

(2023) 02 CAL CK 0034

In the Calcutta High Court

Case No : Criminal Appeal No. 51, 72 Of 2020, IA No. CRAN 1, 2 Of 2020 (Old No. CRAN 1103, 3405 Of 2020)

Faruk Gazi @ Raja

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision : 09-02-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 363, 366, 372, 376
Code Of Criminal Procedure, 1973 — Section 164, 313

Citation : (2023) 02 CAL CK 0034

Hon'ble Judges : Debangsu Basak, J;Md. Shabbar Rashidi, J

Bench : Division Bench

Advocate : Angshuman Chakraborty, Partha Sarathi Bhattacharyya, Debang Bhattacharjee, Aranyo Basu, Negin Ahmed, Amita Gaur

Final Decision : Dismissed

Judgement

Debangsu Basak, J

1. Two appeals have been heard analogously as they emanate out of the same judgement of conviction and the order of sentence dated December 21, 2019 passed by the learned Additional District and Sessions Judge, Fast Track, 7th Court, Alipore, South 24-Parganas. The appeal of Faruk Gazi @ Raja has been registered as CRA No. 51 of 2020 while the appeal of Abdul @ Abdul Jabbar Molla @ Khokan has been registered as CRA No. 72 of 2020.

2. By the impugned judgement of conviction, Faruk Gazi @ Raja has been found guilty under Sections 366/372/376 of the Indian Penal Code, 1860 and sentenced to suffer 10 years imprisonment and a fine of Rs. 25,000 in default of which rigorous imprisonment of one year for the offence under Section 366 of the Indian Penal Code, 1860; 10 years of imprisonment and a fine of Rs. 25,000 in default of which rigorous imprisonment of one year for the offence under Section 372 of the Indian Penal Code, 1860; 10 years of imprisonment and a fine of Rs. 25,000 in default of which rigorous imprisonment of one year for the

offence under Section 376 of the Indian Penal Code, 1860. Abdul @ Abdul Jabbar Molla @ Khokan has been convicted under Section 366 of the Indian Penal Code, 1860 and sentenced to suffer rigorous imprisonment for 8 years and a fine of Rs. 15,000 in default one year of rigorous imprisonment.

3. Three persons had been convicted by the impugned judgement and order two persons had preferred an appeal as noted above. The 3rd person Marjina Khatoon did not prefer an appeal as appearing from the report dated December 5, 2022 of the department as called for by the order dated August 22, 2022.

4. Learned advocate appearing for Faruk Gazi @ Raja has submitted that, the prosecution failed to prove the charges beyond reasonable doubt. He has highlighted the delay in the lodgement of the First Information Report. He has contended that, the First Information Report was lodged with a delay of 6 months without any explanation for the delay. The appellant was not named in the First Information Report. The de facto complainant had died before the commencement of the trial and was therefore not examined.

5. Learned advocate appearing for Faruk Gazi @ Raja has submitted that, the deposition of PW 1 should not be relied upon. The prosecution did not produce any evidence to corroborate the claims that PW 1 had made in her oral testimony. The prosecution had failed to examine various vital witnesses. He has questioned the version of the claim of divorce between PW 1 and her husband. He has pointed out that, PW 1 claimed that the marriage took place following Hindu rites and rituals and that no divorce papers were filed by PW 1.

6. Learned advocate appearing for Faruk Gazi @ Raja has submitted that the defence filed a petition for summoning of Anowara Bibi which was rejected by the learned trial judge. He has submitted that, since such witness was cited in the charge sheet and produced by the prosecution, the defence lost the chance of cross examining such witness at the trial.

7. Learned advocate appearing for Faruk Gazi @ Raja has submitted that, the version of PW 1 is concocted. She had gone voluntarily to the places she claimed to have gone. Therefore, since the oral testimony of PW 1 was not trustworthy, conviction on the basis of her testimony should not have been granted.

8. Learned advocate appearing for Faruk Gazi @ Raja has submitted that, the testimonies of the other witnesses of the prosecution also did not inspire any confidence as they did not witness the incident. Moreover, their testimonies suffered from contradictions.

9. Learned advocate appearing for Faruk Gazi @ Raja has submitted that, the learned trial judge failed to appreciate that the prosecution failed to establish the case of kidnapping and thus the charge under Section 366 of the Indian Penal Code did not have any legs to stand on.

10. Learned advocate appearing for Abdul @ Abdul Jabbar Molla @ Khokan has submitted that, the prosecution did not explain the delay in the lodgement of the

First Information Report.

11. Learned advocate appearing for Abdul @ Abdul Jabbar Molla @ Khokan has contended that, no charge under Section 366 of the Indian Penal Code, 1860 was framed as against him. Therefore, he could not have been convicted under Section 366 of the Indian Penal Code, 1860.

12. Learned advocate appearing for Abdul @ Abdul Jabbar Molla @ Khokan has contended that, the statement recorded under Section 164 of the Criminal Procedure Code did not implicate Abdul @ Abdul Jabbar Molla @ Khokan. Therefore, Abdul @ Abdul Jabbar Molla @ Khokan should not have been proceeded against.

13. Learned advocate appearing for Abdul @ Abdul Jabbar Molla @ Khokan has submitted that Section 366 of the Indian Penal Code, 1860 was not attracted as against Abdul @ Abdul Jabbar Molla @ Khokan. Abdul @ Abdul Jabbar Molla @ Khokan had not been identified. Therefore, the conviction and the sentence of Abdul @ Abdul Jabbar Molla @ Khokan under Section 366 of the Indian Penal Code, 1860 was untenable.

14. Learned advocate appearing for the State has contended that, the father of the victim had lodged a complaint dated January 4, 2004 on the basis of which, the First Information Report dated January 10, 2004 was started. Initially a charge sheet was submitted against Marjina Khatun and Abdul @ Abdul Jabbar Molla @ Khokan under Sections 363/366/120B of the Indian Penal Code, 1860. Subsequent to the recovery of the victim, the case had been reopened, re-investigated and supplementary charge sheet was submitted against Abdul @ Abdul Jabbar Molla @ Khokan, Marjina Khatun, Basanti Roy and Faruk Gazi @ Raja under Sections 363/372/376/34 of the Indian Penal Code, 1860. The case had been filed against Basanti Roy.

15. Learned advocate appearing for the State has submitted that, the father of the victim who was the de facto complainant died during the investigation. The victim had died after recording her testimony.

16. Learned advocate appearing for the State has referred to the testimony of the victim and submitted that, the victim was kidnapped, taken to Pune, raped by Faruk Gazi @ Raja, and compelled to work as a sex worker. The victim had been rescued by a person. She had thereafter returned to her home to narrate the state of affairs. PWs 2, 3 and 4 had corroborated and supported the victim in their oral testimonies at the trial. The victim had recorded a statement under Section 164 of the Criminal Procedure Code. The original school certificate of the victim had been seized being Exhibit 3 which reflects that the age of the victim was 13 years at the time of the incident.

17. Learned advocate appearing for the State has submitted that, from the evidence placed on record, it was established that, Faruk Gazi @ Raja kidnapped the victim, sexually violated and sold her for the purpose of prostitution. Abdul @

Abdul Jabbar Molla @ Khokan had been involved in the offence of abduction/kidnapping of the victim. Abdul @ Abdul Jabbar Molla @ Khokan had accompanied the victim till Pune where, Faruk Gazi @ Raja had sold the victim. Abdul @ Abdul Jabbar Molla @ Khokan had forced the victim to work as a sex worker and assaulted her, poured kerosene oil on her body and threatened that she would be killed if she did not comply. Therefore, he has submitted that, the prosecution had established beyond reasonable doubt the charges as against both the appellants.

18. At the trial, the case of the prosecution had been that, the father of the victim had lodged a complaint with the police station on January 5, 2004 claiming that the victim went to a doctor at about 11 AM on August 27, 2003 and did not return home thereafter. The father of the victim had lodged a general diary on September 4, 2003. The victim had been kidnapped by the accused persons was taken to Pune, sold and forced to work as a sex worker. The victim had managed to return whereupon, further proceedings were taken.

19. The Court had framed charges under Section 366/372/376 of the Indian Penal Code, 1860 against the 3 accused persons on December 3, 2008. The accused persons had pleaded not guilty and claimed to be tried.

20. At the trial, the prosecution had examined 7 witnesses and relied upon various documentary evidences. On conclusion of the evidence of the prosecution, the accused persons had been examined under Section 313 of the Criminal Procedure Code where they claimed to be not guilty. They had declined to produce any defence witness.

21. The victim had deposed as PW 1. She had stated that, the incident took place on August 27, 2003. On that date at about 11 AM, she had gone to the chamber of a doctor for treatment. On reaching the chamber, when she was waiting for the doctor, Faruk Gazi @ Raja came there. She knew Faruk Gazi @ Raja before the date of the incident. Thereafter, at the request of Faruk, she had gone over to the sweet meat shop near the railway station. In that shop, Faruk Gazi @ Raja had supplied her an egg and a glass of water. After she had eaten the egg and drank the water, she felt unwell. She had returned to the chamber of the doctor with Faruk Gazi @ Raja. The doctor had treated her and prescribed medicines. Thereafter, she and Faruk Gazi @ Raja went to the railway station from where they had boarded a train to return to their houses. As the train had reached the home station, Faruk Gazi @ Raja had requested her to go to Sealdah with him. She had gone to Sealdah with Faruk Gazi @ Raja. From such railway station, Faruk Gazi @ Raja had taken her to a park. Two unknown ladies along with two unknown men had come and met them there. Faruk Gazi @ Raja had introduced her to such persons as his cousin sister. After some time, she had felt unwell and became senseless. When she regained her senses, she found herself in a running train. She had started crying. She had found Faruk Gazi @ Raja, and the 2 unknown ladies and the 2 unknown men by her side. On hearing her cry, TT had come there. Thereafter, Faruk Gazi @ Raja had taken the TT by the side of the

coach and told him something. Faruk Gazi @ Raja, the two unknown ladies and the two unknown men had taken her to Pune by train. On reaching Pune, they had taken her to a hotel. They had asked her to take liquor which she refused. Thereafter, Faruk Gazi @ Raja had asked her to open her wearing apparels and when she refused, Faruk Gazi @ Raja started assaulting her. Thereafter, Faruk Gazi @ Raja opened her wearing apparels and raped her. She had asked Faruk Gazi @ Raja to take her to her mother. Faruk Gazi @ Raja had told her that since he did not have money, she needed to stay for 10/12 days in another house.

22. PW 1 had stated that, she had been taken by a lady to a house and kept in the house. She had been introduced to an unknown person who pulled at her wearing apparels but could not succeed. Such unknown person had reported the matter to the unknown lady who told her that, Faruk Gazi @ Raja had sold her and that she needed to work as a sex worker there. When the victim had refused to work as a sex worker, the unknown lady had called the elder brother of Faruk Gazi @ Raja. On that day, Abdul @ Abdul Jabbar Molla @ Khokan had come and asked her to follow the instructions of the unknown lady. When she had refused, Abdul @ Abdul Jabbar Molla @ Khokan assaulted her. At that time, Abdul @ Abdul Jabbar Molla @ Khokan and the unknown lady had poured kerosene oil on her body and told her that they would kill her by setting her on fire if she did not follow the instructions. Thereafter, she had started working as a sex worker.

23. PW 1 had stated that, she took the help of another unknown person whom she subsequently came to know as Vijay and got herself extracted from the place. Vijay had taken her to his house at Pune where they married. Thereafter, she had reached the house when she found that her father, the de facto complainant, had expired. She had met her mother. On that night, the police came to her house and had taken her to the police station, interrogated her when she told the police the entire incident. The police had recorded her statement. She had identified Faruk Gazi @ Raja in Court. She has stated that, Abdul @ Abdul Jabbar Molla @ Khokan was not in Court and that if Abdul @ Abdul Jabbar Molla @ Khokan was present she would have been able to identify him also. She had identified her statement recorded under Section 164 of the Criminal Procedure Code. She had stated that, when she was kidnapped by Faruk Gazi @ Raja, she was below 16 years of age.

24. PW 1 had been cross-examined at great length on behalf of the defence. Nothing favourable to the defence had been extracted during such cross-examination.

25. The brother of the victim had deposed as PW 2. He had stated that, the incident took place on August 27, 2003. He had corroborated the statements made by the victim. He had identified Faruk Gazi @ Raja in Court. He had identified his signature on the seizure list.

26. The wife of PW 2 and the sister-in-law of the victim had deposed as PW 3. She had also corroborated the statement of PWs 1 and 2. In cross-examination,

she had stated that, she did not have personal knowledge about the victim being missing and the return of the victim.

27. The mother of the victim had deposed as PW 4. She had corroborated the victim's testimony. She had identified Faruk Gazi @ Raja in Court. She had stated that, when the victim went missing, she was about 14 years of age.

28. The first Investigating Officer had deposed as PW 6. He had examined the witnesses and arrested Abdul @ Abdul Jabbar Molla @ Khokan and Morjina Khatun. He had submitted charge sheet under Sections 363/366/120B of the Indian Penal Code, 1860.

29. The second Investigating Officer had deposed as PW 7. He had stated that, the case was reopened after the victim returned. He had narrated the course of investigation subsequent to the return of the victim and the reopening of the case.

30. As noted above, the victim had deposed as PW 1. In her testimony, she had spoken how, Faruk Gazi @ Raja had fed her an egg and a glass of water upon which, she started feeling unwell. Faruk Gazi @ Raja had taken her to a park in Kolkata where, they met with 2 unknown ladies and 2 unknown persons. She had lost consciousness at that park and upon regaining consciousness, she found herself travelling in a train when she raised a hue and cry. The TT had sought to intervene when Faruk Gazi @ Raja took the TT away and told him something. She had been taken to Pune where she was sold by Faruk Gazi @ Raja to work as a sex worker. She had been raped by Faruk Gazi @ Raja. She had been forced to work as a sex worker by Faruk Gazi @ Raja and Abdul @ Abdul Jabbar Molla @ Khokan. She had got out of the life as a sex worker through the help of Vijay and was able to return to her house whereupon, the police case was reopened.

31. The police case had been initially started on the basis of the complaint lodged by the father of the de facto complainant. On completion of the investigations, a charge sheet had been submitted. The case had been reopened on the victim returning. The police had filed a supplementary charge sheet on the basis of which, the trial had commenced.

32. On behalf of both the appellants, it had been contended that, there was a delay in the lodgement of the First Information Report. The incident had happened on August 27, 2003. The father of the victim had lodged a missing diary on September 4, 2003. He had lodged a written complaint on January 4, 2004. In the written complaint he had stated that, he went to the residence of Abdul @ Abdul Jabbar Molla @ Khokan when the father of Abdul @ Abdul Jabbar Molla @ Khokan initially said that a marriage between the victim and his son would be arranged and therefore asked the father of the victim to wait for some time. Thereafter, such person had misbehaved with the father of the victim whereupon, the police complaint dated September 4, 2003 was lodged.

33. The victim had been missing since August 27, 2003 till her return. She had

been kidnapped, raped, sold and forced to work as a sex worker and could return after a considerable period of time. On her return, police had reopened the case and filed a supplementary charge sheet.

34. Entire information with regard to the offences that had been committed as against the victim was not available to any person till her return. As noted above, the victim had been kidnapped, raped, sold and made to work as a sex worker. It is only on her return that the police had received information as to the commission of the offences. In such circumstances, the delay in the lodgement of the First Information Report has been adequately explained.

35. PW 1 is the victim who had narrated about the offences which she had suffered. It cannot be said that, her deposition does not inspire confidence in the Court. She had given details of the events. She had been cross-examined in great detail. The defence could not demolish her oral testimony before the Trial Court. No ground has been placed before us to doubt the veracity of the oral testimony of PW 1.

36. It is trite law that, an accused can be convicted on the basis of the testimony of sole prosecution witness so long as such testimony inspires the confidence in the Court. PW 1 in her testimony has implicated all the appellants in the offences that they have been convicted for. The non-examination of Vijay by the prosecution is not material in the facts and circumstances of the present case. The issue of marriage and divorce between PW 1 and Vijay is not relevant in the facts and circumstances of the present case.

37. It has been contended on behalf of Faruk Gazi @ Raja that, defence lost a chance of producing Anwara Bibi as a witness. The defence had applied for examining Anwara Bibi as a witness which was rejected by the Trial Court. The defence did not challenge such order of rejection at the relevant point of time. Defence has not produced any material before the Court to establish that Anwara Bibi was such a vital witness whose absence would vitiate trial or be fatal to the case of the prosecution or that the defence suffered any prejudice thereby.

38. It has been contended on behalf of both the appellants that, PW 1 had gone voluntarily from her house. However, in the facts and circumstances of the present case, it has been established that, PW 1 was given food and drink by reason of which she felt unwell and lost her senses. She had complained that she raised a hue and cry immediately on regaining her senses. However, she did not receive support of any person at the relevant point of time. The moment she could escape from the clutches of the appellants, she had returned to her home when further investigations took place and a supplementary charge sheet was submitted.

39. We have given anxious consideration to the contention on behalf of Abdul @ Abdul Jabbar Molla @ Khokan that no charge under Section 366 of the Indian Penal Code, 1860 had been framed against him. We have perused the case records. We have perused the order dated December 3, 2008 of the Jurisdictional

court. Such order has recorded that, charges under Sections 366/376/372 of the Indian Penal Code, 1860 had been framed against the appellants. They had pleaded not guilty to the charges so framed against them and they claimed to be tried. The learned Court had fixed April 16, 2009 for recording the evidence of the prosecution. Therefore, the contention that no charge under Section 366 of the Indian Penal Code, 1860 had been framed cannot be accepted.

40. Contentions have been raised with regard to the statement recorded under Section 164 of the Criminal Procedure Code by the victim. Nothing has been placed on record to establish that, there are contradictions or embellishment between the statements recorded under Section 164 of the Criminal Procedure Code of the victim and her oral testimony before the Trial Court.

41. It has been contended on behalf of Abdul @ Abdul Jabbar Molla @ Khokan that Section 366 of the Indian Penal Code, 1860 is not attracted as against such appellant. One of the ingredients which attract Section 366 of the Indian Penal Code, 1860 is if a victim is forced to illicit intercourse, the person guilty of compelling the victim thereto, would be punished under such Section. In the facts and circumstances of the present case, PW 1 had narrated how Abdul @ Abdul Jabbar Molla @ Khokan had forced her into working as a sex worker. In our view, PW 1 had implicated Abdul @ Abdul Jabbar Molla @ Khokan in the offence punishable under Section 366 of the Indian Penal Code, 1860.

42. In view of the discussions above, we have found no ground to interfere with the impugned judgement of conviction and the order of sentence. We affirm the same.

43. CRA 51 of 2020 and CRA 72 of 2020 are dismissed.

44. With the dismissal of the appeal nothing survives in the pending applications and IA No. CRAN 2 of 2020 (Old No. CRAN 3405 of 2020) in CRA 51 of 2020 and IA No. CRAN 1 of 2020 (Old No. 1103 of 2020) in CRA 72 of 2020 are dismissed.

45. Period of custody already undergone shall be set off against the sentence imposed. The sentences shall run concurrently.

46. Trial Court records along with a copy of this judgement and order be sent to the appropriate Court forthwith for necessary action.

47. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

48. I agree.