

**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. 497 of 2019

Mithu Sk. @ Md. Asraful Islam

-Vs-

The State of West Bengal & Anr.

For the Appellant : Mr. Sabir Ahmed, Advocate
Mr. Mujibar Ali Naskar, Advocate,
Mr. Hillol Saha Poddar, Advocate.
Mr. Apan Saha, Advocate,
Mr. Shraman Sarkar, Advocate,
Mr. Tasmin Ahmed, Advocate.

For the State : Ms. Faria Hossain, Advocate,
Mr. Anand Keshari, Advocate.

Heard on : 25th March, 2022.

Judgment on : 25th March, 2022.

Joymalya Bagchi, J. :-

Appeal is directed against the judgment and order dated 24.07.2019 and 25.07.2019 passed by learned Additional Sessions Judge, 1st Court, Murshidabad at Berhampur in Sessions Trial No.15 (3) of 2018 arising out of Sessions Case No.549 of 2017 convicting the appellant for commission of offence punishable under Section 365 of the Indian Penal Code and Section 14 of the Foreigners Act and sentencing him to suffer

simple imprisonment for a period of five years and to pay a fine of Rs.1,000/-, in default to suffer simple imprisonment for two months for the offence punishable under Section 365 of the Indian Penal Code and to suffer simple imprisonment for a period of five years and to pay a fine of Rs.2,000/- in default to suffer simple imprisonment for a period of three months for the offence punishable under Section 14 of the Foreigners Act. Both the sentences to run consecutively.

Prosecution case levelled against the appellant is to the effect that the appellant had seduced the victim lady viz., Arsina Khatun from her residence and taken her to Jalangi and upon administration of deleterious substance had committed rape on her on 08.10.2016. He had also snatched away bangles weighing more than five tollas and Rs.50,000/- from her. It was also alleged that the appellant had tried to traffic the victim beyond the borders of the country.

On the aforesaid complaint of the victim, P.W.1, first information report being Domkal P. S. Case No.1249 of 2016 dated 17.10.2016 under Sections 365/376/379 of the Indian Penal Code and Section 14 of the Foreigners Act were registered against the appellant.

In the course of investigation, appellant was arrested and charge sheet was filed against him. Charges were framed under Sections 365/376/379 of the Indian Penal Code and under Section 14 of the Foreigners Act. In the course of trial, prosecution examined six witnesses. Defence of the appellant was of innocence and false implication. He claimed he was an Indian citizen. In support of his plea, he examined one

Doli Begum, a teacher of Sarangpur Junior Basic School as D.W.1 to show that he had studied in the said school.

In conclusion of trial, learned trial Judge by judgment and order dated 24.7.2019 and 25.7.2019 convicted and sentenced the appellant, as aforesaid. The appellant, however, was acquitted of the charges levelled against him under Sections 376/379 of the Indian Penal Code.

This Court has heard Mr. Sabir Ahamed, learned Counsel for the appellant and Mr. Anand Keshri, learned Counsel for the State.

P.W.1, Arsina Khatun is the victim lady. She deposed there was a love affair between herself and the appellant. She eloped and married the appellant under Muslim Shariat law. When the appellant requested to accompany her to Bangladesh, she refused and returned to her parental home. Her father was not agreeable to the marriage as the appellant was a Bangladeshi citizen. She proved her signature on the written complaint but the scribe of the complaint, Ibrahim was not examined and the contents were not proved. Her statement before Magistrate, however, was proved as Exhibit 2/1.

P.W.2, Khalil Mondal is the father of the victim. While P.Ws.3, Sheli Hasan and 4, Swapan Mondal are the cousin and uncle of the victim respectively. P.W. 5 is her neighbour. P.W.2 corroborated his daughter and stated that she had married the appellant out of love and they were staying in the house of the grandfather of the appellant at Jalangi. P.Ws.3, 4 and 5 have also stated that there was a love affair between the appellant and the victim.

From the evidence on record it appears that the victim girl had a love affair with the appellant. She eloped and married the appellant according to Muslim Shariat law. They resided as husband and wife in the house of the grandfather of the appellant at Jalangi. Under such circumstances, I am of the view ingredients of the offence punishable under Section 365 of the Indian Penal Code has not been proved. Appellant is entitled to an order of acquittal on such score.

However, with regard to the offence under Section 14 of the Foreigners Act, trial court has referred to Section 9 of the said Act which, inter alia, shifts the burden on the accused to show that he is not a foreigner in any proceeding where such issue arises with reference to the Act. To discharge the burden, appellant had examined D.W.1, a teacher of Sarangpur Junior Basic School who proved the admission register of the school maintained for the year 1994 wherein name of the appellant appears against Sl. No.3 dated 19.05.1994 (Marked as Exhibit B) as well as a certificate issued on 09.12.2016 (Marked as Exhibit A) stating that he was a student of Class IV in the said school and his date of birth is 28.02.1988 as per the admission register. None of the aforesaid documents, however, show that the appellant was born either in India or from persons who were Indians. In the course of arguments, appellant produced a birth certificate in his name issued on 20.02.2004 reflecting his date of birth as on 28.02.1989, Voter's identity card and Aadhaar card of his mother Arjia Bibi and a sale deed in the name of Josimuddin and Arjia Bibi dated 12.01.1994 in proof of his citizenship.

Upon hearing the parties, trial court by order dated 12.7.2019 rejected the prayer of the appellant to exhibit the voter's identity card and Aadhaar card of his mother, Arjia Bibi on the ground that the said documents had not been produced from proper custody and neither Arijia Bibi nor her husband Josimuddin had come to the witness box to depose and prove their nationality. However, the court marked the birth certificate issued in favour of the appellant as Exhibit C.

In the impugned judgment, trial Court, however, expressed doubt with regard to the genuineness of the birth certificate, Exhibit C as date of birth recorded therein 28.02.1989 whereas date of birth of the appellant in the admission register of the school maintained in the year 1994 is shown as 28.2.1988.

In view of the aforesaid discrepancies, trial court was of the view the birth certificate does not appear to be a genuine one and held the appellant has failed to discharge his onus under Section 9 of the Foreigners Act and held that the appellant was a foreign national.

During the course of hearing, this Court proposed to remand the case for leading fresh evidence with regard to the nationality of the appellant including examination of his parents viz., Josimuddin and Arjia Bibi. Upon instruction, learned Advocate for the appellant submits that his client is unwilling to lead evidence. Thus, this Court has proceeded to adjudicate on the basis of the materials on record. On Examination of Exhibits A and B viz., certificate issued on behalf of the school and the admission register maintained in the school for the year 1994, it does not

appear that the appellant was born either in India or from parents who are Indians. Admission register merely records that he is the son of one Josimuddin and had studied in Class IV of the said school. Neither Josimuddin nor Arjia Bibi was examined in the course of trial and even at the appellate stage when offer was given to remand the case for their examination on oath, appellant declined such offer.

With regard to the birth certificate, Exhibit C, trial court rightly noted the birth certificate which was belatedly issued in 2004 records his date of birth as 28.02.1989 which does not match with the date of birth of the appellant as recorded in the admission register of the school Exhibit C maintained for the year 1994.

In view of the aforesaid discrepancies as to the date of birth recorded in the birth certificate, trial court was unwilling to rely on the entries in the said certificate. Appellant did not adduce the best evidence with regard to his nationality by examining his parents. Even the entries in the birth certificate (Exhibit C) produced by him during trial is erroneous and inconsistent with other materials on record. Hence, I am of the view appellant has not been able to discharge his onus under Section 9 of the Foreigners Act and show that he is an Indian national.

In the light of the aforesaid discussion, conviction and sentence of the appellant under Section 365 of the Indian Penal Code is set aside but his conviction and sentence under Section 14 of the Foreigners Act is upheld.

Accordingly, the appeal is partly allowed.

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of 428 of the Code of Criminal Procedure.

Appellant has already served out the sentence imposed upon him for the offence under section 14 of the Foreigners Act. Under such circumstances, this Court directs the District Magistrate as well the authorities concerned to take appropriate steps for his immediate repatriation to Bangladesh in accordance with law.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

Copy of this judgment be also sent to the District Magistrate, Murshidabad for necessary action.

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.)