
(2017) 04 CAL CK 0024
In the Calcutta High Court
Case No : 182 of 2013

Jahir Alam @ Jahid @ Javed

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 18-04-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 313, Section 164 - Power to examine the accused - Recording of confessions and statements
Indian Penal Code, 1860, <a href=176

Citation : (2017) 04 CAL CK 0024

Hon'ble Judges : Aniruddha Bose, Sankar Acharyya

Bench : DIVISION BENCH

Advocate : Milon Mukherjee, ?Amit Roy, ?Subir Banerjee, ?Jayanta Banerjee, ?Pratick Bose

Final Decision : Disposed off

Judgement

1. This appeal has been preferred by the sole appellant challenging the judgment and orders of conviction and sentence dated 25.02.2013 and 26.02.2013 passed by learned Additional Sessions Judge, 2nd Court, Darjeeling in Sessions Trial No. 11/2010 arising out of Sessions Case No. 24/2010 convicting the appellant under Sections 376 (2) (f) and 366A of the Indian Penal Code (in short I.P.C.). In that judgment the appellant was sentenced to suffer rigorous imprisonment for eight years and to pay fine of Rs.5000/- in default to simple imprisonment for six months in respect of the charge under Section 366A of the I.P.C. and was also sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.10,000/- in default to simple imprisonment for six months in respect of the charge under Section 376 (2) (f) of the I.P.C. with an order for running the sentences concurrently.

2. In the petition of appeal the appellant has assailed the aforesaid judgment (hereinafter called as impugned judgment) on various grounds. Inter alia, the appellant has contended that the prosecution failed to establish that the victim

girl is a minor and also failed to prove the prosecution case against the accused appellant during trial. The appellant has prayed for setting aside the impugned judgment of conviction and sentence in this appeal.

3. On perusal of the materials on the records of trial Court it appears that on 03.03.2010 at 08:25 a.m. a written complaint was lodged at Jore Bunglow police station in the District of Darjeeling by the informant who was subsequently examined as PW 15 by the prosecution during trial. The said complaint was treated as First Information Report (FIR) and registered as FIR No. 13 dated 03.03.2010 under Sections 363, 366A of the I.P.C. against two accused persons namely Chandan Mahato and Rajen Sah. The case made out in the complaint in substance is that a fourteen years old daughter (who was examined as PW 17 during trial) of PW 15 was missing since 25th February, 2010. On search she could not be found out till the lodging of FIR. In the meantime, on 1st March, 2010, PW 17 called the PW 15 through mobile phone No. 9641814723 at the informant's mobile no. 9733330507 and she was crying. Again, on 2nd March, 2010 there was a missed call in the mobile phone of PW 15 from the same number through which PW 17 called PW 15 on the preceding date. On 1st March, 2010, PW 17 told the PW 15 over phone that the sim card no. 9641814723 was purchased and given to her by Chandan Mahato. In the complaint it was also stated that Chandan Mahato and Rajen Sah of Rajib Nagar, Siliguri used to come daily for taking food in the shop of PW 15. The informant suspected that said Chandan Mahato and Rajen Sah had kidnapped the PW 17. Delay in lodging the FIR has been explained as caused for searching the PW 17.

4. On 4th March, 2010 FIR named accused Chandan Mahato was produced under arrest by police before learned Chief Judicial Magistrate, Darjeeling. On 30th March, 2010 the PW 17 was produced by police before the learned Chief Judicial Magistrate and on prayer of the Investigating Officer, statement of PW 17 was recorded under Section 164 of the Code of Criminal Procedure (in short Cr.P.C.).

5. On that very date the appellant Jahir Alam was also brought under arrest by police and produced before learned Chief Judicial Magistrate. On that date on prayer of the Investigating Police Officer Section 376 of the I.P.C. was also added in the FIR. On 31.03.2010 accused Chandan Mahato was released on bail. On 1st June, 2010, the Investigating Police Officer submitted charge-sheet against the appellant only under Sections 363, 366A and 376 of the I.P.C. with a prayer for discharge of FIR named accused persons Chandan Mahato and Rajen Sah. On such prayer said two FIR named accused persons were discharged. Subsequently, the case against accused Jahir Alam (appellant herein) was committed to the Court of Sessions for trial after observing legal formalities. The appellant was released on bail on 27.07.2010 under order of this High Court. On 26.11.2010 learned Additional Sessions Judge, 2nd Court, Darjeeling framed charges under Sections 363, 366A and 376 of the I.P.C. against the accused appellant recording that said charges were read over and explained to the accused in Nepali language which was understood by the accused and he pleaded

not guilty.

6. During trial, prosecution examined as many as twenty three witnesses including the informant (PW 15) and the victim girl (PW 17). Among the said witnesses PW 6 and PW 7 were not asked any question either by prosecution or by defence. During investigation PW 11 medically examined the PW 17. PW 20 held ossification test of PW 17. PW 23 medically examined the accused appellant. PW 22 recorded statement of PW 17 under Section 164, Cr.P.C. In the trial, the appellant as accused pleaded his innocence and claimed himself as not guilty of the charges levelled against him. He was examined under Section 313, Cr.P.C. and result of such examination was recorded by the learned Trial Judge in English language and the accused wrote his signature in Bengali language.

7. At the time of hearing this appeal, Mr. Mukherjee, learned Senior Advocate for the appellant drew our attention to some salient features. As per his arguments the FIR named accused persons were discharged but the appellant whose name does not appear in FIR was charge-sheeted after investigation and convicted and sentenced after trial. According to him, there is no cogent evidence on record as to how this appellant was implicated with the alleged offences. He claimed that neither the charges were properly framed against the accused nor the accused was properly examined under Section 313 of the Code of Criminal Procedure. He pointed out some discrepancies in evidence of prosecution recorded during trial about the age of the PW 17 and involvement of the appellant in the alleged crime. According to him, the delay in lodging the FIR was not satisfactorily explained. He further argued that no charge under Section 376 (2) (f) of the I.P.C. was framed against the accused and that said Section 376 (2) (f) was introduced in the statute (I.P.C) long after the alleged occurrence. He also pointed out that the mobile phones whose numbers have been mentioned in the FIR were not seized during investigation. Learned counsel for the appellant argued that PW 1, PW 2, PW 3, PW 4 PW 10 and PW 15 are aunt, uncle, mother, friend, uncle and father respectively of PW 17 and so they are interested witnesses. PW 5, PW 13, PW 14 and PW 21 are the police witnesses. According to him, the prosecution failed to prove the case. He further submitted that during investigation the appellant's mobile phone with sim card no. 9851236935 was seized but no call record of that phone was proved during trial and there is no evidence that said phone was used in connection with the alleged crime. Moreover, the investigating officer claimed that he collected the call records of the sim card no. 8101799863 but no such call record was exhibited and, therefore, this appellant may not be connected with the alleged crime unless his involvement is proved beyond reasonable doubts. According to him, the charge and examination of accused under Section 313, Cr.P.C. are defective and a fresh trial may be ordered sending the case back on remand to the trial Court.

8. Learned Additional Public Prosecutor argued that there are sufficient evidence for proving the guilt of the accused appellant and he has been rightly convicted and sentenced by the learned Judge in the trial Court. He drew our attention to

the statement of PW 17 recorded under Section 164, Cr.P.C. and the evidence of PW 17 recorded during trial and has argued that only the said evidence is sufficient to convict and award sentence to the accused appellant. He has claimed that the charge was rightly explained to the accused in Nepali language which he understood as recorded in the order sheet and in the charge. He also submitted that the recording of questions and answers recorded during examination of the accused under Section 313, Cr.P.C. leaves no doubt that the accused understood questions and gave his rational answer to those questions. He submitted for confirming the impugned judgment and for dismissal of this appeal.

9. Having gone through the charge, oral evidence, documentary evidence and result of examination of the accused under Section 313, Cr.P.C. we cannot brush aside the submission of learned senior counsel for the appellant for sending the case back on remand for fresh trial. Although it appears that the charge was read over and explained to the accused in the trial Court in Nepali language but no reason has been assigned as to why Nepali language was used for explaining the charge to him when it is evident from result of examination under Section 313, Cr.P.C. that the accused-appellant knows Bengali language as he signed in Bengali. In the Trial Court charges were framed under Sections 363, 366A and 376 of the Indian Penal Code. Learned Judge recorded "The above charges are read over and explained to the accused persons, in Nepali language, understood by the accused persons by learned Public Prosecutor, to which he/they pleaded not guilty by saying "KASUR CHAINA" and claimed to be tried". Be it noted that all the said charges were framed against sole accused Jahir Alam @ Jahid @ Javed. From the charge it seems that more than one accused were present and learned Public Prosecutor appears to have had played the role of the learned Judge to explain the charges to accused which is highly irregular. As such, it may be said that the learned Judge in the Trial Court failed to frame the charges properly against the accused-appellant. Since, framing of charge is the commencement of trial, defect therein warrants intervention by this Court of appeal. We are of the view, that charges were not framed properly. Only on that ground the impugned judgment should be set aside. In our view, learned senior counsel has rightly submitted that a fresh trial is needed to be ordered sending the case back to the Trial Court on remand. However, we make it clear that we do not accept the arguments relating to any defect in examination of the accused under Section 313, Cr.P.C. Further discussion on the evidence and other materials on record by this Court may cause prejudice to either party in fresh trial. Therefore, we refrain ourselves from entering into further discussion.

10. In the light of above observations we find and hold that the impugned judgment is liable to be set aside and the case being ST no. 11 of 2010 arising out of Sessions Case No. 24 of 2010 is required to be sent back to the Trial Court on remand for fresh trial which is to be commenced in the Trial Court by framing of charge afresh. Since the case is being sent back for fresh trial the Trial Court shall be at liberty to deal with the case on all points in accordance with law

independently. Be it further noted that considering the period of detention of the accused learned Judge will be free to consider release of accused on bail if such prayer is made before that Court.

11. Accordingly, the impugned judgment with orders of conviction and sentence is set aside.

12. Let the case be sent back on remand for de novo trial in the light of observations made in this judgment. However, the parties will be at liberty to adopt the evidence which was recorded earlier as evidence in such de novo trial also. The appeal is accordingly disposed of.

13. Urgent Photostat certified copy of this judgment be made available to the parties or their advocates on record expeditiously if applied for following usual legal formalities.