

Form No. J(1)

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

Present :

**The Hon'ble Justice Rajasekhar Mantha
And
The Hon'ble Justice Ajay Kumar Gupta**

C.R.A. No. 708 of 2017
With
I.A. No. CRAN 1 of 2018 (Old CRAN 3098 of 2018)

Ajit Sk.
Versus
The State of West Bengal

For the Appellant: Mr. Prabir Majumder,
Mr. Snehasu Majumder,
Mr. Debraj Shil,
Ms. Sangeeta Chakraborty.

For the State: Ms. Anasuya Sinha, Id. A.P.P.
Mr. Pinak Kumar Mitra.

For the de facto complainant: Ms. Tannistha Bandyopadhyay.

Heard on: January 28, 2025 and January 30, 2025.

Judgment on: January 30, 2025.

Rajasekhar Mantha, J.:

1. The appeal arises out of a judgment of conviction dated 15th September, 2017 and sentence dated 16th September, 2017 passed by the learned Additional District & Sessions Judge, 2nd Court at Krishnagar, Nadia in Sessions Trial No. VIII(VI) of 2017 arising out of Sessions Case No. 05(04) of 2017 (Special) wherein the appellant

was convicted under Section 363 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for five years and also liable to pay fine of Rs.3,000/-, in default, the appellant sentenced to suffer Rigorous Imprisonment for one month more and also sentenced to suffer Rigorous Imprisonment for ten years and also liable to pay fine of Rs.10,000/-, in default, the appellant sentenced to suffer Rigorous Imprisonment for six months more for the offences punishable under Section 4 of the POCSO Act, 2012. The sentences as aforesaid were directed to run concurrently.

2. The brief facts relevant to the case are that on 15th July, 2017, father of the appellant (PW-2), lodged a complaint with the Nakashipara Police Station stating that his daughter (victim) had left the School at 10 O'clock in the morning and had not returned home. It was further stated in the complaint that the daughter was 14 years old and studying in Class X. It was specified in the complaint that the complainant has come to know that his daughter was allured and abducted by the appellant on her way to School.

3. A formal First Information Report being FIR No.197 of 2017 was immediately registered on 8th April, 2017 under Sections 363,

365, 366 and 34 of the Indian Penal Code. The accused were the appellant, his father and his mother.

4. The girl was recovered on 16th April, 2017 eight days after the registration of the FIR from the house of one Maidul Haque Mondal, residing in a short distance albeit a neighbouring district. The appellant was thereafter arrested and was taken into custody. The statement of the victim girl was recorded under Section 164 of the Code of Criminal Procedure in addition to the statements of the other witnesses.

5. The victim was sent for medical examination, which was conducted by PW-4. The Medical Officer (PW-4) has deposed that the hymen of the victim was not intact. Vaginal swab was sent for medical examination. The Medical Officer also advised a long bone test otherwise known as "Ossification Test" to ascertain the age of the victim. The Doctor, however, recorded the statement of the victim that she was 14 years of age. After investigation was completed, charge-sheet was filed and trial commenced. The appellant was charged under Sections 363, 366A, 376(2)(i) of the Indian Penal Code and Section 4 of the POCSO Act, 2012. The appellant's father and mother were charged under Sections 363, 366A and 34 of the Indian Penal Code. The trial commenced after framing of charges.

6. PW-1 was the victim girl. She deposed that on 7th April, 2017 the appellant between 9:30 A.M. and 9:45 A.M. met with the appellant and asked her to accompany him. Upon refusal of the appellant, he offered an ice-cream after which she fell unconscious. The aforesaid incident happened in front of the local electricity office opposite to the School. After regaining conscience, she found herself in a dark room. The appellant is stated to have committed rape on her several times over a period of ten days. She stated that she was recovered thereafter and was brought to the Police Station. The parents also came to the Police Station and she narrated the said incident to her parents. She was taken to the Doctor for medical examination and she signed on the medical report. She also stated that she was examined before the Magistrate under Section 164 of the Code of Criminal Procedure.

7. PW-2 was the complainant, father of the victim. He reiterated the complaint and stated that about 7-8 days after the incident, his daughter was recovered by the police under another Police Station called Vatar.

8. PW-3 was the mother of the victim. She stated that her daughter went to the School but did not return home in the evening. She enquired from other School children and came to know that the appellant took away the victim girl. She stated that

her daughter was 14 years old. She has signed on the medical report prepared by PW-4. She stated that she had seen her daughter for the first time at the local Police Station after she was recovered by the police. She has handed over the birth certificate of the victim to the Investigating Officer of the case. It is surprising that the birth certificate of the victim was never produced in Court.

9. PW-4 was the Medical Officer, who examined the victim. He deposed that the hymen of the victim was not intact and vaginal swab was sent for examination. The examination report of the swab was never produced in Court. Exhibit-1 being the report of the Medical Officer also indicates that there were no injuries on the body of the victim.

10. PW-5 was another Medical Examiner, who examined the appellant and certified that he was capable of performing the physical intercourse.

11. PW-7 was the Investigating Officer of the case. He deposed that he received a complaint and drew up the formal FIR, which was signed by the Officer-in-charge, Nakashipara Police Station. He was entrusted with the investigation. Thereafter based on information received from the source, he arrested the appellant from another village called "Vapsol" under Vatar Police Station in the neighbouring district. The parties resided in the bordering

areas between the District of Nadia and Bardhaman. He deposed that he took the victim for medical examination and obtained report and thereafter also recorded statement under Section 164 of the Code of Criminal Procedure.

12. In cross-examination, however, he stated that the victim's mother (PW-3) was present when he recovered the victim girl. This is ex facie contradictory to the statement of PW-3 that she saw her daughter for the first time after ten days in the local Police Station.

13. The victim is stated to have informed the Investigating Officer of the case that she loved the appellant and was intending to marry him.

14. The appellant was thereafter confronted with all the incriminating circumstances that came out in the evidence against him recorded under Section 313 of the Code of Criminal Procedure.

15. The Trial Judge discussing the evidence, found the appellant guilty of offence as already indicated hereinabove. The accused nos.2 and 3, the mother and father of the appellant were acquitted of the charges.

16. This Court has carefully considered the evidence on record. What is clear in evidence before this Court is that the victim had a romantic relation with the appellant.

17. It is impossible to believe that the victim became unconscious after consuming an ice-cream and was taken away by the appellant in an unconscious state at about 9.30 am. The place of alleged obstruction was in front of a local electricity office which was in front of the school in question. At the relevant point of time it is natural that several students would be entering the school and parents and other persons including local rickshaw pullers and van pullers.

18. The story cooked up by the victim in her evidence and under Section 164 of the Cr.P.C. before the Magistrate, is highly improbable. Given the fact that the Investigating Officer had deposed that the victim was in the love with the appellant, this Court has no hesitation to come to a finding that the victim voluntarily left with the appellant. The evidence is also silent as to whether the victim made any attempt to escape from the house where she was alleged confined. There is no evidence to suggest that the victim was physically or otherwise restrained in any form at the house in question where she was cohabiting with the appellant.

19. It is also difficult to believe the evidence of PW-1, PW-2 and PW-3 that the appellant could have worked for a period of six-seven months at their residence as mason. PW-2, father of the

victim, was admittedly a driver. He could not have engaged a mason in his house over a period of six months. The reasons for engaging the appellant as a mason has also not come on record.

20. This Court, therefore, holds that the prosecution has been unable to prove any case of forceful abduction of the victim girl by the appellant.

21. What, however, remains vital is the age of the victim. It is true that the victim and her father have given different ages i.e. 15 and 14 respectively. The mother also stated that she was 14 years of age. However, the birth certificate obtained by the Investigating Officer from the victim's mother, PW-3, was never produced in course of trial. PW-4, the medical officer, had also recommended an ossification test/long bone test. As to whether such test was ever conducted is not known. The prosecution has been mysteriously silent as regards the same. No such test report was ever produced in course of trial.

22. This Court is conscious of the Section 29 of the POCSO Act. A presumption can definitely be drawn that the victim was below 18 years of age, at the time the incident had occurred. The same, however, does not absolve the prosecution of the responsibility of producing necessary evidence to prove the age of the victim. The birth certificate of the victim was duly collected from PW-3, mother

of the victim. The same was not produced in trial. As already stated hereinabove, no ossification test or long bone test of the victim was conducted.

23. The aforesaid omission of the prosecution coupled with the fact that the victim admitted before the Investigating Officer that she had a love affair with the appellant, and the cross-examination of PW-3, clearly lead to the conclusion that the victim left from the school at 9.30 am on the date of occurrence with the appellant voluntarily. She also voluntarily cohabited with the appellant over a period of ten days and did not protest or raise any alarm.

24. The appellant has been able to demonstrate before the Trial Court that the victim was above 18 years of age. The provisions of Section 363 and Section 4 of the POCSO Act are attracted in the facts of the case.

25. This Court cannot be oblivious to the realities of the day. Given the freely available information and material in the media accessible over the mobile phones and hand held gadgets, promiscuity amongst youngsters above 15 years old has increased.

26. Having regard to the discussions made hereinabove, this Court is of the view that justice would be rendered and the appellant sufficiently penalised if the sentencing of the appellant under Section 4 of the POCSO Act is reduced to the extent of the

incarceration he has already suffered, i.e. a period of 7 years 9 months and 14 days. The period for which the appellant would be entitled to remission comes to 8 years and odd equivalent to slightly over one year of reduction of his sentence.

27. The appellant shall stand convicted to the extent indicated above and shall be set at liberty forthwith if not wanted in any other case. The imposition of fine by the court below shall stand set aside. The victim has already been compensated by the court below.

28. The instant appeal is allowed and disposed of to the extent indicated above.

29. In view of the disposal of the instant appeal, the connected application being CRAN 1 of 2018 shall also stand disposed of.

30. Let a copy of this judgment be sent down to the Court below for information.

29. Let the T.C.R. be returned to the Court below at once.

30. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.

(Rajasekhar Mantha, J.)

I agree.

(Ajay Kumar Gupta, J.)