

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 163 of 2020

With

CRAN 1 of 2020 (Old CRAN 2559 of 2020)

CRAN 2 of 2020 (Old CRAN 4032 of 2020)

CRAN 3 of 2020 (Old CRAN 4033 of 2020)

NOOR ISLAM SK @ NUR ALAM SK @ CHINU @ TINU

VS.

STATE OF WEST BENGAL & ANR.

For the Appellant	: Mr. Navanil De, Adv. Mr. Rajeshwar Chakraborty, Adv. Mr. Srinjan Ghosh, Adv. Mr. Subhrajit Dey, Adv.
For the Respondents	: Mr. S.S. Imam, Adv. Mr. Sandip Kundu, Adv.
Hearing concluded on	: 15 th November, 2022
Judgement on	: 2 nd December, 2022

Siddhartha Roy Chowdhury, J.:

1. This criminal appeal assails the judgment and order of sentence passed by learned Additional Sessions Judge, Kandi, Murshidabad in Sessions Trial No. 01(08) 2017 Sessions Special Case No. 29 of 2017.
2. Briefly stated, on 28th April, 2017 Surat Seikh @ Pilot Seikh informed the Officer-in-charge of Salar Police Station in writing that on that day his minor daughter was kidnapped by two person namely (i) Noor Islam Seikh and (ii) Munna Seik, while she was on her way back to home from Hattala with the assistance of his associate Munna, Nur

Islam @ Chinu raped his minor daughter. The information since disclosed offence, cognizable in nature, police registered Salar P.S. Case No. 84 of 2017 on 18th April, 2017 under Section 363/376/34 of the I.P.C. and took up investigation which culminated into submission of charge sheet against the Nur Islam @ Chinu under Section 363/376 of the I.P.C. and under Section 4 of the POCSO Act. On 1st August, 2017 charge was framed under Section 363/366/376(2) of the I.P.C. and under Section 4 of the POCSO Act. Pleading his innocence the accused person stood trial.

3. Learned Trial Court after considering the testimony of the prosecution witnesses found the charges to have been proved beyond reasonable doubt and recorded an order of conviction sentencing the accused to suffer imprisonment for 4 years and to pay fine of Rs. 10,000/- for each of the offences committed under Section 363/366 of the I.P.C. and 7 years of imprisonment for committing offence under Section 4 of the POCSO Act.
4. Mr. Navanil De, learned Counsel representing the appellant submits that learned Trial Judge could not appreciate the evidence in its proper perspective and recorded the order of conviction and imposed sentence upon absolute misreading of evidence. There is no evidence that the victim girl was kidnapped with a view to compel her to marry the accused or any other person. But an order of conviction was recorded for committing offence within the meaning of Section 366 of the I.P.C.

5. The victim girl was allegedly forced to ride a motor cycle but did not make any attempt to draw the attention of anybody even did not try to release herself when on the motor cycle or after alighting from the vehicle. She did not make any attempt to resist the perpetrator. Rather after alleged rape, victim girl took the paper from the boy containing his phone number.
6. The medical officer examined the victim girl on 19th April, 2017 and did not find any mark of injury while incident took place on 18th April, 2017 at 6.00 p.m.
7. Mother of the victim did not support the prosecution case, rather stated that the accused was falsely implicated. According to Mr. De, impugned judgment may not be allowed to remain in force.
8. Mr. Imam, learned Counsel representing the State, on the other hand submits that prosecution case can be said to have been proved by the testimony of victim girl alone without any corroboration from any other witness. The victim girl stood the test of cross examination. She was only 13 years old at the time of incident. It was difficult for her to gather courage to shout, jump from the motor cycle or put any kind of resistance. Immediately after incident she went to nearby outpost of police and reported the matter. The evidence of medical officer P.W. 5 that after examining the victim, the doctor did not find the hymen which is sufficient to indicate that the girl was sexually assaulted.
9. It goes without saying that evidence should always be considered from the point of view of human probability.

10. It is true if the evidence of victim inspires confidence, if a ring of truth is found around the oral testimony of the victim, an order of conviction can be maintained.
11. In this case, the victim girl, 13 years old, on her way back home from Hattala found two boys, unknown to her by name. She was going to take her bi-cycle when the other boy told that her mother was looking for her. She walked down a few steps, when the accused gave a handkerchief to the other boy and the boy tied her mouth with the handkerchief. The accused then lifted her and made her sit on the motor cycle. She was taken to Kakgram field. The accused disrobed her and committed rape upon her. Then again she was taken to Hindu Para by motor cycle and the boy gave a piece of paper to her containing his contact number. She then went to nearby police outpost.
12. The cross examination was not upto the mark. But the narrative of the victim P.W. 2 when considered from the point of view of human probability, it really becomes difficult to rely upon. There is no evidence that victim was stupefied. But she reacted or responded in such a manner in the company of two boys, as if she was either in a trance or hypnotized. She surrendered to the command and wish of the accused person, which makes her testimony not worth credence. She can ride cycle, which can always be a reason for loss or rapture of hymen. Absence of any injury on her genital organ and non-examination of any police personnel from the outpost, is adding further veil of suspicion on the prosecution story so far offence of kidnapping and sexual assault or rape is concerned.

13. To constitute offence under Section 366 of the I.P.C. it is to be proved that a woman was kidnapped or abducted etc. with intent to compel her to marry any person against her will or to compel her to have sexual intercourse with any person. There is no whisper regarding these ingredients.
14. In my view, learned Trial Judge could not appreciate the evidence in proper perspective. Evidence on record is not sufficient to prove the charges under Section 363/366 of the I.P.C. and under Section 4 of the POCSO Act, 2012 beyond reasonable doubt and such failure of prosecution demands benefit of doubt to be extended to the appellant.
15. The impugned judgment should, in my view, not be allowed to remain in force and should be set aside, which I accordingly do.
16. Before saying omega I would like to point out that a minor girl, in this case was not examined as witness, in consonance with the statutory mandate as laid down under Section 33 (2) of the POCSO Act, 2012. Learned Trial Court allowed the Public Prosecutor and learned Defence Counsel to put question to the victim directly which is impermissible. When a statute requires a thing to be done in a particular manner, it must be done in that manner only and not otherwise.
17. Consequently the appeal succeeds. The impugned judgement passed by learned Trial Court is set aside. Accused person is found not guilty to the charges and is released from bail bonds. Application, if any, stands disposed of.

18. Let a copy of this judgement be sent down along with lower Court record to the learned Trial Court for information and necessary action.
19. Parties are to act on the server copy of this judgement.
20. 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.)