

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Before: Hon'ble Justice Sugato Majumdar

CRA 169 of 2016

With

IA No: CRAN/1/2021

Gopal @ Manu Das

Vs.

The State of West Bengal

For the Appellant : Mr. Debabrata Acharyya,
Mr. Sital Samanta.

For the State : Mr. Saswata Gopal Mukherjee, Ld. Public
Prosecutor,
Mr. Sandip Chakraborty,
Mr. Narayan Prasad Agarwala,
Mr. Pratick Bose.

Hearing concluded on : 19.07.2022

Judgment on : 26.07.2022

Sugato Majumdar, J.:-

The instant appeal is filed against judgment of conviction and order of sentence dated 29/01/2016 passed by the Additional District and Sessions Judge, Second Court, Contai, Purba Medinipur in Sessions Trial No. 02/September/2012 convicting the appellant under section 354 of the Indian Penal Code.

Genesis of the case is the written complaint made by Nilkamal Mondal, the father of the victim girl wherein it was stated that on 25/02/2012 in the evening at about 5:30 P.M. the appellant took his minor daughter to a nearby field on the pretext of giving her some beans and raped her forcefully. At

night, after dinner when the victim went to bed with her mother, she felt unbearable pain in her genital. When her mother interrogated her she disclosed the incident to her. A written complaint was lodged which was received in Egra Police Station on 26/02/2012 at 17:05 hours. On the basis of the written complaint formal F.I.R. was drawn up and Egra Police Case No. 33 of 2012 dated 26/02/2012 under Section 376 (2) (f) of I.P.C. was initiated.

The Investigating Officer visited the place of occurrence, prepared rough sketch map, examined the witnesses and recorded their statements under section 161 of the Code of Criminal Procedure, got the victim medically examined; he also got the accused, the appellant medically examined. Statement of the victim was also recorded under section 164 of the Code of Criminal Procedure, 1973. On completion of investigation, charge sheet was filed. Charge was framed under Section 376 (2) (f) of the Indian Penal Code which was read over and explained the appellant to which he pleaded not guilty and claimed to be tried. Trial followed thereafter.

In course of trial eight witnesses were examined. The father of the victim, being the de-facto complainant was examined as P.W. 1; the mother of the victim as P.W. 4 and the victim was examined as P.W. 5. There were other witnesses including the doctors who examined the victim and the appellant as well as the Investigating Officer.

The Trial Court in terms of the impugned judgment held the appellant guilty of offence under Section 354 of the Indian Penal Code and convicted him and passed order of sentence to suffer rigorous imprisonment for two years and pay a fine of Rs. 4000/- in default to suffer further imprisonment for six months.

On being aggrieved and dissatisfied with impugned judgment and order of sentence, the instant appeal is preferred,

Mr. Samanta appearing for the appellant submitted that there is unexplained delay in lodging written complaint. For such delay creditworthiness of the written complaint becomes questionable.

Mr. Samanta further submitted that writer of the written complaint is not examined as a witness which is another reason to doubt the allegations contained therein.

Next point argued by Mr. Samanta is that there existed enmity and animosity between the family of the victim and that of the appellant. This appears from the statement of P.W. 2, namely, the de-facto complainant and P.W. 3 being the mother of the victim. He also invited attention to the cross-examination part of the victim where she stated that there were quarrels in between her mother and the mother of the appellant from time to time. Suggestion was also given to the victim that her family members used to bring grocery articles from the shop of the appellant on credit and there was huge amount due and payable by the father of victim and that the appellant was not agreeable to give any grocery article on credit which led to animosity and subsequent false implication of the appellant in the instant criminal case.

Next point argued by Mr. Samanta is that the place of occurrence is not mentioned in the sketch map (Ext. 6) which is fatal for the prosecution case. The place of occurrence is mentioned that "*doba*" in the rough sketch map. No field of peas is mentioned in the said sketch map. The Investigating Officer being P.W. 6 was cross-examined in course of which he stated that he had not mentioned in the index of rough sketch map plot number and the owner of land. He also did not mention that the place of occurrence is a field of green

peas. The place of occurrence is described as “*doba*” whereas the Trial Court held that the place of occurrence is a field of green peas. Thus, according to Mr. Samanta, the finding of the Trial Court is not based on evidence which is a serious error in the judgment. Mr. Samanta relied upon the ratio of *Shingara Singh versus the State of Haryana and Another* [2005 SCC (Cri) 870]; *State of M.P. versus Ghudan* [2005 SCC (Cri) 801] in support of his argument and to elaborate the point that omission to mention the place of occurrence in the sketch map makes the prosecution case doubtful.

Mr. Samanta also argued that in course of examination of the appellant under Section 313 of the Code of Criminal Procedure, 1973, the Trial Judge put eight questions. All these eight questions relate to the testimonies of P.Ws. 1, 2, 3, 4 and 5. The Trial Judge did not put any questions with reference to other three witnesses, namely, P.W. 6 - the Investigating Officer, P.W. 7 - the Doctor, who examined the appellant and P.W. 8 - the Doctor who examined the victim. In doing so, according to him, the Trial Judge completely ignored the underlying principle of Section 313 of the Code of Criminal Procedure. Since these pieces of evidences were not put to the appellant, he suffered valuable right to defend himself and to explain those incriminating elements. The Trial Judge should not rely on incriminating evidence to convict the appellant which were not put to the appellant in course of examination under section 313 of the Code of Criminal Procedure, 1973. According to him, there is a serious flaw in the impugned judgment, therefore. Mr. Samanta refers to *Nirmal Pasi and Another versus State of Bihar* [J.T. 2022 (6) SC 28], *Ramvir Yadav - versus - State of Bihar* [(2009) 6 Supreme Court Cases 596.]; *Shaikh Maqsood versus State of Maharastra* [(2009) 6 Supreme Court Cases 583].

It was argued by Mr. Samanta that the statement of the victim is silent on the nail mark found in her private parts although report of medical

examination mentioned such nail marks. According to him, the prosecution developed a story which was not brought before the Court scientifically in terms of the Code of Criminal Procedure, 1973.

In nutshell, Mr. Samanata argued that there are serious flaws in the finding of the Trial Court for which the judgment of conviction and order of sentenced should be set aside.

Mr. Agarwala appearing for the State submitted that delay is sufficiently explained by the victim. It appears from the evidence of the victim that initially she was put on fear by the appellant for which she did not disclose the incident to her mother. But in night when she felt pain she stated the matter to her mother and on the very next date the written complaint was lodged. In fact, according to him, there was no delay at all.

Next point argued by Mr. Agarwala is that the word “field” is mentioned in the charge itself. Omission to mention place of occurrence in the sketch map is a minor discrepancy which, in no way, vitiate the trial.

Next point argued by Mr. Agarwala is that charge was considered under Section 376 of the Indian Penal Code but the appellant convicted under Section 354 of the Code of Criminal Procedure for which medical evidence not so vital. Even if the Trial Court failed to mention the incriminating elements of P.Ws. 6, 7 and 8 before the accused in course of examination under Section 313 of the Code of Criminal Procedure, such a failure was neither fatal nor caused any prejudice to the appellant vitiating the findings of the Trial Court.

Next point argued by Mr. Agarwala is that in course of examination under Section 313 of the Code of Criminal Procedure, the appellant stated that he would give evidence in the case which he did not. Conduct of the appellant

shows that he is not in a position to adduce evidence to establish his innocence in the case.

In nutshell, Mr. Agarwala supported the impugned judgment and order of sentence.

In absence of any eye witness, trustworthiness and credibility of the testimony of the victim girl is to be looked into. In the written complaint, it is mentioned that the incident took place on 25/02/2012 in the evening at 05:30 P.M. The appellant took the victim to the field in the pretext of giving beans and forcefully raped her. The victim stated in her evidence that the appellant threatened her not to disclose the incident to the others. But she disclosed the incident to her mother when she felt pain in her genital at the time of going to bed. On the very next date namely on 26/02/2012 the matter was informed to the police station in terms of the written complaint which was lodged in Egra Police Station at about 17:05 hours. So the written complaint was lodged within twenty four hours of the incident. There cannot be said to be any delay in lodging the written complaint in this regard. I agree with the submission of Mr. Agarwala in this regard.

Although Mr. Samanta argued that on account of non-examination of the scribe as witness makes the prosecution case doubtful, it is evident from examination and cross-examination of the de-facto complainant being P.W.1 that the written complaint (Ext.1) was admitted in evidence without any objection and that in course of cross-examination P.W. 1 explained in details in what circumstances the written complaint was written. No question was put to P.W. 1 challenging the veracity of the written complaint. Therefore, at this stage the same cannot be challenged on the ground of failure to examine the scribe as witness.

The victim stated in her evidence that she was playing in a field a little away from her home. At that time the appellant asked her to come with him alluring with chocolate and green peas. She stated that time it was about to be a night so she won't go. Although she did not agree initially, the appellant took her to a dried pond. She stated further that in the field there was a tree and by the side of the tree there was a dried pond. The appellant took her to the dried pond and opened her pant and touched his genital with her private parts and inserted index finger into her genital. Then the appellant gave some green peas to her. She was cross-examined on the location of the field. She stated that the field of green peas is not visible either from their house or from that of the appellant or from the road. It is one thing to say that the field is not visible from their home and it is altogether another thing to say that there is no field at all. No question was put in cross-examination challenging the existence of field either to the victim or to other witnesses. There is no suggestion that there was no field at all. Statement of the victim explained sufficiently that there was a field in which there was a tree beside a dried pond. The appellant took her to the dried pond and opened her pant and touched his genital organ with her private part. There is no ambiguity in describing the place of occurrence. In his examination under Section 313 of the Code of Criminal Procedure appellant never stated that there was no field or denied the location or place of occurrence. In **Shingara Singh's Case** (supra), Supreme Court of India considered issue of omission in rough sketch map and held that although removal of bricks from wall was not shown in the site plan. The Investigating Officer stated before the Court that he had noted the fact that some of the bricks were removed from the wall in that factual context; the Supreme Court of India held that omission in the site plan could not prejudice in the case of defense. However, the factual background of the case is different from the present one. In **State of M.P. versus Ghudan's** case

(supra) the Supreme Court of India observed that there was no mention in the site plan about existence of tube light by virtue of which the accused was stated to have been identified. The Supreme Court held that benefit of doubt would go in favour of the accused. In that case the Supreme Court of India found serious discrepancies in evidence adduced. Both the cases were decided on different factual matrix. The Investigating Officer being P.W. 6 stated in cross-examination that he did not mention in sketch map (Ext.6) the place of occurrence as a field of green peas but, however, it shows that there was a "Doba". This is in consonance with the evidence of the victim. Therefore, omission to mention field in the sketch map, therefore, is not fatal to the case. Argument of Mr. Samanta is not acceptable, therefore.

P.W. 1 stated in cross-examination that the families of the appellant were not in good terms with their neighbors and that mother of the appellant is his aunt. P.W. 2, the maternal grand-father of the victim, in cross-examination, stated that relationship between the appellant and the parents of the victim were good. P.W. 3 mother of the victim stated that they are existed animosity and strained relation between the families of the appellant and that of the victim but she also stated that at the time of incident there was no enmity and that she had good relation with her neighbors. Therefore, the defense of false implication of the accused on account of animosity does not hold much ground.

Statement of the victim girl was recorded under section 164 of the Code of Criminal Procedure, 1973. Although the signatures of the victim girl in the statement were marked, the statement itself was not marked as an exhibit. The victim girl, being the sole witness of the incident stated the incident in details in deposition. In cross-examination her version was not shaken or debilitated. Her statements recorded under section 164 of the Code of

Criminal Procedure, 1973 are consistent with her deposition made before the court. There is consistent in statement of witnesses as to what the victim subsequently complained of. The victim did not state that there was a penetration of penis but the accused inserted finger into her genital. P.W. 3 being the mother of the victim stated in evidence that she washed and massaged by oil the private parts of the victim to alleviate her pain. The victim was medically examined on the next day that is on 26/02/2012. Medical examination report (Ext. 7) shows the nail mark on the right thigh of the victim. The victim mentioned nothing about nail scratch mark as stated in the medical report but her mother (P.W.3) mentioned in her deposition that she noticed a nail mark on her thigh. The Medical Officer being P.W. 8 stated that such scratch mark may be caused by friendly scratching. It is not in evidence of anybody that the questioned nail mark was caused in course of the offence committed. It is not in anyone's evidence that nail mark was caused in course of the perpetrated offence. It might have been caused by scratching of friendly hand or otherwise. In absence of anything more, such nail marks cannot be taken as corroboration. Omission to mention nail mark by the victim cannot be said to render her otherwise acceptable evidence as untrustworthy. It cannot be said that omission to mention nail mark made the whole prosecution case improbable or doubtful. Even though the victim failed to state in her evidence that there was a nail mark, that omission does not make her version otherwise improbable. In *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat*, (1983) 3 SCC 217 the Supreme Court of India observed:

“6. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important

“probabilities factor” echoes in favour of the version narrated by the witnesses.”

In catena of subsequent decisions the same principle was reiterated. If the evidence of victim of rape is reliable, trustworthy and inspire confidence to rely upon, minor omissions of discrepancies can well be overlooked provided that the “probability factor” is not diluted. Mere fact that a nail mark can be caused by scratching of a friendly hand or that the victim failed to mention any nail mark on her thigh do not render her otherwise consistent and trustworthy evidence. Brushing aside a reliable testimony of an eight years old girl on the ground of false implication of the appellant because of suspected acrimonious relationship between two families is a serious miscarriage of justice. Why an eight years old girl would make false allegation on such a sensitive issue of outraging her modesty. There is no reason to suspect her version.

Much stress was laid by the learned Counsel for the appellant on the fact that failure to place the evidences of P.W. 6 - 8 is a serious flaw of the Trial Judge causing prejudice to the appellant as well as violation of principles of natural justice, undermining the basic principle enshrined in section 313 of the Code of Criminal Procedure, 1973. In **Nirmal Pasi’s** case (supra) incriminating piece of evidence was identification of the accused person by the witnesses. Identification of the accused persons in court was preceded by identification in test identification parade, held during investigation was not at all put before the accused person in their examination under Section 313 of the Code of Criminal Procedure. In that case considering long pendency of the case the accused were acquitted. In **Shaikh Maqsood’s** case (supra) no question was put to the accused relating to his authorship of the crime. On that ground the judgment of conviction was set aside. In **Ranvir Yadav’s** case (supra) no

incriminating material was put before the accused person while examining him under section 313 of the Code of Criminal Procedure. On that ground conviction was set aside.

The Trial Judge did not put any question to the appellant on the nail mark noticed on the thigh of the victim or placed the evidences of P.W. 6, P.W. 7 and P.W. 8 before him. P.W. 3, the mother of the victim stated in her evidence that she noticed such nail mark there. She was cross-examined on this evidence and suggestion was given to her that she did not notice the nail mark. In course of examination of the appellant under section 313 of the Code of Criminal Procedure, 1973 the statements of witnesses namely P.W - 1 to P.W. - 5 on commission of the offence by him were put to him to which he replied that allegations are false. It shows he is fully aware of the allegations raised against him. Nail mark is not the sole evidence on which the finding of the trial court was based. P.W. 8 namely the doctor who examined the victim was cross examined at length and he stated in course of cross examination that prognosis of the patient was also not mentioned in the report. In such circumstances omission to place the evidence of P.W. 8 cannot be said to cause any prejudice to the appellant. Mr. Samanta, in course of argument submitted that such omission caused prejudice to the appellant but could not explain what prejudice was caused to the appellant.

It is well settled principle of law that mere omission on the part of the court to put any incriminating circumstances to the accused would not vitiate the trial by *ipso facto* unless some prejudice is caused to the accused for such omissions. In catena of decisions this principle was reiterated by the Supreme Court of India. A three-Judge Bench of the Supreme Court India in **Wasim Khan vs. State of U.P.** [AIR 1956 SC 400] and **Bhoor Singh vs. State of Punjab** [(1974) 4 SCC 754] considered the issue in terms of section 342 of the

old Cr.P.C (corresponding to section 313 of the present Code) and held that every error or omission in compliance with the provisions of Section 342 does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him. The principle was reiterated in catena of decisions. In **Suresh Chandra Bahri vs. State of Bihar, 1995 Supp (1) SCC 80**, while negating the plea that omission of the trial court to put incriminating circumstances to the accused while examining under section 313 of the Code of Criminal Procedure, 1973 prejudiced him the Supreme Court of India observed that it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance but he must also show that such non-examination has actually and materially prejudiced him and has resulted in failure of justice. It was further observed that the counsel appearing for the appellants was unable to place before the Supreme Court of India to what in fact was the real prejudice caused to the appellants by omission to question the accused/appellant Suresh Bahri on the point of his motive for the crime. No material was also placed to show as to what and in what manner the prejudice, if any, was caused to the appellants or any of them. In **Santosh Kumar Singh vs. State, [(2010) 9 SCC 747]** one of the issue was whether omission to put to the accused during examination under section 313 of the Code, evidence of helmet and the ligature marks on the neck which were put to the doctor vitiated the trial or not. It was held by the Supreme Court of India that the defense counsel had raised comprehensive arguments before the trial court and also before the High Court and the defense was, therefore, alive to the circumstances against the appellant and that no prejudice or miscarriage of justice had been occasioned. In **Alister Anthony Pareira v. State of Maharashtra [(2012) 2 SCC 648]** chemical analyser's report as well as evidence of doctor were not put to the accused was held that no prejudice was caused.

In **Nar Singh vs. State of Haryana, (2015) 1 SCC 496** the Supreme Court of India examined the issue at length referring to earlier authorities on this point. It was reiterated that the trial court is required to act in accordance with the mandatory provisions of Section 313 Cr.P.C, failure on the part of the trial court to comply with the mandate of the law, in our view, cannot automatically enure to the benefit of the accused. Any omission on the part of the court to question the accused on any incriminating circumstance would not *ipso facto* vitiate the trial, unless some material prejudice is shown to have been caused to the accused. It was further observed:

“20. The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance with Section 313 Cr.P.C has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 Cr.P.C, it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that the accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 Cr.P.C. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. The facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.”

In view of the settled principles of law and factual aspects of the present case, stated above, the argument of Mr. Samanta on this point does not impress much.

On perusal of the materials on record and the impugned judgment it is evident that the trial court passed the impugned judgment on proper appreciation of evidence and this court concur with the findings of the trial court as well as the sentence.

The impugned judgment of conviction and order of sentence invite no interference and stand upheld.

In nutshell, the instant appeal fails.

No order of cost.

The appeal is accordingly disposed of along with pending application.

(Sugato Majumdar, J.)