

Calcutta High Court (Appellate Side)

Digantan Mukherjee vs Raju Roy & Anr on 23 December, 2022

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:
THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 512 of 2018

DIGANTAN MUKHERJEE
VS.
RAJU ROY & ANR.

For the Appellant	: Mr. Moinak Bakshi, Adv. Ms. Roma Roy, Adv.
For the State	: Mr. Partha Sarathi Sen, Adv. Ms. Manasi Roy, Adv.
For the Petitioner	: Mr. Sourav Chatterjee, Adv.
Hearing concluded on	: 17th November, 2022
Judgement on	: 23rd December, 2022

Siddhartha Roy Chowdhury, J.:

1.

This is an appeal against an order of acquittal passed by learned Additional Sessions Judge, 2nd Court, Pachim Medinipur, in POCSO Case No. 24 of 2014 R. No. 77 of 2015 arising out of Kotwali P.S. Case No. 420 of 2014 dated 15th April, 2014 under Section 8 of the Protection of Children from Sexual Offences Act, 2012 and under Section 354 B of the Indian Penal Code, acquitting thereby the accused person holding him not guilty to the charged offences. Leave has duly been granted.

2. Briefly stated, on 15th April, 2014 Digantan Mukherjee informed the Inspector-in-charge of Kotwali Police Station Medinipur, District Paschim Medinipur in writing that on 15th April he came back to his house from his place of posting and found his wife was crying so was his elder daughter, aged about 7 years, she was visibly scared. Subsequently, he came to know that Sri Raju Roy of his neighbourhood two days ago, lifted his elder daughter bodily (hereinafter referred to as 'victim girl') from the road and took her by the side of a field, disrobed her, licked her genital thereafter, tried to insert his genital organ into the vagina of the victim girl. The victim girl started crying, it was almost a deserted place and after nearly an hour she came back home and told her mother about the pain she was feeling in her genital. The victim girl identified the accused person from afar and told her mother that said Raju Roy was responsible for the pain she was suffering.

3. As the incident disclosed offence cognizable in nature Kotwali P.S. Case No. 420 of 2014 dated 15th April, 2014 was registered under Section 376 (2) (I) of the I.P.C. and 5 (M) POCSO Act, 2012. Police took up investigation which culminated into submission of charge sheet against the accused person who stood the trial, pleading his innocence.
4. To bring home charges the prosecution examined 10 witnesses and after considering the evidence on record adduced by the witnesses including the victim girl, learned Trial Court passed the judgement impugned.
5. Before getting into the merit, I would like to point out some general features as I find from the judgement impugned.
6. Cognizance was taken on 11th August, 2014 and charge was framed by the learned Trial Court on 16th January, 2015. The victim girl was examined in this case as P.W. 1 on 16th April, 2015. Name of the victim was found to have been disclosed by the learned Trial Court in the order sheet, in the deposition even, while framing charge, which is impermissible under Sub-Section 7 of Section 33 of the said Act far to speak of explanation appended to the said Section. From the order sheet, I do not find any indication that Sub-Section 2 of Section 33 of the said Act was complied with by the learned Trial Court. Let us revisit the provision of Section 33 of the POCSO Act, 2012.

"Section 33 of POCSO Act 2012 - Procedure and powers of Special Court Section 33 of Protection of Children from Sexual Offences Act, 2012 : Procedure and powers of Special Court (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.-For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974) for trial before a Court of Session."

7. The Special Court is therefore, empowered to take cognizance of any offence without the accused being committed to it for trial upon receiving of complaint of facts which constituted such offence or upon police report of such fact. In this case, I find from the order sheet that learned Special Court (learned Additional District and Sessions Judge, 2nd Court, Paschim Medinipur) received the L.C.R. including the order sheet, FIR, Memo of arrest etc. together with prayer of I.O. for recording statement of victim girl on 17th April, 2014. But learned Special Court took cognizance of the offence only on 11th August, 2014 after the police submitted charge sheet.

8. The victim was supposed to be examined within a period of 30 days from the date of taking cognizance of the offence but the testimony of the victim girl was recorded nearly after 8 months on 16th April, 2015 and there was no explanation whatsoever as to the delay resulting into infraction of statutory provision.

9. Section 35 of the POCSO Act says:-

Section 35 of POCSO Act 2012 - Period for recording of evidence of child and disposal of case
Section 35 of Protection of Children from Sexual Offences Act, 2012 : Period for recording of evidence of child and disposal of case
(1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

10. Sub-Section 2 of Section 35 envisages that the trial ought to have been completed within one year from the date of taking cognizance but the judgement in this case was pronounced on 29th August, 2017, almost after 3 years from the date of taking cognizance.

11. In NAZIR AHMAD VS. EMPEROR (No. 2) on 16th June, 1936 reported in (1936) BOMLR 987 it was held:

"Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

This has now become a settled principle of law.

12. Thus it appears that learned Trial Court did not conduct the trial of the case strictly following the statutory mandate. It is true that no one blew the whistle while learned Trial Court failed to comply with the mandates of the statute but it is ultimately the obligation of the Court to act in terms of the law laid down in the statute book. In absence of any prejudice explicitly argued before the Court, I am not going to make any further observation in this regard however, I would request the learned Trial Court to follow statutory provisions in letter and spirit and if at all the time frame cannot be adhered to there should be a reasonable explanation for such delay.

13. Mr. Moinak Bakshi, learned Counsel representing the appellant assailing the impugned judgement submits that the victim girl is the best witness in this case who as P.W. 1 has narrated the incident. She stood the test of cross-examination. Learned Trial Court, however, refused to rely upon the testimony of the victim girl and for that learned Trial Court gave very feeble and frivolous reasons. Learned Trial Court was looking for corroboration from the witnesses who were not present at the time of incident or in other words who did not have direct knowledge about the incident. Learned Trial Court was pleased to hold that shopkeeper Shankar and Kalu, Suman and Chaiwala since did not come to the witness box to support the testimony of P.W. 1, her testimony cannot be taken into confidence.

14. Drawing attention of the Court to the provision of Section 134 of Evidence Act, Mr. Bakshi submits that no particular number of witnesses is required to be examined by the prosecution to prove the charge beyond reasonable doubt. It is further contended that in order to prove charge of sexual assault the penetration is not sine-qua-non, then the charge would have been one under Section 6 of the POCSO Act. Learned Trial Court discarded the evidence of P.W. 1 on the ground that doctor did not find any mark of injury. Learned Trial Court highlighted certain discrepancies from the testimony of the parents of the victim and those discrepancies are minor in nature and should have been ignored. It is further argued that there was delay of two days in informing the police but learned Trial Court did not consider that the victim did not get any opportunity to narrate the incident immediately thereafter. Her mother was informed in the evening of the following day. She in turn informed her husband who came on 15th April. The parents of the victim in order to assess

the incident went to the place of occurrence being led by the victim and, thereafter, father of the victim interacted with the accused person being indicated by the victim girl. The conversation between the father of the victim and the accused person was witnessed by P.W. 4, Himadri Sekhar Jana. Only after that P.W. 2 approached the police. In absence of the man of the family the other family members did not approach police and it was quite reasonable. According Mr. Backshi learned Trial Court refused to lay confidence upon the testimony of the victim as she told that her parents guided her before she made statement. She told the Magistrate as instructed by her parents, she never stated that she was tutored by her parents. The POCSO Act contains the provision that the child should be guided by her parents or person to the confidence of the victim. Therefore, learned Trial Court had no reason to disbelieve the testimony relying upon the testimony of victim made under Section 164 of the Cr.P.C.

15. Refuting such contention Mr. Sourav Chatterjee, learned Counsel submits that learned Trial Judge while discussing the evidence pointed out that neither the shop owner Shankar nor the children Kalu, Suman and Chaiwala were interrogated by the police. There was delay of two days in informing the police and there was no explanation. The statement of the victim girl was recorded after six days and no explanation was given. The victim girl made statement before the Magistrate as per instruction of her parents. Learned Trial Judge further highlighted that mother of the victim girl stated that her daughter told her when she cried loudly then some people gathered at the spot and started fighting and seeing the same she ran away. There is no corroboration that the victim girl went to purchase chocolates from the shop of Shankar and the incident was witnessed by Kalu, Suman or any Chaiwala. As prosecution withheld those persons, adverse presumption was rightly drawn up. No injury was found by the doctor upon examination of the victim. According to Mr. Chatterjee these are the factors that shrouded the prosecution case with shadow of suspicion and inspired learned Trial Court rightly to record an order of acquittal.

16. From the attending facts of the case it is admitted that the father of the victim girl set the criminal administration of justice into motion by informing the police about the incident. Admittedly he did not witness the incident as alleged. Out of 10 witnesses examined by prosecution apart from the victim girl none of the witnesses had any direct knowledge about the incident.

17. In this case the victim girl is the best witness and as P.W. 1 she narrated the incident. She stated that as her brother wanted to have chocolate, she went out to bring the same for her brother and in order to avoid traffic she took the field to access to the shop owned by one Shankar. She purchased chocolates and proceeded towards her house when she was obstructed by the accused who lifted her bodily, she made futile attempt to release herself from the clutches of the accused even after giving a bite on the upper part of his right arm. There was a jungle by the side of the field where the victim was taken. The boy opened his pant, removed the panty of the victim girl and tried to contact physically his penis with the genital organ of the victim, in colloquial language the victim stated "USNE PONDI SATAYA THA". The victim girl screamed in pain which attracted Kalu, Suman and Chaiwala who came to her rescue. In Bengali the victim girl shouted to leave her. Raju threatened Kalu and Suman. She came back to her home. She found her mother was busy over phone who told her to go away. The victim girl went to sleep. On the following evening she narrated the incident to her parents who informed police. She was taken to hospital for medical examination by the police.

She was produced before 'Magistrate Madam' before whom she narrated the incident.

18. During cross-examination she stated that she was coming from the shop of Shankar through the field. Normally children play over there but at the time of incident no one was present. No one was present in and around the shop of Shankar as well, she purchased the chocolates from Shankar. She did not say anything to Shankar after the incident, she did not say anything to anyone while running back home. It is her further evidence that her father is in police. Her mother is a student of International Law. There are few tall trees by the side of the field and few shrubs. She generally sits to study at about 6.00 p.m. The victim girl stated, before coming to the learned Magistrate for recording her statement she was guided by her parents and she narrated everything as per the instruction of her parents. She had never been to the house of the accused who used to play with her in Maidan and most of the time he used to push her and hurt her. He used to sit outside the shop of Nepa most of the time.

19. The statement of victim as I have already pointed out was recorded under Section 164 of the Cr.P.C. by learned Magistrate which is not admitted into evidence as a whole, though relevant and admissible under Section 80 of the Evidence Act. Only the signatures of the victim girl appearing on the statement were admitted as Exhibit-1 Series. However, I find that learned Magistrate recorded that statement of the victim in Hindi after being satisfied about the voluntariness of the maker of the statement. The victim girl stated before the learned Magistrate on 21st April, 2014 that her brother was asking for chocolates and she went to the shop of Shankar with two rupees to purchase chocolates. She took the field to access to the shop. She came across the accused person who lifted her and took her to jungle and forced her to sit. She tried to flee but the accused caught hold of her and removed her panty and his pant as well. Kalu saw the incident so was Chaiwala who asked Raju to release the victim girl. Victim girl scratched the accused person who touched her genital. One day after the incident she disclosed everything to her parents.

20. P.W. 2 is father of the victim who informed the police about the alleged incident which he came to know two days after the alleged occurrence when he came to house from duty. From the evidence of P.W. 2 we find that on 15th April, 2014 his wife asked the victim girl to show the accused person. The victim girl indicated the place where the incident of sexual assault took place. After reaching there he found 7-8 boys standing on the other side of the field and his daughter pointed out the miscreant Raju Roy among those boys. He found an old man who disclosed the name of the said boy was Raju Roy, son of Sambhu Roy. Suggestion was given to P.W. 2 that his wife had quarrel with the mother of Raju Roy and being instigated by his wife P.W. 2 informed the police about the alleged incident. During cross-examination he stated that Raju Roy is his neighbour who visited his house to collect donation for different pujas. Neither his wife nor he himself told any person of his neighbourhood about the alleged incident. He did not visit the house of Raju Roy. Confronting him with the written information learned Defence Counsel found certain statement, which was made by the P.W. 2 in course of evidence were not disclosed in his written information.

21. P.W. 3, Namita Mukherjee is the mother of the victim girl who also did not have any direct knowledge about the incident but from her testimony we find that on 13th April, 2014 in between 6.00 - 7.00 p.m. her daughter went to purchase chocolates. She was busy over phone when her

daughter entered into the house crying. She thought that her daughter was unwilling to study and she told her daughter to go to sleep. After preparing the food when she was trying to wake up her children the victim did not respond and on the next evening only the victim stated about the incident to her. Immediately thereafter, she contacted her husband over phone and told that their daughter was unwell. On the following morning her husband came back home then he was appraised of the incident. After that her husband talked to the victim girl and, thereafter, she took her daughter outside to find out Raju Roy. The victim girl took her to the field and indicated the place of incident first. They found a group of people standing near the grocery shop and Raju was one of them. He was identified by her daughter. Her husband thereafter talked to Raju about the incident who stared with big eyes at the victim girl. Thereafter, they left for police station. During cross-examination she stated that she did not ask the shopkeeper if her daughter went to purchase chocolates. She did not disclose anything to the shopkeeper. Prior to the incident Raju visited their house with other boys to collect donation for puja. Raju resides at a distance of 2-3 minutes walk from their house. She did not say anything to her neighbours about the alleged incident. She did not inform the local Councilor. She could not remember if she told police that she was busy over phone when her daughter came back. The victim girl was in their custody prior recording of her statement before the Magistrate. She admitted to have lodged a case against Chandrasekhar Paramanik and his wife Arati Paramanik. She denied to have quarreled with the mother of Raju Roy. She denied the suggestion that because of such quarrel she instigated her husband to file the case against Raju.

22. P.W. 4 stated that on 15th April, 2014 he found Digantan Mukherjee asking Raju as to why he misbehaved with his daughter. Apart from that he knew nothing.

23. P.W. 5 Niranjana Patra was examined by the prosecution in the light of Section 154 of the Evidence Act. P.W. 6 Arun Shaw @ Kalu aged about 45 years expressed his ignorance about the alleged incident. P.W. 7 Nityananda Pal @ Pappu too expressed his ignorance about the incident. During his cross-examination the witness stated that in between the field near the house of Digantan and the road there is a kachcha drain which one cannot be cross jumping, foul water of the locality passes through the drain. P.W. 8 Kartik Pal expressed his ignorance about the incident. P.W. 9 S.I. Prasanta Kumar Pathak is the I.O. of this case who stated that during investigation he examined available witnesses and recorded their statements. He arranged for medical examination of the victim girl and produced the victim girl for recording of her statement under Section 164 of the Cr.P.C. He arrested the accused person and forwarded him to the Court. He arranged medical examination of accused Raju Roy and after completion of investigation he submitted charge sheet under Section 6 of the POCSO Act and under Section 376 (2) (i) of the I.P.C. against the accused person. During cross-examination he stated that he did not prepare any seizure list. He did not cite any member of New Sporting Club as witness. He did not cite any staff of Health Centre as witness. He did not cite Shyamal Das, Bimal Das, Abjijit Dutta and Debu Das, the neighbours of the victim as witnesses. He did not cite Shankar as witness. Father of victim girl Digantan is known to him. He did not examine any witness in the vicinity of the house of Digantan. He did not examine any person who saw the victim girl going out of the house to purchase chocolates. Namita Mukherjee did not tell him she was busy over phone when she found her daughter crying. She did not tell him that after preparing the dinner though she tried to, her daughter did not wake up. She did not tell him that Namita informed her husband on the following evening. She did not specifically tell him, she and

her husband along with her daughter left the house in search of Raju Roy. The victim girl was examined on 15th April, 2014 by doctor and her statement recorded under Section 164 of the Evidence Act after six days. During those six days the victim girl was in the custody of her parents. He stated that videography was done while the victim girl was making statement. P.W. 10 is the Recording Officer. Both P.W. 9 and 10 did not have any direct knowledge about the incident.

24. The victim was examined by doctor Samar Sinha Das who did not find any mark of forceful sexual intercourse. This finding of doctor is in conformity with the narrative of the victim girl who stood the test of cross-examination and there is nothing to impeach the credibility of the victim girl. Unfortunately learned Trial Court while passing the judgement did not accept the testimony of the victim girl as sufficient to record an order of conviction. According to learned Trial Court non-examination of shopkeeper Shankar and other children namely Kalu, Suman, Chaiwala was fatal to the prosecution case. The incident took place in the evening of 13th April and it was reported on 15th April. The statement of the victim under Section 164 of the Cr.P.C. was recorded on 21st April, 2017 (should be 2014) and there is no explanation of delay involved in the case by the prosecution. According to learned Trial Court since the victim girl in her testimony stated that she narrated the incident under the instruction of her parents and father of the victim girl is constable of police, the testimony of victim girl appeared to be insufficient to rely upon. According to learned Trial Court the testimony of the victim girl suffers from infirmity. The doctor did not find any injury and the testimony of doctor is also not supporting the testimony of the victim girl. The de-facto complainant and his wife stated that they did not inform the incident to local people whereas victim stated that Kalu, Suman and Chaiwala witnessed the incident. All these statement according to learned Trial Court shrouded the prosecution case with shadow of suspicion.

25. In this case charge has been framed under Section 8 of the POCSO Act. Section 7 of the Act defines sexual assault:

"7. 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."

26. Section 8 is penal provision for sexual assault which says:-

"8. Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine."

27. If we consider Section 7, it appears that whoever with a sexual intent touches 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, he would be considered to have committed an offence of sexual assault within the meaning of Section 7 of the Act. The victim girl stated that the accused person lifted her bodily and took her to nearby jungle by the side of the field and removed her wearing apparel as well as his pant. This testimony undoubtedly speaks loud and clear about the

sexual intent of the accused person with which he touched the victim girl. True it is the victim in her statement on oath stated that her parents guided her and she narrated everything under the instruction of her parents. This very statement perhaps was disturbing the conscience of the learned Trial Court and perhaps learned Trial Court missed the statutory provision as laid down under Section 37 of the POCSO Act which makes it mandatory for the learned Trial Court to record evidence in presence of the parents of the child or any other person in whom the child has trust and confidence.

"Section 37 of Protection of Children from Sexual Offences Act, 2012 : Trials to be conducted in camera.

The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:

Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provisions of section 284 of the Code of Criminal Procedure, 1973 (2 of 1974)."

28. Section 26 of the POCSO Act says:-

"Section 26 of Pocso Act 2012 - Additional provisions regarding statement to be recorded Section 26 of Protection of Children from Sexual Offences Act, 2012 : Additional provisions regarding statement to be recorded (1) The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.

(2) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the statement of the child.

(3) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child. (4) Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means."

29. While recording the statement under Section 164 of the Cr.P.C. or under Section 161 of the Cr.P.C. under Sub-Section 1 of Section 26 the Magistrate or the police officer as the case may be shall have to record the statement as spoken by child in the presence of parents of the child or any

other persons in whom the child has trust or confidence.

30. The child was guided by his parents and not tutored by them and under the scheme of the act, the parents are entitled to guide the child. Learned Trial Court ought not to have disbelieved the testimony of the child on the ground that she was guided by her parents and statement was made under their instructions. In every phase, under the Act right from the investigation to the recording of evidence of victim, an atmosphere friendly to the child is required to be created. A police is not supposed to appear before the child in uniform even the family members of the child or person of confidence of the child are permitted to be present in the Court during recording of evidence of the victim even in a given case child need not be produced before the Court for recording of statement. Therefore, the statement made by the victim girl during her cross-examination regarding presence of her parents, their guidance and instruction in my view was blown out of proportion. We should not be unmindful to the fact that child is always receptive of abnormal events and would never forget those events for the rest of the life. In this case the victim girl narrated her experience without any improvement or embellishment of serious nature. At the tender age a child is incapable of having any malice or ill will against any person. Therefore, the testimony of victim girl inspires confidence in me. In this regard, I would like to refer one judgement of Hon'ble Supreme Court pronounced in the case of GAGAN KANOJIA & ORS. VS. STATE OF PUNJAB reported in (2006)13SCC516 wherein it is held:

"Part of the statement of a child witness, even if tutored can be relied upon if it inspires confidence."

31. Though there was no witness to the occurrence Kalu, Suman and Chaiwala came being attracted by cry of the victim girl, yet if we consider those three, as witness to the occurrence then also non-examination of those persons cannot be said to be fatal to the case of the prosecution. They were not examined by the I.O., therefore, the prosecution did not have the opportunity to examine them as prosecution witness. The only option available before the learned Trial Court was to invoke the provision of Section 311 of the Cr.P.C. which learned Trial Court did not invoke. In RAI SANDEEP @ DEEPU VS. STATE OF NCT OF DELHI reported in 2012 AIR SCW 4456 Hon'ble Supreme Court held:

"It is now well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

(emphasis added)

32. In KUSTI MALLAIAH VS. THE STATE OF ANDRA PRADESH reported in 2013 AIR SCW 3181 wherein Hon'ble Supreme Court held:-

"It has been held in catena of decisions of this Court that there is no legal hurdle in convicting a person on the sole testimony of a single witness if his version is clear and reliable, for the principle is that the evidence has to be weighed and not counted. In Vadivelu Thevar v. The State of Madras[5], it has been held that if the testimony of a singular witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof. In the said pronouncement it has been further ruled that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness."

33. It is settled law that in ritualistic formula non-examination of eye witness cannot be pressed into service to discard the prosecution case with a stroke of pain. If the evidence coming from the mouth of the eye witness examined is found to be trustworthy and worth being relied upon then non-examination of yet another witness would not cause any dent or infirmity in the prosecution case.

In every criminal trial some discrepancies are bound to happen and this case is no exception, since they are in the shape of pebbles and not boulders. Court should tread upon it.

34. In my humble opinion, learned Trial Court committed mistake by seeking corroboration of the testimony of victim girl who was subjected to sexual assault. Non examination of the shopkeeper or the Chaiwala or the children cannot be of such nature so as to strike at the root of the prosecution case. It would have been better, had the Chaiwala been examined but the victim girl cannot be made to suffer because of laches of I.O. In this regard, we can rely upon the judgement of the Supreme Court pronounced in the case of STATE OF U.P. VS. JAGDEO reported in (2003) 1 SCC 456 wherein it is held:-

"Coming to the aspect of the investigation being allegedly faulty, we would like to say that we do not agree with the view taken by the High Court. We would rather like to say that assuming the investigation was faulty, for that reason alone the accused persons cannot be let off or acquitted. For the fault of the prosecution, the perpetrators of such a ghastly crime cannot be allowed to go scot free."

35. Section 354B of the I.P.C. enunciates:-

"354B. Assault or use of criminal force to woman with intent to disrobe.--Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine."

By lifting the victim girl bodily the accused/opposite party used criminal force and disrobing of child, undoubtedly makes him culpable of offence within the meaning of Section 354B of the I.P.C. as well.

36. In my humble opinion, the judgement passed by learned Trial Court suffers from infirmity and order of acquittal was unmerited and warrants an order of reversion. Accordingly, I am inclined to allow the appeal. Impugned judgement and order of acquittal passed by learned Trial Court is set aside. The accused Raju Roy is found to be guilty to the charge under Section 8 of the POCSO Act as well as under Section 354B of the Indian Penal Code. Accordingly I record an order of conviction. In both the offences, minimum punishment prescribed is three years and maximum punishment prescribed under Section 8 of the POCSO Act is five years and under Section 354B of the I.P.C., 7 years. But he cannot be punished twice.

37. Mr. Bakshi however, submits that the offence committed by the convict has left an indelible mark in the mind of the child. She is suffering from depression and now she is going through the process of counseling. The boy was 22 years when the incident took place while the victim was only of 7 years of age. It indicates the perverse mind of the convict and he should suffer substantive punishment.

38. Mr. Chatterjee, learned Counsel for the respondent being appointed by Calcutta High Court Legal Service Committee submits that the incident took place way back in 2014 when the convict was 22 years old. He hails from a poor family without any criminal antecedent. He has spent some days behind the custody. Considering the circumstances in which the offence was committed he may be released on probation

39. From the attending facts, I find that the boy was 22 years in the year 2014 when the offence took place, may be at the age of 28 years now he is having his own family.

40. However, considering the right of the convict to have his say on the point of sentence I am inclined to send back the lower Court record to the learned Trial court with a direction that learned Trial Court will hear the convict on the point of sentence and balancing the aggravating and mitigating circumstances, will take appropriate decision on sentencing the convict. The convict is directed to appear before the learned Trial Court to have his say on the point of sentence within 31st day of January, 2023.

41. I my humble opinion, the victim girl is entitled to compensation and considering the facts and circumstances I award a sum of Rs. 1,00,000/- to be given to the victim within one month from this day.

42. Let a copy of this judgement be sent down to learned Trial Court for information and necessary compliance.

43. Let the Trial Court record together with copy of this judgement be sent to learned Trial Court immediately. Another copy of judgement be sent to Member Secretary, West Bengal State Legal Services Authority for information and necessary action.

44. With the disposal of appeal, application pending, if any, also stands disposed of.

45. Urgent Photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)