

Both the appeals were taken up for hearing together since the appellants, herein, are challenging one and the same Judgment and both the appellants are being disposed of by this common Judgment.

2. The appellant, namely, Md Amin Uddin, has been convicted under Section 376 of the Indian Penal Code, whereas, the appellants, namely, Md Siraj Uddin, Md Abdul Mannaf and Md Faras Uddin, have been convicted under Section 366 of the Indian Penal Code, vide impugned Judgment and Order dated 20.06.2005, passed by the then learned Sessions Judge, Hailakandi, in Sessions Case No. 39 of 2002. After such convictions, the appellant, Md Aminuddin, has been sentenced to undergo RI for 10 (ten) years and also to pay a fine of Rs. 50,000/- (Rupees fifty thousand) with default sentence to undergo further RI for 1 (one) year. The appellant, Md Sirajuddin, has been sentenced to undergo 2 % years RI, with fine of Rs. 5,000/- (Rupees five thousand), with default sentence to undergo further RI for 6 (six) months. The appellants, Md Abdul Mannaf and Md Faras Uddin, have been sentenced to undergo RI for 2 (two) years with fine of Rs. 4,000/-, with default sentence to undergo further RI for 5 (five) months each.

3. Heard Sri A M Barbhuiya, learned counsel as well as Sri A Roy, learned counsel, representing Sri SS Dey, learned counsel for the appellants. Also heard Sri K C Mahanta, learned Additional Public Prosecutor, for the State of Assam. I have also gone through the impugned Judgment and the prosecution witnesses proffered in the trial Court. The defence case was of total denial and no evidence in defence was tendered.

4. The gist of the prosecution case is that the victim girl (PW-3) is the sister-in-law of the informant. At the relevant time, she had come to stay in her brother-in-law's home on courtesy visit. It is also the prosecution case that at about midnight intervening 8th and 9th of June 1996, the appellants forcibly took away the victim girl and the appellant Aminuddin also subjected her to sexual intercourse. The offence of kidnapping took place from Village- Bhabanipur under Lala Police Station and the victim girl was recovered on 10.01.1996 from Hailakandi Police Station. The FIR was lodged on 09.1.1996 at Lala Police Station since the offence of kidnapping had taken place under the said Police Station.

5. After the recovery of the victim girl she was medically examined and her statement under Section 164 CrPC was also obtained. After investigation, chargesheet was submitted under Sections 143/ 448/ 341/ 366A/ 376 of the Indian Penal Code against 4 (four) accused persons.

6. After the chargesheet, the accused Aminuddin was tried for the offence of rape simpliciter (under Section 376 IPC) and the remaining accused persons were tried for the offence under Section 366 IPC. After the trial, the learned Sessions Judge found that the accused Aminuddin was the principal accused for kidnapping the girl. However, the Court chose not to convict the said appellant for the offence of kidnapping since no formal charge under Section 366 IPC was framed. The said accused was, however, convicted under Section 376 IPC and the remaining accused persons were convicted under Section 366 IPC.

7. Only 5 (five) witnesses were examined by the prosecution. PW-1 is the informant; PW-2 is the wife of the informant, i.e., elder sister of the victim girl; PW-3 is the victim girl herself; PW-4 is the doctor and PW-5 is the Investigating Officer.

8. The learned counsel for the appellants vehemently argued that the prosecution witnesses could not prove the allegation of kidnapping as well as

rape. This submission was made on the basis of certain contradictory statements given by the witnesses in their cross-examination.

9. By now, it is the settled position of law that the offences in the nature of kidnapping and rape can be proved on the basis of the sole testimony of the victim girl provided her deposition is wholly trustworthy and does not suffer from gross infirmities and discrepancies.

10. In the present case, PWs-1, 2 and 3, have given almost identical deposition that on the relevant night someone knocked their door, then PW-1 opened the door. Thereafter, 2 (two) persons entered the house and forcibly took away PW-3. In the chief examination, PW-1 has named all the 4 (four) accused persons for taking away his sister-in-law. However, in the cross-examination, PW-1 has admitted that he could not identify the persons, who had taken away his sister-in-law. PW-2 had admitted in the cross-examination that the accused persons were cultivating their land, indicating that in that regard, they came in contact with her victim sister. PW-2 further admitted in the cross-examination that the accused Aminuddin had alone taken away her sister. However, the victim herself has time and again deposed that the appellant Aminuddin and Sirajuddin @ Siru had physically lifted her from the bedroom and carried her to some distance. Thereafter, she was taken to the house of the relative of Aminuddin, whereas the said accused Aminuddin subjected her to sexual intercourse against her will and consent. In the chief examination, the victim girl has implicated the appellant Md Abdul Mannaf and Md Faras Uddin by deposing that on the next morning, they also accompanied the principal accused to take her to another place. In other words, the victim girl has not stated that the aforesaid 2 (two) persons also joined Aminuddin and Sirajuddin at the time of kidnapping.

11. Admittedly, the victim girl was recovered from another village known as Sorashpur and the prosecution did not examine any witnesses from the said village. According to the Investigating Officer, the victim girl was recovered by VDP persons. In this way, there is no concrete evidence that the appellants, Md Abdul Mannaf and Md Faras Uddin also took active part in kidnapping the girl. Hence, I am of the view that these 2 (two) appellants may be acquitted by giving benefit of doubt.

12. The learned counsel for the petitioners also contended that as per the victim girl herself, she was taken to different villages and kept her with families and despite that she had not raised any protest or tried to flee away and from this conduct itself it can be inferred that that the victim girl was a consenting party for eloping. In fact, the victim girl was also given the suggestion in the cross-examination that she had willfully fled away with the accused Aminuddin out of their love affairs. From this suggestion, it can be safely inferred that Aminuddin was the prime accused for the offence of kidnapping and rape. Besides this, the victim girl has also implicated Sirajuddin in the offence of kidnapping. From the deposition of PW-3, it is also apparent that she was kept in the house of the relatives of the appellants Aminuddin and Sirajuddin and under such circumstances, neither the victim girl could have expected any help nor could have challenged her confinement. Besides this, the victim girl was mostly moved from one place to another during night hours and also through rural roads. Had the victim girl voluntarily eloped with the appellants there would have been no necessity to take her through rural path and forest areas.

13. For the foregoing reasons, the conviction of the appellant Sirajuddin @ Siru for the offence under Section 366 IPC is hereby affirmed. However, the accused Aminuddin has not been convicted under Section 366 IPC due to technical defect in the trial for not framing formal charge under Section 366 IPC. At this stage, it may be mentioned here that although the charge was framed under Section 366 A IPC, the learned Sessions Judge has convicted the appellants as in his view the victim girl was more than 18 years of age. This view has been taken

by giving liberal interpretation of medical opinion. According to the doctor, the victim girl was in between 17-18 years of age. However, the learned Sessions Judge failed to take into consideration that the girl was studying in Class-IX and during ossification test it was found that epiphysis of radius joints did not fuse completely. As per the medical jurisprudence, the bones of radius joints normally unite at the age of 18 years. In this way, the girl was less than 18 years, but certainly, on the verge of attaining majority.

14. Be that as it may, since the learned Sessions Judge has taken a liberal view to convict the appellant Sirajuddin under Section 366 IPC, instead of 366A IPC, I am not interfering with the conviction now.

15. Coming to the question of sentence, the learned counsel submitted that in view of the facts and circumstances the sentences are on the higher side. I have already mentioned in the preceding paragraphs that the victim girl was almost on the verge of attaining majority and she was known to the appellants from before, as the appellants were working in the house of the appellants. Besides this, after the incidence, the victim girl has already been given in marriage. Hence, the sentence of the appellant Aminuddin for his conviction under Section 376 IPC is reduced to 7 (seven) years rigorous imprisonment. Similarly, the fine amount of Rs. 50,000/- (Rupees fifty thousand) appears to be on the higher side since the prosecution witnesses themselves have admitted that the appellant was working as a labourer. Hence, the fine amount is reduced to Rs. 5,000/- (Rupees five thousand). In default of payment of fine, further RI for 3 (three) months.

16. With regard to the sentence of Sirajuddin for his conviction under Section 366 IPC, I do not see any reason to interfere with the same. In other words, his sentence of 2 % years of RI for conviction under Section 366 IPC is hereby maintained. Similarly, the fine amount of Rs. 5,000/- (Rupees five thousand) is also affirmed only with the modification that for non-payment of fine, the appellant shall undergo further RI for 3 (three) months instead of 6 (six) months.

17. In the result, the appeals stand partly allowed. The appellants, Md Abdul Mannaf and Md Faras Uddin, are hereby acquitted and their conviction under Section 366 IPC is hereby set aside and the appellants are set at liberty forthwith. Their bail-bonds stand discharged. However, the conviction of the appellants, Aminuddin and Sirajuddin, under Section 376 and Section 366 IPC, respectively, is hereby upheld, subject to the modification of the sentences as noted in the preceding paragraphs.

18. The appellant, Sirajuddin @ Siru is directed to surrender before the learned trial Court immediately, to serve out the remaining period of sentence. The appellant, Aminuddin is in custody. On receipt of a copy of this Judgment, the trial Court shall issue modified custody warrant.

19. The Registry is directed to return the LCRs immediately, along with a copy of this Judgment.