

IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
Criminal Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Siddhartha Roy Chowdhury

CRA 4 of 2019

HEMANTA BARMAN
Vs.
THE STATE OF WEST BENGAL

For the Appellant : Mr. Arnab Saha
For the State : Mr. Aditi Shankar Chakraborty
Mr. Abhijit Sarkar
Heard on : 28.8.2023
Judgment on : 04.9.2023

The Court:

1. This appeal challenges the judgment and order of conviction passed by the learned Additional Sessions Judge, FTC-II, Alipurduar, District- Jalpaiguri in S.C. No. 206 of 2013 (S.T. 09 of 2014). By the impugned judgment the learned Trial Court was pleased to record an order of conviction against Hemanta Barman, the appellant herein for committing offence under Section 365 of the Indian Penal Code for which he has been sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.5,000/- with default clause and to suffer rigorous imprisonment for seven years for the offence punishable under Section 376 of the Indian Penal Code and to pay fine of Rs.10,000/- with a default clause for three months subject to the provision of Section 428 of the Code of Criminal Procedure.

2. Briefly stated, on November 1, 2007 Golap Mian informed the Inspector-in-Charge, Falakata P.S. that on 30.10.2007 at about 11 am Hemanta Barman eloped

with his minor daughter, hereinafter referred to as victim girl, who was a student of class VII. The information since disclosed offence cognizable in nature Falakata P.S. case no. 342 of 2007 dated 01.11.2007 was registered under Sections 363/366A/376 of the Indian Penal Code. Police took up investigation and submitted charge sheet against the accused person.

3. Learned Trial Court after considering the evidence collected in course of investigation was pleased frame charge under Sections 365/366A/376 of the Indian Penal Code on March 13, 2014. The accused person pleaded his innocence to the charges and claimed to be tried.

4. To bring home charges prosecution examine as many as 2 witnesses. Learned Trial Court after considering the testimony of witnesses both oral and documentary was pleased to record the impugned judgment.

5. Mr. Arnab Saha learned counsel representing the appellant assails the impugned judgment on the ground that the prosecution failed to prove the age of the victim by producing documentary evidence. The victim, her mother and the accused person used to work for gain under the same employer. The *de facto* complainant admittedly used to live elsewhere, therefore, he did not have any knowledge about the relationship *inter se* between the accused person and the victim girl. They were in love and the victim left her house with the accused person on her own, there was no kidnapping within the meaning of Section 361 of the IPC. The victim had attained the age of discretion when the incident took place and decided to leave her house with the accused person, therefore, learned trial court had no reason to hold that the victim was taken out of the keeping of her lawful guardian. Learned trial court had no reason to record the order of conviction under Section 365 of the Indian Penal Code.

6. It is further contended that the case of the prosecution is full of discrepancies which was not considered by the learned trial court. It is the specific case of the prosecution that at the time of alleged kidnapping the victim was accompanied by her younger brother who allegedly informed the mother of the victim. Prosecution did not examine the said brother of the victim Abdul Ghani. The best witness since was withheld learned trial court ought to have given benefit of doubt to the accused person.

7. Drawing my attention to the testimony of PW1 Mr. Saha submits that Hemanta the accused person had a relationship with the victim to the knowledge of the parents of the victim, therefore, the learned trial court ought to have considered the alleged incident as an adventure of two persons who were in love. There was no *mens rea* on the part of the accused person to commit any offence. It is further contended that prosecution had the obligation to comply with the provision of Section 53A of Code of Criminal Procedure but it was not complied with. Learned trial court did not take into consideration the said fact. According to Mr. Saha the ownership of the house from where the alleged victim was recovered since was not determined and none of the inhabitants was examined by the prosecution as witness, Learned Trial Judge ought to have disbelieved the prosecution case.

8. It is further contended that the victim claimed to have informed his family members over phone. The investigating agency did not collect any call record to substantiate such claim. The doctor who attended the victim in his report stated as PW10 that he did not find any mark of injury suggesting application of force on the person of the victim. This finding of the doctor does not support the charge under Section 376 of the Indian Penal Code.

9. Drawing my attention to the testimony of the parents of the victim PW1 and PW2, Mr. Saha submits that the victim since is not getting support from any of the witnesses particularly when the medical evidence does not support the prosecution case, learned trial court ought to have extended the benefit of doubt.

10. According to Mr. Saha the statement made by the victim before the learned Magistrate under Section 164 of the Code of Criminal Procedure is not worth credence in as much as the statement was recorded at a belated stage.

11. Refuting such contention Mr. Sarkar learned counsel for the State submits that the discrepancies as pointed out by Mr. Saha learned counsel for the appellant are of trivial nature. The evidence of victim if is considered in its entirety is established that the victim never gave her consent in physical union. Therefore, force was applied and conviction under Section 376 of the Indian Penal Code is justified. Learned trial court had no reason to disbelieve the testimony of victim who is getting support from the testimony of doctor. PW 10, who found sign of sexual intercourse.

12. Drawing my attention to the cross examination the victim PW4 Mr. Sarkar submits that when the victim during cross examination stated that she raised hue and cry while being sexually assaulted by the accused person and on the following morning being asked by the neighbouring people she also told them about the penetrative sexual assault committed by the accused person. This statement alone is sufficient to prove the charge of Section 376 of the IPC.

13. Admitting the failure on the part of the prosecution to prove school leaving certificate according to law, Mr. Sarkar submits the I.O. collected the copy but no attempt was made to prove the said document and thereby to prove the age of the victim but that shortcoming in the prosecution case does not give any discount of the

accused person. Even an adult person if violated the man should be considered to have committed offence within the meaning of Section 375 of I.P.C.

14. True it is the prosecution has failed to prove the age of the victim, if we consider the provision of Section 361 of the Indian Penal Code, the prosecution had the obligation to prove that victim was below the age of 18 years and he was taken out of the lawful guardianship of her parents. But in absence of any evidence to prove that the victim was below the age of 18 years, I am inclined to hold that learned Trial Court could not have recorded an order of conviction under Section 365 of the Indian Penal Code. But that does not strike at the root of the prosecution case. If we, go by the maiden statement of the de facto complainant, and if it is assumed that the victim was not abducted or kidnapped she left her house with accused person on her own, that does not give the accused person the right to invade upon the privacy of the victim girl or to commit any penetrative sexual offence within the meaning of rape as defined under Section 375 of the Indian Penal Code. During her evidence in chief she stated that she refused to accompany the accused person to the house of his paternal aunt (pisi) and the accused person forcibly took her into a reserved vehicle at Sonapur Patkapara. There was no cross-examination on that statement.

15. In her evidence-in-chief the victim stated that the accused person kept her confined for three days in that house and committed rape upon her.

During cross-examination she stated “ I raised alarm by raising hue and cry while Hemanta raped him in that house. In the next morning the members of that house asked me the reason for which I raised alarm then I told them Hemanta raped me”.

16. This statement, made during cross-examination undoubtedly, proves the case of prosecution so far Section 375 of the Indian Penal Code is concerned. The victim was examined by doctor and as P.W. 10 doctor stated that victim was habituated in sexual intercourse.

17. Though Mr. Saha strenuously argues that absence of mark of injury takes out the sting out of the case of the prosecution and in support of his contention places his reliance on the judgement pronounced by Hon'ble Supreme Court in ***Pratap Misra and Ors. vs. State of Orissa*** reported in AIR 1977 SC 1306. But the ratio laid down in the said judgement cannot be made applicable in this case on the ground that in the said case the victim was allegedly raped by three men.

18. As I have pointed out the victim in her testimony made it clear that force was applied by the accused person while he engaged himself in sexual intercourse that too against the consent of the victim, the prosecution case stands proved. The victim not only with stood the test or cross examination, the defence counsel by way of cross-examination has extended support to the prosecution case.

19. It is no more *res integra* that victim of an offence under Section 375 is the best witnesses to prove the charge.

20. Here in this case nothing has come out from the cross-examination of the victim to shake her credibility, therefore, there is no reason to seek corroboration as it would amount to add an insult to the injury already suffered by the victim.

21. Therefore, I do not find any reason to interfere with the order of conviction.

22. So far imposition of sentence is concerned, I find that the learned Trial Court did not invoke the provision of Section 360 of the Code of Criminal Procedure even did not adhere to the provision of Section 361 of the Code of Criminal Procedure. This Case is 16 years old and the appeal is pending for four years.

23. Drawing my attention to the aforesaid circumstances, Mr. Saha, submits that since this incident took place in the year 2007, taking into consideration and the accused person is sole bread earner for the family who has been passing through the anxiety for 16 years, this Court may interfere with the quantum of sentence.

24. Mr. Sarkar does not oppose such submission.

25. During hearing on the point of sentence the accused person stated that he was only the bread earner of the family and at that relevant point of time, the accused person was twenty six years old and he has been passing his days with agony and anxiety.

26. Under such circumstances, I am of the view that the ends of justice would be met if the appellant / convict is sentenced to suffer imprisonment for four years instead of seven years for committing offence under Section 376 of the Indian Penal Code.

27. Consequently, the appeal is allowed but in part.

28. The appellant is found not guilty to the charge under Section 365 of the Indian Penal Code. The conviction under Section 376 of the Indian Penal Code stands affirmed.

29. The accused person shall undergo imprisonment for four years instead of seven years subject to the provision of Section 428 of Code of Criminal Procedure and shall pay fine as imposed by the learned Trial Court.

30. The appellant / convict is directed to surrender to the jurisdiction of the learned Trial Court within 09.10.2023 to serve out the sentence. Failing which learned Trial Court shall be at liberty to take recourse of law to make the appellant suffer imprisonment.

31. Let a copy of the judgement and Lower Court Record be sent down to the learned Trial Court for information and necessary action.

(Siddhartha Roy Chowdhury,J)