

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 554 of 2004

Ramesh Bhunia @ Bhuiya

-Vs-

State of West Bengal

Amicus Curiae	: Mr. Amartya Ghosh
For the State	: Ms. Faria Hossain
Heard on	: 08.06.2023, 14.06.2023
Judgment on	: 05.10.2023

Ananya Bandyopadhyay, J. :-

1. This appeal is preferred against the judgment and order of conviction under Section 366 of the Indian Penal Code sentenced to 5 years of rigorous imprisonment and fine of Rs. 1,000/- in default 30 days simple imprisonment and conviction under Section 376 of Indian Penal Code for 7 years rigorous imprisonment and fine of Rs. 1,000/- in default 30 days simple imprisonment. By the judgment and order dated the 4th day of August, 2004 passed by Learned Additional Sessions Judge, Second Court at Asansol, in Sessions Case No. 5 of 2003 (ST 22/04), both sentences to run concurrently.
2. The prosecution case in brief is to the effect that on 27.12.1998 at about 7.30 p.m. Remu Kumari (P.W.3) aged about 13 years the daughter of the de-facto complainant Bhagwan Chowdhury of

Damodar Colliery was missing. At that time she was wearing a white salwar suit and Brown Chador on her person and that Ramesh Bhunia son of Late Dhaturi Bhunda of the same locality kidnapped Renu, and that Raju Bhunia, Mahendra Bhunia and Ajoy Paswar helped in the said act of kidnapping. Bhagwan Choudhury, the father of the missing girl narrated the whole story to the police.

3. After completion of investigation charge sheet was submitted under sections 363/366/120 read with section 376 of the Indian Penal Code.
4. The Learned Sub-Divisional Judicial Magistrate, Asansol, upon receipt of such charge sheet was pleased to take cognizance of the offences and after compliance of necessary formalities committed the case to the court of sessions wherefrom the same was transferred to the file of the Learned Judge for trial.
5. The Learned Judge framed charges against the appellant under section 366/376 of the Indian Penal Code for his alleged involvement in the said offence and under section 363/120B of the Indian Penal Code against his co-accused Raju Bhunia and Mahendra Bhunia, all of whom pleaded not guilty to the said charges framed against them and claimed to face trial.
6. During the course of trial that followed the prosecution produced as many as 11 (eleven) witnesses and exhibited certain documents while the defence produced none.
7. Learned Amicus Curiae for the appellant submitted that -

- a. The order of conviction and sentence as has been recorded against the appellant is a glaring example of non-application of judicial mind by the Learned Judge wherein the Learned Judge has not at all taken into consideration the broad/salient features that have been emerged through the evidence, more particularly from the cross examination of the prosecution witnesses and thereby fell in serious error of law and made the impugned order of conviction and sentence bad in law and liable to be set aside.
- b. The Learned Trial Judge passed the order of conviction on consideration of documents that were neither marked as exhibits nor proved by the prosecution as required under law.
- c. The Learned Trial Judge did not consider the contradictions in the evidence of the prosecution witnesses.
- d. The Learned Trial Judge acted illegally in considering that an un-exhibited Xerox copy (xerox copy of birth certificate issued by a private practitioner) has evidentiary value even though the document was not exhibited and the said private practitioner was not produced as a prosecution witness neither the writing nor the contents were proved more over the said xerox

copy was procured on the date when allegedly the accused was put under arrest by the police.

- e. The Learned Trial Judge erred in law in considering that 'xerox copy' had evidentiary value even though the original was never produced for the perusal of the court nor did the prosecution make any attempt to prove the same in spite of that the Learned Trial Judge relied on such piece of paper in coming to the conclusion that the victim girl was a minor.
- f. The Learned Trial Judge failed to apply his judicial mind to the fact that the date of birth of the victim girl (P.W.) had not been established beyond all reasonable doubt and did not consider the fact that in case of any doubt benefit must be given to the accused.
- g. The Learned Additional Sessions Judge acted to the grave prejudice of the accused by not taking into account the evidentiary value of the statement of the victim girl (P.W.3) recorded under Section 164 Cr. P.C.
- h. While summing up the evidence the Learned Judge had failed to observe that the witnesses did not corroborate each other and except and witnesses of the medical experts there were no un-interested and independent witnesses.

- i. The Learned Judge did not take into consideration the fact that the medical evidence falsified the evidence of other interested witnesses.
- j. The Learned Additional Sessions Judge came to an erroneous conclusion in considering that the xerox copy of the birth certificate as seized by the I.O. was issued by a Doctor of the Marwari Hospital whereas the P.W. 1, the defacto complainant, in his evidence nowhere stated such fact that the said doctor was attached to the Marwari Hospital. Moreover no attempt was made from the side of the prosecution to examine the said Doctor and to prove the genuineness of such certificate.
- k. The Learned Trial Judge failed to appreciate the fact that no conclusive proof as to the age of the victim girl (P.W. 3) could be ascertained from the evidence produced by the prosecution and conviction was mainly based on an un-exhibited xerox copy as to proof of age without considering the medical evidence.
- l. The Learned Judge omitted to consider the fact that there was discrepancy in the date of occurrence as gathered from the evidence produced by the prosecution
- m. In view of reception of inadmissible evidence and reliance placed thereon by the Learned Judge, the order of conviction and sentence cannot be sustained both in law and facts.

8. The Learned Advocate for the State submitted that the recovery of the victim by the police after the complaint being lodged by the de-facto complainant and the subsequent statement of the victim before the Court corroborated the incident of kidnapping and commission of rape upon her. The sole evidence of the victim is credible enough to establish the prosecution case and as such the prosecution has been able to prove its case and the appeal shall be dismissed.
9. PW-1, the de-facto complainant stated on 27.12.1998 his daughter, the victim was kidnapped by the appellant while she attended nature's call. After seven days of lodging the complaint, police asked him to accompany them to Bihar. The victim was recovered after 20 days of the occurrence from Bihar. On her recovery the victim informed the complainant of being raped by the appellant. PW-1 identified his signature marked as Exhibit 1/1 on the written complaint and Exhibit No. 2/1 on the seizure list of the seizure of the birth certificate of his daughter.
10. During his cross-examination, PW-1 stated his daughter, the victim had a relationship with the appellant for which he used to threaten and assault his daughter i.e., the victim.
11. The evidence of PW-2, is based on hearsay.
12. PW-3, the victim denied to know nothing about the case. She stated that the appellant kidnapped her forcefully to a place called Jamui and ravished her. She was aged 14 years and had stayed at the aforesaid place for about one month. Police recovered her and

brought her to her father's house. She stated that the appellant had raped her on several occasions which she disclosed to her parents, relatives and the police officers. She further stated being intimidated, she declined to narrate the incident before the Learned Magistrate.

13. During her cross-examination, she refused to accept her relationship with the appellant. She denied to have written "love letters" shown to her during cross-examination further stating that the same were not written by her but she was assaulted by her father as she was caught red handed by her "Bhabi". She further stated she did not go out of her house for the purpose of nature's call with her sister. In the month of December at about 7 p.m. she was playing with her friend Sony who had died. The appellant had kidnapped her from the house of a third party beneath the stair case of the same. The appellant got hold of her hand and tied her mouth by a piece of cloth. Further she was taken to Jamui. She was first taken to the house of Ramesh which was far away from her house. She did not meet any other person on the way. There were shops and other houses in between her house and the house of Ramesh, which were closed due to night time. She, thereafter, stated that at about 7 p.m. when she was being taken away all shop rooms were opened.

14. She further stated there was no shop in between her house and the house of Ramesh. There were houses in between two houses. She found men on the way. Thereafter she stated there was no person

on the way at the relevant time. On the next date she was taken to Raniganj Railway Station by Ramesh. She was forcibly taken onto train by Ramesh. There were other passengers in their compartment. She did not tell any other passenger that she was being taken forcibly from her house.

15. She further stated that *"I cannot say the time taken by train from Raniganj to Jamui. I was written in the Railway Station that the Station was at Jamui. I was written in the Railway Station that the Station was at Jamui. I was not examined by I.O. I was not asked by any Ld. Magistrate to state anything to him. I was examined by a Doctor, but I do not know where I was examined. My marriage has not been settled. I do not know where I am going after the Election is over."*

16. She further stated that *"Not a fact that I stated before the Ld. Magistrate that I left my home with Ramesh at my own accord. (One photograph is shown to the witness). This is my photography (MAT Exbt-A). I know the meaning of term of rape. I was not pregnant. I had no sexual relationship with Ramesh or any other person for 4 years prior to the occurrence as reported by Doctor. My menstruation was started from 1997. I have not seen as to whether Ramesh took any pre-cautionary measure at the time of such rape on me. We used to stay in a brick field at Jamui within a Jhupri. At the relevant time there was no workman working in that brick field. Ramesh was not also attached to brick field. I do not know who prepared our meal. We used to take rice, dal and vegetables. I did not prepare our*

meal as I do not know cooking. I tried to resist Ramesh Bhuiya from doing rape on me. I used only one dress during my stay with Ramesh Bhuiya at Jamui. It was green in colour. I do not know whether he used any condom at the time of rape on me or not. When rape was committed on me for the first time my menstruation was not started. My next menstruation date was after one month as usual. I had tape with me for taking precautionary measure during my period. Though I used only one dress for two months, but dress was not dirty. I did not state to Ramesh that my period was started. Ramesh had no idea about the date of my period. Ramesh touched my breast. I cannot say how rape was committed. I do not know as to whether I am 24 years old. I am fully dependent on my father.”

17. She further stated that *“Not a fact that I stated to I.O. that since date all my family members were against me. Not a fact that I stated to I.O. that I decided to marry Ramesh. I never took any step to marry Ramesh. Not a fact that I stated to I.O. that in the evening I went out side with my sister.*

Not a fact that I stated to I.O. that I went to Jamui with Ramesh. I stated to I.O. that I was kidnapped by Ramesh forcibly. Ramesh was working in brick field at Sakendar. His duty hours was for the whole day time. During that period I used to stay in a Jhapri alone. Other female used to take their bath in the river during my bath. But I did not know those females as they were outsiders. I used to take my bath at the noon and Ramesh used to stay with me up to the river.

I used to take my bath with the help of Gamcha as I had only Salwar Kamiz with me. I did not go out of the Jhupri at the brick field during the absence of Ramesh as I had no money with me. Not a fact that I stated to I.O. that I would not go back my father.

I had talk with the Magistrate.

I had no fear against any person and thereby I stated the Magistrate what I wanted to state. I stated my name as Renu to the Magistrate. He also asked me about my father's name. He also asked my about my address."

18. PW-5, the mother of the victim deposed to have known the appellant prior to the incident. PW-5 further stated that her son's wife handed over a letter from Renu to her father for which she was rebuked. PW-5 had told the victim not to associate with the appellant after the said letter was recovered. She further stated that police went alone to recover Renu. She further stated that she was unwilling to get the victim married to appellant as he was poor and below her caste.

19. PW-6, PW-7 the related witnesses conformed to the evidence of the de-facto complainant and PW-5.

20. The deposition of PW-8, the doctor who examined the victim did not detect any injury or evidence of rape upon the victim who was otherwise habituated to sexual intercourse. PW-8 further stated during cross-examination that the victim had told him that she willingly went with the appellant at her own accord.

21. PW-10, the doctor who conducted the ossification test opined that the victim was between 15-16 years of age on the date of her x-ray examination i.e. on 16.03.1999. During cross-examination he further stated that the age may be plus, minus three years on either side in calculating the age of the person according to the view of Modi.

22. PW-11, the Investigating Officer stated that they recovered the appellant and the victim from a brick field with the help of Sakendra P.S. He further stated both the accused and the victim girl were produced before the Learned S.D.J.M., Jamui and thereafter both of them were produced before the Learned S.D.J.M., Asansol. Statement of the victim girl was recorded by the Learned Magistrate under Section 164 of the Cr.P.C. He collected medical report, ossification test report, and statement under Section 164 Cr.P.C. of the victim girl. Thereafter he submitted charge-sheet under Sections 363/366/120B of the Indian Penal Code read with Section 376 of the Indian Penal Code. He did not remember whether the original certificate was shown to him or not. Witness Mahesh told him that his sister Renu went to field for nature's call. He also told him that his youngest sister also accompanied Renu Kumari. He also told him that he came to know that Renu had gone to fields from Tinku. PW Tinku stated to him that Ramesh had talking terms with Renu Kumari. She stated to him that Ramesh sent a letter to Renu Kumari, and thereby her father threatened Renu Kumari, and directed Renu Kumari to leave

her study. Renu Kumari stated to PW-11 that from the date of receipt of the letter from her custody her parents and brothers were annoyed with her, and they used to utter filthy language to her. Then she decided to marry Ramesh. She also stated to PW-11 that both Ramesh and herself left the place of her father on her own. She stated to PW-11 that on 27.12.1998 in the evening she left the house of her father on her own at the pretext of attending nature's call. PW-11 accompanied the father of the victim girl, Bhagaban Choudhary and two constables of Raniganj P.S. went to Jamui. They recovered Ramesh and the victim girl from Nageswar brick fields of Jamui on 20.02.1999 at about 11.35 hours. Both of them were preparing bricks in the brick fields on daily wages. They used to reside in a labour quarter attached to brick fields. Both of them stated to PW-11 that they were married and were living as husband and wife. Marriage took place in a temple as per Exhibit-9.

23. The document marked as Exhibit-9 is a Xerox copy of a certificate issued by one Senapati Mondal, B.Sc., R.M.P., the author of the said certificate was not examined and the said certificate cannot be relied upon.

24. Victim in her statement under Section 164 of the Cr.P.C. stated that nothing had happened to her and she had been to Jamui with her husband. Nobody kidnapped her and went with the appellant at her own desire. She had married the appellant near a brick field

at Sakendra. She further stated that she has nothing to state against anybody and she wanted to go with her husband.

24. A circumspection of the evidence of the prosecution witnesses revealed that the appellant and the victim had a prior relationship before the occurrence of the incident to the un-acceptance and disapproval of the victim's parents and family owing to the financial status and caste difference of the appellant. A revelation of a love letter written by the victim to the appellant and her subsequent rebuke or reprimand propelled her to convince the appellant to flee and get married. The victim travelled a considerable distance and stayed with the appellant within the jurisdiction of Sakendra P.S. as a married couple working as daily labourers in a brick kiln. She had ample opportunity to release herself from any wrongful and illegal confinement and forceful enticing or taking away from the lawful guardianship of the parents.

25. The evidence of the victim suffers from inconsistencies. There are contradictions in her depositions during examination-in-chief as well as cross-examination. Her statements are at variance and uncorroborative in nature and the victim cannot be given the statement of 'sterling witness'.

26. Section 363 of the Indian Penal Code states as follows:

“363. Punishment for kidnapping.—Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term

which may extend to seven years, and shall also be liable to fine.”

27. Section 366 of the Indian Penal Code states as follows:

“366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—*Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid].”*

28. The age of the victim in absence of probable documentary evidence has to be computed on the basis of ossification test. Based on the computation of PW-10, if the age of the victim on the date of the incident is accused to be 15 years, then with a margin of plus 3 years, it can be emphatically stated that the victim was nearly 18 years of age. A statement under Section 164 of Cr.P.C. as well as a statement recorded under Section 161 of Cr.P.C. before the Investigating Officer are not substantive pieces of evidence and can only be taken into consideration for the purpose of corroboration. The evidence of the Investigating Officer during his cross-

examination corroborated the evidence of the de-facto complainant PW-5 and the other related witnesses that the relationship of the appellant and the victim was rejected by her parents and family members to her disgust and grievance which she approved before the investigating Officer. The victim in her statement under Section 164 Cr.P.C. denied of any accusation against anybody and stated to have married the appellant at her own will. During her deposition before the Court, she deviated from her earlier stance and emphasized being ravished by the appellant. From her deposition before the Court, it further transpired that she was not captivated or physically sustained in any manner by the appellant and she was forcefully subjected to physical intercourse, forcefully against her will. She could have raised alarm and protested. She did not accuse the appellant to have coerced or threatened her in any manner. The medical report did not state any kind of injury to her private parts.

29. In the case of **S. Varadarajan v. State of Madras**¹ the Hon'ble Supreme Court observed as follows:

“7. The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that “taking” of Savitri out of the keeping of her father has not been established. The

¹ 1965 AIR (SC) 942

offence of “kidnapping from lawful guardianship” is defined thus in the first paragraph of s. 361 of the Indian Penal Code:

“Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.”

It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what, we have to find out is whether the part played by the appellant amounts to “taking”, out of the keeping of the lawful L2Sup./64—3 guardian, of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan, she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law “taking”. There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar’s office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or anything like that. On the other hand the

evidence of the girl leaves no doubt that the insistence of marriage came from her own side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was no uneducated or un-sophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area. The learned Judge of the High Court has referred to the decision in re : Abdul Sathar(1) in which it was held that where the evidence disclosed that, but for something which the accused consented to do and ultimately did, a minor girl would not have left her husband's house, or would not have been able to leave her husband's house, there was sufficient taking in law for the purpose of Section 363 and

expressing agreement with this statement of the law observed: "In this case the minor, P.W. 4, would not have left the house but for the promise of the appellant that he would marry her." Quite apart from the question whether this amounts to blandishment we may point out that this is not based upon any evidence direct or otherwise. In Abdul Sather's case(I) Srinivasa Aiyangar J., found that the girl whom the accused was charged with having kidnapped was desperately anxious to leave her husband's house and even threatened to commit suicide if she was not taken away from there and observed:

"If a girl should have been wound up to such a pitch of hatred of her husband and of his house or household and she is found afterwards to have gone out of the keeping of her husband, her guardian, there must undoubtedly be clear and cogent evidence to show that she did not leave her husband's house herself and that her leaving was in some manner caused or brought about by something that the accused did."

In the light of this observation the learned Judge considered the evidence and came to the conclusion that there was some legal evidence upon which a court of fact could find against the accused. This decision, therefore, is of little assistance in this case because, as already stated, every essential step was taken by Savitri herself: it was she who telephoned to the appellant and fixed the rendezvous, she walked up to that place herself and found the appellant waiting in the car; she got into the car of her own accord without the appellant asking her to step in and permitted the appellant to take her wherever he liked. Apparently, her one and only intention was to become the appellant's wife and thus be in a position to be always with him.

...

9. It must, however, be borne in mind that there is a distinction between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father’s protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

10. It would, however, be sufficient if the prosecution establishes that through immediately prior to the minor leaving the father’s protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian’s house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian’s house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to “taking”.

30. In **Mafat Lal & Anr. vs The State of Rajasthan**² the Hon'ble Supreme Court observed as follows :-

“7....Kidnapping would necessarily involve enticing or taking away any minor under eighteen years of age if a female for the offence under Section 363 Indian Penal Code. In the present case, the abductees had clearly stated that she was neither taken away nor induced and that she had left her home of her own free will. Section 366 Indian Penal Code would come into play only where there is a forceful compulsion of marriage, by kidnapping or by inducing a woman. This offence also would not be made out once the appellant no. 2 the abductees has clearly stated that she was in love with the appellant no. 1 and that she left her home on account of the disturbing circumstances at her parental home as the said relationship was not acceptable to her father and that she married appellant no. 1 on her own free will without any influence being exercised by appellant no. 1.”

31. In **Kuldeep K. Mahato vs. State of Bihar**³, the Hon'ble Supreme Court observed that:

“7.....We are unable to accept this submission because Dr. Maya Shankar Thakur - (P.W.2), had emphatically stated that the age of prosecutrix was below 18 years on the date of occurrence. Both the courts below found that the age of prosecutrix was below 18 years. After going through the evidence of Dr. Maya Thakar (P.W.5) and other material on record, we are of the opinion that this finding needs no Interference....

² 2022 Live Law (SC) 362

³ (1998) 6 SCC 420

11. Then coming to the conviction of the appellant under Section 376 IPC, although both the courts below have held after accepting the evidence of prosecutrix being truthful help that the appellant has forcibly committed the rape, we are of the opinion that the said finding is unsustainable. The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of neighbours from the said village. The medical evidence of Dr. Maya Shankar Thakur-P.W. 2 also indicates that there were no injuries on the person of the prosecutrix including her private part. Her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under Section 376 IPC cannot be sustained. There is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the result her movements were restricted. This circumstances also goes to negative the case of forcible intercourse with the prosecutrix by the appellant.”

25. Under the facts and circumstances of the case in absence of proof of commission of the offence by the appellant beyond reasonable doubt, the prosecution has failed to prove its case and accordingly the appeal is allowed.

26. Accordingly, CRA 554 of 2004 is disposed of.

27. I record my appreciation for the able assistance rendered by Mr. Amartya Ghosh, Learned Advocate, as *Amicus Curiae* in disposing of the appeal.

28. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
29. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)