

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA 102 of 2021

With

IA No. CRAN 1 of 2021

Babu Sk & Anr.

-vs.-

The State of West Bengal

For the appellants : Mr. Soumik Ganguli,
Mr. Diptendu Banerjee,
Ms. Pinky Sarkar.

For the State : Mr. Swapan Banerjee.

Heard on : 04.07.2022 & 18.07.2022.

Judgment on : 25.07.2022

Tirthankar Ghosh, J:-

The present appeal has been preferred challenging the judgment and order of conviction dated 05.02.2016 /06.02.2021 passed by the learned Additional Sessions Judge, First Court, Katwa, Purba Bardhaman, in Sessions Trial No. 46 of 2010 arising out of Sessions Case no. 249 of 2009, thereby holding the appellant no. 1 guilty of commission of offence punishable under

Section 448/323/376/511 of the Indian Penal Code and the appellant no.2 under Section 448/325 of the Indian Penal Code. The learned Trial Court thereafter was pleased to impose the following sentences in respect of the appellants:

Appellant No.1/Babu Sk:

- 1) Sentenced to suffer R.I for five years (5 years) for the offence punishable under Sections 376/511 of the Indian Penal Code and fine of Rs.5,000/- in default S.I. for six months (6 months).
- 2) Sentenced to suffer R.I. for one year (1 year) for the offence punishable under Section 323 of the Indian Penal Code and fine of Rs.500/- in default S.I. for ten days (10 days).
- 3) Sentenced to suffer R.I. for one year (1 year) for the offence punishable under Section 448 of the Indian Penal Code and fine of Rs. 500/- in default S.I. for ten days (10 days).

Appellant no.2/ Momai Sk:

- 1) Sentenced to suffer R.I. for six months (6 months) for the offence punishable under Section 448 of the Indian Penal Code and fine of Rs. 500/- in default S.I. for ten days (10 days).
- 2) Sentenced to suffer R.I. for three years (3 years) for the offence punishable under Section 325 of the Indian Penal Code and fine of Rs. 1,000/- in default S.I. for one month (1 month).

The genesis of the case relates to an application under Section 156(3) of the Code of Criminal Procedure preferred by one Rashida Bibi before the learned ACJM, Katwa. The allegations made therein are that on 03.09.2008 at mid night between 11.30 pm to 12.00 am when the complainant and her two sisters were sleeping in their house, the appellant no.1 trespassed into the room and pulled the wearing apparels of Pakhira Bibi, sister of the complainant, thereby attempting to disrobe her, as a result of which Pakhira Bibi woke up and screamed when the appellant no.1 fled away. The incident was informed to the police station but no action was taken and as such the appellant no.1 along with an illegal mob on 26.09.2008 entered into their house with deadly weapons along with stick, axe etc. and started hurling filthy languages by grabbing the hand of the complainant. Appellant no.1 and his associates which included appellant no.2 threatened as to why a complaint was lodged at the police station and assaulted the complainant with iron rod. As a result of which the right arm of the complainant was fractured and she fell down on the ground when the appellant snatched away her gold chain. At that time the complainant's sisters were screaming as they were also assaulted with sticks and iron rod by the miscreants. Sahida Bibi's hand was broken, however, hearing the hue and cry the villagers rushed to their house when the accused persons fled away. Sahida Bibi was taken to Ketugram Health Centre and from there she was referred to Katwa Hospital and she was released after treatment on 01.10.2008. Complainant states that as the police was inactive in

spite of receipt of information she was compelled to file the case for a direction upon the police authorities to investigate into the alleged offence.

On the direction of the Learned Additional Chief Judicial Magistrate, Katwa Police Station case no. 114/08 dated 07.12.2008 was registered for investigation under Sections 147/148/149/448/506/504/323/326/379/34/376/511 of Indian Penal Code. On completion of investigation the Investigating Authority submitted charge-sheet against 9 accused persons namely, (1) Babu Sk, (2) Momai Sk, (3) Kalo Sk, (4) Futu Khatun, (5) Jharna Bibi, (6) Ansara Bibi, (7) Momena Bibi, (8) Sakina Bibi and (9) Tani Bibi.

The prosecution in order to prove its case relied upon 7 witnesses namely; PW1, Rasida Bibi, complainant; PW2, Pakhira Bibi, sister of the PW1; PW3, Naser Sk, acquaintance; PW4 Sahida Bibi, sister of PW1 and PW2; PW5, Anirban Banerjee, Advocate who drafted the application under Section 156(3) of Cr.P.C.; PW6, Dr. Siddhartha Kr. Sen, Medical Officer and PW7, Basudeb Mondal is the Investigating Officer of the Case.

PW1, Rashida Bibi identified all the 9 accused persons in Court and deposed that after informing Ketugram Police when the police authorities did not take any steps, she approached the learned ACJM, Katwa through one Advocate for initiation of the case. She stated that she was sleeping inside the house along with her two sisters at about 10.30 pm/12 am Pakhira Bibi started crying as she was disrobed. The witness stated that hearing such hue

and cry she woke up and saw Babu Sk running away. In the next morning the incident was informed to the police station. After 23 days Babu Sk being accompanied with other eight accused persons entered into their house and hurled abusive language to the three sisters. Babu Sk was armed with Tangi and iron rod. She deposed that Babu Sk tried to hit her head with the iron rod in order to kill her but since she shifted her head the iron rod struck her hand and she fell down, when Kalo Sk snatched away the gold chain. The other two sisters at that point of time came to her aid when they were also assaulted and Sahida Bibi's right hand was fractured by Momai Sk. The witness stated that she sustained injury in different parts of her body including her right hand, they were treated first at Ketugram Hospital and thereafter referred to Katwa Sub-divisional Hospital, where Sahida Bibi was admitted for 3/4 days, thereafter she was discharged.

PW2, Pakhira Bibi identified all the accused persons in Court and stated that three years ago at about 11.30 pm/12.00 am when the three sisters were sleeping inside a room then Babu Sk entered and pulled her wearing apparels and inner garments, thereby disrobing her. The accused sat on her thigh and attempted to commit rape upon her. Hearing her hue and cry the other sisters woke up and then Babu Sk fled away. The incident was reported to Ketugram Police Station and she believed that a case was registered. However, after 22 days all the accused persons armed with lathi, tangi and other arms trespassed into their house and assaulted Rashida Bibi on her right hand which was fractured and when Sahida Bibi tried to save her Momai Sk assaulted Sahida

and her right hand was also fractured by Momai Sk. The accused persons assaulted all the three sisters in different parts of their body and even snatched away the gold chain of Rashida Bibi. When the villagers rushed to their house the accused persons went away. She also stated that Sahida was admitted at the hospital for 4/5 days.

PW3, Naser Sk, is an acquaintance of the defacto complainant, who identified all the accused persons and stated that three years ago PW1, PW2 and PW4 were sleeping inside their house while Babu entered inside their room at about 11.30 p.m./12.00 a.m. Babu entered to commit rape upon PW2. Hearing the hue and cry he went to their house when Babu Sk fled away. The incident was informed to the police station by Rashida Bibi but police did not take any steps, thereafter about 22 days later all the nine accused persons entered the house of the three sisters and assaulted them and many persons of the locality saw the incident. The witness stated that PW1 was admitted to hospital for 6/7 days as her arms were fractured and he also came to know that a gold chain of PW1 was snatched away by Kalo Sk. The witness also stated that Sahida Bibi was also injured and her arms were also fractured.

PW4, Sahida Bibi, identified all the accused persons in Court and narrated the incident in the same manner as PW1 and PW2.

PW5, Anirban Banerjee, is an Advocate who prepared and filed the application under Section 156(3) of Cr.P.C. and identified the left hand thumb

impression of PW1 and also identified his signature which was marked as Ext.1 series.

PW6, Siddhartha Kr. Sen, is the Medical Officer who treated Sahida Bibi and found the following injuries:

“ 1. History of trauma of right hand.

2. Diffused swelling over right hand and wrist. Xray report revealed that there was fracture on the base of 2nd Meta carpal bone on the right hand.”

The witness identified the injury report which was prepared by him with his signature which was marked as Ext.2.

PW7, Basudeb Mondal, is the investigating Officer of the case who narrated the chronology of evidence and the manner in which investigation was conducted by him and also identified the sketch map along with index which was marked as Ext.3 collectively.

Records of the case reflect that although charges were framed under Section 376/511 of the Indian Penal Code against appellant no.1, Babu Sk and under Sections 148/448, 323/34. 325/34, 380/34 against all the accused persons yet the learned trial Court while arriving at its conclusion held that the prosecution has failed to prove the charges under Sections 148/323/380 of the Indian Penal Code against the appellant no.2. The learned Trial Court on scrutiny of the evidence also acquitted 7 accused persons namely, (1) Kalo Sk,

(2) Futu Khatun, (3) Jharna Bibi, (4) Ansara Bibi, (5) Momena Bibi, (6) Sakina Bibi and (7) Tani Bibi.

The learned trial Court, however, was pleased to hold Babu Sk guilty for the offences under Sections 448/325/376/511 of the Indian Penal Code and the accused Momai Sk guilty under Sections 448/325 of the Indian Penal Code.

Mr. Soumik Ganguli, learned advocate appearing for the appellant submitted that there are no independent witnesses who have supported the case of the prosecution. It has also been contended by the learned advocate that except the three sisters who claimed themselves to be victim of the circumstances there are no cogent material for arriving at the conclusion regarding the finding of guilt and the learned trial Court erroneously arrived at such conclusion. Additionally, it has been submitted that Momai Sk is entitled to the same benefit as other accused persons who have been acquitted from the charges and the learned trial Court convicted him only on the testimony of the three sisters without the same being corroborated from the injury report regarding the assault being inflicted by the appellant No.2 or any of the associates. Learned advocate submitted that there is a gross illegality in the order so passed by the learned trial Court and the same as such calls for interference by this Court.

Mr. Swapan Banerjee, learned advocate appearing for the State resisted the contention of Mr. Ganguli and submitted that the factual circumstances

necessary for proving the charges have been well established by the prosecution. He submitted that the genesis of the case originates from 03.09.2008 when Babu Sk attempted to ravish PW2, Pakhira Bibi. The accused persons become overconfident because of the inaction of the police authorities and as such after 22/23 days attacked them to establish their authority or dominance. Additionally it has been submitted that the medical documents of Rashida Bibi and Sahida Bibi would reflect that they were injured, being treated in Government Hospital. The prosecution, according to the learned advocate has proved the case beyond reasonable doubt and as such the order of conviction and sentence passed by the learned trial Court should not be interfered with.

I have assessed the evidence of the four prosecution witnesses which included the three sisters namely, Rashida Bibi, Pakhira Bibi and Sahida bibi and also an acquaintance who supported the case of the prosecution. It is a fact that in the injury report there is no reflection regarding the persons who assaulted the two sisters, however, the same cannot be a yardstick because firstly, they went to a primary health centre which did not have any infrastructure or even letterhead of a Government Hospital, they were then referred to Sub-divisional Hospital and the injury report of the Sub-divisional hospital reflects that they were referred from Ketugram Hospital. The evidence of PW6, Medical Officer proves that Sahida Bibi was assaulted on the right hand wrist and the X-ray revealed that there was fracture on the base of 2nd Meta carpal bone of the right hand. PW1, PW2 and PW3 has consistently

stated regarding the overacts of Babu Sk both on 03.09.2008 and 26.09.2008 and that of Momai Sk on 26.09.2008. So far as infliction of injury is concerned the same has been stated both by the injured witnesses regarding the particular person inflicting injury. In case of Rashida Bibi all the witness has stated that the injury was sustained because of the assault by iron rod by Babu Sk and in case of Sahida the assault being inflicted by Momai Sk additionally this has been corroborated by PW2 and PW3.

In view of the aforesaid so far as the incident of 03.09.2008 and 26.09.2008 is concerned, I am of the opinion that the incident had taken place. Accordingly, the finding of guilt arrived at by the learned Trial Court in respect of the appeal are not interfered with.

So far as applicability of the sections are concerned, I am of the opinion that the incident as narrated on 03.09.2008 would fall under Section 354 of the Indian Penal Code. Accordingly, accused Babu Sk should be convicted and sentenced for the offence under Sections 448/323/354 of the Indian Penal Code. So far as the appellant Momai Sk is concerned his conviction under Sections 448/325 of the Indian Penal Code is maintained.

However, the sentence imposed upon both the Appellants call for modification, accordingly:

- i) Babu Sk, appellant no.1 is sentenced to Rigorous Imprisonment of one year and fine of Rs.5,000/- in default to suffer Simple

Imprisonment for three (3) months for the offence under Section 354 of the Indian Penal Code.

- ii) Babu Sk, appellant no.1 is sentenced to Rigorous Imprisonment of one month and fine of Rs.5,000/- in default to suffer Simple Imprisonment for ten days for the offence under Section 323 of the Indian Penal Code.
- iii) Babu Sk, appellant no.1 is sentenced to Rigorous Imprisonment of one month and fine of Rs.5,000/- in default to suffer Simple Imprisonment for ten days for the offence under Section 448 of the Indian Penal Code.

The sentence of appellant no.2, Momai Sk is modified to the extent as follows:

- i) For the offence under Section 325 of the Indian Penal Code the appellant would undergo sentence of Simple Imprisonment for three months and fine of Rs.5,000/- in default to suffer Simple Imprisonment for ten days.
- ii) And for the offence under Section 448 of the Indian Penal Code the appellant would undergo sentence of Simple Imprisonment for one month and fine of Rs.5,000/- in default to suffer Simple Imprisonment for ten days.

All the sentences would run concurrently.

Accordingly, CRA 102 of 2021 is disposed of by modifying the sentence as directed above.

The appellants are on bail their bail bonds shall stands cancelled. They are directed to surrender before the learned Additional Chief Judicial Magistrate, Katwa, Purba Bardhaman.

Pending Applications, if any, are consequently disposed of.

Department is directed to send back the Lower Court Records and communicate this judgment, so that effective steps are taken by the learned trial Court.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)