

(2018) 07 CAL CK 0075

In the Calcutta High Court

Case No : C.R.A. No.263, 1010 of 2013, C.R.A. No.737 of 2009, C.R.A. No.650 of 2017

Khairul Molla And Others

APPELLANT

Vs

State Of West Bengal Ors.

RESPONDENT

Date of Decision : 13-07-2018

Acts Referred:

Indian Penal Code, 1860 — Section 120B, 376, 376(2)(g), 394
Code Of Criminal Procedure 1973 — Section 161, 164
Indian Evidence Act, 1872 — Section 32(2), 428

Citation : (2018) 07 CAL CK 0075

Hon'ble Judges : JOYMALYA BAGCHI, J;RAVI KRISHAN KAPUR, J

Bench : Division Bench

Advocate : Partha Sarathi Bhattacharya, Rituparna De, Arun Kr. Maity, Debjani Sahu

Final Decision : Disposed Of

Judgement

Joymalya Bagchi, J.

All the appeals are taken up together and are being disposed of by this common judgment and order. The appeals are directed against the judgment

and order dated 27.7.2009 and 28.7.2009 passed by learned Additional Sessions Judge, Fast Track Court No.4, Barasat, North 24 Parganas, in

Sessions Trial No.1(3)06 convicting the appellants, namely, Khairul Molla @ Chhurun @ Haddi, Hasan Laskar @ Bhola, Jaiul Laskar @ Saiful

Laskar @ Mehabub and Rabiul Laskar @ Rabi, for commission of offence punishable under sections 394/120B/376(2)(g) of the Indian Penal Code

(for short I.P.C.) and sentencing them to suffer rigorous imprisonment for life each and to pay a fine of Rs.5000/- each, in default to suffer

further rigorous imprisonment for one year each for the offence punishable under

section 376(2)(g) of I.P.C. and to suffer rigorous imprisonment for five years each and pay a fine of Rs.2000/- each, in default to suffer rigorous imprisonment for further six months each for the offence punishable under section 394 of I.P.C. Both the sentences are to run concurrently.

Prosecution case, as alleged, against the appellants is to the effect that Jainal Molla (P.W. 2) was residing with his family consisting of his wife, Amirun Bibi (P.W. 4) and his minor girl (P.W. 3) in the garage of premises no.GC-55, Bidhannagar, Salt Lake, owned by one Pradyut Kumar Biswas (P.W. 1). On 24.7.2005 at around 04.45 a.m. when his wife, Amirun Bibi (P.W. 4) opened the door for going to the toilet four unknown boys entered their room and asked for money from him. As he was unwilling to give them the money they stated to beat him and tied him. At that time his minor daughter protested. Thereupon one of the miscreants pressed his daughter's mouth and took her in a corner of the bed and she was raped by another person against her will. In the meantime he was able to untie himself and started screaming. The miscreants ran away from the room.

Having heard his cries the neighbours came out and chased the miscreants. Three of the miscreants were caught in front of premises no.GC-76.

Upon interrogation the miscreants disclosed their identities as Khairul Molla, Hassan Laskar and Jainul Laskar. A scuffle took place between the miscreants and the local people and a bag was recovered from one of them wherein a black rectangular box was found. On questioning the miscreants admitted that they had stolen the box from another house. The miscreants also stated that they were four in number and one of them, namely, Rabi Laskar had fled away from the spot. Police came to the place of occurrence and took the miscreants away. He lodged written complaint at the police station resulting in registration of Bidhannagar South P.S. Case No.90/05 dated 24.7.2005 under sections 394/376/120B of I.P.C.

In the course of the investigation, Rabi Laskar was arrested. Victim girl was medically treated in the hospital. Her statement was recorded under section 164 of the Code of Criminal Procedure before the Magistrate. Victim girl and his parents identified the appellants during test identification parade (for short T.I. Parade). In conclusion of investigation, charge-sheet was filed against the appellants under sections 394/376/120B of I.P.C. The case being a sessions triable one was committed to the Court of

Sessions and transferred to the court of the learned Additional Sessions

Judge, Fast Track Court No.4, Barasat, North 24 Parganas for trial and disposal. Charges were framed under sections 394/376(2)(g)/120B of I.P.C.

against the appellants. They pleaded not guilty and claimed to be tried.

In the course of trial, prosecution examined twelve witnesses and exhibited a number of documents. The defence of the appellants was one of

innocence and false implication. In conclusion of trial, the trial Judge by judgment and order dated 27.7.2009 and 28.7.2009 convicted and sentenced

the appellants, as aforesaid. Mr. Partha Sarathi Bhattacharjee, learned advocate for the appellants as well as Mrs. Rituparna De (Ghose), learned

amicus curiae argued that the evidence of the victim girl (P.W. 3) suffers from various contradictions. P.W. 2, father of the victim did not speak of

any demand of money in the course of the incident. He was also silent with regard to the fact that his wife had been assaulted and was tied up.

The evidence of P.W. 3, victim and P.W. 4, her mother are contradictory to each other with regard to the manner and course in which the incident

occurred. Witnesses claimed that police did not come to the place of occurrence on the date of the incident, thereby improbabilising the seizures

effected in the course of the investigation. The medical report of the victim has not been exhibited in accordance with law as the doctor who treated

her had not been examined. It is also argued that non-examination of local people adversely affected the unfolding of the prosecution case relating to

the detention of three of the appellants at the spot. It is further argued that the identification of the appellants during T.I. Parade and in Court are not

beyond doubt.

On the other hand, Mr. Maity learned Additional Public Prosecutor for the State with Mrs. Sahu argued that the evidence of P.W. 3, the victim girl is

corroborated by the evidence of P.W.s 2 and 4, her parents. Three of the appellants were caught red handed at the spot. The victim and her parents

identified the appellants both in the course of T.I. Parade and in Court. Hence, the appeal is liable to be dismissed. Let me consider the rival

submissions in the light of the evidence on record.

P.W. 1, Pradyat Kr. Biswas is the owner of the premises where the victim girl (P.W. 3) was residing with her parents. He deposed that the incident

took place on 24.7.2005 at around 05.00 a.m. He accompanied Jainal Molla (P.W.

2) to the police station where he scribed the first information report as per narration of Jainal (Exbt.1). Then he took Jainal and his family members to the hospital for treatment. Subsequently, the police came to the place of occurrence where they seized articles including wearing apparels under a seizure list. He put his signature thereon (Exbt.2/1). He identified the seized apparels seized by police during course of investigation. He further stated that police also seized various articles bearing finger print impressions on them and under a seizure list. He put his signature thereon (Exbt. 3/1). In cross-examination, he deposed that he could not tell the names of the neighbour who came to the place of occurrence at the relevant point of time.

P.W. 2, Jainal Molla is the father of victim girl (P.W. 3). He deposed that he resided with his family in the garage of one Biswas Babu at premises

No. G.C. No.55, Salt Lake. On 24.7.2005 at about 04.45 a.m. he was sleeping with his wife and daughter. His wife opened the door for going to the

bathroom and four miscreants entered the room and caught hold of her. They also caught hold of him and his daughter and tied him to the bed. They

pulled his daughter down and committed â??kharap kajâ?? upon her. Meanwhile, he somehow managed to untie himself and rushed out of the room.

He started screaming and the intruders ran away.

Local people chased the intruders and caught three of them. Subsequently, he went to the police station along with his wife, daughter and the house

owner and reported the incident. The house owner, Biswas Babu scribed the written complaint as per his narration. He put his signature on it

(Exbt.1/1). He stated that Police seized the wearing apparels, bedsheet etc. from the place of occurrence. He identified the garments and his

signature on the seizure list (Exbt.2/2). He identified the appellants in Court and in jail. He also told that his daughter was 14 years old and used to

read in class VIII at the relevant time. In cross-examination, he deposed that he could not say the exact time when he went to the police station on the

date of incident.

P.W. 4, Amiran Bibi is the mother of the victim (P.W. 3). She deposed that on 24.7.2005 at about 04.45 a.m. she woke up and opened the door to go

out to relieve herself. At that time, four persons rushed into the room, assaulted her and her husband and demanded money from them. They tied her

up as well as her husband. Her daughter protested against the violent acts of the intruders. The miscreants tied up her daughter, assaulted her with

kicks and blows, pulled down her wearing apparels and raped her. She further stated that her husband was somehow able to unfasten himself. In the

meantime, the intruders ran away. Her husband rushed out of the room and started screaming. Upon hearing local people chased the intruders and

caught three of them. After the occurrence she along with her husband, daughter and the house owner went the police station. From the police station

they went to hospital. They went to jail and identified the accused persons. In cross-examination, she deposed that she went to the Court only once.

P.W. 3 is the victim girl in the instant case. She deposed that she was studying in class VIII at the time of occurrence. On 24.7.2005 at about 04.45

a.m. she woke up and found four persons inside the room. One of them was holding a torch and a â??cheniâ?? on the head of her father. They

assaulted her parents and demanded money. When she protested they caught hold of her, pulled her down on the floor, tied her hands, forcefully tore

her apparels and made her naked. One of them assaulted her, another firmly caught hold of her legs while another raped her. As a result she suffered

bleeding injury. Some white substance fell on her body. Jairul Laskar assaulted her, Rabiul Laskar tried to rape her after she had already been raped

by another man, Kairul Molla.

Hasan Laskar forcefully caught hold of her hands and pressed her mouth. Her father was somehow able to untie himself and raised hue and cry.

Then the intruders ran away. After the incident she along with her parents and the house owner went to the police station wherefrom they went to

hospital. Thereafter she was taken to Court for recording her statement before Magistrate. Police seized her torn wearing apparels. She identified the

seized wearing apparels, undergarments and bedsheet. In crossexamination, she deposed that the entire occurrence lasted for about one and half

hours.

P.W. 5, Sailendranath Das who was posted at C.I.D., West Bengal as a Finger Print Expert deposed that on 28.07.2005 he visited the place of

occurrence, situated at G.C. 55, Salt Lake City, Kolkata-91, where he found a wooden showcase with glass fittings with seven finger prints. He

developed the fingerprints which were marked as A-1/A-2/A-3/A-4/A-5/A-6 and

A/7 respectively. Another finger print was detected on the C.D.

player, marked as A-8. He sent the finger prints to the Director of Finger Prints Bureau, West Bengal for obtaining expert's opinion.

P.W. 6, Sankar Dutta Roy deposed that he was the senior Finger Print Expert at Finger Print Bureau, C.I.D., West Bengal. He knew the Director of

Finger Print Bureau, West Bengal, Shri Bikash Bhusan Chowdhury. He proved the finger print report (Exbt.6). He also proved his authorization letter

(Exbt.7).

P.W. 7, Sanjit Chakraborty was posted at Bongaon police station as I.C. He deposed that on 24.7.2005 he received written complaint from one Jainal

Molla and made his endorsement thereon. He drew up the formal FIR (Exbt. 8)

P.W. 8, Bipasha Mondal (Das) was posted as Judicial Magistrate at Bidhannagar Sub-Division. She deposed that on 29.7.2005 she conducted T.I.

Parade of the appellants and P.W.s 2, 3 and 4 identified all the appellants in the course of such examination. She proved the T.I. Parade proceeding

(Exbt.9). She recorded the statement of victim girl under section 164 Cr.P.C. (Exbt.4/7).

P.W. 9, Dr. Abhik Kr. Bhattacharjee was attached to Bidhannagar SubDivisional hospital. He deposed that on the basis of the requisition challan

issued by South Bidhannagar police station he held ossification test of the victim girl. He proved his signature on the requisition slip (Exbt. 10). He

opined that the victim girl was above 13 years but below 16 years. Ossification report along with film no.8R (4 in number) were marked as Exbt. 11

series.

P.W. 10, Dr. Sipra Roy was attached to the office of Forensic Science laboratory. She deposed that S.D.P.O., Bidhannagar, North 24 Parganas, sent a

letter requesting the Director-cum-Senior Chemical Examiner to hold chemical examination in respect of the subject matter pertaining to Bidhannagar

(S) P.S. case no.90 dated 24.7.2005 under section 394/376/120B of I.P.C. She proved the letter (Exbt. 12). She proved the chemical examination

report. She did not find any mark of semen on the items. She, however, stated that blood was found on item marked as A was insufficient for

serological test and blood was detected in item marked as D and in the panty marked as E.

P.W. 11, S.I. Arun Kumar Dutta deposed that on 24.7.2005 he was posted as S.I.

of Police at Bidhannagar South P.S. He was entrusted to investigate the instant case. He examined the complainant in the course of investigation and prepared sketch map with index (Exbt. 14). He recorded the statements of witnesses under section 161 Cr.P.C. The accused persons were manhandled in front of house no.GC-76, Sector-1, Salt Lake. They were removed to hospital. Victim girl was medically treated by attending doctor. On 24.7.2005 he made over the case diary to I.C., Bidhannagar P.S.

P.W. 12, Sankha Shubhra Chakraborty deposed that he was posted as S.D.P.O., Bidhannagar at the material point of time. On 24.7.2005 in the

afternoon he took up the case from S.I. Arun Kr. Dutta. As per his instruction a raid was conducted and the absconding accused, namely, Rabiul

Laskar was arrested. The accused persons were produced before the learned Court on 26.7.2005 and he prayed for the medical examination of all the

accused persons. Victim was also medically examined as per the order of Court and her statement was recorded under section 164 Cr.P.C. He also

prayed for T.I. Parade and finger print examination of the accused persons. One prayer was also forwarded to finger print bureau for visiting the

place of occurrence. The wearing apparels of the victim were seized and forwarded for FSL examination. Medical reports of the victim as well as the

accused persons were collected by him (Exbt. 15 series). After completion of investigation, he had submitted charge-sheet against the accused

persons and after receiving of serological report he submitted supplementary charge-sheet.

From the evidence on record it appears that Jainal (P.W. 2) was residing with his family consisting of his wife (P.W. 4) and daughter (P.W. 3) in the

garage of premises no.GC-55 owned by Pradyut Biswas (P.W.1). On 24.7.2005 at around 04.45 a.m. his wife opened the door to go to outside to

relieve herself. At that time four miscreants entered the room and demanded money from Jainal (P.W. 2), which he had received the day before. As

Jainal was unable to hand over any money they assaulted him and tied him up with a rope. His wife was also assaulted and tied with a rope. At that

time, his daughter protested against the wrongful acts of the intruders. Thereupon they brought her down. One of them assaulted her, another held her

legs, her wearing apparels were torn and one of them raped her and thereafter another tried to rape her. In the meantime, Jainal (P.W. 2) untied

himself and started shouting. The miscreants ran out of the room. Jainal also followed them whereupon the local people caught three of the miscreants

in front of premises no.GC-76, a neighbouring house. Police was informed and they came to the place of occurrence and took away the detained

miscreants who were admitted to hospital. In the meantime, first information report was registered. The fourth miscreant, namely, Rabiul Laskar was

subsequently arrested. All the miscreants were identified in T.I. Parade and also in Court by P.W.s 2, 3 and 4. Learned advocate for the appellant as

well as the learned amicus curiae argued that there are contradictions in the evidence of victim as well as her parents. I have examined their evidence

in great detail. I find that the aforesaid narration has been consistently concurred by all the witnesses.

There may be some omission in the evidence of Jainal (P.W. 2) with regard to demand of money or assault upon his wife (P.W. 4) but keeping in

mind the consistent version of the other witnesses, namely, P.W. 3 and P.W. 4 with regard to the demand of money as well as the reflection of such

demand in the first information report, I am unwilling to give much credence to such minor omission which is all but natural when facts come out from

the mouths of truthful witnesses. Evidence of P.W. 3 and P.W. 4 have been criticized on the ground that they have not narrated the incident in the

same manner. When an assault including sexual assault is perpetrated by a number of persons on a minor victim in front of her parents, it is impossible

to expect that all the witnesses will narrate the incident in a parrot like manner. There are bound to be some variations in their narrations. However,

the variations in the instant case are minor and do not go to the root of the prosecution case. However, it is unequivocally established that the

appellants had illegally trespassed into the room where the inmates were sleeping and after failing to rob the money from Jainal (the father of the

victim), they brutally raped the victim in front of her parents.

It has, however, been argued that the unfolding of the prosecution case is adversely affected as the local people who had caught hold of three of the

miscreants, namely, Khairul Molla, Hassan Laskar and Jainul Laskar, have not been examined. I am unable to accept such contention as it has come

out from the mouth of the one of the investigating officers (P.W.11) that three of the miscreants had been arrested from the place of occurrence and

were sent to hospital for medical treatment as they had been accosted by the local people. Apprehension of three of the appellants has also been

reflected at the earliest opportunity in the first information report and the depositions of P.W.s 2 and 4, the parents of the victim. Hence, non-

examination of the local people, in my considered opinion, does not cause a dent to the prosecution case as the apprehension of three of the appellants

at the spot has been proved by the prosecution witnesses including the Investigating Officer (P.W.11).

Seizure of the wearing apparels and other articles from the place of occurrence was doubted on the ground that P.W.s 2, 3 and 4 in their cross-

examination stated that police did not come to the place of occurrence on the day of the incident. One however, cannot lose sight of the fact that the

said witnesses are illiterate people and, therefore, were confused as to the date on which the police had come to the place of occurrence. Evidence of

P.W.s 11 and 12, investigating officers as well as P.W.1, the house owner clearly established the fact that wearing apparels of the victim were seized

from the place of occurrence on the date of the incident itself. In the light of such evidence on record, I have no doubt that the seizures of the wearing

apparels of the victim as well as the bedsheet were effected from the place of occurrence on the date of incident itself.

That apart, evidence of P.W.s 5 and 6, Finger Print Experts, clearly portray that the fingerprints of the appellants were found on the articles which

were inside the room of P.W.2, where the incident had been occurred. Moreover, serological report (Exbt.13) also proved the presence of blood on

the undergarment of the victim.

These circumstances wholly corroborate the deposition of the victim (P.W. 3) that the appellants had brutally raped her in the garage room in the

morning of 24.07.2005. Although, the doctor was not examined, injury report (Exbt. 15) has been proved by the Investigating Officer (P.W.12) in

terms of section 32(2) of the Indian Evidence Act in the light of the law declared in Vijendra vs. State of Delhi, (1997) SCC (Cri) 857. The said report

corroborates the allegation of sexual assault on the victim. Hence, I am inclined to uphold the conviction of the appellants, namely, Khairul Molla @

Chhurun @ Haddi, Hasan Laskar @ Bholu, Jaiul Laskar @ Saiful Laskar @ Mehabub and Rabiul Laskar @ Rabi.

Coming to the issue of sentence, I find that the appellants do not have any criminal antecedents and accordingly, I reduce the substantive sentence imposed upon the appellants for the offence punishable under section 376(2)(g) of I.P.C. and I direct that the appellants shall suffer rigorous imprisonment for twelve (12) years each and to pay a fine of Rs.5,000 (rupees five thousand) each in default to suffer rigorous imprisonment for one year more and that the entire fine, if recovered, be paid as compensation to the victim girl in the instant case. The sentence imposed upon the appellants for the offence punishable under section 394 of I.P.C. shall, however, remain unaltered. Both the sentences shall run concurrently.

With the aforesaid modification as to sentence, the appeals are disposed of.. The period of detention suffered by the appellants during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon them in terms of Section 428 of the Code of Criminal Procedure. I record my appreciation for the able assistance rendered by Mrs. Ghose, as Amicus Curiae in the instant case A copy of the judgement along with L.C.R. be sent down to the trial Court at once for necessary action. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of all formalities.