

(2012) 12 CAL CK 0060
In the Calcutta High Court
Case No : C.R.A. 424 of 2010

Sukur Ali @ Sukur Ali Kha @ Bablu

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 18-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 34, 342, 363, 366, 372

Citation : (2012) 12 CAL CK 0060

Hon'ble Judges : Kanchan Chakraborty, J

Bench : Single Bench

Advocate : Pratik Bhattacharyya, Amicus Curiae, for the Appellant; Amarta Ghosh, for the State, for the Respondent

Judgement

Kanchan Chakraborty, J.—The challenge in this appeal is to the judgment and order dated 4.5.2009/5.5.2009 passed by the learned Additional District & Sessions Judge, Fast Track, Court No. II, Uluberia, Howrah in Sessions Trial No. 274/2008 thereby convicting the appellant Sukur Ali @ Sukur Ali Khan @ Bablu for committing offence punishable under Sections 363/ 376 of the I.P.C. and sentencing him to suffer R.I., for five years for the offence u/s 363 of the I.P.C. and R.I. for seven years for the offence u/s 376 of the I.P.C. together with fine and with a direction that all the sentences would run concurrently. On 29.2.2008, at 16.35 hours, Subhendu Pandit (P.W. 2) lodged one F.I.R. with Bagnan Police Station stating therein that on 27.2.2008, while his "Boudi" was returning home with her three daughters by a bus from her parents house at Deuli Bazar under P.S. Shyampur at about 4.00 P.M. by a bus at Bagnan and changing the bus therefrom. After some time, her elder daughter Sarmistha Pandit, P.W. 1 wanted to drink water and had gone to a sweet meat shop for that purpose. Thereafter, Sarmistha did not come back and she was not found in the vicinity. A thorough search was done and one missing diary was lodged bearing No. 2164 dated 27.2.2008. In course of searching Subhendu Pandit and others reached Daxin Malia village under Bagnan Police Station on 29.2.2008 and they came to know

that Sarmistha was detained by Mahela Bibi, wife of Aktar Gazi. Having so information, they rescued Sarmistha from Mahela Bibi's house. Sarmistha disclosed that on 27.2.2008, when she went to the sweet meat shop to drink water, an unknown dark thin boy of medium height threatened her with a knife and compelled her to board on Amta bound bus. Thereafter, she was taken by tracker and on foot to the house of Mahela Bibi. After reaching there, Mahela Bibi and that boy detained her in a room. The boy raped her during the night. The boy and Mahela Bibi detained Sarmistha with an intention of trafficking her. On the basis of the said F.I.R., Bagnan Police Station Case No. 30 of 2008 dated 29.2.2008 was started against Mahela Bibi and one unknown male person u/s 363/ 372/ 376/ 34 of the I.P.C. Mahela Bibi was arrayed to face charges u/s 342/ 372/ 34 of the I.P.C. while the appellant Sukur Ali was arrayed to face charges u/s 363/ 366/ 342/ 372/ 376/ 34 of the I.P.C. Both of them pleaded not guilty to the charges and the trial commenced.

2. In course of trial, the prosecution examined 11 witnesses. The F.I.R., statement u/s 164 of the victim, T.I. Parade report, birth certificate, medical reports, G.D. entry No. 2164 dated 27.2.2008, sketch map of the place of occurrence etc. were admitted into evidence and marked Exts. 1 to 11 on behalf of the prosecution. No witness was examined on behalf of the accused Mahela Bibi and Sukur Ali. The learned Trial Court upon consideration of the evidence on record found that the prosecution failed to bring home charges labelled against the accused Mahela Bibi and as such, she was acquitted while the learned Trial Court found that the prosecution could establish the charges u/s 363 and 376 of the I.P.C. against Sukur Ali @ Bablu and accordingly, passed the order impugned which has been assailed in this appeal on the following grounds;

- a) that the learned Trial Court failed to appreciate the evidence on record in its true and proper perspective;
- b) that the learned Trial Court failed to take note of the fact that there was delay in lodging the F.I.R and no explanation was provided by the prosecution for such delay;
- c) that the learned Trial Court was oblivious of the fact that the victim was medically examined at a belated stage on 11.3.2008 and no explanation for such delay was provided by the prosecution although the victim was rescued according to the prosecution case on 29.2.2008;
- d) that the learned Court also failed to take into consideration that the victim was examined by a local Doctor on 29.2.2008 but the said Doctor was not cited as a witness;
- e) that the learned Trial Court erred in coming to conclusion that the appellant committed offence u/s 363 of the I.P.C. as the ingredients of offence were conspicuously absent in the evidence;
- f) that the learned Trial Court did not consider that the place of occurrence was a

crowded place and the police personnels were posted nearby and that there was hardly any chance for any one to be kidnapped at the point of knife;

g) that the learned Trial Court failed to take into consideration the discrepancies and contradictions in the statement of witnesses on material points;

h) that the learned Court failed to take into consideration that the scribe of the F.I.R. was not examined and that the incident was not narrated to the P.W. 9 Dr. Shyamal Kr. Bera by the victim or any other person;

i) that the judgment being otherwise bad in law, is liable to be set aside;

3. Mr. Pratik Bhattacharyya, learned Amicus Curiae appointed for the appellant put much stress on point No. 1 that the delay in lodging the F.I.R. and No. 2, i.e., the victim was not placed before any Doctor immediately after recovery in order to ascertain the rape allegedly committed on her by the appellant.

4. Mr. Ghosh, learned Counsel appearing for the State of West Bengal contended that the missing diary was lodged then and there on 27.2.2008. When missing diary was made and searching was continued till the victim was recovered on 29.2.2008, question of lodging F.I.R. prior to that did not arise. He contended that there was delay in holding medical examination of the victim but that fact alone did not necessarily roll out the prosecution case. When the prosecutrix made a specific statement regarding the incident of kidnapping and rape by the appellant and immediately after her rescue, got her statement recorded u/s 164 of the Cr.P.C. and identified the appellant in T.I. Parade as the man who kidnapped and raped her, no further corroboration of her statement was required by the learned Trial Court. Therefore, according to Mr. Ghosh, the learned Court made no mistake either in appreciating the evidence on record, facts situation of the case and passing the judgment and order impugned.

5. On careful perusal of the Ext. 2, i.e., the F.I.R., it appears clearly that the lodger of the F.I.R. was not in the scene at the relevant point of time. He was told about the incident by the prosecutrix Sarmistha about the kidnapping and rape. He, however, being a member of the rescue party, obviously had seen the prosecutrix in the house of Mahela Bibi, the accused who was acquitted by the learned Trial Court.

6. In the instant case, the prosecutrix was examined as P.W. 1. She stated that on 27.2.2008 at about 4.00 P.M., she, her sister and mother boarded on the bus at Bagnan Bus stand. She felt thirsty and after taking permission of her mother, gone to a nearby sweet meat shop to drink water. At that time, one person had shown a knife to her and moved a piece of cloth in front of her face. She started feeling drowsy and simply followed the man to a Amta bound bus and thereafter, another bus, tracker and on foot and finally reached a house of Daxin Malia. The said person kept her in a room in confinement. That man raped her also in the last part of that night. The name of the person was Bablu. The P.W. 1 Sarmistha identified the appellant in Court. The P.W. 1 also stated that she did not find the

lady in whose house she was confined. She stated that on 29.2.2008, her uncle and others recovered her from that house and she narrated the facts to her mother, other relatives, got her statement recorded by Magistrate on 1.3.2008 wherein she put her signature. She also identified the appellant in Correctional Home where the T.I. Parade was held on 5.3.2008.

7. From the side of the appellant, the prosecutrix was cross-examined extensively. She stated that she did not raise alarm seeing the knife and did not raise any objection while she boarded on a Amta bound bus with the unknown person. She raised no protest although the bus was crowded. It is found from her cross-examination that she came to know about the name of the appellant Bablu on the date she was recovered. She denied that she was not raped. The injury she sustained because of her rape remained only for one day. She handed over the wearing apparels to her mother. Police brought her to Bagnan Hospital on 11.3.2008 and she stated the fact to the Doctor who noted down the same in our presence. She denied that she deposed falsely or that the case was initiated against the appellant falsely because of an incident in her life.

8. To be stated precisely, the defence miserably failed to shake the statement of the prosecutrix made in her examination-in-chief. That statement in examination-in-chief corroborated the fact stated in the F.I.R., Ext. 2. The Ext. 2, i.e., the F.I.R. was lodged after rescue of the victim. Prior to that a missing diary being No. 2164 dated 27.2.2008 was recorded by the Bagnan Police Station. It was stated by the prosecutrix (P.W. 1) that after rescue, she narrated the incident to her mother and other relatives. The lodger of the F.I.R. is none but the uncle of the prosecutrix. He was also a members of the rescue party. What he stated by the prosecutrix had exactly been reflected in the F.I.R. The P.W. 2, the lodger of the F.I.R. stated that he received a telephone from "Boudi" that Sarmistha was missing. He went to Bagnan bus stand and searched for her. Thereafter, he lodged a missing diary with the Bagnan Police Station. On 29.2.2008, at about 10.00 a.m., Sarmistha was recovered from a house at Daxin Malia and thereafter, the P.W. 2 came to know, he stated, from Sarmistha that when Sarmistha went to drink water in a sweet meat shop as directed by her mother, one person took her therefrom at the point of knife and taken her by bus, tracker and on foot and ultimately detained her in a house wherefrom she was rescued. He stated further that the prosecutrix (P.W. 1) informed him that the said person committed rape on her and the name of the person was Bablu. Thereafter, he lodged a complaint written by Asish. He identified his signature in the F.I.R. which was marked Ext. 2.

9. From the side of the appellant, Sukur Ali, the P.W. 2 was cross-examined exhaustively but I failed to find out anything which might discredit either the statement of the prosecutrix or the statement of the P.W. 2 and the fact stated in the F.I.R.

10. The P.W. 1, the prosecutrix was placed before the learned Magistrate at Uluberia, Howrah on 1.3.2008 for recording her statement u/s 164 of the Cr.P.C.

She stated categorically before the Magistrate that she was taken to a house belonging to one lady named Lakshmi by the appellant at the point of knife while she was taking drinking water from a sweet meat shop at Bagnan bus stand. She stated also that she was raped by the appellant and ultimately rescued by uncle and others. The statement of the prosecutrix u/s 164 of the Cr.P.C. was marked Ext. 1/b and that being the first legal statement of the prosecutrix admissible in evidence was of great importance. The statement u/s 164 of the Cr.P.C. of the prosecutrix not only supported her testimony but also the prosecution case as reflected in the F.I.R.

11. P.W. 3 is the mother of the prosecutrix. She stated that at the relevant date and time, Sarmistha was about 14 plus years old. She, Sarmistha and two other daughters of her boarded on a Fulia bound bus for returning home at Patinan from Bagnan bus stand. Sarmistha (P.W. 1) asked for water and P.W. 3 told her to go nearby sweet meat shop. But, Sarmistha did not return. She made extensive search and then called P.W. 2 over telephone. The P.W. 2 appeared there after having such an information over phone, searched for Sarmistha but could not trace her out. The P.W. 3 stated that a missing diary was lodged with Bagnan Police Station. Sarmistha was recovered from a house of a Muslim family of Village Daxin Malia on 29.2.2008 and she came to know from Sarmistha that the appellant raped her on that night and the appellant took her from the sweet meat shop at the point of knife and after making a journey by bus, tracker and on foot, she was ultimately confined in the house wherefrom she was rescued.

12. I have carefully scrutinised the evidence of the P.W. 3 specially her statement in cross-examination by Sukur Ali, the appellant. She denied that she also accompanied Sarmistha to the sweet meat shop to drink water. She waited for five minutes and ultimately understood that her daughter Sarmistha was missing. She thoroughly searched the place, asked people about Sarmistha but ultimately did not trace her out. She informed P.W. 2 over phone. The evidence of P.W. 3 is not only consisting, corroborating but also inspiring confidence. She was the only grown up person accompanied Sarmistha on the relevant date and time. She being mother, told Sarmistha to go to the nearby sweet meat shop and drink water. She was having other two daughters with her also and seating inside the bus. It was quite natural that when Sarmistha did not come back for a considerable period of time, she became anxious, searched for her, asked people questions and ultimately understood that Sarmistha was missing. She then and there made a phone call to the P.W. 2, her husband's brother. The P.W. 2 supported the statement of P.W. 3 as well as P.W. 1 so far these facts are concerned. He stated categorically that on receiving the telephone call from P.W. 3, he had been to the Bagnan bus stand, apprised of the facts, searches for Sarmistha and ultimately lodged a missing diary. There was no embellishment, no exaggeration, no falsity in the evidence of the P.Ws. 1, 2 and 3 in making the prosecution case believable. On the contrary, their statements are not only consisting, clinching, corroborating but also trustworthy.

13. Besides the statement u/s 164 of the Cr.P.C. of the prosecutrix, there is another lethal weapon used by the prosecution in order to bring home the charges against the appellant, i.e., holding a T.I. Parade of the appellant. The story which can be gathered from the F.I.R. shows clearly that the appellant was not known to the prosecutrix at that point of time when she was taken away at the point of knife. She had seen the boy while making journey with him by bus, tracker and on foot and lastly, when she was confined and raped by him. The T.I. Parade was held on 5.3.2008. The report of the T.I. Parade was admitted into evidence and marked Ext. 4 on behalf of the prosecution. It shows clearly that Sarmistha identified the appellant as the person who forcibly took her away and raped her afterwards.

14. I do not think that any further evidence was required for the prosecution to bring home the charges against the appellant. Anyway, in all 11 witnesses were examined by the prosecution. Amongst them, Pradip Pandit, the P.W. 4 was the father of the prosecutrix. It appears from his statement that he was not present in the scene or at the time of recovery. He did not try to exaggerate the prosecution case claiming himself to be a witness of recovery.

15. The P.W. 5 is the maternal uncle of Sarmistha. He supported the prosecution case. He was one of the members of the recovery party and was narrated about the incident by the prosecutrix. There was nothing in his evidence which makes his statement unbelievable and unacceptable. Same, in case of the P.W. 6.

16. The P.W. 7 is Sanjoy Maity. He brought birth certificate of Sarmistha in Court and the same was admitted into evidence and marked Ext. 3. The date of birth of Sarmistha was recorded as 29.4.1993, i.e., she was less than 15 years at the relevant date and time.

17. The P.W. 8 was the learned Magistrate who held the T.I. Parade of the appellant. He stated categorically that the T.I. Parade was held after observing all the formalities. Sarmistha identified the suspect Sukur Ali Khan by touching his head as the man who took her away and subsequently committed rape upon her.

18. The P.W. 9 is Dr. Shyamal Kr. Bera who examined the victim on 29.2.2008. She did not find any fresh mark of injury in the private part of the prosecutrix but he found old injury mark and hymen was found ruptured. He identified the report prepared by him which was marked Ext. 5. It is true that P.W. 9 did not state anywhere that he was told by the prosecutrix about the incident. He stated that had that been told, he would have mentioned that in the report.

19. Mr. Pratik Bhattacharyya, learned Amicus Curiae, tried to impress upon the Court that non-disclosure of the fact to the Doctor who did not find any fresh injury on the private part, obviously created doubt in the prosecution case. Although, I find substance in his submissions but, do not like to put much importance on that. It is true that it was stated by the P.W. 1 that she stated the Doctor about the incident and the Doctor noted it down, this discrepancy does not strike at the root of the prosecution case that she was kidnapped by the

appellant at the point of knife and was raped afterwards. There might be an exaggeration on the part of the prosecutrix in stating the fact that she stated the Doctor about the incident. It was natural and also trivial in nature in view of the facts situation of the case.

20. Again, it is not necessary that in all cases of rape, there should be mark of injury. The P.W. 10 was another Doctor who also examined vaginal swab of Sarmistha on 11.3.2008 and did not find any spermatozoa in the said vaginal swab.

21. Mr. Bhattacharyya also tried to impress upon the Court that no spermatozoa was found in the vaginal swab of the prosecutrix which was taken by the P.W. 9 on 29.2.2008. I do not find any substance in such proposition. The vaginal swab was taken on 29.2.2008 but examined on 11.3.2008. It was not possible for the P.W. 10 to find out spermatozoa after such a long period. There was laches, no doubt, on the part of the prosecution to get the swab examined by P.W. 10 after such a long period. But this laches on the part of the prosecution cannot defeat the prosecution case of kidnapping and rape. The P.W. 11 is the I.O. of the case who had also supported the prosecution case wholeheartedly.

22. I have carefully gone through the judgment impugned and found that the learned Trial Court had considered each and every fact and circumstance as well as the evidence on record on material points. It would be incorrect to say that the learned Court failed to appreciate the evidence in its true and proper perspective. There are some factors, such as, how a girl could be kidnapped from a place like Bagnan bas on broad day light. So many things happen and in such a manners which cannot be easily explained. The P.W. 1 stated categorically that she was forced to board on a bus by the appellant at the point of knife and her head was spinning. If so, it was possible for the appellant to take away the prosecutrix from such a populated bus stand and boarded on a bus. There were some discrepancies in the evidence but those did not at all touch at the root of the prosecution case. The substratum of the prosecution case that the appellant kidnapped Sarmistha from Bagnan bus stand at the point of knife, took her to a house at Daxin Malia and thereafter, committed rape on her have been well established by the evidence on record. The evidence adduced on behalf of the prosecution was clinching, consisting, trustworthy and credible. The learned Trial Court, in my view, was justified in recording the order of conviction and sentence which is not required to be upset in this appeal.

23. Accordingly, the appeal stands dismissed and disposed of.

24. Mr. Pratik Bhattacharyya, has done excellent job as Amicus Curiae on behalf of the appellant. This Court appreciates his work and thinks that he should be provided with a token remuneration. The Secretary, Legal Aid Services Authority, High Court, Calcutta is directed to pay Mr. Pratik Bhattacharyya a sum of Rs. 2,000/- for the job rendered by him.

25. A copy of this judgment be given to the Secretary, Legal Aid Services

Authority, High Court, Calcutta and Mr. Bhattacharyya. Urgent photostat certified copy of this order, if applied for, be given to the appearing parties upon compliance of necessary formalities.