

IN THE HIGH COURT AT CALCUTTA**Criminal Appellate Jurisdiction****Present: - Hon'ble Mr. Justice Subhendu Samanta.****C.R.A. No. – 55 of 1996****IN THE MATTER OF****Arshad @ Ashad Ali Sheikh****Vs.****State of West Bengal.****For the Appellant : Mr. Prabir Mazumder, Adv.,
Mr. Snehansu Majumder, Adv.****For the State : Mr. Narayan Prasad Agarwala, Adv.,
Mr. Pratick Bose, Adv.****Judgment on : 05.10.2023****Subhendu Samanta, J.**

The instant appeal has been preferred against the order of conviction and sentence dated 07.02.1996 passed by the Learned Additional Sessions Judge 2nd Court Nadia in Sessions Trial No. 2nd November 1995 (Sessions Case No. 21st of March 1995) against the present appellants u/s 376 of IPC and sentencing of rigorous imprisonment for two years and to pay a fine of Rs. 1,000/-in default of suffer further rigorous imprisonment for 06 months.

Charges have been framed against the present appellant before the Learned Trial Court u/s 417 and 376 of IPC.

The brief facts of the prosecution case need to be discussed here for the purpose of effective disposal of the appeal. On 05.03.1994 the victim lodged one written FIR before the Officer-In- Charge Nakasipara Police station mentioning inter alia that about 08 months ago she was raped by the accused during night at about 11: 00 p.m. by inducing her with a false compromise to marry her. Out of her shyness she could disclose it to anybody. Thereafter the accused similarly had sexual intercourse with her on 06 occasions and as a result she became pregnant. Thereafter she informed the matter to her parents. A shalish was held at the village wherein the accused admitted his guilt.

During trial the prosecution has examined 14 witnesses PW 1 is the victim herself, PW 2 her father, PW 3 her mother, PW 4, PW 5, PW 6, PW 7 are the witnesses to the Salish held at the village, PW 8 is the Head Master where the victim was a student PW 9 was the scribed of FIR, PW 10 and PW 11 are the formal police witnesses, PW 12 is the IO, PW 13 is a Doctor who examined the victim and PW 14 is the Head Master of a primary school, where the PW 1 was admitted and proved her

DOB (as short Date of Birth) through the admission register of school.

After taking evidences on record the appellant was examined by the Learned Trial Judge, u/s 313 Cr.P.C. After recording his statement and after hearing arguments of both sides the learned Additional Sessions Judge, has passed the impugned Judgment and sentence against the present appellant.

Hence this appeal.

Learned Advocate for the appellant submits that the impugned Judgment passed by the Learned Sessions Judge is erroneous and the order of conviction is baseless and need be set aside. He further argued that the Learned Sessions Judge has failed to appreciate the facts and circumstances of this case and consequently the scanning of evidences on record are faulty thus the order of sentence against the present appellant need be set aside.

A specific argument is made on behalf of the appellant at the stage that the present appellant was minor at the time of alleged incident. The appellant being the minor need be tried according to the Juvenile Justice Act but the trial conducted by the Learned Sessions Judge is faulty one. He placed his argument on that score by sighting the statement of the

accused/appellant recorded u/s 313 Cr.P.C. by the Learned Trial Judge. In the said form the age of the appellant was mentioned as 18 years. The examination of the accused u/s 313 IPC was held on 12.01.1996. The alleged incident happened in the year 1993 thus at the time of alleged incident the appellant was aged about 15 years that he was a Juvenile at the time of incident. It is the specific argument of the Learned Advocate for the appellant that the claim of Juvenility was not raised by the accused before the Trial court but they have made the claim in the memo of the appeal.

Now considering the entire facts and circumstances of the appeal in my considered view there are two relevant points to dispose of the instant appeal.

1. Whether the impugned judgment of sentence and conviction passed by the Learned Sessions Judge is justifiable considering the evidences on record.

2. Whether the appellant is entitled to get the benefit of doubt regarding his alleged age mentioned in the statement recorded u/s 313 Cr.P.C to be 18 years.

Point No. 1 – it has been argued by the Learned Advocate for the appellant that de-facto complainant in FIR stated that she was 15 years of age. Being the minor girl she signed the said document and on the basis of the same the present case was

initiated. The statement of the minor is itself bad in law and the instant criminal appeal on the basis of which is also bad in law.

The de-facto complainant claimed that she was a minor at the time of occurrence of the incident but no conclusive evidence to that effect is forthcoming from the side of the prosecution except the school admission register which was produced by PW 14. The DOB was appearing on 05.02.1982. PW 14 stated before the trial judge that the DOB of the victim girl was declared by one of the guardian but name of such guardian was not mentioned of the document. Moreover, no signature of the guardian was available in the respective column of the said register. It has appeared before the trial judge, that the electoral role prepared in the name of the victim thus the victim was major person and she was consenting party to the alleged Act of sexual inter course. On that score, it is argued that the Learned Trial Judge has failed to consider the fact beyond reasonable doubt against the present appellant and there is a miscarriage of justice. He further argued that the fact goes to show that appellant married the victim girl so the victim girl being the married wife of the appellant cannot file the complaint u/s 376 of IPC. Another criminal case lodged by the de-facto complainant u/s 498A against the present

appellant which was ended in acquittal and no appeal has been preferred against the said order of acquittal. The de-facto complainant did not disclose about the alleged act of rape in the said proceeding thus it is a clear case that the prosecution has failed to bring home the charge against the present appellant beyond of reasonable doubts; and he prayed for setting aside the impugned judgment.

Learned Advocate for the state argued before the court that the impugned judgment passed by the Learned Trial Judge suffers no illegality. Each and every prosecution witnesses has supported the prosecution case. The victim herself deposed as PW 1. The other co-related witnesses also supports the victims version; during the examination the credibility of the witnesses were not shaken. The evidences on record have justifiably proved that the appellant has committed the alleged offences of rape upon a victim girl. On that score the observation of the Learned Trial Judge is not improper and the conviction is maintainable.

Heard the Learned Advocates.

In considering the materials on record it appears to me that the de-facto complainant had sufficient knowledge and understanding to the facts and circumstances of this case and

there is no legal bar to file a complaint before the police on the basis of the version of a minor.

To prove the age of the victim girl the document exhibited before the Learned Trial Judge and were mark as Exhibit 2, 3 and 6. These are the school records sufficiently proved by the respective head masters of the school. The electoral role was also exhibited before the Learned Trial Judge as Exhibit- A. The Learned Trial judge has considered the age of the victim girl on the basis of the school records. The findings of the Learned Trial Judge is specific and clear also speaking to that respect. I find no justification to interfere with the finding of the Learned Trial Judge regarding the age of the victim at the time of the alleged incident. The age of the victim appearing in the electoral role is not justified. The school records are the sufficient proof of the age of the victim. Thus there is no iota of doubt to the effect that the victim was aged about 12 to 13 years at the time of alleged incident of rape. In considering the case of the prosecution it appears to me the evidence of victim has sufficiently proved the alleged incident. Other circumstantial evidences i.e. the relatives of the victim and the lecal witnesses also support the prosecution case. The investigation of the police cannot be said to be perfunctory. Discrepancy appearing in the prosecution case appears to be minor discrepancies thus

I am of a view that prosecution has sufficiently proved the charge u/s 376 IPC against the present appellant. The order of conviction and sentence passed by the Learned Trial Judge against the appellant appears to be justified thus the point No. 1 decided against the appellant.

Point NO.- 2 It has been argued by the appellant that at the time of alleged incident the appellant aged about 15 years the said argument has its support in the form of recording of the statement of the accused person u/s 313 Cr.P.C. wherein his age was mentioned 18 years.

Learned Advocate for the appellant submits that the claim of juvenility has been specifically raised at the time of appeal. The same situation has been raised before the Hon'ble Supreme Court as well as the Hon'ble High Court in several times. The Apex Court has decided the issue that the appellant cannot be convicted by a sessions judge in a sessions trial as he was a minor at the time of alleged incident. In support of his contention he has cited some decisions reported in

(1) Najima Bibi Vs. State of West Bengal, (2004) SCC Online CAL 255

Gopinath Ghosh Vs State of West Bengal, (1984 SUPP) SCC 228

Pradip Kumar Vs. State of Uttar Pradesh, (1995) (4) SCC 419

Bhola Bhagat Vs. State of Bihar (1997) 8 SCC 720

Joy mala Vs. Home Secretary Government of Jammu & Kashmir and Ors. (1982) 2 SCC 538.

Learned Advocate for the appellant further argued that where two views of a story appears to be probable the one that was contended by the accused should be accepted. The above observation was passed by the Hon'ble Supreme Court in **Bikramjit Singh Alias Biki Vs. State of Punjab (2006) 12 SCC 306.**

On the other hand Learned Advocate for the State submits that the statement of the accused recorded u/s 313 Cr.P.C is not a substantive piece of evidence the entire trial cannot be vitiated by mentioning the age of the accused to be 18 years at the said form. The appellant has purposively not argued the matter before the Learned Trial Judge but as raised at this appellate stage. It is not permissible in the eye of law. He further argued that the appellant was never a minor at the time of alleged incident, only his statement recorded u/s 313 Cr.P.C cannot exonerate him from the criminal charge.

Heard the Learned Advocates.

Perused the observation of the Hon'ble Supreme Court and the Apex Court. The same issues were raised before the Hon'ble Supreme Court and High Court at the time of hearing of the appeal. The Hon'ble Supreme Court has directed the concern sessions judge to conduct an investigation from the radiologists to ascertain the age of the accused/appellants. On the basis of such report the order was passed by the Hon'ble Apex Court.

The same procedure was adopted by this court and a specific order was passed directing the sessions Judge of the concerned district to direct concerned CMOH to form a medical board to ascertain the age of appellant. The same was done accordingly. The report was received from the court. From the report it appears that the age of the appellant could not be ascertained. Thus the report appears to me in conclusive. I have perused the statement recorded by the Learned Additional Sessions Judge. At the time of recording the statement of the appellant u/s 313 Cr.P.C, at the top of the form, the age of the appellant was written as 18 years. It is quite impossible to hold that whether any specific question regarding the age of the appellant was asked or not. All the statements recorded u/s 313 Cr.P.C was made under question and answer form. Thus, it appears to me that the Learned Additional Sessions Judge

was very unmindful at the time of writings the age of the appellant. When the appellant stated his age to be 18 years, the same must be investigated by the Learned Sessions Judge before hearing the argument from respective parties. Obviously the matter regarding confirmation of the age of the appellant at the time of alleged incident after more than 25 years is a futile exercise and the report is obviously inconclusive. Thus it appears to me that the benefit of doubt always stands in favour of the accused/appellant.

Thus the point No. 2 answered in favour of the appellant.

Considering the same I think it necessary to dispose of the appeal by holding that, though the impugned Judgment and sentence passed by the Learned Sessions judge suffers no illegality but the appellant has a reasonable doubt on fact that he was minor at the time of alleged incident.

On that score the order of conviction passed by the Learned Additional Sessions Judge is sustained and the sentences of imprisonment passed upon the appellant is hereby reduced to imprisonment for the period already undergone by him during investigation, enquiry and trial the appellant is directed to pay a fine of Rs. 10,000/- in default to suffer simple imprisonment of 06 months.

The appellant is directed to appear before the Learned Trial Court and pay a fine as aforesaid within 20th of November 2023.

The Criminal Appeal is disposed of.

Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)