
(2013) 01 CAL CK 0070
In the Calcutta High Court
Case No : CRA No. 237 of 2011

Jarina Bibi @ Kajal

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 24-01-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 313, 363

Evidence Act, 1872 — Section 24

Penal Code, 1860 (IPC) — Section 32, 34, 361, 363, 372

Citation : (2013) 01 CAL CK 0070

Hon'ble Judges : Toufique Uddin, J

Bench : Single Bench

Advocate : Ayub, for the Appellant; Amartya Ghose and Ms. Rituparna De, for the State, for the Respondent

Final Decision : Allowed

Judgement

Toufique Uddin, J.—This appeal arose against the judgment and order of conviction dated 14.3.2011 and 16.3.2011 passed by the learned Additional Sessions Judge, Fast Track Court, 8th Court of Alipore, South 24 Parganas in Sessions Trial No. 4(5)03 convicting the appellants for committing offence u/s 363 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 years and to pay a fine of Rs. 5000/- with default clause. In the background of this appeal the fact in a nutshell is that one Jarina Bibi, wife of Ayub Ali Sk. of village Chandrahati, P.O. Khagramuri, P.S. Bishnupur, Dist. South 24 Parganas lodged a complaint on 16.11.2003 with the Police at Bishnupur P.S. alleging that one Jarina Bibi, a co-villager on 2.10.2001 took away her daughter Saida Khatoon aged about 14/15 years to her relatives' house and since then her daughter is missing. Jarina Bibi was also did not turn up to the village. The complainant lodged General Diary No. 126 dated 2.10.01. Jarina Bibi returned to the village after some time. Then, due to pressure of the villagers, the complainant learnt that she sold her daughter in a place at Bihar for prostitution.

2. After completion of investigation Police has submitted charge-sheet against 4 accused persons viz. Jarina Bibi @ Kajal, Nur Hussain Sk., Raju Sk. @ Rajkumar Paswan and Mannan Mallick. Subsequently, Nur Hussain Sk. passed away.

3. The case was committed to the learned Court of Sessions.

4. The learned Sessions Judge transferred the case to the learned court below for trial.

5. On hearing of both sides charges u/s 363/ 34 IPC and 374/ 32 IPC were framed against the three accused persons. The contents of the charges were read over and explained to them who pleaded not guilty and claimed to be tried.

6. The prosecution has examined as many as 8 witnesses, while none was examined on the side of the defence. However, the accused persons were examined u/s 313 of the Code of Criminal Procedure. The defence case as appeared from the trend of cross-examination of the witnesses and the replies given at the time of examination u/s 313 of the Code of Criminal Procedure was the denial of offence with the plea of innocence.

7. On hearing of both sides, the learned trial court convicted the appellants by the impugned judgment.

8. Now, the point for consideration is if the impugned judgment suffers from any material irregularity and calls for any interference or not.

9. The learned counsel for the appellants argued with respect to the following points:

i) From the evidence it transpires that there is ample scope for doubting the genuineness of this case and as such the petitioners should be given the benefit of doubt and accordingly be acquitted.

ii) There is nothing to show that there was case of kidnapping or abduction.

iii) First G.D. was lodged in 2001 but the FIR was lodged after two years. The contents of the G.D. were not proved.

iv) Most of the witnesses are relations and could not be relied upon. The age of the victim girl is not proved.

v) Allegedly prepared "salishnama" has not been produced.

vi) Lastly, he argued that in terms of Section 24 of the Evidence Act the appellant should be let off.

10. On the other hand, learned counsel for the State strenuously argued that Section 363 of the Code of Criminal Procedure has been soundly proved beyond any reasonable doubt in this case specially by the witness PW 2 and PW 6 and there is no scope to let the present appellants off. Her last but not the least argument was that the victim is still missing.

11. Section 363 of the IPC reads as under:

12. Punishment for kidnapping-Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

13. The ingredients defined by the Supreme Court are as follows:

14. The ingredients of Section 363 IPC involve an act of kidnapping of any person from the lawful guardianship. Kidnapping from the lawful guardianship is defined u/s 361 IPC, where it is stated that whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, a case of kidnapping is made out.

15. Careful examination of materials on record goes to suggest that no evidence for commission of offence u/s 372 of the Indian Penal Code appears to have been proved against any accused persons who have rightly been acquitted by the learned court below. Further, nothing has been found to implicate the rest accused persons except Jarina Bibi who has been convicted for commission of alleged offence u/s 363 IPC.

16. From the evidence of PW 1 to PW 6 in general and PW 2 and PW 6 in particular, it is clear that Jarina Bibi called Saida Khatoon from her parent's place on 2.10.01 on the plea of taking her to the relative's place of Jarina Bibi. Ultimately, Saida Khatoon did not return and still admittedly is missing. This fact of remaining Saida Khatoon missing has also been admitted by the accused Jarina Bibi, the only appellant facing trial in the examination u/s 313 of the Code of Criminal Procedure. Further, it transpires that Jarina Bibi was last seen with Saida Khatoon on 2.10.01. The defacto complainant lodged G.D. Entry on 2.10.01 bearing No. 126. The complainant appears to be rustic villager. Due to missing of daughter he lodged the Diary. Here, in this case, why the G.D. Entry No. 126 dated 2.10.01 has not been produced has not been explained. But still then, the case requires to be taken from other angles. For fault of the investigation the prosecution should not suffer. From the evidence of witnesses, I find that after lapse of two years, Jarina Bibi came back to the village and allegedly a salish held wherein reportedly she has confessed of selling the victim girl Saida Khatoon at Bihar for the purpose of prostitution. Such salishnama was collected by the I.O. but what prompted him not to produce before the Court is not known. Why those documents (the G.D. and salishnama) were not produced by the Police and what are the contents thereof are not known to this court.

17. So, I am of the view that for fresh and proper adjudication, G.D. Entry and the salishnama should be proved in the learned court below by invoking power u/s 311 of the Code of Criminal Procedure. With much displeasure the court observes that the way of investigation was extremely poor and requires to be looked into by appropriate authority.

18. In the result, I am of the view that this is a fit case for sending the case back on remand for trial after taking further evidence to arrive at a just finding as mentioned above.

19. Accordingly, the appeal stands allowed in part with the modification that the case be sent back on remand to the learned trial court with the direction to get the G.D. Entry No. 126 dated 2.10.01 and the salishnama proved according to law by invoking Section 311 of the Code of Criminal Procedure after giving opportunity to the defence side to cross-examine the witnesses for such purposes.

20. Let the LCR be sent down to the learned court below.

21. The Superintendent of Police, South 24 Parganas be informed of the relevant gist of the order. Upon appropriate Application(s) being made, urgent Photostat Certified copy of this Judgment, be given/issued expeditiously subject to usual terms and conditions.