

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 366 of 2007
CRAN 1 of 2007 (Old CRAN No. 1415 of 2007)

Rajinder Lohar
-Vs-
The State of West Bengal

For the Appellant : Mr. Partha Pratim Das, Adv.
Ms. Rituparna Ghosh, Adv.

For the State : Ms. Amita Gaur, Adv.
Mr. Pratick Bose, Adv.

Heard on : 19.04.2022

Judgment on : 19.04.2022

Joymalya Bagchi, J. :-

Appellant has assailed judgment and order dated 19.01.2005 passed by the learned Additional Sessions Judge, 1st Fast Track Court, Alipurduar, Jalpaiguri in Sessions Trial Case No. 36 of 2004 arising out of Sessions Case No. 54 of 2000 convicting the appellant for commission of offence punishable under Sections 376(2)(f) of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay fine of Rs. 5,000/-, in default, to suffer imprisonment for one year.

Mr. Partha Pratim Das, learned Advocate appearing for the appellant submits that the appellant was a juvenile at the time of occurrence. During his examination under Section 313 Cr. P. C., he had stated his age in January, 2004 as 23 years. Incident occurred in October, 1996 when he would be around 16 years old.

In view of the aforesaid submission, by an order dated 8th June, 2016, this Court had directed enquiry to be made with regard to the age of the appellant under the provisions of the Juvenile Justice Act. Report of Chief Judicial Magistrate, Jalpaiguri dated 24th September, 2016 stating the date of birth of the appellant as April 7, 1980 as per certificate dated 17th August, 2016 issued by Hasimara Hindi High School (HS) was, however, not accepted by this Court and direction was given upon the Chief Judicial Magistrate, Jalpaiguri to conduct ossification test to determine approximate age of the appellant. Pursuant to such direction, ossification test was conducted and report of Dr. Rajib Prasad, M.D., Associate Professor, Department of Forensic Medicine and Toxicology, NBMCH showing the approximate age of the appellant between 35-40 years as on 02.06.2017 was placed before this Court. In view of the wide gap of five years between the lower and the upper age limit, Chief Judicial Magistrate was again directed to obtain opinion of the medical expert of Medical College, Calcutta with regard to the approximate age. Till date no report from Medical College, Calcutta has been placed before this Court.

In ***Mukarrab And Others Vs. State of Uttar Pradesh***¹ the Apex Court observed determination of age through Radiological examination after the accused is above 30 years cannot be done with precision. In ***Darga Ram Vs. State of Rajasthan***² the Apex Court expressed discomfort in estimating age when a wide range is proposed in the medical report. In the present case, while calculation of age in terms of Rule 12(3) of the Juvenile Justice Rules by taking the lower age limit would take the approximate age of the appellant below 18 years. Similar calculation on the basis of the upper age limit would, however, show that the appellant was above 18 years at the time of occurrence.

In the light of the aforesaid situation, Mr. Das submits that the appeal may be taken up for hearing on merits which we presently do.

Prosecution case as alleged against the appellant is to the effect that on 21.10.1996 P.W.3 along with his wife (P.W.4) and two minor children aged 4 years and 7 years respectively went to his in-laws' house at Beech Tea Garden. Appellant was their neighbour. P.W.3 stayed back at his in-law's house and the appellant accompanied his wife and children to his residence. On the way, appellant took their minor daughter (P.W.5) inside the tea garden and raped her. The victim started shouting "*save me, save me*". Mother of the victim (P.W.4) rushed to the spot and found her daughter in her under garments with

¹ (2017) 2 SCC 210 (para 27 to 29)

² (2015) 2 SCC 775 (para 16)

bleeding injuries. Appellant was also pulling up his trousers. Victim narrated the incident to her mother. Written complaint was lodged by her father (P.W.3) resulting in registration of Jaigaon P.S. Case No. 94 of 1996 under Section 376 IPC. Victim was medically treated at the tea garden hospital and thereafter at Alipurduar Hospital. Charge sheet was filed against the appellant and charge was framed under Section 376(2)(f) IPC. During trial, prosecution examined 12 witnesses including the victim. In conclusion of trial learned trial Judge by the impugned judgment and order dated 19.01.2005 convicted and sentenced the appellant, as aforesaid.

Mr. Das appearing for the appellant argues that the version of the victim suffers from various improbabilities and inconsistencies. Manner and circumstance in which the victim was forcibly raped does not appear to be credible. Hence, the appellant is entitled to the benefit of doubt.

Ms. Amita Gaur, learned Advocate appearing for the State submits that the victim was aged about 7 years at the time of incident. She was being accompanied by her mother (P.W.4) and younger brother when the appellant dragged her inside the tea bushes and raped her. Her version is corroborated by her mother (P.W.4) as well as the Doctors who treated her (P.W.9 and 10). Other prosecution witnesses also support the case. Hence, the appeal is liable to be dismissed.

P.W.5 is the minor victim. She deposed that on the fateful day she was returning home from her maternal grandfather's house along with

her mother and brother. Appellant was also accompanying them. When they reached No. 10 garden, her mother and brother were walking ahead of her. She was following them along with the appellant. Appellant suddenly caught her and dragged her inside the tea garden. Thereafter, he forcibly raped her. She shouted for help and her mother came to the spot. She suffered bleeding injuries in her private parts. She narrated the incident to her mother. She was taken to the hospital in the tea garden and thereafter to Alipurduar S.D. Hospital. She told the facts to local people.

P.W.4 mother of the victim girl, has substantially corroborated her deposition.

P.W.3 is the father of the victim girl. He heard the incident from his wife and lodged First Information Report which was scribed by P.W.1 and Marked Exhibit 1. He stated police seized the wearing apparels of the victim girl.

P.Ws. 7 and 8 are local villagers.

P.W.7 stated he heard the incident from P.W.4 and the victim girl P.W.5. He took the victim to the garden hospital. He saw bleeding injuries in the private parts of the victim.

P.W.8 stated after hearing the incident he tried to catch the appellant but he fled away.

P.Ws. 9 and 10 are medical experts.

P.W.9 (Dr. Kamallesh Adhikary) treated the victim at tea garden hospital at Malangi. He found bleeding injury in her vaginal region.

Such injury may be caused due to various reasons such as forcible penetration of penis. He proved the injury report, Exhibit 4.

P.W.10 (Dr. Rudra Kumar Iswarary) is the doctor who treated the victim at Alipurduar S.D. Hospital. He proved his report Exhibit 2/1 and signature of Dr. B.K. Sikdar, Exhibit 2/2.

From the aforesaid evidence on record, it appears that the version of forcible rape as stated by the minor victim viz. P.W.5 is corroborated by her parents as well as local people. Her evidence also receives corroboration from the medical evidence on record. Hence, conviction of the appellant has been proved beyond doubt.

Although, the victim was a minor and was forcibly raped, appellant was also a young person who was barely above 18 years at the time of occurrence. He does not have criminal antecedents. Keeping in mind the aforesaid facts and as he has already suffered incarceration for about 18 years, I modify the sentence imposed upon the appellant and direct that he shall suffer imprisonment for the period already undergone in place of the maximum sentence of life imprisonment imposed upon him and pay the fine imposed upon him by the trial Court, in default, shall suffer rigorous imprisonment for one year.

With this modification as to sentence, appeal is disposed of.

Connected application being CRAN 1 of 2007 (Old CRAN 1415 of 2007) is also disposed of.

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off from the substantive sentence imposed

upon the appellant in terms of Section 428 of the Code of Criminal Procedure.

Lower court records along with copies of this judgment be sent down at once to the learned trial Court for necessary compliance.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellant upon completion of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

as/akd/cm/PA