

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

***C.R.A. 162 of 2016
(CRAN 2 of 2023)***

***Nargis Bibi
-Vs-
The State of West Bengal***

W I T H

C.R.A. 149 of 2016

***Abdul Sk. & Ors.
-Vs-
The State of West Bengal***

For the Appellant : Ms. Sima Ghosh, Adv.
[In CRA 162/2016] Ms. Sabina Khatun, Adv.

For the Appellants : Mr. Dipayan Kundu, Adv.
[In CRA 149/2016]

For the State : Mr. Nuguive Ahmed, Id. A.P.P.
Mrs. Manasi Roy, Adv.

Heard on : 11.09.2023 & 13.09.2023

Judgment on : 13.09.2023

Joymalya Bagchi, J.:-

1. Appeals are directed against judgment and order dated 06.01.2016 and 07.01.2016 passed by learned Judge, Special Court-cum-Additional Sessions Judge, 2nd Court, Suri, Birbhum in Sessions Case No. 41 of 2015 arising out of Sessions Trial No. 2(8) of 2015 convicting Saidul Sk. for commission of offence punishable under Section 5(l) of the POCSO Act and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs.5000/-, in default, to suffer rigorous imprisonment for one year more and convicting Nargis Bibi (appellant in CRA 162 of 2016) and Abdul Sk., Basir Khan & Nasir Khan (appellants in CRA 149 of 2016) for commission of offence punishable under Section 16 of the POCSO Act and sentencing them to suffer rigorous imprisonment for ten years each and to pay a fine of Rs.5000/- each, in default, to suffer rigorous imprisonment for six months more.

Genesis of the prosecution case:-

2. Prosecution case as alleged against the appellants and one Saidul Sk. is as follows :-

On 16.09.2014 at 12 noon the victim aged about 17 years went out to purchase grocery items from the shop of Sukhen at village Bhadrapur under Nalhati P.S. Appellants apprehended her, gagged her mouth and took her away in a Maruti van. When the victim regained her senses, she came to learn she was at Beljhuri. Saidul Sk. raped her against her will at the instigation of the appellants. They also negotiated

with an unknown person to sell her to a brothel. The victim somehow made a phone call to her parents from the mobile phone of Saidul Sk.

3. Father of the victim (PW 4) lodged missing diary. 6-7 days later the appellants along with Saidul Sk. took her to Rampurhat railway station. Victim overheard their plan to kill her. She somehow escaped and reached Nalhati Police Station.

4. She lodged written complaint which was scribed by PW 9. On her written complaint, Nalhati Police Station Case No.240 of 2014 dated 29.09.2014 under Sections 363/365/366A/120B/376(2)(i) IPC and Section 4 of the POCSO Act was registered against Saidul Sk. and the appellants.

5. In course of investigation, Saidul was arrested. Charge sheet was filed and charges were framed under Section 376(2)(i) IPC and Section 6 of the POCSO Act against Saidul Sk. and under Sections 363/366/120B IPC and Section 7 of the POCSO Act against the appellants. Accused persons pleaded not guilty and claimed to be tried.

6. In course of trial, prosecution examined ten witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication. It was their specific defence that the victim girl had fallen in love with Saidul Sk. and eloped. They got married. Appellants are the relations of said Saidul Sk. Father of the victim lodged a false case to implicate Saidul Sk. and the appellants. It was also contended that the victim was major at the time of occurrence.

To probabalise their defence the accused exhibited the Voter's Identity Card of the victim (Ext. B) and a letter written by her (Ext. A).

7. Upon analysis of the evidence on record, learned trial Judge by the impugned judgment and order dated 06.01.2016 and 07.01.2016 convicted and sentenced the appellants, as aforesaid. Saidul Sk. was also convicted under Section 5(l) of the POCSO Act and sentenced to life imprisonment.

8. Saidul Sk. has not appealed against his conviction and sentence but the appellants have assailed their conviction and sentence.

Arguments at the Bar:-

9. Learned Advocates for the appellants submit no charge under Section 16 of the POCSO Act has been framed but their clients were convicted on such score. Hence, there was a mistrial and conviction under Section 16 of the POCSO Act is illegal. They also submitted the victim (PW 3) is not a reliable witness. Her deposition with regard to kidnapping is inconsistent. While in the FIR she claimed all the accused persons had kidnapped and dragged her into a Maruti van, before Magistrate she claimed two male persons had dragged her into the van. In Court, she implicated the female accused viz. Nargis Bibi in the act of dragging her into the van. Role of the appellants in the alleged kidnapping is therefore, not proved beyond doubt. Appellants are the relations of Saidul Sk. Saidul Sk. and the minor had fallen in love and eloped. Hence, there is no question of instigating Saidul Sk. to commit rape.

10. Defence version with regard to love affair between Saidul Sk. and the victim is probalised through the evidence of the Investigating Officer (PW 6). He stated prosecution witnesses viz. PWs.7, 8 & 10 told him that the victim and Saidul Sk. had eloped. Victim wrote a letter (Ext A) admitting she had eloped owing to ill treatment by her parents. It is also contended Voter's Identity card (Ext B) shows the victim was born on 11.09.1995 and was above 18 years at the time of occurrence. Hence, the appellants may be acquitted.

11. On the other hand, Mr. Neguive Ahmed, learned Additional Public Prosecutor submits the victim was a minor. Admit Card issued by the West Bengal Board of Secondary Education on 19.09.2013 shows her date of birth as 11.09.1997. Appellants were fully aware of the prosecution case and cross-examined all the witnesses effectively. All incriminating circumstances were put to them during their examination under Section 313 of the Code of Criminal Procedure. Hence, failure to frame charge under Section 16 of the POCSO Act did not prejudice them or occasion failure of justice. Evidence on record shows appellants actively participated in the kidnapping and instigated Saidul Sk. to commit rape. Version of the minor victim is credible and corroborated by other evidence including medical evidence. Appeals are liable to be dismissed.

Evidence on record:-

12. PW 3 is the minor victim. She stated on 16.09.2014 at 12 noon she went to the shop of Sukhen to purchase grocery items. Near the

house of Monir Sk., Nargis Bibi gagged her mouth and took her into a Maruti van. She became unconscious. When she gained consciousness, she found herself at Beljhuri, Muradabad. Saidul Sk. raped her at the instigation and in presence of the appellants. Thereafter, a brothel owner was called to sell her. Somehow she called her parents from the mobile phone of Saidul Sk. The matter was reported to the Officer-in-charge, Nalhati Police Station. Mother and sister of Saidul Sk. were detained. 6-7 days later accused persons took her to Rampurhat railway station. She overheard them discussing that they would kill her. Hearing this she boarded the train and got down at Nalhati railway station. She went to Nalhati Police Station. She lodged complaint. Complaint was scribed by the law clerk (PW 9). She proved the complaint (Ext.5). She stated at Beljhuri appellants had forced her to write a letter against her parents. She was examined at Rampurhat S.D. Hospital. She made statement before Magistrate. During cross-examination, she identified the letter written by her (Ext. A) as a document which she was forced to write. She also identified her Voter's Identity Card as Exhibit B.

13. PW 4 and PW 5 are the parents of the minor girl. They corroborated her version.

14. PW 4, her father stated on 16.09.2014 at 12 noon his daughter had gone out to purchase grocery items from the shop of Sukhen. When he returned home around 2-2:30 P.M. he heard from his wife that her daughter had not returned. They searched at various places but could not find the girl. Two days later he lodged missing diary. He received a

phone call from his daughter stating that she was confined in a room at Beljhuri. Thereafter, he informed the police station. Police arrested the mother and sister of Saidul Sk. Accused took his daughter to Rampurhat railway station wherefrom she escaped and came to Nalhati Police Station and lodged complaint.

15. PW 5 has corroborated her husband. Their depositions remained unshaken during cross-examination.

16. PW 11 is the cousin of the victim. She stated victim was missing from 16.09.2014. 2-3 days later victim made a phone call from Muradabad. 6-7 days later she was recovered.

17. PW 2 (Dr. Ajay Kumar Mondal) is the medical officer attached to Rampurhat S.D. Hospital. He examined the victim. He prepared the medical report. He opined the hymen of the victim was ruptured and there were old scratch marks on her forearm.

18. PW 6 (Sunil Baran Nayek) is the Investigating Officer. He proved the formal First Information Report. He deposed he went to the place of occurrence and prepared rough sketch map with index. He recorded statements of witnesses. He sent the victim for medical examination. He collected statement of the victim recorded before Magistrate. He also collected registration certificate of the victim for matriculation examination (Ext.7). He arrested Saidul Sk. and submitted charge sheet. During cross-examination, he stated Serina Bibi (PW 7), Banera Bibi (PW 8) and Tota Bibi (PW 10) had made statements to him that the

parents of the victim were forcing her to marry another person. Victim had left with Saidul Sk. to Beljhuri, Muradabad.

Age of the victim:-

19. It has been argued victim was major at the time of occurrence. Reliance has been placed on her Voter's Identity Card (Ext. B). Therein her date of birth is stated as 11.09.1995. Incident occurred on 18.09.2014. Hence, the victim was above 18 years old at the time of occurrence. It is true victim admitted the Voter's Identity Card. But the registration certificate for matriculation examination issued by the West Bengal Board of Secondary Education on 19.09.2013 shows her date of birth as 11.09.1997. As per the said document age of the victim was below 18 years on 18.09.2014 when she was kidnapped and raped. Admit Card issued by the West Bengal Board of Secondary Education is a prior document and I am inclined to rely on the said document in preference to the subsequent Voter's Identity Card.

20. That apart, as per Rule 12(3) of the Juvenile Justice (Care & Protection of Children) Rules, 2007 (Section 94 of the 2015 Act), date of birth reflected in the matriculation certificate would prevail over other evidence.

21. Rule 12(3) of the Juvenile Justice (Care & Protection of Children) Rules, 2007 reads as follows:-

“12.(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

22. The preferential order of the prescribed documents in the aforesaid provision shows a matriculation or equivalent certificate of the juvenile has to be given precedence for determination of the age than other documents including ossification report. An admit card issued by the Board to a candidate for matriculation examination may be treated as synonymous to ‘matriculation certificate’ under Rule 12(3)(a)(i) of the Juvenile Justice (Care & Protection of Children) Rules, 2007. The Voter’s Identity Card has not been cited as a relevant document. In **Jarnail Singh vs. State of Haryana**¹ the Apex Court held determination of the age of a minor victim shall be done in terms of Rule 12(3) of the Juvenile Justice (Care & Protection of Children) Rules, 2007.

¹ (2013) 7 SCC 263

23. That apart, the Voter's Identity Card in the present case was issued after the admit card by the West Bengal Board of Secondary Education. Hence, I am of the view the former document ought not to be given precedence in determination of age of the minor.

24. Accordingly, I am of the opinion the prosecution has been able to prove that the victim was below 18 years at the time of occurrence.

Role of the appellants in the crime:-

25. PW 3 stated appellant viz. Nargis Bibi kidnapped her and pushed her into the Maruti van. Her deposition in court is at variance to her statement before police or Magistrate. Before Magistrate the victim stated two male persons had pushed her into the van. Though it is unclear whether Nargis Bibi had pushed her into the van, a wholesome reading of her evidence in court shows presence of all the appellants at the time when she was kidnapped. Evidence on record also shows that the appellants instigated Saidul Sk. to commit rape. It would be argued Saidul Sk. had a love affair with the victim and she had voluntarily eloped. Defence has relied on a letter (Ext. B) written by the victim but the victim has resiled from the said letter in court. She explained she was compelled by the accused to write a letter against her father.

26. Defence also relies on the cross-examination of PW 6 to support its plea. In cross-examination, the Investigating Officer (PW 6) stated Serina Bibi, Banera Bibi and Tota Bibi had stated victim left with Saidul Sk. as her parents were planning to marry her off to another person. Serina Bibi, Banera Bibi and Tota Bibi had been examined in Court as

PWs 7, 8 and 10. No question was put to the said witnesses to corroborate the Investigating Officer that they had made such statements during investigation.

27. It is trite law, statement before the Investigating Officer is inadmissible as per Section 162 of the Code of Criminal Procedure. It may be used only to corroborate or contradict the maker. It was incumbent on the defence to put questions to the maker of the said statements i.e. Serina Bibi, Banera Bibi and Tota Bibi and corroborate the said statements on oath. Defence was not confident and chose not to do so. This shows the hollowness of the defence version with regard to the plea that there was a romantic liaison between Saidul Sk. and the victim and the latter had voluntarily eloped.

28. On the contrary PW 3 has emphatically stated she was kidnapped and forcibly raped. Appellants instigated Saidul to commit rape. She also narrated the manner in which the appellants and Saidul had tried to sell her to a brothel owner. Realising she had informed her parents and police had been activated, they took her to Rampurhat railway station and were planning to murder her. These evidence remain unchallenged and establish the prosecution case beyond doubt. Involvement of the appellants in instigating Saidul Sk. to commit rape is fully established.

Non-framing of charge – whether fatal:-

29. It is argued the charge of abetment to rape had not been framed. Hence, conviction on such count was illegal. Prosecution led evidence

with regard to the role of the appellants in the offence. PW 3 stated the appellants had instigated Saidul Sk. to commit rape. They also assisted Saidul Sk. in the kidnapping. Appellants were fully aware of the aforesaid evidence and had ample opportunity to cross-examine the witnesses on this score. All these incriminating circumstances had been put to the appellants during their examination under Section 313 of the Code of Criminal Procedure.

30. In **Willie (William) Slaney vs. The State of M.P.**² the Apex Court referring to sections 535 and 537 Cr.P.C., 1898 (sections 464 and 465 Cr.P.C., 1973) held any defect including omission to frame charge would not be fatal unless if it is demonstrated such failure had prejudiced the accused in preparing his defence and had occasioned failure of justice. It observed these:-

“38. ...cover every possible case that relates to the charge and they place all failures to observe the rules about the charge in the category of curable irregularities. Chapter XIX deals comprehensively with charges and Sections 535 and 537 cover every case in which there is a departure from the rules set out in that Chapter. Such departures range from errors, omissions and irregularities in charges that are framed, down to charges that might have been framed and were not and include a total omission to frame a charge at all at any stage of the trial. In all these cases, the only question is about prejudice. We say this because the Code repeatedly says so in express and emphatic terms and because that is the foundation on which rules of procedure are based. We say it because that accords with logic and principle and reason and because it touches the deep verities on which the structure of justice is erected and maintained.”

(Emphasis supplied)

31. In view of the overwhelming evidence led by the prosecution unequivocally disclosing the role of the appellants in instigating Saidul

² AIR 1956 SC 116

to rape the victim and the extensive cross-examination of the witnesses on such score, it cannot be said omission to frame charge under Section 16 of the POCSO Act had prejudiced the appellants or occasioned failure of justice.

Abetment of graver offence – if proved:-

32. However, I am in agreement with the appellants that the offence of aggravated sexual assault under Section 5(l) of the POCSO Act has not been established. Though PW 3 in her statement before police and Magistrate stated she was raped repeatedly, in her deposition she merely stated she had been raped by Saidul Sk. There is nothing in her deposition that discloses Saidul Sk. had committed rape upon her more than once. Hence, I am of the opinion though penetrative sexual assault upon the victim by Saidul Sk. has been proved, the ingredients of aggravated sexual assault as defined under Section 5(l) have not been established.

Conclusion:-

33. Under such circumstances, I am of the view conviction of the appellants under Section 16 of the POCSO Act for abetment of penetrative sexual assault by Saidul Sk. punishable under Section 4 of the Act may be upheld. As the offence abetted by the appellants is one of penetrative sexual assault punishable under Section 4 and not aggravated sexual assault punishable under Section 6 of the Act, concession may be given to them on the score of sentence.

34. Section 17 of the POCSO Act states an accused found guilty under Section 16 of the Act (abetment of the offence) shall be punished with the same punishment prescribed for the principal offence.

35. As discussed above, the appellants cannot be held guilty to have abetted the offence punishable under Section 6 of the POCSO Act but they are guilty of abetting the offence under Section 4 of the said Act. Minimum sentence prescribed under Section 4 of the Act at the time of commission of offence in 2014 is seven years of rigorous imprisonment. Appellants have already undergone imprisonment for more than seven years. They do not have criminal antecedents.

36. Accordingly, I modify the sentence imposed upon the appellants and direct that they shall suffer imprisonment for the period already undergone and pay a fine of Rs.5000/- each, in default, to suffer simple imprisonment for six months more.

37. With the aforesaid modification, appeals are, accordingly, disposed of.

38. In view of disposal of the appeals, connected application being CRAN 2 of 2023 is also disposed of.

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

40. Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

41. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)

akd/sdas/PA