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**(2004) 09 CAL CK 0043**

**Calcutta High Court**

**Case No:** C.R.A. No. 193 of 1999

Golam Mustafa Laskar

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** Sept. 22, 2004

**Acts Referred:**

- Juvenile Justice Act, 1986 - Section 22, 25
- Penal Code, 1860 (IPC) - Section 376

**Citation:** (2005) 1 CHN 184 : (2005) CriLJ 2421

**Hon'ble Judges:** Sankar Prasad Mitra, J; Gorachand De, J

**Bench:** Division Bench

**Advocate:** Milan Kr. Mukherjee, Abdul Alim and Saifur Rahaman, for the Appellant; S.N.S. Alquadri and Usuf Ali Dewan, for the Respondent

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### **Judgement**

Gorachand De, J.

This appeal is directed against an order of conviction dated 27.5.1999 and sentence dated 28.5.1999 passed by the learned Assistant Sessions Judge, 1st Court, Alipore in Sessions Trial No. 2(3)/99 arising out of Baruipur P.S. Case No. 264(8)/95. By the said judgment, the learned Assistant Sessions Judge found the appellant Golam Mustafa Laskar guilty u/s 376 of the IPC, convicted him thereunder and sentenced him to suffer R. I. for 10 years and also to pay a fine of Rs. 5,000/-, in default, to undergo R. I. for six months.

2. The prosecution case in brief is that one Aziman Bibi lodged a written complaint to the Officer-in-Charge, Baruipur Police Station on 30.8.95 alleging that on 26.8.95 in between 8 and 9 p.m. the appellant/convict Golam Mostafa Laskar came to their house when her minor daughter Mafuja Khatun and her youngest brother Raju aged about four years were reading in the verandah of their house. In that verandah one T.V. was being displayed. The convict started to witness the T.V. show and at that time the complainant and her husband were absent in that house and

her youngest son Raju fell asleep. Suddenly, the current went off and taking this advantage the victim raped Mafuja Khatun causing bleeding injury on her private part. The complainant returned to their house and the current came back when she found the convict fleeing away. Victim was treated by a Medical Doctor and thereafter she was removed to Seva Tirtham Nursing Home as she was bleeding profusely. In the nursing home she was treated and in course of operation 4 bottles of blood had to be transfused and accordingly, there was a delay in lodging the complaint. On the basis of such written complaint, a formal FIR was drawn and investigation of the case was started. In course of investigation the minor girl was medically examined. Convict was also examined medically. After conclusion of investigation chargesheet was submitted against the present appellant/convict. Convict was arrested on 18.10.95 and subsequently, he was enlarged on bail.

3. As it was a case u/s 376 of the IPC, the case was committed to the Court of Sessions on 2.2.99 after which charge u/s 376 of the IPC was framed against the convict. Since the accused/convict pleaded not guilty to the charge, the prosecution examined as many as 21 witnesses including the Investigating Officer. However, no defence witness was examined. But the defence case as can be ascertained from the trend of cross-examination and the reply given by the accused in course of examination u/s 313 of Cr. PC is that he did not come to the residence of the victim at the time of alleged incident and he was not involved in the alleged offence. The Trial Court after scanning the evidence on record and keeping in view the nature of the offence came to the conclusion that the charge against the victim was proved beyond all reasonable doubt. Accordingly, the convict/appellant was found guilty u/s 376 of the IPC, was convicted thereunder and was sentenced in the manner indicated hereinabove.

4. In course of hearing of this appeal, Mr. Milan Mukherjee, learned Counsel appearing on behalf of the convict/appellant took a preliminary point that the convict being juvenile was required to be tried in accordance with the provision of Juvenile Justice Act, 1986 but the Trial Court ignoring this aspect proceeded with the trial and convicted and sentenced the accused like an adult convict. Of course, Mr. Mukherjee also took other grounds viz., the prosecution failed to prove the case against the accused/convict inasmuch as the mother of the victim or victim herself did not name the accused/convict before the doctor. An attempt was also made to show that the victim being aged about 14-16 years attended the age of consent and sexual act, if any, was committed with consent. It is also pointed out that the evidence on record is not sufficient to prove the charge levelled against the accused/convict.

5. The learned Counsel for the State however, contended that the plea of minority of the accused was not taken in the Memorandum of Appeal and as such, this plea cannot be allowed to be taken at this stage. It is also pointed out that the Trial Court duly considered the evidence and came to a just finding. Accordingly, the learned

Counsel prayed for confirmation of the sentence.

6. As regards the evidence on record, it is to be stated that the guilt of the convict can be established only on the basis of the evidence adduced by the victim herself. In the present case, medical evidence as well as the evidence of the complainant mother (P.W.1) and the victim herself (P.W.8) is sufficient to indicate that immediately after the incident there was profuse bleeding in the private part of the victim for which she had to be admitted in the nursing home where operation had to be undertaken and four bottles of blood had to be transfused. Suggestion was also tried to be given to the witnesses that the injury was caused due to sudden fall, but the medical evidence is sufficient to indicate that there was no external injury and the injury was actually caused in the vagina after rupture of the hymen and the vaginal canal was found congested. So, the injury can only be caused by forcible coitus in the vaginal canal. Accordingly, the story of sustaining injury due to a sudden fall on the private part was rightly ruled out by the Trial Court.

7. The Trial Court came to the conclusion that the rape on the victim girl has been proved beyond all reasonable doubt. The plea taken by the accused/ convict that he was not present at the time of the alleged incident has not been substantiated. On the other hand, from the evidence of P.W. 1 and P. W. 8, it is sufficiently clear that the convict was very much present in the house of the victim and she was forcibly raped by the convict. The Trial Court duly analysed this aspect and came to a just decision that the convict actually had committed rape on the person of the victim. We are of the view that the plea taken by the accused/convict as regards the injury on the person of the victim is without any basis.

8. The most vital question is whether the minority of the convict taken in this appeal can be entertained at this stage. From the order dated 15.11.95 of the Trial Court, it appears that the accused was directed to be shifted to Dhruba Ashram where the convict was kept detained from 18.10.95 till 17.1.96. It also appears from the Lower Court Records that the Session Judge in C. M. C. Case No. 6864/95 passed an order on 13.11.95 where he found the convict as juvenile and directed his removal from the jail custody to any home constituted under the Juvenile Justice Act. On the basis of such order, the Superintendent of Alipore Central Jail filed an application before the learned Sub-Divisional Judicial Magistrate, Alipore for sending the convict/appellant Golam Mustafa Laskar to a Juvenile Home. Accordingly, the convict was sent to Dhruba Ashram. So, the fact remains that the convict before the Trial Court was found to be a Juvenile Offender and there was a specific direction to treat him under the Juvenile Justice Act. It is surprising that the Trial Court did not take into consideration this aspect.

9. So it is rightly argued by Mr. Milan Mukherjee, learned Counsel for the appellant that even if the specific plea of minority is not taken in the Memorandum of Appeal that cannot debar the appellant to take up the point as it is already analysed in the record itself. It is already pointed out that no attempt was made on behalf of the

prosecution to set aside the order passed by the learned Sessions Judge as regards the minority of the convict and that order achieved its finality. The learned Public Prosecutor was fair enough to concede this aspect especially in view of the order passed in the L. C. R.

10. Not only from the Lower Court Record but also from the evidence adduced by the parties it is sufficiently clear that date of birth of the convict was 2.9.80 and it was confirmed by P.W.15 and the certificate was marked as Ext. 9 P.W.15 was unshaken in cross-examination. So the position remains beyond reasonable doubt that the date of birth of the convict Golam Mustafa Laskar was 2.9.80 and he was a minor on the date of the incident on 26.8.95.

11. After a careful consideration of the materials on record we are satisfied that both the convict as well as the victim were minor, on the date of the alleged incident. It is also established that the convict was physically fit to commit the offence of rape. It is already stated above that the Trial Court duly considered all these aspects and came to a just decision that the victim was actually raped by the convict, who was also a minor. The minority of the convict appellant lost sight of the Trial Court for which he took a wrong course of action by proceeding with the trial regularly before the Sessions Court which is completely prohibited under the provision of Juvenile Justice Act, 1986 (Act 53/86). So the convict being a minor it was incumbent upon the Court to proceed against him in accordance with the provision of the said Act. But for not following that procedure a failure of justice has occasioned in this case.

12. In the Juvenile Justice Act, 1986, there is no provision of imposing any sentence to Juvenile Offender and in appropriate case he can be kept in appropriate homes. Similarly under the provision of Section 22 of the Act a delinquent juvenile cannot be sentenced in the manner done in this case. The proviso to that section further clarifies that in a case of this nature the convict could have been sent to special home or if necessary he could be kept in safe custody.

13. The record indicates that the trial of the convict was started at a stage when he was going to be adult. But the law as settled by the Apex Court was discussed in a decision of this Court in [Uttam Ghosh Vs. State of West Bengal and Another](#), and it was viewed that imposition of sentence had no sanction of law. In fact, the Trial Court was not competent enough to pass an order of sentence in the manner done in the present case. Hence passing of sentence in this case having no sanction of law is without jurisdiction and is liable to be set aside.

14. But the fact situation in this case led us to a situation where conviction of the present appellant-convict is liable to be upheld. But the sentence imposed upon him is liable to be set aside and quashed. Such a situation was taken into consideration by the Apex Court in Bhoop Ram v. State of U. P., reported in 1989 SCC (Cri) 486 and the view taken was that since the appellant convict was sufficiently aged, there was no question of sending the appellant to any approved school for being detained

there. Accordingly Their Lordships sustained the conviction but quashed the sentence awarded against the appellant. In *Pradip Kumar v. State of U. P.*, reported in 1995 SCC (Cri) 395, the Apex Court in similar situation upheld the conviction but quashed the sentence and released the convict. In the present case at the time of commission of offence the convict was a minor, but subsequently he became adult. At present he is aged about 24 years. So no purpose would be served in sending the convict back to any safety home for detention for further trial. The convict is already in custody for more than five years. So in a case of this nature we do not think that it would be proper to send him back to any home for resumption of a fresh trial. In this backdrop the principle laid down in *State of Haryana v. Balbant Singh*, reported in 1993 SCC (Cri) 251, as relied upon by the State-respondent has got no manner of application.

15. In view of the discussion hereinbefore made and the materials on record, we sustain the conviction of the appellant u/s 376 of IPC, but quash the sentence imposed against him and direct his release forthwith from custody.

16. It is made clear that in view of the provision of Section 25 of the Juvenile Justice Act, 1986 (Act 53 of 1986) the conviction of the appellant Golam Mustafa Laskar shall not be regarded as disqualification attached to conviction for the offence.

17. With the above observation the appeal is disposed of. Consequently the application for bail being C. R. A. N. No. 1540 of 2003 is also disposed of.

18. Let a copy of this judgment be sent to the Superintendent, Alipore Central Correctional Home with a direction to release the convict Golam Mustafa Laskar forthwith.

Sankar Prasad Mitra, J.

19. I agree.