

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

Before: Hon'ble Justice Sugato Majumdar

CRA 659 of 2011

**Jahirul Sk. @ Jarul Ali
Vs.
The State of West Bengal**

For the Appellant : Mr. Suranjan Mandal.

**For the State : Mr. Binoy Kumar Panda,
Mr. Narayan Prasad Agarwala,
Mr. Pratick Bose.**

Hearing concluded on : 25/07/2022

Judgment on : 28/07/2022

Sugato Majumdar, J.:-

The instant criminal appeal is preferred against the judgment of conviction dated 22/09/2011 and order of sentence dated 23/09/2011 passed by the Additional Sessions Judge, First Fast Track Court, Sadar, Cooch Behar in Sessions Trial No. 8 (5) 2009 arising out of Sessions Case No. 97/2009, whereby the appellant was convicted and sentenced under section 363 and 365 of the Indian Penal Code.

The de-facto complainant Pradip Sarkar lodged a written complaint on 07/12/2007 in Tufangunj Police Station alleging kidnapping of his minor son Parthib Sarkar alias Palas Sarkar by the appellant. It was alleged in the written complaint that on 06/12/2007 at about 01:30 hours at night his wife suddenly woke up from sleep and found her four years son Parthib alias Palas Sarkar was missing from the bed and doors of the room was open. In spite of thorough searching the boy could not be found out that night. The de-facto complainant

lodged *ejahar* in Tufangunj Police Station reporting the missing of his son. Police authorities began investigation and came to know from a source the whereabouts of the boy and rescued him from one Baneswar Burman with help of one of his relatives. It also came to knowledge that the appellant along with one Fazar Ali and Barek Seikh kidnapped the boy for ransom. The written complaint was received by Tufangunj Police Station on 07/12/2007 at 18:05 hours. On the basis of the said written complaint Tufangunj Police Station Case No. 110/07 dated 07/12/2007 under sections 363/364(A)/34 of the Indian Penal Code was initiated.

In course of investigation the Investigating Officer visited the place of occurrence, prepared rough sketch map, examined witnesses and did all other things necessary and incidental to such investigation. On completion of investigation charge sheet was filed under sections 363/364A/34 of the Indian Penal Code against the three accused persons. The matter was committed to the Court of Sessions and then the case was transferred to the court of Additional Sessions Judge, First Fast Track Court, Sadar, Cooch Behar for trial and disposal.

Charges were framed against the accused persons including the appellant under sections 363/364/365/34 of the Indian Penal Code. Charges were read over and explained to the accused persons to which they pleaded not guilty. Therefore, trial began.

In course of trial seventeen witnesses were examined and various documents were adduced in evidence. The accused persons were examined under section 313 of the Code of Criminal Procedure, 1973. Defense of the accused persons was false implication. The appellant stated in course of examination that he demanded “much wages” for which he was implicated in the instant prosecution.

The trial court, in terms of the impugned judgment acquitted the accused Barek Sk. And Fazar Ali but convicted the appellant and sentenced him to four years rigorous imprisonment and fine of Rs. 1000/- in default of which a further imprisonment of one month under section 363 of the Indian Penal Code. The trial court also sentenced the appellant with rigorous imprisonment of same terms and same fine under section 365 of the Indian Penal Code. Both the sentences were to run concurrently.

On being aggrieved and dissatisfied the instant appeal is preferred.

Mr. Mondal, the Learned Counsel appearing for the appellant submitted that evidence in this case is rather vague and contradictory. P.W. 9 Rahul Amin who was allegedly approached by the appellant in night with the boy for shelter and whose statement was recorded under section 164 of the Code of Criminal Procedure, 1973 to that effect, stated in examination-in-chief that no person ever visited his house with any child. He further stated in examination-in-chief that he signed recorded statements. He was declared hostile by the prosecution. In course of cross-examination by the prosecution he stated that on 06/12/2007 at about 02:30/3:00 A.M. a young boy came to his home with a male child on lap. The name of the young boy was Jahirul. Both of them stayed in the night. But he could not identify that Jahirul. In course of cross-examination on behalf of the accused persons, he stated that he was compelled to make statement before the magistrate. According to Mr. Mondal evidence of P.W.9 failed to connect the appellant with the offence alleged and cannot be relied upon. Similarly P.W. 10, Baneswar Burman who rescued the boy, failed to identify the appellant on dock. The victim boy identified the appellant by touching his hand. It is not clear why the victim boy should identify the accused by touching hand whereas the appellant is known to victim and his family. The whole identification process of the appellant is doubtful. The trial judge ignored these serious discrepancies in prosecution evidence. Such discrepancies undermining the probability factor

and involvement of the appellant in the alleged crime should not be relied upon in passing an order of conviction. Therefore, according to Mr. Mondal, the impugned judgment and order of sentence is liable to be set aside.

Mr. Mondal further argued that the prosecution failed to establish how the boy was kidnapped. No evidence is there in this regard. The circumstance under which the boy was taken from her mother's bed, circumstances under which one or more kidnapper trespassed into the otherwise locked up house remains a mystery. In absence of any proof in this regard the whole prosecution case remains doubtful. When evidence is shady and doubtful, conviction is unwarranted.

In nutshell, Mr. Mondal argued that since evidence of witnesses are contradictory, uncorroborated and doubtful, the impugned judgment and order of sentence is liable to be set aside.

Per contra Mr. Agarwala, appearing for the State, argued that even though identification of the accused by P.W. 9 and P.W. 10 are doubtful, the victim boy clearly identified the accused. The Investigating Officer P.W. 17 arrested the appellant who was detained in the house of Sk. Jamal Mia at Changmari. P.W. 13, Himangshu Biswas, the maternal uncle of the victim boy stated in cross examination that he found the accused at Changmari. He saw the appellant in the court. Evidences are, therefore, corroborative supporting the prosecution case. According to him, the trial court committed no error in coming to the conclusion. Therefore, the appeal is liable to be dismissed, according to Mr. Agarwala.

I have heard rival submissions.

The Prosecution case is that the victim boy was sleeping with her mother. Suddenly on waking up, the mother found her son missing from the bed. She raised hue and cry. The father of the victim came and started searching out the

boy. It was noticed that the grill-gate was unlocked and the lock and key was kept hanging there. The matter was reported to Tufangunj Police Station. Police also started searching out. On the next day one Baneswar Burman found a lungi-clad boy was riding a bi-cycle with another child. The child was crying. When asked why the boy was crying, the said lungi-clad boy fled away. The said Baneswar Burman rescued the child. When police reached there along with the father of the child he handed over the child to his father. The lungi-clad boy was detained in Changmari in the house of Sk. Jamal Mia. The Investigating Officer arrested the said lungi-clad boy from there. The said lungi-clad boy was the appellant and the child was the victim boy.

In this whole case, there is no evidence how the appellant entered into the room of the victim boy and in what situation the boy was kidnapped by the appellant. Although it was stated that the grill-gate was kept open and the lock and key was there, the same were not handed over to police for any forensic examination. It is prosecution case that the appellant went to the residence of P.W. 9, Ruhul Amin to stay at night. Statement of P.W. 9 was earlier recorded under section 164 of the Code of Criminal Procedure, 1973. On dock, P.W. 9 stated that he signed one a-priori written statement. He was declared hostile by the prosecution. On his cross-examination he stated that one young boy named Jahirul came to their residence with a male child on 06/12/07 at about 2:30 A.M. and stayed in the night. But he could not identify the appellant. So it cannot be relied upon that the appellant spent the night along with the victim boy in the house of P.W. 9. P.W. 10, Baneswar Burman failed to identify the appellant too although he supported the prosecution case that one lungi-clad boy was passing by a bi-cycle with a male child who was crying and that the lungi-clad boy abandoned the male child and fled away. P.W. 17, Sub Inspector S. Datta was the Investigating Officer of the case. He stated that the appellant was detained in the residence of Sk. Jamal Mia, a member of gram panchayat. P.W. 17

arrested the appellant from there. P.W. 17 further stated that from the said Jamal Mia he came to know that the appellant made an extra-judicial confession to him that the appellant kidnapped the victim boy for ransom. Sk. Jamal Mia deposed in this case as P.W. 3. He did not corroborate that the appellant was detained in his residence and was arrested from there or that any extra-judicial confession was made by the appellant to him. He did not identify the appellant. Interestingly, no arrest memo was produced in the court and adduced as evidence to show the place of arrest. No arrest witness was examined. There is no explanation why the arrest memo was not produced. In absence of arrest memo, which is the best evidence of arrest, the oral testimony of the Investigating Officer should not be relied upon. This makes arrest of the appellant from the residence of the said Jamal Mia a doubtful incident particularly when the said Jamal Mia spent not a single word on this. The trial court failed to notice these discrepancies in the evidence of prosecution. The trial court relied upon the oral testimony of P.W. 17 without caring to consider the absence of the arrest memo which ought to be adduced in evidence.

The trial court laid much emphasis on the evidence of the victim boy and accepted his identification of the appellant. The trial court failed to take into consideration that the victim boy identified the accused by touching his hand. As it appears from evidence of witnesses, the appellant was known to the family of the victim boy. The victim boy should know the face of the appellant. It is not clear why he identified the appellant by touching his hand.

On appreciation of evidence, it is evident that corpus of evidence adduced by the prosecution is doubtful. Evidence adduced by the prosecution failed to establish a case against the appellant. The trial court, while appreciating evidences failed to take into consideration lack of authenticity, cogency and coherence of the evidence of prosecution which failed to establish the prosecution case. Moreover, the trial court appreciated evidence in terms of

“preponderance of probabilities” being oblivious of the basic principle of appreciation of evidence in criminal trial that a prosecution case should be established beyond reasonable doubt. When evidence is not reliable, contradictory and incongruous, conviction on the basis of such evidence is travesty of justice. The trial court, therefore, committed serious error in passing the impugned judgment in convicting the accused.

For the reasons stated above, the impugned judgment and the order of sentence is liable to be set aside.

In nutshell, the instant appeal is allowed.

The judgment of conviction dated 22/09/2011 and order of sentence dated 23/09/2011 passed by the Additional Sessions Judge, First Fast Track Court, Sadar, Cooch Behar in Sessions Trial No. 8 (5) 2009 arising out of Sessions Case No.97/2009 is hereby set aside.

The instant appeal is disposed of along with pending application, if any.

Lower court record along with a copy of this judgment be sent back.

(Sugato Majumdar, J.)