

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 372 of 2018

SURAJ DEY
VS.
THE STATE OF WEST BENGAL & ANR.

For the Appellant	: Mr. Sandipan Ganguly, Sr. Adv. Mr. Arkadeb Bhattacharyya, Adv. Mr. Shekhar Barman, Adv. Ms. Priyanka Sarkar, Adv.
For the State	: Ms. Faria Hossain, Adv. Mr. Anand Keshari, Adv.
Hearing concluded on	: 7 th February, 2023
Judgement on	: 23 rd February, 2023

Siddhartha Roy Chowdhury, J.:

1. This criminal appeal challenges the judgement passed by learned Additional Sessions Judge, 3rd Court, Barrackpore in S.C. 358 of 2009 (S.T. Case No. 14 (2) 2010) on 28th June, 2018 whereby learned Trial Court was pleased to record an order of conviction, having found the appellant guilty for committing offence under Section 366 of the Indian Penal Code and sentenced him to suffer imprisonment for seven (7) years and to pay fine of Rs.5,000/- with a default clause.
2. Briefly stated, on 29th April, 2008 Mangal Mandi, father of the victim girl set the criminal administration of justice into motion by informing Inspector-in-Charge Kharda Police Station in writing that

his daughter (hereinafter referred to as victim girl), who was a student of Bhairav Ganguly College went missing on and from 12th February, 2008. She left her house to attend Saraswati Puja in her college but did not come back. Her mobile phone was switched off. He informed the local police station and G.D. entry No. 961 dated 13th February, 2008 was recorded. Subsequently, he came to know from the friends of his daughter that his daughter came across a lady named Puja at Titagarh station. They found the victim girl talking to Puja at Belgoria Station as well. On the day of Saraswati Puja, she entrusted her friend Lakhi Besra with her mobile phone and went with Puja. Lakhi Besra the friend of the victim girl received a phone call, made by a boy and Lakhi Besra came to know that the name of the said boy was Suraj. While giving back the mobile phone to the victim girl, Lakhi informed her about the phone call made by Suraj. His daughter took the phone back from Lakhi. The informant further stated that Lakhi told him that on 12th February, 2008 at about 2 p.m. the victim girl was found talking to Puja while leaving her college.

The informant subsequently came to know that with the help of Puja, Suraj and Bapan abducted the victim girl and engaged her in flesh trade.

The information, since disclosed offence, cognizable in nature, Kharda P.S. Case No. 121 dated 29th April, 2008 was registered under Section 363/366 of the Indian Penal Code. Police took up investigation which culminated into submission of charge-sheet

against two accused persons. To bring home charges prosecution examined nine (9) witnesses.

3. Learned Trial Court after considering the evidence adduced by prosecution witnesses, was pleased to pass the judgement impugned.
4. Mr. Ganguly, learned Senior Counsel, assailing the judgement submits that learned Trial Court passed the impugned judgement without taking into consideration the evidence or record properly. The judgement impugned is manifestation of absolute misreading of evidence.
5. Drawing my attention to the written information given by Mangal Mandi the defacto complainant, on 29th April, 2008, Mr. Ganguly, submits that the case was registered on 29th April, 2008 and the victim girl was produced before the Kharda police station by her father and one Biswajit Maity on 9th May, 2008.
6. It is found from the evidence of prosecution witnesses, particularly the victim girl, stated that she was brought back by her father and one of her neighbours from Delhi pursuant to a phone call she made to one Pradip Hansda of her neighbourhood from Delhi, by using the phone of one of her clients. The Investigating Officer was kept in dark about such development. The defacto complainant did not take help of police to bring back his daughter from brothel, as claimed. There is no evidence whatsoever to substantiate this fact of recovery of victim girl. Even, no railway ticket was produced by the Investigating agency to substantiate the claim that the victim girl along with her father and Biswajit Maity undertook a journey from Delhi to Kharda.

The victim girl claimed to have informed Pradip Hansda who according to P.W. 4 Biswajit Maity, informed the father of the victim as well as P.W. 4 about such call. That information goaded them to rush to Delhi. But prosecution did not examine this Pradip Hansda to substantiate the claim of P.W. 4 as well as P.W. 1, the defacto complainant.

7. It is submitted by Mr. Ganguly, that there is no clinching evidence to build up a nexus between the convict and the victim girl, far to speak of inducement made by him. The mobile phone of the victim, according to P.W. 1 was with Lakhi Besra, where accused person allegedly made a phone call in order to talk to the victim girl. Police did not seize the said phone. No C.D.R. was collected to prove the fact that victim girl was in talking terms with the convict. The victim girl identified the appellant in a T.I. Parade conducted in presence of P.W. 6 Mr. Sandip Chakraborty, learned Additional Chief Judicial Magistrate, Barasat. The accused person during his examination under Section 313 of the Code of Criminal Procedure stated that father of the victim was present in Court while he was produced and I.O. of this case during cross-examination has also admitted the said fact. Therefore, identification of the accused person in course of T.I. Parade, before a Magistrate cannot be said to have sufficient potential to make the accused culpable for committing the alleged offence. The victim girl claimed to have been taken to a hotel in Sealdah, before that to a restaurant in Dum dum. She spent the night at hotel together with the convict. No attempt was made by the Investigating

Officer collect evidence to substantiate such claim of the victim girl. The hotel register could have been seized to show that the victim girl for all practical purposes spent night in the said hotel.

8. It is further contended by Mr. Ganguly that the victim was an adult girl. She was attending her college. She was taken to Asansol and from there to Delhi but no attempt was made by the victim to draw the attention of her co-passengers about her being trafficked by the accused person.
9. P.W. 5 the victim girl is not getting support from the testimony of other witnesses. True it is she made a statement before the doctor, P.W. 7 to the effect that she was forcibly taken to a hotel at Sealdah and she was abused sexually over there by the accused person and she was taken to Delhi. But the evidence of P.W. 7 when is considered in the backdrop of conduct of the victim, in course of her journey from Sealdah to Delhi via Asansol, such disclosure appears to be of no consequence.
10. According to Mr. Ganguly, this uncorroborated testimony of P.W. 5, victim girl is not sufficient to saddle the appellant with any kind of criminal liability.
11. Learned Trial Court had no cogent reason to record an order of conviction under Section 366 of the Indian Penal Code.
12. Refuting such contention of Mr. Ganguly, Ms. Hossain submits that the victim girl since stood the test of cross-examination, her uncorroborated testimony should be considered to be sufficient to

record an order of conviction and learned Trial Court was absolutely justified in passing the judgement impugned.

13. According to Ms. Hossain, the father of the victim ought to have informed the police soon after receiving the information regarding whereabouts of the victim, from Pradip Hansda of his neighbourhood. The recovery of victim would have been beyond any doubt had it been done by police.
14. Ms. Hossain, further submits, drawing my attention to the testimony of the Investigating Officer P.W. 9 that he failed to conduct the investigation properly. It was his duty to take the victim to the hotel at Sealdah and to the brothel in Delhi but he passed the buck. According to the I.O. the victim girl did not take him to places like Belgharia, Titagarh, Asansol, Sealdah Railway station, Central Park, where the victim girl was accompanied by the accused person. The victim did not take him to any house in Delhi. From the evidence of the I.O. it appears as if, the victim was supposed to steer the course of investigation and his role was to follow the victim girl.
15. It is a settled principle of law, argued Ms. Hossain, that for the latches on the part of the Investigating Officer, the prosecution and in particular the victim girl should not suffer. The victim girl cannot be held responsible for not being recovered by police. There is no reason to disbelieve the victim girl because the prosecution failed to produce the witnesses like Pradip Hansda.
16. In this case victim stood the test the cross-examination. Even she was not cross-examined by the defence counsel while she stated that,

“On the night when I was taken by Suraj at Sealdah hotel, that night he forcibly had sex with me against my will and in spite of my resistance, and on the next morning he along with his friend first took me to Asansol by a bus from Dharmatala and from Asansol they took me to Delhi by train”.

17. Ms. Hossain, further contends that though there are lacunae in conducting the investigation, yet Court should not find any difficulty to rely upon the testimony of P.W. 5 victim girl, who has no reason to implicate the convict falsely. Court should consider the quality of the statement and should not insist for corroboration if the testimony of victim girl inspires confidence.
18. The State has not challenged the order of the learned Trial Court recording an order of acquittal in respect of offence committed under Section 363/376 of the I.P.C. Of course while considering the appeal, this Court has jurisdiction to remit the case for retrial but in this particular case, as rightly observed by learned Trial Court, the victim being a college student when decided to go with the accused person to spend night in a hotel and was found to have undertaken journey with him for Delhi, the Court should feel no hesitation to presume about her implied consent towards sexual union, even though, the victim stated that it was done by the accused ignoring her objection.
19. It is unfortunate for the victim girl as well as for the society that crime was not properly investigated into by the Investigating Agency. The Investigating Officer stated that victim did not lead him to various places where she was allegedly taken by the accused person. The

Investigating Officer could have collected the C.D.R. to prove the fact that there was conversation between the accused and the victim girl. C.D.R. even could have proved the prosecution case that victim made a call from Delhi to her neighbour Pradip Hansda. The I.O. ought to have collected the tickets from the victim, her father and neighbour Biswajit Maity to show that victim was brought from Delhi. Even he should have gone to that particular brothel for the interest of investigation. There is absence of sufficient evidence to prove beyond reasonable doubt that the victim being induced or allured by the accused person, left her house, accompanied the accused person and went to Delhi, the accused person trafficked her for immoral purpose and thus compelled her to have illicit sexual intercourse. It goes without saying that suspicion, howsoever strong, cannot circumvent the obligation of the prosecution to prove the charge beyond reasonable doubt.

20. In this case Investigating Officer, the prosecutor and learned Trial Judge, all have failed to play their respective role properly.

The Investigating Officer did not go to different places, where the victim was taken or from where she was rescued as victim did not take him there (*"The VG did not take me to Belghoria, Titagarh, Dum Dum, Asansol and Sealdah Railway Station and Central Park during investigation. The VG did not take me to any restaurant near Dum Dum Railway Station nor she take me to any hotel near Sealdah Railway Station. The VG did not take me to any house to Delhi"*). This is not

faulty investigation simplicitor. There is every reason to hold that it was done with motive to ensure safe passage for the accused person.

The prosecutor discharged his 'liability' and not duty in a mechanical manner while conducting prosecution. Even learned Trial Court Judge did not take participatory role.

21. The victim as P.W. 5 stated that by using the mobile of one of her clients, she informed one Pradip about her place of stay. His father and Biswajit, with police came and rescued her.

22. True it is we the judges are trained not to get swayed by emotion. We are trained to adjudicate without taking sides and without being mindful of the consequences. But we are supposed to adjudicate on the basis of parameters, which are well defined.

23. Learned Trial Court could have invoked the provision of Section 311 of the Code of Criminal Procedure to examine said Pradip as Court witness. Even learned Trial Court could have directed the investigating agency for further or re-investigation under Section 173 (8) of the Cr.P.C.

24. In **HASANBHAI VALIBHAI QURESHI VS. STATE OF GUJARAT & ORS.** reported in **(2004) 5 SCC 347** Hon'ble Apex Court held:-

"13. In Om Prakash Narang and Anr. v. State (Delhi Admn.)² it was observed by this Court that further investigation is not altogether ruled out merely because cognizance has been taken by the Court. When defective investigation comes to light during course of trial, it may be cured by further investigation if circumstances so permitted. It would ordinarily be desirable and all the more so in this case, that police should inform the Court and seek formal permission to make

further investigation when fresh facts come to light instead of being silent over the matter keeping in view only the need for an early trial since an effective trial for real or actual offences found during course of proper investigation is as much relevant, desirable and necessary as an expeditious disposal of the matter by the Courts. In view of the aforesaid position in law if there is necessity for further investigation the same can certainly be done as prescribed by law. The mere fact that there may be further delay in concluding the trial should not stand on the way of further investigation if that would help the Court in arriving at the truth and do real and substantial as well as effective justice. We make it clear that we have not expressed any final opinion on the merits of the case.”

25. It goes without saying that version of a victim should be given due credence and appreciated with due care and sensibility. Minor discrepancies or inconsistencies should not be given undue importance to discard her testimony. But in the given facts and circumstances, particularly when she left her house and accompanied the accused voluntarily, her testimony deserves higher degree of scrutiny as well as circumspection. Testimony of P.W. 5, fails to inspire confidence in me.
26. In my humble opinion prosecution has miserably failed to prove the charge under Section 366 of the I.P.C. which learned Trial Court failed to appreciate. The impugned judgement, therefore, is liable to be set aside, which I accordingly do.
27. True it is for the latches of I.O. the prosecution should not suffer but in this case there is no cogent evidence to saddle the accused

person with criminal liability and all credit goes to the Investigating Officer, who toyed with the constitutional right of the victim to have fair investigation. Fair investigation and fair trial are considered to be right to life and in this case both such rights were denied to the victim.

28. In **STATE OF GUJARAT VS. KISHANBHAI ETC.** reported in **AIR 2014 SCW 557** Hon'ble Apex Court held:-

“20. Every acquittal should be understood as a failure of the justice delivery system, in serving the cause of justice. Likewise, every acquittal should ordinarily lead to the inference, that an innocent person was wrongfully prosecuted. It is therefore, essential that every State should put in place a procedural mechanism, which would ensure that the cause of justice is served, which would simultaneously ensure the safeguard of interest of those who are innocent. In furtherance of the above purpose, it is considered essential to direct the Home Department of every State, to examine all orders of acquittal and to record reasons for the failure of each prosecution case. A standing committee of senior officers of the police and prosecution departments, should be vested with aforesaid responsibility. The consideration at the hands of the above committee, should be utilized for crystalizing mistakes committed during investigation, and/or prosecution, or both. The Home Department of every State Government will incorporate in its existing training programmes for junior investigation/prosecution officials course- content drawn from the above consideration. The same should also constitute course-content of refresher training programmes, for senior investigating/prosecuting officials. The above responsibility for preparing training programmes for officials, should be

vested in the same committee of senior officers referred to above. Judgments like the one in hand (depicting more than 10 glaring lapses in the investigation/prosecution of the case), and similar other judgments, may also be added to the training programmes. The course content will be reviewed by the above committee annually, on the basis of fresh inputs, including emerging scientific tools of investigation, judgments of Courts, and on the basis of experiences gained by the standing committee while examining failures, in unsuccessful prosecution of cases. We further direct, that the above training programme be put in place within 6 months. This would ensure that those persons who handle sensitive matters concerning investigation/prosecution are fully trained to handle the same. Thereupon, if any lapses are committed by them, they would not be able to feign innocence, when they are made liable to suffer departmental action, for their lapses.

21. On the culmination of a criminal case in acquittal, the concerned investigating/prosecuting official(s) responsible for such acquittal must necessarily be identified. A finding needs to be recorded in each case, whether the lapse was innocent or blameworthy. Each erring officer must suffer the consequences of his lapse, by appropriate departmental action, whenever called for. Taking into consideration the seriousness of the matter, the concerned official may be withdrawn from investigative responsibilities, permanently or temporarily, depending purely on his culpability. We also feel compelled to require the adoption of some indispensable measures, which may reduce the malady suffered by parties on both sides of criminal litigation. Accordingly we direct, the Home Department of every State Government, to formulate a procedure for taking action against all erring investigating/prosecuting officials/officers. All such erring officials/officers identified, as responsible for failure of a

prosecution case, on account of sheer negligence or because of culpable lapses, must suffer departmental action. The above mechanism formulated would infuse seriousness in the performance of investigating and prosecuting duties, and would ensure that investigation and prosecution are purposeful and decisive. The instant direction shall also be given effect to within 6 months.”

29. It is expected Home Department, in consonance with the aforesaid mandate of Hon’ble Supreme Court has formulated a procedure for taking action against erring investigating officer.

30. In **DAYAL SINGH & ORS. VS. STATE OF UTTARANCHAL** reported in **AIR 2012 SC 3046** Hon’ble Apex Court held:-

“Director Generals of Police UP/Uttarakhand are hereby directed to initiate, and expeditiously complete, disciplinary proceedings against PW6, SI Kartar Singh, whether he is in service or has since retired, for the acts of omission and commission, deliberate dereliction of duty in not mentioning reasons for non-disclosure of cause of death as explained by the doctor, not sending the viscera to the FSL and for conducting the investigation of this case in a most callous and irresponsible manner. The question of limitation, if any, under the Rules, would not apply as it is by direction of the Court that such enquiry shall be conducted.”

31. Accordingly, taking lumen from said judgement Director General of Police is directed to take appropriate step to identify the Investigating Officer of Khardah P.S. Case No. 121 of 2008, S.I. Vivekananda Mondal and start disciplinary proceeding against him for dereliction of duty, whether he is in service or has since retired. On 24th March, 2017 S.I. Mondal who adduced evidence as P.W. 9 before the learned

Trial Court, when he was posted at Tehatta, Nadia. Action taken report must be filed within four months from date before the learned Trial Judge.

32. Let a copy of this judgement be sent down along with lower Court record to the learned Trial Court for information and necessary compliance. Another copy be forwarded to Director General of Police, West Bengal for information and necessary action.
33. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)