

AD. 6.
September 2, 2021.
MNS.

C.R.A. No. 35 of 2017
with
CRAN 1 of 2018 (Old CRAN 24 of 2018)
+
CRAN 2 of 2019 (Old CRAN 1317 of 2019)
+
CRAN 3 of 2020

(Via Video Conference)

Chiranjit Kabiraj
Vs.
The State of West Bengal

Mr. Prabir Majumder,
Mr. Debabrata Roy,
Mr. Snehansu Majumder

...for the appellant.

Mr. Arijit Ganguly,
Mr. Arik Ghatak

...for the State.

The present challenge has been preferred against the conviction of the appellant under Section 363 of the Indian Penal Code. It is evident from the impugned judgment that the trial Judge used flowery language, which might reflect his vocabulary, but does not reflect any objective consideration of the relevant materials on record.

It is unfortunate that although the appellant was not convicted under any of the provisions of the Protection of Children from Sexual Offences Act, 2012, apparently the Judge proceeded on the entirely erroneous premises that the accused has failed to prove his innocence.

Such an approach is contrary to the general standards followed in criminal cases, being that of the allegation being proved beyond reasonable doubt.

In the present case, in case of the most crucial witnesses, the Judge recorded that cross-examination was “declined” by reason of the absence of learned counsel for the accused. The accused person was about 20 years of age at the relevant juncture. It is unimaginable that the expression “declined” is used by a Judge having such a rich vocabulary, without the understanding of the proper connotation of the term. The expression “declined” means a positive negation and/or refusal and not a passive act of the 20 years old accused, who is a layman in law and, thus, failed to cross-examine the witnesses in view of the absence of his counsel.

As such, in the present case, the legitimacy of the entire deposition of the prosecution witnesses is in doubt, in the absence of appropriate opportunity having been given for cross-examination to the accused. The evidence of all the prosecution witnesses were taken first on three successive dates in August, 2016 and then on a single date of September, 2016, thereby preventing the accused from having an appropriate audience and right to contradict the statements of the prosecution witnesses in the real sense of the term, since the senior engaged by his advocate on record was absent on all the said dates due to his ailment, for which adjournments were sought but refused.

Even proceeding on the premise of the deposition of the prosecution witnesses, as well as the evidence on record, the following facts stare in the face:

- i) The Doctor, who allegedly examined the victim, in her deposition as well as in her medical report, stated that there was no injury on any other body part of the victim child apart from a reddish tinge in the lower portion of her vagina. No sign

of any force being applied on the victim was also borne out by the deposition and report of the Doctor. The Doctor only recited in a parrot-like fashion the statements made by the victim girl, which was at best hearsay from the perspective of the Doctor.

ii) Surprisingly, the court relied on the evidence on record, which does not clinch the issue in favour of the victim at all. It may be noted that the victim girl and both her parents were consistent in their assertion that the accused gagged the victim with a handkerchief, causing her to fall unconscious.

However, the statement of the victim under Section 164 of the Code of Criminal Procedure entirely omits any reference to such gagging. Rather, the victim girl stated that she was taken from her school by the accused and she, thereafter, became senseless. Nothing has been stated in such statement regarding the reason of her becoming senseless and/or any allegation made regarding gagging or anything being shoved into the mouth of the victim by the accused or any other person. Rather, the victim girl goes on to make the contradictory statement under Section 164 of the Code of Criminal Procedure that, since the accused tried to touch her indecently, she shouted out, which is not expected normally from a senseless person. In any event, according to the statement of the victim girl herself, immediately upon shouting out, the accused did not do anything further to her.

iii) That apart, the evidence of the investigating officer clearly shows that the alleged place of occurrence was a

thickly populated area, being lined by shops, therefore being in the nature of a public thoroughfare. It is beyond credibility that the victim meekly submitted to the accused, although she had shouted in protest previously, all through the episode of the alleged kidnapping, without any person in such thickly populated area even noticing or reporting such incident or being produced as witness.

iv) The evidence of the neighbours of the place of residence of the victim girl is utter hearsay and cannot be relied on at all. Even the evidence of the parents of the victim are hearsay, inasmuch as the same reflects the version allegedly given by the victim to them.

v) The wearing apparel of the victim, though seized, was only recovered from the mother of the victim herself and never sent for forensic examination. The birth certificate was not corroborated by any other evidence to prove its veracity. Even if reliance is placed on such birth certificate and it is taken that the victim girl was a minor of 11 years at the relevant juncture, the accusation of kidnapping has not been proved by an iota of evidence in the present case, let alone beyond reasonable doubt.

In such view of the matter, not only was the trial conducted in a slipshod fashion by the presiding Judge of the court below in virtually denying the accused proper opportunity to controvert the suggestions made in the examination-in-chief of the prosecution witnesses, but the trial Judge committed a patent perversity in totally misreading the

records and coming to a finding, which is contrary to that, which would inevitably be assumed by a person of ordinary prudence.

Hence, the impugned judgement and order of conviction do not stand legal scrutiny.

Accordingly, C. R. A. No. 35 of 2017 is allowed, thereby setting aside the impugned judgement and order of conviction of sentence, respectively dated November 17, 2016 and November 18, 2016, passed by the Additional District and Sessions Judge, Second Court at Krishnagar, District – Nadia, in Sessions Trial No. VIII (VII) of 2016 arising out of Sessions Case No. 05(03) of 2016 (Special) convicting the appellant under Section 363 of the Indian Penal Code as well as the resultant awarded by the trial Judge. The appellant shall immediately be set free from incarceration.

In view of disposal of the appeal, the pending applications, if any, stand disposed of accordingly.

It will be open to the appellant to approach the appropriate forum for adequate compensation due to baseless incarceration for a prolonged period, particularly keeping in view the young age of the accused and the stigma attached to such baseless conviction, which would affect his future prospects, against the authorities-in-question as well as the parents of the victim.

If such an approach is made, the appropriate forum, competent to take up such matter, will decide the same, of course, without being influenced by any of the observations made herein, independently and in accordance with law.

The trial Judge, as well as the correctional home and other relevant parties, including the parties, shall act on the communication of

this order by the learned advocate for the parties, accompanied by a server copy of this order, without insisting upon prior production of a certified copy thereof.

The order may be communicated by the Office to the appropriate authorities, at the earliest.

(Sabyasachi Bhattacharyya, J.)