

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 319 of 2021

Harts @ Hasmat Sk @ Raja

Vs.

The State of West Bengal

For the Appellant : Mr. Dipanjan Chatterjee, Adv.
Ms. Richa Pramanik, Adv.

For the State : Mr. Neguive Ahmed, Adv.
Mr. Iqbal Kabir, Adv.

Hearing Concluded on : March 21, 2023
Judgement on : March 30, 2023

DEBANGSU BASAK, J.:-

1. The appellant has assailed the judgement of conviction dated September 17, 2021 and the order of sentence dated September 18, 2021 passed by the learned Additional Sessions Judge cum Judge Special Court under POCSO Act, Krishnanagar, Nadia in Sessions Case No. 15 (03) 2019 Sessions Trial No. II (V) 2019.

2. The appellant has been convicted under Section 366A of the Indian Penal Code, 1860 and under Section 6 of the Protection of Children from Sexual Offences Act, 2012. The appellant has been sentenced to suffer imprisonment for 7

years and to pay a fine of Rs. 50,000 and in default simple imprisonment for one year for the offence punishable under section 366A of the Indian Penal Code, 1860 and life imprisonment and to pay fine of Rs. 1 lakh and in default simple imprisonment for 2 years for the offence punishable under section 6 of the Act of 2012.

3. At the trial, the case of the prosecution had been that, the appellant abducted and kidnapped the victim who was a minor from the legal guardianship on February 1, 2019 at about 1 PM. The appellant had done so with the intention to illicit intercourse or in order that the victim will be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse and thereby committed the offence punishable under section 366A of the Indian Penal Code, 1860. The appellant had raped the victim and alternatively forcibly committed aggravated penetrative sexual assault on the victim.

4. Learned advocate appearing for the appellant has submitted that, the victim was married on the date the alleged kidnapping is alleged to have taken place. He has referred to the written complaint. He has submitted that, there was a delay of 12 days in lodging the First Information Report. This

delay in lodgement of the First Information Report has not been satisfactorily explained by the prosecution witnesses. He has contended that, the lodging of the First Information Report is extremely dubious. He has drawn the attention of the court to the conduct of the victim as well as her family members subsequent to the alleged kidnapping. He has submitted referring to the testimonies of the prosecution witnesses that, the mother of the victim was well aware of the whereabouts of the victim much prior to the victim being allegedly rescued.

5. Learned advocate appearing for the appellant has submitted that the Toto vehicle in which the alleged kidnapping took place was not seized by the police. The driver or the owner of such vehicle were not examined by the prosecution at the trial.

6. Learned advocate appearing for the appellant has submitted that, no charge under the Immoral Traffic (Prevention) Act, 1956 had been framed as against the appellant. If the prosecution story is to be believed then, the victim had been taken to Manali where she was made to extend sexual favours to various persons. Despite such claims being made by the prosecution, no effort had been made to

either examine any witnesses from Manali or proceed against the appellant under the provisions of the Immoral Traffic (Prevention) Act, 1956.

7. Learned advocate appearing for the appellant has drawn the attention of the court to the testimony of the victim. He has submitted that, the victim had claimed that she was taken by train to Delhi and thereafter to Manali. All the while, she had acknowledged that, she was in contact with the public. She had seen police personnel in the train compartment. The victim had never sought help from the public or the police personnel she had come across.

8. Learned advocate appearing for the appellant has submitted that, the victim and the appellant had an affair prior to the victim being married to a different person. The victim had left voluntarily with the appellant. The mother of the victim was aware of the whereabouts of the victim within 3 days from the date of the alleged kidnapping and despite such knowledge the mother of the victim did not approach the police. Such fact, according to the learned advocate for the appellant, established that, the victim had left voluntarily with the appellant.

9. Learned advocate appearing for the appellant has submitted that, the conduct of the parents of the victim were unnatural. The father of the victim had arrived at his residence after 12 days from the date when he had received information that his daughter was kidnapped. This along with the conduct of the mother of the victim, are extremely unnatural and tends to suggest that the parents had been well aware as to the whereabouts of the victim and were therefore free from any anxiety.

10. Learned advocate appearing for the appellant has doubted the recovery of the victim from Manali. He has submitted that, no document had been produced at the trial to establish that the victim was rescued from Manali.

11. Learned advocate appearing for the appellant has relied upon **2023 SCC online SC 89 (Naim Ahamed versus State of NCT of Delhi)** in support of his contention that, the deposition of the victim had been misunderstood and misconstrued by the learned trial judge.

12. Learned advocate appearing for the appellant has submitted that, the appellant should be acquitted as the prosecution had failed to prove the charges beyond reasonable doubt.

13. Learned advocate appearing for the State has submitted that, the prosecution proved the charges as against the appellant beyond all reasonable doubt. The appellant had kidnapped the victim. The victim was a minor at the time when the appellant had kidnapped her. The birth certificate of the victim being exhibit 4 had proved the date of birth of the victim. The victim had been taken to Manali and raped. Medical treatment documents of the victim being Exhibit 2, Exhibit 2/1 and Exhibit 3 had proved the injuries suffered by the victim relating to forcible and aggravated penetrative sexual assault on her.

14. Learned advocate appearing for the State has submitted that, in her testimony, the victim had identified the appellant as the person who kidnapped her and who took her to Manali and made her to extend sexual favours. She had also identified the appellant as a person who had raped her.

15. Learned advocate appearing for the State has submitted that, the impugned judgement of conviction and the order of sentence should be upheld.

16. Victim had deposed as PW 1. In her deposition she had claimed that she was 16 years of age. The learned Judge had tested the victim with regard to her ability to answer questions

put to her and concluded that, the victim was quite fit to depose in the case.

17. PW 1 had stated that, her date of birth was November 18, 2003 and that she read up to Class IX. On the date of the incidence, she was going to her matrimonial home from her paternal house by a Toto and on the way, there was a bamboo grove by the side of the road. At that time the appellant had forced her to get down from the Toto. Prior to the date of incidence, she had met the appellant at a fair and the appellant used to talk to her over telephone prior to her marriage. She had stated that, there was another person with the appellant and that she did not know him. Then the appellant had slapped her on her cheek and put a handkerchief on her nose and boarded her on a vehicle. Thereafter, she had lost her sense.

18. PW 1 had stated that, when she regained her senses she came to know that she was at Delhi. Thereafter, the appellant had taken her to Manali and put her in a hotel. The appellant did not allow her to talk to anybody and go outside the hotel. The appellant had asked her and forced her to cohabit with other male persons in different places in different hotels. She had been there for 25 days. She was compelled to

cohabit with different persons. The accused had also assaulted her and committed rape on her on several occasions.

19. PW 1 had stated that, some female, with whom the appellant had connection, got money from male persons in lieu of cohabitation by her with the other male persons. Once while she had been kept inside a room she had called one person from bathroom's window to go out from the room. One person had helped her to ring to her parents over telephone. Thereafter, her father, maternal uncle and police personnel of Nabadwip police station had come and recovered her.

20. PW 1 had stated that, she recorded her statement under 164 of the Criminal Procedure Code before the Learned Magistrate. Such statement had been tendered in evidence and marked as Exhibit 1. She had tendered her medical examination documents which were marked as Exhibit 2/1. She had stated that, she was admitted to the State General Hospital for several days. She is now residing with her husband at her matrimonial home. She had been discharged from hospital on February 2, 2019. The discharge certificate had been tendered in evidence and marked as Exhibit 3. She had identified the appellant in Court.

21. In cross-examination, PW 1 had stated that, she knew the phone numbers of her parents. She had stated that, she could not identify the hotel where she was kept at Manali. She had regained her senses inside the train while approaching towards Delhi Station. She had tried her level best to say something but was not in a position to say anything. She had stated that after 3 days of reaching Manali she rang her mother through mobile phone of the appellant as a result of which she was assaulted by the appellant. She had narrated the incidence to her mother as to how she was kidnapped and where she was taken for the first time and where she was staying.

22. The mother of the victim had deposed as PW 2. She had stated that, the victim was going to her matrimonial home at noon by a Toto vehicle. She had rang her matrimonial home and came to know that the victim did not reach there. She had been to the matrimonial home of the victim and did not find her there. She had rang her daughter when, the calls were at times received and at times not received. However, the victim did not talk to her. After 4/5 days, the victim had informed her over telephone that she was at Manali and told

her that she was not in a position to convey anything. Thereafter, the victim had discontinued the phone connecting.

23. PW 2 had thereafter gone to the police station and informed the police about the matter. She had also shown the number to the police by which the victim informed her over telephone. Thereafter she had lodged the complaint. PW 2 had stated that she came to know that the victim was kidnapped by the appellant. She had identified the appellant in Court. She had stated that, that on several occasions the victim had rang her and told her how the position of the victim was. Thereafter, the victim had somehow managed to escape from the custody of the appellant where she was kept and took shelter in a hotel and informed her where she was. Thereafter the matter was informed to the local police station when the local police station had been there along with her husband and brother. The victim had thereafter been recovered by the police.

24. PW 2 had stated that the victim came to her and informed her that the appellant had committed rape on her 10/12 times in a day. The victim had also informed her that the appellant had placed her before different persons for making sexual relation with them in lieu of money. The

appellant used to collect money from different persons and the victim had been compelled to do sexual work with them. The appellant had threatened the victim that in default the appellant would kill the victim. The victim had been placed before the doctor for medical examination. She had identified her signature which was marked as Exhibit 2/2.

25. The father of the victim had deposed as PW 3. He had identified the appellant in Court. He had produced the original birth certificate of the victim which was marked as Exhibit 4. He had stated that, on the date of the incidence when the victim was kidnapped, he was at Bilaspur, he had been informed over telephone by PW 2 as to the victim being missing. After reaching his house, he came to know of the First Information Report that had already been lodged by PW 2. He had informed the matter to the local Member of Legislative Assembly. After 20/25 days from the date of the incidence, they had come to know that the victim was at Manali because one friend of the appellant informed them about the same and sent the photograph of the victim through Whatsapp. Then, PW 2 had been to the police station and informed the matter to the police, supplied the phone number and also handed over the photographs which had been

received through Whatsapp. Then, they went to Manali along with the police and had recovered the victim. Thereafter, the victim had been placed before the doctor for medical examination. The police had arrested the appellant. The appellant had committed rape upon the victim. The appellant had placed the victim to different persons for making sexual relation and by which the appellant had earned money.

26. An aunty of the victim had deposed as PW 4. She had identified the appellant in Court. She had stated that, she was not interrogated by the Investigating Officer of the case.

27. The paternal aunty of the victim had deposed as PW 5. She had stated that on February 1, 2019, the victim had gone out of the house for the purpose of going to her matrimonial home. After sometime PW 2 had called the victim over telephone but the victim disconnected the line. Then PW 2 had called the father-in-law of the victim and came to know that the victim did not reach there. Thereafter, PW 2 had been to the maternal home of the victim and found that the victim was not there. PW 2 had returned and searched her relatives' house for the victim but in vain. Thereafter, they had gone to the police station where, PW 2 lodged the written complaint. After 3/4 days, the victim had rang PW 2 and informed that

the appellant had kidnapped her and that she was in Shimla. The victim had reported to PW 2 that the appellant earned money from male persons by placing the victim for sexual relation with them in lieu of money. When the victim did not agree to such proposal the appellant had threatened the victim. The police had been to Shimla. Her brother-in-law had accompanied the police. When the victim had returned to their house, she came to know about such facts from the victim. She had seen that the victim was physically ill at that time. She had identified the appellant in Court.

28. A friend of the father of the victim has deposed as PW 6. He had stated that, the father of the victim had informed him that the victim was missing and also told him that the victim was at Manali. The father of the victim had asked him to accompany them to Manali. Then, he and the father of the victim had accompanied police personnel to Manali where the victim was recovered from a hotel. The victim had been brought and that she was physically seriously ill.

29. The doctor who had examined the appellant had deposed as PW 7. He had tendered the medical examination report of the appellant which was marked as Exhibit 5.

30. The police personnel who had registered the formal First Information Report had deposed as PW 8. He had tendered the formal First Information Report in evidence which was marked as Exhibit 7.

31. The Investigating Officer had deposed as PW 9. He had stated that, on February 12, 2019 he had taken up the investigation. During investigation, he had visited the place of occurrence and prepared a rough sketch map along with index which was tendered in evidence. He had examined available witnesses and recorded their statement under Section 161 of the Criminal Procedure Code. He had seized the birth certificate of the victim by a seizure list which was tendered in evidence and marked as Exhibit 9. He had taken a photo copy of the birth certificate and handed over the original to PW 2 by way of a zimmanama which was tendered in evidence and marked as Exhibit 10. He had then handed over the Case Diary to the Inspector-in-Charge of the police station for further investigation of the case due to his transfer.

32. The doctor who had examined the victim on February 25, 2019, had deposed as PW 10. He had stated that on examining the victim he found the victim to be a little confused. The external injuries on the person of the victim

had been noted. He had described such injuries. He had stated that the victim was admitted under him from February 25, 2019 to February 28, 2019. The injury report of the victim had been tendered in evidence and marked as Exhibit 2 collectively.

33. The second Investigating Officer had deposed as PW 11. He had stated that, after taking charge of the Investigation he came to learn that the victim was at Himachal Pradesh and thereafter he along with the father and one relative of the victim proceeded there. He had taken the help of the local police station at Manali and recovered the victim therefrom. He had placed the victim before the doctor for her medical examination. He had collected the medical examination report of the victim. He had placed the victim before the magistrate for recording her statement under Section 164 of the Criminal Procedure Code. He had examined all available witnesses and recorded statement under Section 161 of the Criminal Procedure Code. He had arrested the appellant from a bus stop. He had identified the appellant in Court. He had sent the appellant for his potency test. He had made prayer for adding Section 6 of the Act of 2012 which was allowed. On completion

of the investigation, he had submitted a charge sheet on March 15, 2019.

34. In cross-examination, PW 11 had been shown a General Diary details of the Manali Police Station by which, he had taken help of the Manali police. Such General Diary Entry had been marked as Exhibit A.

35. The scribe of the written complaint had deposed as PW 12. He had stated that, he wrote the complaint as per the direction of PW 2. The written complaint had been tendered in evidence and marked as Exhibit 2 and his signature as Exhibit 6/2.

36. On completion of the evidence of the prosecution, the appellant had been examined under Section 313 of the Criminal Procedure Code. In such examination, he had claimed that he was falsely implicated and that he was innocent. He had stated that, he had a love affair with the victim prior to her marriage. The victim was a dancer and that she was not a good girl/lady.

37. The age of the victim had been established by the birth certificate of the victim being Exhibit 2. The date of birth of the victim is November 18, 2003. The date of the incidence is

February 1, 2019. Therefore, it is established that the victim was a minor on the date of the incident.

38. The victim had deposed as PW 1 and narrated how she was kidnapped by the appellant with the help of another person and taken ultimately to Manali where the appellant had raped her and she was made to extend sexual favours to other persons in lieu of money which was taken by the appellant.

39. The claim of penetrative sexual assault on the victim stands corroborated by the medical examination report of the victim being Exhibit 2 as well as the deposition of the doctor examining the victim being PW 10.

40. The appellant had been medically examined on March 5, 2019 by PW 7 as to his potency. Exhibit 5 being the medical examination report of the appellant read with the deposition of the doctor examining him had established that, the appellant was sexually potent.

41. The victim had been rescued from Manali. This fact has been established by the deposition of PW 1, PW 3, PW 6 and PW 11. That police personnel had been to Manali is established by Exhibit A being the GD Entry of Manali Police Station.

42. *Naim Ahamed (supra)* has observed that, the evidence of the witness has to be taken down in the language of the Court as required under Section 277 of the Criminal Procedure Code. If the witness gives evidence in the language of the Court, it has to be taken down in that language only. If the witness gives evidence in any other language, it may, if practicable, be taken down in that language and if it is not practicable to do so, a true translation of the evidence in the language of the Court may be prepared. It is only when the witness gives evidence in English and is taken down as such, and a translation thereof in the language of the Court is not required by any of the parties then the Court may dispense with such translation. If the witness gives any evidence in the language other than the language of the Court, a true translation thereof in the language of the Court has to be prepared as soon as practicable.

43. In the facts and circumstances of the present case, the deposition of all the prosecution witnesses had been recorded by the learned Trial Judge in English and in the narrative form.

44. PW 1 being the victim, had vividly described the trauma she faced both at the hands of the appellant as also at

the hands of other persons. She had stated that, the appellant had raped her repeatedly. This statement of her, has been corroborated by her medical examination report being Exhibit 4. We have nothing on record to disbelieve the testimony of PW 1.

45. As has been noted above, the victim was a minor on the day of the incident. She had been kidnapped by the appellant and taken to Manali where she had been raped by the appellant and made to extend sexual favours to others, by the appellant, in lieu of money.

46. Therefore, according to us, the prosecution had established the charges under Section 366 A of the Indian Penal Code 1860 and under Section 6 of the Act of 2012.

47. In such circumstances, we have found no reason to interfere with the impugned judgement of conviction or the order of sentence.

48. CRA 319 of 2021 is dismissed.

49. The sentences awarded shall run concurrently.

50. Period of detention suffered by the appellant pre-trial, during trial and post the conviction be set off against the sentences awarded.

51. A copy of this judgement and order along with Trial Courts records be remitted to the appropriate Court expeditiously.

52. Urgent Photostat certified copy of this judgement and order be supplied to the parties applying for the same, on completion of all formalities.

[DEBANGSU BASAK, J.]

53. I agree.

[MD. SHABBAR RASHIDI, J]