

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bibhas Ranjan De

C.R.A. No. 168 of 2017

Amirul Gazi

Vs.

The State of West Bengal

For the appellant: Mr. Rajdeep Mazumder, Adv.
 Mr. Moyukh Mukherjee, Adv.
 Mr. Pritam Roy, Adv.

For the State: Ms. Anasuya Sinha, Adv.
 Mr. Pinak Kumar Mitra, Adv.

Heard on : 07.01.2022

Order on : 28.01.2022

Bibhas Ranjan De, J.:-

By this appeal under section 374 (2) of Code of Criminal Procedure Code, 1973, the appellant has challenged the Judgment dated 12.01.2017/13.01.2017, passed by 7th Additional Sessions Judge,

Barasat, 24 Parganas (North) in Sessions Trial No. 02 (02) of 2013 whereby, the appellant has been convicted for the offences punishable under section 376, 363 and 366A of the IPC and sentenced to 7 years RI for the Offence Under Section 376 with fine of Rs. 20.000/- and default RI for 10 months and sentenced to 5 years RI for the offence under Section 363 with fine of Rs. 5000/- and default RI for 3 months and also sentenced to 8 years RI for the Offence under section 366A of IPC with fine of RS. 20,000/-and default RI for 10 months, all the sentences are to run concurrently.

2. Prosecution case is that on 03.11.2010 victim, minor daughter of the complainant Shri Kalyan Kr. Ghosh, resident of village Ranihati, Deganga, Barasat, was kidnapped by the appellant while she had gone to answer nature's call at around 3 A.M. Complainant searched in all possible places but could not find her out.

3. On receipt of the written complaint on 03.11.2010 at about 22.45 hours instant case was registered as Deganga P.S case no 355 dated. 03.11.2010 u/s 363/366A I.P.C. During investigation I.O (PW-19) visited place of occurrence and prepared sketch map. I.O arrested two persons namely Jahangir Kabir Gazi and Manirul Gazi and they were taken to police custody. I.O. examined witnesses and recorded

their statements u/s 161 Cr.P.C. During investigation I.O raided several places and finally on 20.04.20211 arrested the appellant and recovered the victim from Balagarh in the District Hooghly. I.O. also recorded the statements of witnesses namely Sk. Ohidur Rahaman (PW- 17), Sk. Raju (PW-14) and victim (PW-11) recorded u/s 164 Cr.P.C. After completion of investigation I.O. submitted charge sheet u/s 363/366A/120B/376/34 I.P.C against nine (9) accused including appellant before the Ld. Chief Judicial Magistrate, who then committed the case to the Ld. Sessions Judge, Barasat. The case was transferred to the Ld. Addl. Sessions Judge, Barasat, for trial.

4. Ld. Addl. Sessions Judge framed charge u/s 363/ 366A/120B I.P.C against all nine (9) accused including the appellant and also framed a separate charge u/s 376 against the appellant. In course of trial prosecution examined 19 witnesses and proved a good number of documents marked as ext. 1 to 13. On behalf of defence, three memos of arrest marked as ext. A to C were exhibited in course of cross-examination of I.O (PW-19). After recording evidence of all witnesses, appellant was examined u/s 313 Cr.P.C.

5. The trial Court after considering the evidence of the victim and other relevant witnesses found that the charges against the appellant

are proved. Accordingly, the trial Court has convicted and sentenced the appellant in the manner indicated above. Co-accuseds were, however, acquitted of the charges levelled against them.

Arguments advanced

6. Mr. Rajdeep Mazumder, Ld. Counsel for the appellant, submits that the Ld. Trial Court has committed an error relying on evidence of PW-14, 16 & 17 who contradicted one another. It is further contended that the victim herself did not state about any kidnapping in course of her statement u/s 164 Cr.P.C Mr. Mazumder has tried to persuade this court that there was a love affair between the victim and the appellant. Mr. Mazumder also referred to the evidence of the mother of victim (PW-2) who stated the age of her daughter (victim) was more than 18 years. He also referred to the ext. 5/a and submits that ossification test report shows the age of victim as more than 17 years but less than 19 years. Accordingly, he submits victim, a major lady, had voluntarily left her residence and the charges levelled against the appellant had not been proved beyond doubt.

7. In opposition to that Mrs. Anasuya Sinha, Ld. Counsel for the State, submitted that the offences have duly been proved and the appeal does not have any merit.

Decision with reasons:-

8. Having heard the Ld. Counsels for the parties and on perusal of evidence on record it is noticed undisputedly the victim is the daughter of the complainant, Shri Kalyan Kr. Ghosh (PW-1). I have gone through the evidence of PW-1 (Complainant), PW-2 (mother of the victim), PW-3 (brother of the victim) and I find that these four witnesses stated about the incident when the appellant kidnapped the victim in early morning on 03.11.2010 while the victim came out of the home to answer nature's call. PW-4 (neighbor), also corroborated the factum of kidnapping of victim by the appellant. That apart, PW-6 stated in his evidence that on the alleged date of incident he came to a tea stall in the early morning and he found one Maruti van passing away and at the same time he heard a sound of crying from the house of complainant. PW- 5,7,8,9 & 10 could not say anything about the incident. Pw-11 (victim) stated that on the alleged date of incident when she came out of their house for collecting water from the tube well she was forcibly taken away by the appellant in a Maruti Car. PW

11 also stated about her kidnapping by the appellant, in her statement u/s 164 Cr.P.C. before the Magistrate.

9. Though there may be minor discrepancies in the evidence of PW-1, 2, 3, 4 and 11 but those discrepancies, in my opinion, are inconsequential and do not make any dent in the prosecution case of forcible kidnapping of PW11. It may be pertinent to note that the appellant in response to question no. 7 in course of examination u/s 313 Cr.P.C, stated as follows:-

“I did not kidnapped the victim. On the aforesaid date victim’s mother called me and handed over the victim and told me to took away her because victim’s father arranging the marriage of the victim”

10. According to defence theory, mother of the victim (PW-2) handed over the victim to the appellant for taking her away. Unfortunately on behalf of the appellant neither any evidence adduced nor even any suggestion put to any of the witnesses during cross-examination to probabilise such weak and flimsy of defence.

11. Therefore by no stretch of imagination I can come to conclusion that the appellant did not kidnap the victim. That apart nowhere from the evidence I find that the appellant took away the victim either with her consent or that of her lawful guardian.

12. Next I propose to come to the issue of age of the victim. In this regard Mr. Mazumder Ld. Counsel for the appellant, referred to the ossification test report and the evidence of mother of the victim (PW2).

13. With regard to age of victim, P.W1 father of the victim, categorically deposed that at the time of occurrence his daughter was aged about 15 years and a few months. That apart, exhibit -2 shows that original birth certificate of the victim was produced by PW-1 for its seizure on 06.11.2010. Ext.2 shows the date of birth of victim as 28.03.1995.

14. Pw-2, mother of victim, in her examination- in-chief stated that age of her daughter was more than 18 years but in cross-examination she clearly denied the suggestion that her daughter was 18 years of age. It is further noticed that PW-2 was cross-examined on the same day leaving no chance of tutoring. It is trite law evidence of a witness is to be read as a whole. It would be incorrect to cull out a single

sentence and read it out of context without reference to other portions of the evidence. If the evidence of PW2 is read as a whole, it can safely be inferred that it was a slip of tongue when she stated her daughter's age as 18 during examination-in-chief and promptly corrected herself duly in cross-examination by denying similar suggestion put to her.

15. Determination of the age of a person based on ossification test cannot be conclusive proof as the results are not accurate, and it does not indicate the exact age of the person concerned. It cannot be lost sight of that the opinion of the doctor regarding age determination is not conclusive, and has corroborative value only. In this case, I find the direct evidence of the father of the victim, PW1, regarding her age as 15 years is corroborated by the birth certificate which shows her date of birth as 28.03.1995. These pieces of evidence clearly establishes the fact that the victim was below 16 years at the time of commission of offence.

16. Next I come to the offence of rape punishable u/s 376 I.P.C. In this regard, evidence of victim is very important. PW-11 (victim) specifically stated in her evidence that she was taken to different places and confined her and appellant had sexual intercourse with her against her will. In response to the suggestion that the appellant did

not have sexual intercourse against her will, victim categorically denied the same.

17. From the evidence of PW-14 and Pw-16 it appears that the appellant and victim resided together at different places as tenant, for a considerable period. Both the witnesses let out rooms to the appellant and victim to reside together. In reply to question nos. 22, 25 & 26 in section 313 examination, appellant appears to have admitted the fact of his residing in tented accommodation with the victim. Besides, Pw-18 Dr. Ranjit Kr. Mandal attached to Barasat District Hospital, who had examined the victim found the following :-

“On examination o f the victim I found:

1. no external injury mark seen any here in the body ; 2) breast - normal ; 3) axillary hairs – normal ; 4) pubik hairs – normal ; 5) menstrual histry – cycle regular, LMP – 19.04.1 ; 6) vulva – normal ; 7) clitoris – normal ; 8) hymen – old hymentear present ; 9) vagina plus uterus bloody mucoid discharge was present due to period ; 10) vaginal discharge / bleeding as mentioned earlier ; 11) fourchette – normal ;

12) examination was easy and two examining fingers were admitted easily.”

18. From the evidence of the victim (PW-11), Medical evidence and other attending circumstances it is clear that after having kidnapped her, the appellant cohabited with the victim at different places. With regard to the issue whether the victim was a consenting party, I note such plea is of little consequence. As discussed above, the prosecutor has established she was below 16 years at the time of the incident and her consent was immaterial in view of 6th clause of section 375 IPC. In the backdrop, even if we assume that sexual intercourse was with the consent of the victim, we cannot consider such consent as a valid one as the age of the victim is below 16 years. Hence, the offence of rape is proved beyond doubt.

19. Now I come to the offence alleged to have been committed u/s 366A of I.P.C. A reading of Section 366A shows that in order to attract the said provision, a minor girl below the age of 18 years must be induced to go from place to place or to do any act with the intent that she will be forced to do illicit intercourse with **another person**. It is clear from a reading of the said provision that it is attracted when a minor girl is procured by **one person** for the seduction of sexual

intercourse by a **third person**. If a person induced a minor girl to go along with him and sexual intercourse with her, Section 366A cannot have any application. Here, in our case, this is not the prosecution case that any third person other than the appellant intercoursed with the victim far to speak of any evidence thereof.

20. In this factual backdrop, though I am of the view the order of conviction u/s 366A I.P.C. is not maintainable, the offences u/s 363/376 I.P.C. are clearly made out against the appellant for which he has been rightly convicted.

21. In the aforesaid view of the matter, I am inclined to set aside the order of conviction and sentence u/s 366A I.P.C. However, conviction and sentence for the offences u/s 376 and u/s 363 I.P.C are hereby affirmed. Both the sentences shall run concurrently. It is further directed that the fine amount, if realized, be given to the victim, as compensation.

22. The period of detention of the appellant, if any, during investigation, enquiry and trial shall be set off within the meaning of Section 428 Cr.P.C.

23. Thus the appeal is partly allowed.

24. Let a copy of this Judgment along with the Lower Court record be communicated to the trial Court at once.

25. All parties shall act on the server copies of this judgment duly downloaded from the official website of this Court.

26. Urgent photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I agree,

(Joymalya Bagchi, J.)

(Bibhas Ranjan De, J.)