on her. She felt pain. He threatened her not to disclose the incident to anyone failing which he would kill her. On 08.02.2021, her mousa again tried to commit the same act, but she resisted and informed her younger brother and thereafter she informed her mausi. On the pretext of going to the barber shop, her mausi took her to Police Station and lodged complaint. She was medically examined. She made statement before the magistrate. During cross-examination, she denied the suggestion that she had falsely implicated her mausa at the behest of her mausi.

11. PW-2, is the mausi. She stated the survivor was her sister's daughter and was residing with her as a criminal case had been initiated against her father. She was declared hostile and stated she had lodged false case to teach her husband a lesson. She was cross-examined by the prosecution. During cross-examination, she admitted she had gone through the statement recorded by police on

08.01.2021 and signed on it. She also put her signatures on her statement before magistrate. She stated she had met her husband at the correctional home.

12. PW-8 is the medical officer who examined the survivor. She deposed survivor was brought to her with multiple swellings and lacerations on the breasts and aerola, lips and left lateral aspect of the left hand. On vaginal examination, she found external injuries on the urethra, clitoris with ruptured hymen. There were bleeding and swelling in the hymenal orifice. The injuries are suggestive of forceful penetration/insertion either by finger or penile penetration. She also proved the medico-legal and injury reports.

13. PW-3 is the medical officer who examined the appellant. He noted various injuries on his body and opined that the injuries are of similar age and may be caused due to physical resistance by the survivor.

14. PW-4 is the Caretaker of Balika Niketan where the survivor had been kept after the incident. He stated birth certificate of the survivor was seized by police and he had put his signature on the seizure list.

15. PW-5 is another employee of the Balika Niketan and is a signatory to the seizure list.

16. PW-7 is the Coordinator of Child Line, Prayas and was present when the statement of the defacto complainant was recorded at the police station.

17. PW-6 was incharge of PS Bambooflat on the relevant date. He deposed he received a written complaint from PW-2 and drew up the first information report.

18. PW-9 is the Investigating Officer. She took up investigation, recorded the statement of defacto complainant (PW-2) and arrested the appellant. She seized photocopy of the birth certificate/Aadhaar Card of the survivor. Survivor was sent for medical examination at PHC, Wimberlgunj. She collected the medical examination report. She collected the injury report of the appellant. She produced the survivor before the Child Welfare Committee and pursuant to the suggestion of the Committee, she shifted her to Balika Niketan. She forwarded the survivor and PW-2 before the magistrate for recording their statements under section 164 of the Code of Criminal Procedure. She obtained the extract of the original birth certificate from the Registrar (Birth and Death) and submitted the charge sheet.

WHETHER THE SURVIVOR IS A RELIABLE WITNESS?

19. PW-1 is the survivor, who is the most vital witness. She deposed she was staying with her aunt. The appellant is the husband of her aunt. On 01.02.2021, the appellant had asked her to disrobe and raped her. She felt pain. Appellant threatened to kill her, if she disclosed the incident to anyone. On 08.02.2021, appellant again tried to committee rape, but she resisted. She informed her cousin i.e son of the appellant and then her aunt. Appellant assaulted her

brutally. On the pretext of going to the barber shop, her aunt brought her out of the house and lodged First Information Report. Her statement was recorded before the magistrate and she was medically examined. During cross-examination, she denied the suggestion that her aunt told her to falsely implicate the appellant.

20. Mr. Gobind argues the aunt (PW-2) had not supported the case. She had tutored the child to falsely implicate the appellant. He also contends vital witnesses like the cousin, to whom the survivor had first disclosed the incident or her friend, had not been examined. Parents of the child had also not been examined.

21. I have given anxious consideration to the aforesaid issues raised by Mr. Gobind. It is true PW-2 turned hostile and stated she had falsely implicated her husband to teach him a lesson. At the same time, the said witness admitted that she had gone through the contents of her statement before police which was treated as first information report and signed on it. She also admitted her signatures on the statement before magistrate. Her contradictory stance in court shows that she is an untruthful witness. She admitted she had met her husband while he was at the correctional home. It is possible during such visit she had been persuaded by her husband to suppress the truth and take a different stance. But the contradictory stance of PW-2 does not impair the credibility of the

survivor's version as the prosecution case finds corroboration from the medical and other evidence on record.

22. PW-8 posted as Chief Medical Officer at PHC, Wimberlygunj had examined the survivor. The medico-legal examination report was proved as Exhibit-9. Examination report notes swelling and scratches on the face, breast, left arm/finger, lower limbs and buttocks. Swelling and redness were also noted in urethra and clitoris. Hymenal orifice was ruptured and swollen. Oedematous swelling was also present. The medical officer also proved the injury report (Ext-11) recording bite marks on face, swelling and bruises on left forearm, breast, ruptured hymen and oedematous swelling around the vagina. Doctor opined the injuries were suggestive of forcible penetration either due to finger or penile penetration.

23. Mr.Gobind made a desperate attempt to show the injuries recorded in the medico-legal examination report and injury report are at variance to one another. He contends bite marks on face are not noted in the medico legal examination report.

24. Having gone through the two reports, I find the nature and situs of injuries noted therein are substantially similar. Facial injury and swelling is noted in the medico legal examination report which correspond to the bite marks recorded in the injury report. Extensive injuries around private parts and oedematous swelling in the vagina are noted in both the reports. Medical reports clearly demonstrate

the survivor had been subjected to brutal sexual as well as physical assault. Thus her version in Court is wholly corroborated through medical evidence.

25. Moreover, medico legal examination of the appellant by PW-3 also corroborates the prosecution case. PW-3 noted a number of injuries on the appellant's body. He deposed the injuries may be caused by due to physical resistance by the survivor. This further reinforces the prosecution case of a skirmish between the appellant and the survivor on 08.02.2021 when she resisted the rape.

26. It is also argued that CFSL report with regard to the nail swabs/nail cuttings of the appellant had not been produced in Court. As the injuries noted in the medical report of the survivor clearly establish a case of penetrative sexual assault and the injuries on the appellant have also been explained arising due to resistance by the survivor, non-production of CFSL report of the scanty nail cuttings cannot be a ground to disbelieve the prosecution case.

27. When survivor's version has been substantially corroborated by independent medical evidence on record, lack of support from the defacto complainant who turned hostile in an obvious effort to protect her husband is of little consequence.

28. For these reasons, I am of the opinion the survivor is wholly reliable witness and her version corroborated by medical evidence is sufficient to prove the prosecution case.

NON-EXAMINATION OF WITNESSES:-

29. It has also been argued vital witnesses namely cousin to whom the survivor disclosed the incident, her friend and parents have not been examined.

30. Survivor has graphically described the manner and circumstances in which the crime was committed. Her deposition is corroborated by the medical evidence on record. In light of the aforesaid, non-examination of the cousin or the survivor's friend does not adversely affect the unfolding of the prosecution case. One must bear in mind that the predator is the uncle of the survivor. Though her aunt initially lodged complaint, during trial in an attempt to protect her husband, she turned hostile. In these circumstances, it is most unlikely that the cousin i.e. the appellant's son would have supported the prosecution case. Hence, non-examination of this witness by the prosecution in the face of the survivor's consistent version corroborated by medical evidence does not affect the credibility of the prosecution case. Neither friend of the survivor nor her parents were present at the time of offence. Under no stretch of imagination, their non-examination affects the prosecution case.

AGE OF THE SURVIVOR:-

31. PW-9, Investigating Officer collected photocopy of the birth certificate of the survivor from Balika Niketan. She also obtained extract of the birth certificate from the office of the Registrar of Birth

and Death. The extract has been exhibited as Exhibit-15. Exhibit-15 shows the survivor was born on 01.07.2010 and was only 10 years old at the time of occurrence. The birth certificate of the survivor has been produced from the office of the Registrar of Births and Death and carries a presumption of correctness.

32. Mr.Gobind contends that the registration number in the birth certificate in exhibit -15 does not correspond to the entry in the seizure list prepared with regard to seizure of photocopy of the certificate collected from Balika Niketan.

33. Incorrect recording of registration number in the seizure memo is an inadvertent mistake and would not affect credibility of the birth certificate produced from the Registrar of Births and Death in any manner.

CONCLUSION:-

34. In light of the aforesaid discussion, I am of the opinion, the prosecution has been able to prove its case beyond reasonable doubt.

35. Conviction and sentences of the appellant is accordingly affirmed.

36. The appeal is dismissed.

37. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon in terms of section 428 of the Code of Criminal Procedure.

38. Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once

39. Photostat certified copy of this judgment, if applied for, shall be made available to the appellant within a week from the date of putting in the requisites.

EPILOGUE :-

40. I have noted with utmost concern that the paper book contains copies of FIR, charge sheet, deposition where the name, address and other particulars of the survivor are disclosed.

41. **In Nipun Saxena and another vs Union of India and other**¹ the Apex Court *inter alia* directed that the name and other particulars of the victim shall not be disclosed in FIR and court documents.

42. Relying on the said decision this court in ***Prafulla Mura vs. State of West Bengal and another***² issued directions that the identity of the victims shall not be disclosed in pleadings submitted in cases relating to sexual offences and POCSO Act. Similar directions were also given by a learned Single Judge with regard to non-disclosure of the identity of the victim in FIR/charge sheet, statements recorded during investigation under sections 161/164 of Cr.P.C as well as medical documents. 4

43. Pursuant thereto Criminal Rules and Orders of the High Court was amended and Rule 713A was added. The rule reads as follows:-

¹ (2019) 13 SCC 719

² 2022 SCC OnLine Cal 1283

“Rule 713A

(a) No petition or application in any proceeding pertaining to offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB, 376E of the Indian Penal Code as well as offences under POCSO Act filed in Court shall disclose the identity of the victim, that is, the victim’s name, parent age, address or any other particulars relating to her identity;

Provided that such disclosure may be made in pleadings/records of the case as per authorisation in writing of the major victim or in case such victim is dead or of unsound mind, by or with the authorisation in writing of the kin of such victim;

Provided further that in case of a minor victim disclosure of identity of the said victim in the pleadings or record of the case shall not be made without the permission of the trial Court and only in the interest of the said victim,

Explanation – In case of a minor victim identity shall include the identity of her family, school, relatives or a any other particular which tends to disclose the identity of such victim.

(b) Vakalatnama, if any, executed by the victim disclosing her identity shall be filed in a sealed cover.

(c) Only redacted copies of the police papers/documents disclosing identity of the victim shall be served under section 207 Cr.PC unless otherwise directed by the Court.

(d) All documents/annexures filed in the proceedings disclosing identity of the victim shall be kept in sealed cover and wherever possible redacted copies shall be filed and kept as a part of the public record of the Court;

(e) Inspection of the documents/annexures filed in the proceedings disclosing identity of the victim and kept in sealed cover shall be given only with the permission of the Court;

(f) Certified copies of documents disclosing identity of the victim shall be available, as per rules, only in redacted form.

(g) While recording statement u/s 164 Cr.P.C, the learned Magistrate shall not record the name the victim. It shall be

recorded only under the heading “the statement of the victim”. The learned Magistrate shall take help of the parents of the victim, if available, for identification of the victim and shall make endorsement to the effect of such identification at the top of the statement recorded by him/her.

- (h) After recording the statement of the victim u/s 164 Cr.P.C and reading over and explaining the same to the victim, the learned Magistrate shall obtain signature or LTI of the victim on a separate sheet and keep it along with his certificate in a separate sealed cover, which shall be opened by the learned Special Judge only, if necessary during trial.*
- (i) Signature/LTI of the victim on her deposition shall be taken by the learned Special Judge on a separate sheet and the said sheet along with certificate of the learned Special Judge to that effect shall be kept in a sealed envelope which shall be opened by the Appellate Court only in case issue of identity of the victim is raised.*
- (j) Learned Special Judge shall not disclose the name or any particular disclosing identity of the victim in the judgment in any circumstances.*
- (k) A declaration shall be made in the body of all the petitions stating that the identity of the victim, as aforesaid, has not been disclosed;*
- (l) Without express order from the Court, no petition or application in the matter pertaining to the aforesaid offences shall be received unless they are in conformity to the aforesaid directions”.*

44. In spite of these directions, names and other particular disclosing identity of victims are appearing in police papers and/or court documents which are in public domain. Noticing this fact, the Apex Court in **Utpal Mandal @ Utpal Mondal vs. State of West Bengal and another**³ directed sensitization of Judicial Officers as

³ SLP (Crl) Diary No.8058/2024

well as police officers in the State to ensure strict compliance of these requirements. Accordingly, this Court directs as follows:-

- (a) West Bengal Judicial Academy is directed to undertake sensitization programme in light of the directions given in ***Utpal Mandal (supra)*** to sensitize police officers and Judicial Officers with regard to non-disclosure of the identity of victims of sexual offences including minors in light of section 228A of the Indian Penal Code (section 366(3) of Bharatiya Nagrik Suraksha Sanhita, 2023) and section 33 (7) of the POCSO Act, 2012, various directions of the Hon'ble Supreme Court and this Court and the Rule 713A of Criminal Rules and Orders.
- (b) In case of criminal appeals, revisions and other proceedings, department is directed to maintain original documents bearing names and other particulars disclosing identity of victim in sealed cover which shall not be opened except with the permission of the Court.
- (c) Redacted copies of such documents shall be used to prepare paper books and other documents for use during judicial proceedings.

45. These directions are in addition to the earlier directions issued by this Court in ***Prufulla Mura (supra), Utpal Mandal (supra)*** and Rule 713 A of Criminal Rules and Orders.

46. Copy of this order be sent to the Registrar General, High Court at Calcutta, Registrar, Circuit Bench of Calcutta High Court at Port Blair and the Director, West Bengal Judicial Academy for necessary compliance.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)