

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

C.R.A. 311 of 2014

**Dilip Sahoo
Vs.
The State of West Bengal**

**For the Appellant : Md. Asraf Ali
Mr. Sankar Banerjee**

**For the Respondent : Mr. Saswata Gopal Mukherjee, Ld. P.P.
Mr. Pravas Bhattacharyya
Mr. Sandip Chakraborty**

Heard on : 07.12.2021.

Judgment On : 13.12.2021.

Bibek Chaudhuri, J.

This is an appeal under Section 374(2) of the Code of Criminal Procedure assailing the judgment and order of conviction and sentence dated 17th February, 2014 and 18th February, 2014 respectively passed by the learned Sessions Judge, Purba Medinipur in Sessions Case No.394/December/2012 corresponding to Sessions

Trial No.32/July/2013 thereby convicting the appellant for the offence under Sections 363/366A/496/376 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act and sentencing him to suffer rigorous imprisonment for seven years and to pay fine of Rs.10,000/-, in default, to suffer simple imprisonment for six months for the offence under Sections 363/366A/496/376 of the Indian Penal Code and Section 4 of the POCSO Act.

Khejuri P.S. Case No.51 of 2013 was registered on the basis of a written complaint filed by one Kanailal Das on 7th March, 2013 alleging, inter alia, that the appellant herein used to induce the minor daughter of the *de facto* complainant for some days prior to 10th February, 2013. On that date, the appellant eloped her from the 'morum' road situated on the eastern side of the house of the complainant. On 7th March, 2013 the daughter of the *de facto* complainant returned her paternal home. She told her father that the appellant married to her and used to reside in a rented home as husband and wife. During their stay the appellant committed sexual intercourse with the minor daughter of the *de facto* complainant. When the appellant brought her to his house, she found that the appellant had already married having his first wife and a child. Then she returned to her paternal home and narrated the incident to her father.

Police took up the case for investigation and on completion of investigation submitted charge sheet under Section 363/366/376/494 of the Indian Penal Code against the accused. Since the offence charged is exclusively triable by the Court of Sessions, the case was committed to the learned Sessions Judge who herself took up the trial of the case.

The charge was framed against the appellant under Sections 363/366/496/376 of the Indian Penal Code and Section 4 of the POCSO Act. As the accused pleaded not guilty when the charge was read over and explained to him, trial of the case commenced.

During trial, the prosecution examined as many as 11 witnesses. Among them the *de facto* complainant deposed during trial as P.W.1. P.W.2 is the wife of the *de facto* complainant and mother of the victim. P.W.3 is the victim girl. P.W.4 is the younger brother of the *de facto* complainant. P.W.5 is the uncle of the victim. P.W.6 is also a close relative of the victim. P.W.7 is the wife of the appellant Dilip Sahoo and P.W.8, P.W.9 and P.W.10 are the neighbours of the appellant. P.W.11 is the Investigating Officer of this case.

Needless to say that in a case of rape or penetrative assault, sole evidence of the prosecutrix is sufficient to warrant conviction of the accused if her evidence is found to be trustworthy, cogent, believable and worthy of credence. No amount of corroboration is

necessary because the evidence of a victim of an offence of rape is at par with an injured witness. Therefore, Court seldom holds the evidence of the victim girl as unworthy of credence unless her evidence suffers from material contradictions. In offence of rape the evidence of parents of the victim, other relatives and rest of the witnesses are corroborative in nature and most of the time hearsay evidence which the Court is not in a position to accept. Therefore, in such a case it is the evidence of the victim girl who matters most.

Bearing the above principle as to appreciation of evidence of a victim of sexual assault, let us now consider the evidence of P.W.3 who happens to be the victim of the case. According to P.W.3 she was aged about 15 years on the date of her deposition i.e., on 29th July, 2013. At the relevant point of time she was a student of class-VIII. It is stated by her that she used to use mobile phone of her father. One day the appellant contacted her over the said mobile phone. He told her that he was unmarried; was the only son of his parents having landed properties and he used to love her. Then on 27th February, 2013 the appellant took her away from the lawful guardianship of her father from the 'morum' road in front of their house. He married the victim girl with false assurance and cohabited with her. Thereafter both of them returned to their village. The victim went to her paternal home and on the following day she visited the

house of Dilip Sahoo. In his house she saw the first wife and children of Dilip and seeing them she ran away from his residence. She narrated the entire incident to her father. It is also stated by her that she made a statement before the learned Magistrate under Section 164 of the Code of Criminal Procedure. In course of her cross-examination it is ascertained that the victim was taken to Gorakhpur, Uttar Pradesh by the appellant.

In her statement recorded under Section 164 of the Code of Criminal Procedure she did not take the name of the appellant. It is stated by her before the learned Magistrate that a boy took her away making some false promise to her. Then he tried to sell her to some other persons. When she came to know, she told that she would go to her paternal home. The said boy took her to his house situated in the same village. There she found that the said boy has his wife and children. Then she returned to her paternal home and narrated everything to her father. On the next day her father went to the house of the appellant. A village 'Salish' was held. But the dispute was not solved. It is also stated by the victim girl that he performed bad act against her will.

It appears from the evidence of the *de facto* complainant that the appellant induced his daughter through mobile phone and took her away from his residence on 27th 'Magh' to Gorakhpur, Uttar

Pradesh. The accused married the daughter of the *de facto* complainant by putting vermilion on her forehead. Then she returned with the accused from Gorakhpur and went to his house. She saw the first wife and children of the appellant in his house. Seeing them she left the house and informed everything to the *de facto* complainant on 23rd 'Falgun'. When the *de facto* complainant saw his daughter with conch, bangles on her hands and vermilion on her forehead, he lodged the complaint in the local police station. From the said complaint it appears that it was lodged on 7th March, 2013. The mother of the *de facto* complainant (P.W.2) corroborated the evidence of her husband in her deposition.

During investigation police seized one transfer certificate in the name of the victim girl issued by the school authority of Kultha Sarada Siksha Sadan. As per the record of the admission register her date of birth was 3rd December, 1998. The seizure list in respect of the said transfer certificate was marked as exhibit -2 during trial of the case. However, the prosecution did not take any attempt to prove the transfer certificate issued by the school authority on 12th March, 2013.

The learned Sessions Judge, Purba Medinipur on appreciation of evidence found that the defence did not challenge the date of birth of

the victim girl during cross-examination of the *de facto* complainant or his wife or the victim girl.

I am in agreement with the observation made by the learned Trial Judge that the victim girl, a minor aged about 15 years at the relevant point of time was enticed by the appellant and taken away to Gorakhpur in the State of Uttar Pradesh. There is a discrepancy between the statement made in the FIR and the statement of the victim girl regarding the date of her kidnapping. According to the FIR, the victim girl was taken away by the appellant from the side of her house on 10th February, 2013. On the contrary, the victim while deposing as P.W. 3 stated on oath that she was enticed by the appellant and taken from her lawful guardianship away to Gorakhpur on 27th February, 2013. In my considered view, such discrepancy is absolutely minor in nature and can be overlooked. During cross-examination of the *de facto* complainant, a suggestion was put by the defence on behalf of the accused that the accused person did not take away his daughter by force. The said suggestion was promptly denied by P.W. 1 as well as P.W. 3.

From the evidence of P.W. 3, it is found that the appellant induced her saying that he is the only issue of his parents having landed property and he was unmarried at the relevant point of time. The victim girl was induced by such words of the appellant and ran

away from her home. Under such circumstances, the learned Trial Judge was absolutely justified to hold the appellant guilty for committing offence under Section 363 of the Indian Penal Code.

Next comes the question as to whether the learned Trial Judge was justified in holding the accused guilty for committing offence under Section 366A of the Indian Penal Code.

In order to attract Section 366A of the Indian Penal Code, essential ingredients are: -

- (i) that the accused induced a girl;
- (ii) that the person induced was a girl under the age of 18 years;
- (iii) that the accused has induced her with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse;
- (iv) such intercourse must be with a person other than the accused; and
- (v) that the inducement caused the girl to go from any place or to do any act.

In the instant case, the evidence on behalf of the prosecution is that the appellant kidnapped the minor victim girl and took her to Gorakhpur in the State of Uttar Pradesh and married her. Thereafter, he cohabited with the said girl. Therefore, it is not the case of the

prosecution that the victim girl was either forced or seduced to illicit intercourse with a person other than the accused/appellant. Thus, the learned Trial Judge was wrong in convicting the appellant under Section 366A of the Indian Penal Code.

The evidence-on-record, however, establishes beyond any shadow of doubt that the accused/appellant kidnapped the prosecutrix with the intention of marrying her in order that she might be forced to illicit intercourse. So, an offence under Section 366 is committed when a person has forcibly taken a woman with the intention as specified in Section 366. The decision of the Hon'ble Supreme Court in the case of ***Tarkeshwar Sahu –Vs.- State of Bihar (Now Jharkhand)*** reported in ***(2006) 8 SCC 560*** may be relied on in this regard.

Let me now consider independently on the basis of evidence-on-record as to whether the learned Trial Court was justified in convicting the appellant under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act. I have already recorded the evidence of the victim girl and her parents in detail. During examination of the accused/appellant under Section 313 of the Code of Criminal Procedure, he denied the allegations made against him by the *de facto* complainant but it is important to note that when the incriminating material appearing in the evidence of P.W. 5 was

confronted with the accused that he came to know from the *de facto* complainant that she stayed for about one month at Gorakhpur with you as husband and wife and cohabited, the appellant replied that he has nothing to say about such incident. Thus, the appellant did not deny that he cohabited with the victim girl. It is also not denied that the victim girl returned to the village with 'vermilion' on her forehead and 'conch, bangles' and 'Pala' on her hands. Needless to say that these are the symbols of a married lady. It is not denied that she returned to her village with the appellant.

The learned advocate for the appellant vehemently urged with reference to Section 27 of the POCSO Act that in order to prove a charge under the POCSO Act medical examination of the child at the earliest is absolutely necessary. Section 27 of the POCSO Act reads thus:-

"27. Medical examination of a child.- (1) *The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with Section 164-A of the Code of Criminal Procedure, 1973 (2 of 1974).*

(2) *In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.*

(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution”.

In the instant case, the victim girl was not examined medically under Section 164A of the Code of Criminal Procedure read with Section 27 of the POCSO Act. Without such evidence being available on record, the learned Trial Judge was not justified in convicting the accused under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act.

Purpose of Section 27 of the POCSO Act and Section 164A of the Code of Criminal Procedure is to collect and bring the available marks of injury due to forcible sexual offence at the earliest to establish as to whether the victim was subjected to rape or penetrative sexual assault or not. The purpose behind medical examination of a victim of the offence of rape or penetrative sexual assault is to collect evidence or violence, especially sexual violence resulting in several physical and psychological consequences. However, when the evidence-on-record

suggests that a minor girl was induced to cohabit with the accused after performing a marriage ceremony, it is not possible to have marks of violence in the person of the victim girl. During cross-examination of the victim girl, specific question was put to the effect that she was not sexually assaulted by the appellant and that there was no cohabitation between her and the appellant, to which she promptly denied. It is needless to say that the victim was a minor at the time of commission of offence. In ***Ashwani Kumar Saxena – Vs.- State of M.P.*** reported in **(2012) 9 SCC 750** it is held by the Hon'ble Supreme Court that age determination test is necessary when the age of the victim is in doubt and when reliable documentary proof of age is not available. In the instant case, the victim girl and her parents stated that she was aged about 15 years at the relevant point of time. The said fact was not challenged by the accused. Therefore, even when medical examination report the Court can hold the accused guilty for committing offence under Section 376 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012.

In view of the above discussion, I do not find any scope to spill ink over the judgment and order of conviction and sentence passed by the learned Sessions Judge, Purba Medinipore.

Accordingly, the appeal is **dismissed** on contest. The judgment and order of conviction and sentence is affirmed.

The appellant is directed to surrender before the learned Trial Court within two weeks from the date to suffer sentence, else the learned Trial Judge is at liberty to issue warrant of arrest against the appellant and forfeit the bail amount submitted by the sureties.

Let a copy of this judgment be sent to the learned Court below along with the lower court record.

Parties are at liberty to act on the server copy of the judgment.

Urgent photostat certified copy of this order, if applied for, be given to the learned Advocates for the parties on the usual undertakings.

(Bibek Chaudhuri, J.)

Suman/Srimanta
A.Rs. (Court)