

Form J(2)

In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side

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

CRA 675 of 2018

Dipankar Roy
-Vs.-
State of West Bengal

For the appellant : Mr. Tapan Datta Gupta, Adv.,
Mr. Parvej Anam, Adv.

For the State : Mr. Madhusudan Sur, Adv.,
Mr. Manoranjan Mahata, Adv.

Heard on : 23.11.2021, 30.11.2021.

Judgment on : 08.12.2021.

Bibek Chaudhuri, J.:

This is an appeal under Section 374(2) of the Code of Criminal Procedure filed by the convict/appellant against the judgment dated 4th October, 2018 and order of conviction dated 5th October, 2018 passed by the learned Additional Sessions Judge, 5th Court at Malda in Sessions Trial No. 23 of 2016 arising out of Sessions Case No. 157 of 2016 sentencing the appellant to suffer rigorous imprisonment for five years and fine of Rs.10,000/-, in default, to suffer further rigorous

imprisonment for six months for committing offence under Section 363 of the Indian Penal Code. The learned Trial Judge passed similar sentence, as stated above, against the appellant for committing offence under Section 365 of the Indian Penal Code. The appellant was further sentenced to suffer imprisonment for seven years and fine of Rs.10,000/-, in default, to suffer further rigorous imprisonment for six months for the offence punishable under Section 376 of the Indian Penal Code.

One Arshad Mian lodged a written complaint before the Officer-in-Charge, Ratua Police Station on 2nd May, 2013 stating, *inter alia*, that his minor sister, aged about 16 years, was missing since 26th April, 2013. A missing diary was made in the Police Station on 27th April, 2013 vide General Diary Entry No. 1143. Subsequently, the *de facto* complainant came to know that the accused kidnapped his minor sister for the purpose of trafficking having enticed her to give her a job. It is further alleged that the accused and the *de facto* complainant belonged to different religion and as a result of kidnapping of his minor sister, a communal tension was prevailing in the locality amongst the people of two different religious faith.

On the basis of the said complaint, Police registered Ratua Police Station Case No. 253 of 2013 dated 2nd May, 2013 under Sections 363/365/34 of the Indian Penal Code against the appellant and his

father. During investigation, the victim girl was recovered. On completion of investigation, the Investigating Officer submitted charge-sheet against two accused persons, namely, the appellant herein and his father, Kinkar Roy under Sections 363/365/34 of the Indian Penal Code. Charge-sheet was also filed against the appellant under Section 376 of the Indian Penal Code.

Since the case was triable by the learned Court of Sessions, it was committed to the sessions and subsequently, transferred to the Court of the learned Additional Sessions Judge, 5th Court at Malda for trial and disposal.

The learned Trial Judge framed charge against the appellant and his father under Sections 363/365/34 of the Indian Penal Code. Charge was also framed under Section 376 of the Indian Penal Code against the appellant. On conclusion of trial, the father of the appellant was acquitted. However, the appellant was convicted and sentenced accordingly.

Mr. Tapan Datta Gupta, learned advocate for the appellant, at the outset, submits that the charge framed against the appellant by the learned Trial Judge is defective and on the basis of such defective charge, the accused was prejudiced in trial. Therefore, the impugned judgment and order of conviction cannot sustain. In order to substantiate his contention, it is submitted by Mr. Datta Gupta that

according to Section 212 (1) of the Code of Criminal Procedure, the charge was contained such particulars as to the time and place of alleged offence and the person against whom or the thing in respect of which, it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. He next brings me to the formal charge framed by the learned Trial Judge referring to the Lower Court Record. It is stated by the learned advocate for the appellant that time of commission of offence has not been stated in the charge framed against the appellant. It is also not stated in the charge under Section 376 of the Indian Penal Code when and how the victim was allegedly raped by the appellant.

At the outset, I like to record that the technical objection raised by Mr. Datta Gupta in his introductory argument has no legal implication in view of the specific provision laid down in Section 464 of the Code of Criminal Procedure. Section 464 runs thus: -

"464. Effect of omission to frame, or absence of, or error in, charge. – (1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) *If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may –*

(a) *in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;*

(b) *in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:*

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”

Thus, an error or failure in framing charge is not fatal if no failure of justice is occasioned because of such error. Section 464 of the Code provides what is to be done in cases where a charge is not framed or there is any error, omission or irregularity in framing of the charge. A finding, sentence or order could be set aside, if it causes failure of justice prejudicially to the accused/appellant. But if it is found that no failure of justice has, in fact, been occasioned thereby,

the finding, sentence or order of the Court of competent jurisdiction is not to be set aside on that ground.

In the instant appeal, it is abundantly clear from the charge framed by the learned Trial Judge that the appellant was facing trial for kidnapping the minor sister of the accused and committing rape upon her. The said charge was read over and explained to the appellant and he pleaded not guilty. Entire trial of the case was conducted in his presence. The witnesses on behalf of the prosecution were examined on behalf of him by his learned advocate in the Trial Court. The appellant was examined under Section 313 of the Code of Criminal Procedure and the incriminating materials appearing against him in the evidence led by the witnesses on behalf of the prosecution were confronted with the accused/appellant. In the Trial Court, he did not raise any objection against irregularity in framing charge causing failure of justice prejudicially to him. Therefore, this Court is not in a position to accept technical objection made by the learned advocate for the appellant with regard to framing of charge.

At this stage, let me appreciate the evidence on record independently being the first Court of Appeal having responsibility to scan the evidence on record independently to come to a finding as to whether the learned Trial Judge was justified in convicting the appellant.

The *de facto* complainant deposed during trial of the case as P.W. 1. In his evidence, he stated that about three years before the date of recording his deposition, the appellant along with his friends kidnapped his sister when she was going with her bicycle. The incident took place in the evening and on the following morning the *de facto* complainant lodged a missing diary in the local Police Station. After eight days, the sister of the *de facto* complainant was recovered by the Police. It was further stated by P.W. 1 that she was confined in a room by the accused persons and they committed rape upon her. The signature of the *de facto* complainant in the written complaint was marked as 'exhibit-1'. In cross-examination, the *de facto* complainant admitted that two days after the recovery of his sister, he lodged written complaint in the Police Station.

P.W. 8 is the victim girl. From her evidence, it is ascertained that on 26th April, 2013 when she was coming from her school, the accused persons restrained her at Kalitala Bus Stand and forcibly kidnapped her and took her away by a vehicle. They took her to the house of the maternal aunt (Masir Bari) of the appellant. They confined the victim for about 6/7 days. During that time, Dipankar committed rape upon her. One day when Dipankar was talking to his father, she somehow fled away from the place and went to the Police Station. Thereafter, her father got information and attended the Police

Station and took her away on the following day on the strength of an order passed by the learned Judicial Magistrate. It is also found from her evidence that during investigation, she made a statement under Section 164 of the Code of Criminal Procedure which was recorded by a Magistrate. The said statement of the victim girl was marked as 'exhibit-5' in the Trial Court.

Referring to the cross-examination of the victim girl, it is submitted by Mr. Datta Gupta that the incident took place at Kalitala Bus Stand. It is admitted by the witness that there are many houses and shops around Kalitala Bus Stand. Surprisingly enough, no independent witness saw a girl wrongfully restrained by the accused persons and forcibly taken away by a vehicle. According to Mr. Datta Gupta, the story of kidnapping is absolutely concocted. The victim on her own went away with the appellant because she had love relation with the appellant. In support of his contention, he refers to the statement of the victim girl recorded under Section 164 of the Code of Criminal Procedure. Learned counsel for the appellant further submits that during cross-examination, the victim girl could not state number and name of the female members of the house where she was confined. She did not raise any alarm to attract the neighbouring people though she admitted that there are 4/5 houses beside the house where she was confined. It is further submitted by Mr. Datta

Gupta that the victim girl was aged about 17 years and 24 days on the date of the alleged kidnapping. Admittedly, she had love relation with Dipankar. Since Dipankar and the victim belonged to different religion, the victim girl fled away on her own accord with Dipankar.

It is further submitted by the learned advocate for the appellant that the victim girl alleged that she was subjected to rape by the appellant. Surprisingly enough the victim girl did not allow her medical examination by the doctor in order to ascertain whether there was any physical intercourse with her. It is submitted by the learned advocate for the appellant that in view of Section 164(A) of the Code of Criminal Procedure it is the bounden duty of the Investigating Officer to get the person of the woman with whom rape is alleged to have been committed by a medical practitioner employed in a hospital, run by the Government or local authority. Sub-section (2) of Section 164 (A) mandates that the medical practitioner shall without delay examine the person of the victim girl and prepare a report on the particulars mentioned in the said section in detail. After the recovery of the victim girl the Investigating Officer sent her to the local hospital for medical examination in terms of Section 164 (A) of the Code of Criminal Procedure. However, she refused to get herself examined medically. Therefore, according to the learned advocate for the appellant, in absence of examination report of the medical officer the

Court cannot hold as to whether she was subjected to sexual intercourse or not.

It is submitted by the learned advocate for the appellant that P.W.2 Sk. Niajuddin, P.W.3 Ajmat Mia, P.W.4 Rustam Mia and P.W.7 are local residents whose evidence are not material in the instant case in view of the fact that their evidence was hearsay in nature.

P.W.8 Josiman Khatun is the scribe of the F.I.R. and P.W.9 Kalimul Ansari is the Investigating Officer of the case.

Mr. Datta Gupta next submits that learned trial Judge was also not justified in holding the accused guilty for committing offence under Section 363/365 of the Indian Penal Code because of the fact that she was neither kidnapped nor confined in a room as alleged by P.W.1 and P.W.8. P.W.8 went away with Dipankar as a result of love relationship and left the place on her own accord and came to the police station. If she was confined in a room, it would not be possible for her to leave the said place and reach the police station on her own. Not only the victim but P.W.4 Rustam Mia in his cross-examination admitted that marriage between Hindu and Muslim is not widely accepted in their village and the parents of the victim girl did not want her marriage to be held with the appellant. The specific answer of P.W.4 suggests that love relationship between Dipankar and the victim girl was widely known to the villagers. As a result of such love relationship she fled

away with Dipankar on her own and subsequently she made some false allegations against the accused.

Mr. Datta Gupta has also raised a question regarding delay in lodging the F.I.R. It is submitted by him that there is no explanation as to why the elder brother of the victim girl lodged the F.I.R. two days after the recovery of the victim girl. It is also submitted by him that the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. The evidence of the victim girl in this case is not of such quality that there is no other evidence on record which may even lend some assurance, sort of corroboration that she is making truthful statement.

In support of his contention he refers to the decision of the Hon'ble Supreme Court in the case of ***Vimal Suresh Kamble versus Chaluverapinake Apal S.P. and another*** reported in ***(2003) 3 SCC 175***. Referring to another decision of the Hon'ble Supreme Court in the ***State of Karnataka versus F. Nataraj*** reported in ***(2017) 1 SCC (Cri) 408*** it is submitted by the learned advocate for the appellant that in view of serious contradictions in the evidence of the victim girl and absence of medical evidence make it highly improbable

that sexual intercourse took place between the victim and the appellant.

In paragraph 17 of the report in **F. Nataraj**, the Hon'ble Supreme Court observed as hereunder:-

"In the present case, the gaps in the evidence of the prosecutrix and the medical officer make it highly improbable that sexual intercourse took place. It would be erroneous to rely upon such discrepant testimonies and convict the accused. It can thus be stated with certitude that the solitary evidence of the prosecutrix, in absence of any corroboration by the medical evidence, is not of such quality which can be relied upon. The respondent-accused is, therefore entitled to benefit of doubt."

Learned P.P-In-Charge on the other hand, submits that in a case of kidnapping or abduction for illicit purpose within the meaning of Section 365 of the Code of Criminal Procedure, if the prosecution is able to prove that the victim girl, a minor, was taken away or enticed from her lawful guardianship and was confined in a room and subjected to sexual intercourse by the accused, no amount of corroboration is necessary. If the version of the prosecutrix is believed and is found to be trustworthy, credible and consistent, the same would form the basis of conviction because the evidence of a convict of sexual assault stands on a par with the evidence of an injured witness

and is entitled to great weight, absence of corroboration notwithstanding. If her evidence does not suffer from any infirmity and does not render unworthy of credence, as a general rule, there is no reason to insist on corroboration.

In the instant case the victim girl was found missing from 26th April, 2013. The evidence on record shows that the victim girl appeared in local police station either on 30th April or on 1st May, 2013. In her evidence she stated she fled away from the clutches of the appellant-accused from the house where she was kept confined. She also stated that she was raped during the days of her confinement by the appellant. The above evidence of the victim girl withstood the test of cross examination. She did not deviate from her examination-in-chief while facing cross examination. Therefore, the learned trial court did not commit any error in relying upon the sole testimony of the victim girl in his judgment while convicting the appellant.

Having heard the learned Counsels for the appellant as well as the defence and on careful perusal of the entire evidence on record, this Court refers to an important circumstance to the effect that the victim girl refused to get herself medically examined when she was produced before the Medical Officer to ascertain as to whether she was subjected to sexual intercourse or not. Practically, the victim denied to submit herself to the medical examination.

Learned trial judge relied on a decision of the Hon'ble Supreme Court reported in **1983 (3) Cr L J 1285** where it was observed:-

"In a rape case prosecutrix and her husband were belonging to backward community living in a remote area and as such they could not be expected to know that they should rush to a doctor after the occurrence of the incident and the absence of any injuries on the person of the prosecutrix who was the helpless victim of rape might not by itself discredit the statement of the prosecutrix and in such a situation the non-production of a medical report would not be of much consequence if the other evidence was believable."

The facts of the said reported decision is clearly distinguishable from the facts of the instant appeal. According to the victim girl on 26th April, 2013 when she was coming from school, the appellant and his father resisted him at a place named, Kalitala Bus Stand and forcibly kidnapped her and took her away by a vehicle. In her cross examination, she admitted that there are many shops and other business establishments situated at Kalitala Bus Stand. On the date and time of occurrence, other children were also coming from the school. Surprisingly enough, when she was obstructed and forcibly taken to a vehicle, she did not raise any alarm. Nobody saw the victim being lifted by the accused person in a vehicle and was taken to another place. According to the prosecution case the incident of

kidnapping took place in the afternoon. Absence of any eye witness of the incident of kidnapping renders the story highly improbable.

Secondly, she was subjected to sexual intercourse in the house where she was kept confined by the appellant. The victim did not offer herself for medical examination in order to prove the said fact. The Division Bench of this Court in the judgment of **Kamal Krishna Banik @ Kamal Banik vs. The State of West Bengal** reported in **2019 (2) C.Cr.Lr (Cal) 530** held that where a victim of rape refuses to get herself medically examined under Section 164A of the Code of Criminal Procedure, it is open for the court to draw adverse presumption to the effect that had the victim being examined medically at the earliest, there would have been no evidence of forcible sexual violence of the minor victim girl.

It is already recorded that though the victim was allegedly kidnapped from a busy area and she alleged that she was forcibly lifted to a vehicle, in her statement recorded under Section 164 of the Code of Criminal Procedure which was marked exhibit during trial of the case at her instance, she admitted that she had love relation with the appellant. Thus, the two circumstances, first nobody saw the victim forcibly taken to a vehicle and secondly, her admission that she had love relation with the appellant render the allegation of kidnapping for the purpose of illicit intercourse highly improbable.

Thirdly, the victim girl was aged about 17 years on the date of his alleged kidnapping. Therefore, she attained the age of discretion. Under such circumstances her refusal to get herself medically examined by Medical Officer creates serious suspicion in the mind of the Court. In **Dola Alias Dolagobinda Pradhan & Anr. vs. State of Odisha** reported in **(2018) 18 SCC 695** it is held by the Hon'ble Supreme Court –

"If, however, the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

In the instant case also, the attending circumstances coupled with the victim's denial of having medical examination and attainment of age of discretion by her, make the entire case absolutely unreliable.

For the reasons stated above this Court is not in a position to concur with the finding of the learned trial court as regards acceptability of the solitary evidence of the prosecutrix in convicting the appellant under Section 363/356/376 of the Indian Penal Code.

Accordingly, the instant appeal is allowed.

The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 5th Court at Malda in Sessions Trial No.23 of 2016 arising out of Sessions Case No.157 of 2016 is set aside.

The appellant be released at once if he is in detention, else he be discharged from his bail bond.

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.

(Bibek Chaudhuri, J.)

Srimanta/Mithun/Suman
A.Rs. (Court)