

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

C.R.A. 288 of 2021
With
C.R.A.N.3 of 2024

Jiyarul Sk
Vs.
The State of West Bengal

For the Appellant : Mr. Tapodip Gupta, Adv.

For the State : Ms. Rituparna De Ghosh, Adv.
Ms. Rajashree Tah, Adv.

Heard on : 07.01.2025

Judgment on : 07.01.2025.

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 10.02.2021 passed by the learned Additional District & Sessions Judge, Fourth Court, Berhampore, Murshidabad in Sessions Trial No. 2(08) 2013 arising out of Sessions Case No. 79 of 2013 convicting the appellant for commission of offences punishable under Sections 366/376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment

for ten years and to pay fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for five years for the offence under Section 366 of the Indian Penal Code and to suffer imprisonment for life and to pay fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for five years more for the offence punishable under Section 376 of the Indian Penal Code; both the sentences to run concurrently.

Prosecution Case:

2. Prosecution case as alleged against the appellant is as follows:-

PW 7 is the daughter of the de-facto complainant (PW 1). He alleged appellant used to seduce his daughter. On the pretext of taking his daughter to a nearby house, appellant forcibly dragged her and took her to an unknown place. Appellant made false promise of marriage and tried to sell the victim to a brothel. Victim was untraceable. As a result, the de-facto complainant (PW 1) lodged diary at Daulatabad Police Station. Police personnel of Daulatabad Police Station rescued the victim. Appellant had also taken money and earrings of the victim.

3. On the basis of the aforesaid allegations, PW 1 took out an application under Section 156 (3) of the Code of Criminal Procedure before Magistrate. Pursuant to direction of the Magistrate, Daulatabad Police Station Case No.210 of 2012 dated 14.10.2012 under Sections 363/366/379 of the Indian Penal Code was registered against the appellant.

4. In conclusion of investigation, charge sheet was filed against the appellant and charges were framed under Sections 366/376 of the Indian Penal Code. Appellant pleaded not guilty and claimed to be tried.

5. During trial prosecution examined seven witnesses including the victim (PW 7). PW 7 did not support the prosecution case and stated she had voluntarily accompanied the appellant. However, relying on her statement before Magistrate recorded under Section 164 of the Code of Criminal Procedure, trial Judge came to a finding of guilt.

6. In conclusion of trial, the trial Judge by the impugned judgment and order dated 10.02.2021 convicted and sentenced the appellant, as aforesaid. Hence, the present appeal.

Arguments at the Bar:

7. Learned Advocate for the appellant contends there is no legally admissible evidence that the appellant had abducted the victim (PW 7) and raped her against her will. PW 7 stated she had voluntarily accompanied the appellant to her sister's house and after three months had returned with the appellant. It is also contended no cogent evidence is forthcoming that the victim was a minor at the material point of time. Accordingly, he prays for acquittal of the appellant.

8. Learned Advocate for the State contends the de-facto complainant, father of the victim stated that the victim was studying in Class V. Her age recorded in her statement under Section 164 of the Code of Criminal Procedure (Ext.1) is 14 years. Consent of minor is

immaterial. As a result, conviction of the appellant has been rightly recorded.

Evidence on record:

9. PW 1 is the complainant and father of the victim. He deposed his daughter used to study in Class V. His daughter had gone to visit their relative's house at Bainchitola village. Appellant took her away from a place near Tematha in Bainchitola village. He lodged general diary. His daughter was untraceable for three months. Finally, police recovered her. She told him appellant had taken her to Bangalore to sell her. Prior to recovery of her daughter, he had filed a case before the Chief Judicial Magistrate, Murshidabad. After his daughter was recovered, he again filed the case.

10. PW 7 is the victim. She stated she was acquainted with the appellant. Both of them went voluntarily to the her sister's house at Purandapur, Murshidabad. They came back after three months. She used to study in class VII. She had voluntarily gone with the appellant. During cross examination she stated she made statement before magistrate as per tutoring of her father.

11. Sutirtha Banerjee (PW5) is the judicial officer who recorded her statement (Ext 1).

12. Dr. Bhaskara Nanda Seal (PW 6) is the medical officer. He examined PW 7. He did not find any injury mark. However, he noted the victim was pregnant. He proved the injury report (Ext. 2).

Analysis and findings:-

13. Analysis of the evidence on record unequivocally shows the victim (PW 7) did not support her father (PW 1) that she had been forcibly abducted and raped. On the other hand she stated she knew the appellant. Both of them had voluntarily left and resided at her sister's residence. After three months they returned. Trial Judge discarded her evidence and relied on her statement before Magistrate (Ext. 1). In Ext. 1, PW 7 had come out with a different story. She claimed that the appellant had abducted and threatened that he would take her to Bangalore to sell her. He had raped her against her will. As a result, she had become pregnant. One boy named Tohibur had saved her. She telephoned her father who recovered her.

14. In Court she resiled from her previous statement. She claimed that statement was made on the tutoring of her father.

15. It is trite statement before Magistrate is not substantive evidence. It can be used to corroborate or contradict its maker.

16. In such view of the matter trial judge erred in relying on the contents of the statement which was contrary to that of the deposition of the victim in court. It is also relevant to note the victim had explained the circumstance in which she was compelled to make the aforesaid contradictory statement before Magistrate. Her father had compelled her to do so. No corroborative evidence that the victim had

been taken to Bangalore and forcibly raped uo78is also placed on record by the prosecution.

17. Under such circumstances it would be incorrect to rely on the victim's statement before Magistrate which she claims she was tutored to make at the behest of her father.

18. State argues the victim had become pregnant. This proves a case of rape.

19. Section 53A and 164A of the Code of Criminal Procedure provides in case of rape DNA examination of the victim and accused ought to be undertaken. No DNA examination of the foetus was done to establish that the appellant was its father. Even if the pregnancy may lead to an inferential conclusion of sexual intercourse it cannot be said the same was a forcible one particularly when the victim emphatically claimed that she had voluntarily stayed with the appellant.

20. The final straw on which the prosecution seeks to prove culpability is that the victim was a minor. Trial Judge relied on the age recorded as 14 years in her magisterial statement (Ext 1) to come to this conclusion.

21. As discussed earlier contents of the magisterial statement is not substantive evidence. Neither PW 1 nor PW 7 deposed regarding her age. Learned counsel for the State refers to their evidence to show that the victim was a school going girl. School records were not produced in Court to prove her date of birth. Best evidence regarding the age of

victim has been withheld. It is common knowledge that girls in the rural arrears attend school at an advanced age. In absence of unimpeachable evidence proving the minority of the victim it would be incorrect to come to a finding that the victim was below 18 years at the time when the incident occurred.

Conclusion:

22. In light of the aforesaid discussion, I set aside the conviction and sentence of the appellant.

23. The appellant shall be discharged from bail bonds after expiry of six months in terms of section 481 of the BNSS.

24. The appeal is allowed. In view of the disposal of the appeal all connected applications are disposed of.

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

26. Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)