

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 516 of 2016

Arifan Bibi @ Areefan Bibi @ Bhutti

-Vs-

State of West Bengal

For the Appellant	:	Mr. A Chakraborty, Adv. Mr. S S Saha, Adv.
For the State	:	Mr. Swapan Banerjee, Adv. Ms. Purnima Ghosh, Adv.
Heard on	:	25.04.2023, 03.05.2023 and 08.05.2023
Judgment on	:	16.05.2023

Joymalya Bagchi, J.:-

1. Appeal is directed against the judgment and order dated 26.07.2016, 27.07.2016 and 28.07.2016 passed by learned Additional Sessions Judge, 7th Court, Barasat, North 24-Parganas in Sessions Trial No. 01(02)2013 arising out of Sessions Case No. 01(01)2013 convicting the appellant under sections 302/201/379/411 I.P.C. and sentenced her to suffer rigorous imprisonment for life and to pay a fine of Rs. 10,000/-, in default, to suffer rigorous imprisonment for ten months for the offence punishable under section 302

I.P.C., to suffer rigorous imprisonment for two years and to pay a fine of Rs. 5,000/-, in default, to suffer rigorous imprisonment for five months for the offence punishable under section 201 I.P.C., to suffer rigorous imprisonment for one year and to pay a fine of Rs. 2,000/-, in default, to suffer rigorous imprisonment for two months for the offence punishable under section 379 I.P.C. and to suffer rigorous imprisonment for one year and to pay a fine of Rs. 2,000/-, in default, to suffer rigorous imprisonment for two months more for the offence punishable under section 411 I.P.C. All the sentences to run concurrently.

Prosecution case:-

2. Prosecution case involves the murder of a ten-year old girl Ajmira Khatun. On 29.08.2012 at 3:30 p.m. she left her residence to take private tuition from Sabina Yasmin (P.W. 11). She did not return till 5:30 p.m. In spite of search she could not be traced. Around 11:00 p.m. her body was found floating on a nearby pond of Mohat Ali Mondal. Her lower apparels and inner garments were found missing. A pair of ear rings was also missing. Ayeb Nabi (P.W. 2) after recovery of the child lodged written complaint being Ashokenagar Police Station Case No. 453/12 dated 30.08.2012 under sections 302/201 I.P.C. In the course of investigation on 11.09.2012 appellant was arrested. On her leading statement, a pair of ear rings was recovered. Subsequently, a school bag, books, slippers and trousers of the victim were recovered on the showing of the appellant from a *doba* near the house of her father-in-law, Mosaraf Mondal.

3. Charge-sheet was filed and charges were framed under sections 302/201/379/411 I.P.C. Appellant pleaded not guilty and claimed to be tried.

4. During trial, prosecution examined 27 witnesses and exhibited a number of documents.

5. In conclusion of trial, the trial Judge by the impugned judgment and order convicted and sentenced the appellant, as aforesaid.

Evidence on record:-

6. P.W. 1, Md. Rahamatullah is the scribe of the F.I.R.

7. P.W. 2, Ayeb Nabi is the father and de-facto complainant. He deposed on 29.08.2012 his daughter had gone to take private tuition from one Sabina Yasmin. She did not return till 5:30 p.m. He heard from his sister-in-law, Rahima Mondal (P.W. 23) that she had seen the appellant take her daughter to her house. He went to the house of the appellant but could not find his daughter. Thereafter, appellant told them to search by the side of the pond of Mohat Ali Mondal. They went there and found the dead body of her daughter floating on the pond. Her hands were tied with a rope from behind. Her trousers were absent. Slippers and ear rings were missing. Police took away the body from the pond. He lodged written complaint at Ashokenagar Police Station. Two or three days later, police took appellant and came to the spot. Exercise books, ear rings, school bag, slippers were recovered from a *doba* in front of the house of Mosaraf Mondal. He put LTI on the seizure list.

8. P.W. 3, Akher Ali is the brother of the deceased. He corroborated P.W. 2 that on the fateful day his sister had gone to take private tuition from Sabina

Yasmin. She did not return and they started searching for her. Her mother went to the house of Sabina but was told that her daughter had left from the tuition class. He also joined to search for his sister. Dead body of his sister were found floating on the pond of Mohat Ali Mondal. Her hands were tied from behind with a rope. Her golden ear rings were missing. She was taken to Ashokenagar Hospital where doctor declared her dead. He went to the police station where the complaint was lodged.

9. P.W. 4, Mamtaj Bibi is the mother of the deceased. She has corroborated her son Akher (P.W. 3).

10. P.W. 16, Habibur Rahaman is the younger brother of Ayeb Nabi (P.W. 2). He deposed he heard from his sister-in-law, Rahima Mondal (P.W. 23) that Arifan Bibi had taken away Ajmira after catching her hand. He further deposed that he accompanied Rahimato the house of Arifan Bibi. Arifan told them she gave food to Ajmira and thereafter Ajmira left her residence. While they were searching Ajmira, she came and told them to search the pond of Mohat Ali Mondal. They found the body of Ajmira floating in the pond. She was taken to Ashokenagar Hospital where she was declared dead.

11. P.W. 23, Rahima Mondal is the star witness. She claimed on the fateful day around 5:30 p.m. while she was returning home, she saw appellant caught the hand of Ajmira and took the latter to her residence. When Ajmira was untraceable, P.W. 23 with P.Ws. 2 and 4 went to the house of the appellant and enquired about Ajmira. Appellant told them Ajmira took food from their house and, thereafter left. Ajmira could not be traced out and P.W. 23 along

with P.W. 4 and other again went to the house of appellant. Then appellant told them to search the pond of Mohat Ali Mondal. While searching the pond of Mohat Ali Mondal, body of Ajmira was found. She also stated that the school bag, exercise books, slippers, trousers etc were recovered from a *doba* situated beside the house of Mosaraf Mondal. In cross-examination, she admitted she did not disclose to her husband and she made disclosure statement for the first time in Court. She also claimed to have been interrogated by the police at 9:00 p.m. on the fateful night. These are the relations of the deceased.

12. P.W. 6, SI Chand Ratan Roy held inquest over the body of the deceased and P.W. 26, Narayan Chandra Naskar conducted ministerial inquest over the body. They proved inquest report.

13. P.W. 10, Dr. Ranajit Narayan Dey is the medical officer who was posted at Ashokenagar State General Hospital. He deposed that the victim was brought dead at 1:20 a.m. on 30.08.2012 by her uncle Habibur Mondal. He proved the report (Exhibit – 6).

14. P.W. 7 (Dr. Abhijit Ghosal), P.W. 8 (Supriti Ghorai) and P.W. 9 (Dr. Shakti Pada Sardar) conducted post mortem over the body. P.W. 8 deposed that they found the following injuries:-

“(1) A bruise 1” X 1/4th” on the anterior aspect of the upper part of the right leg 3” below the right knee, (2) A bruise 1” X 1/4th” on the anterior aspect of the right leg placed 1” below the injury No. 1. (3) A bruise 1 and 1/2” by 1/2” on the anterior aspect of the right leg placed 2” below the injury No. 2, (4) A scratch abrasion crescentic shape 1/4” X 1/4” placed on the anterior midline 1/2” below the lower lip, (5) A bruise 1/2” X 1/4” placed on the inner aspect of the right half of the upper lip, (6) A bruise 1/2” X 1/4” on the inner aspect of the right half of the upper lip placed 1/4” midior to the injury No. 5, (7) A bruise 1/4” X 1/4” on the inner aspect of the right half of the lower lip, (8) A scratch abrasion 1/2” X 1/4” present on the flexor aspect of the left

forearm ½" above left wrist joint, (9) A scratch abrasion ¾" X ¼" placed on the lateral aspect of the left wrist joint, (10) A bruise 1 and ½" X ½" encircling the left forearm 1 and ½" above the left wrist joint, (11) a scratch abrasion ½" X ¼" on the dorsal aspect of the right hand 2 and ½" tista to the right wrist joint, (12) A scratch abrasion ¼" X ¼" placed on the torsal aspect of the right hand ½" diastar to the lower end of the right radius, (13) A scratch ¼" X ¼" on the lateral aspect of the right hand placed ½" below the right joint, (14) A bruise 2" ¼" X ¼" on the thenar eminence of the right hand, (15) A bruise 1 and ½" X ¼" encircling into right forearm 1 and ½" above the right wrist joint, (16) An abrasion ½" X ½" on the right anterior aspect of the neck placed 1 and ½" below the right base of the mandible, 2" to the right anterior midline, (17) A bruise ½" X ½" placed on the lower left vagina wall on dissection fracture of both cornu of the hyoid bone, inward compression in type with extravasations of blood in the surrounding adjacent tissues of the neck, 2) a scalp hematoma ½" X ½" on the front area of the scalp"

He deposed that the injury Nos. 10, 11, 12, 13, 14 and 15 may arise if hands are tied with rope and all the injuries in the neck were caused by strangulation. He proved the post mortem report (Exhibit – 5).

15. P.W. 11, Sabina Yasmin deposed in the evening of 29.08.2012, Ajmira had come to her house for private tuition. She had left at 5:30 p.m.

16. P.W. 21 (Rahul Amin Mondal) and P.W. 25 (Faruk Mondal) are students who used to take tuition with Ajmira in the house of Sabina Yasmin.

17. P.W. 22, Omar Ali Mondal is the father of P.W. 25. He deposed Ajmira was present in the tuition class in the evening of 29.08.2012. Subsequently, her dead body was recovered from the pond of Mohat Ali Mondal.

18. P.W. 13 (Mofiq Mondal), P.W. 14 (Obai Mondal) and P.W. 24 (Gias Uddin) have also deposed with regard to the recovery of the dead body from the pond of Mohat Ali Mondal.

19. P.W. 27, Surendra Kumar Singha is the investigating officer. He deposed upon registration of F.I.R. case was transferred to him. He reached the place of occurrence and drew rough sketch map with index. He examined witnesses. He seized General Diary with regard to UD case registered regarding the death of the victim. On 01.09.2012, he interrogated Arifan Bibi. Before arrest she made disclosure statement. On the basis of disclosure statement, he went to the house of Abdul Halim Box and recovered a pair of ear ring made of gold. He seized the article under a seizure list (Exhibit – 10). He produced the accused before Magistrate and she was remanded to the police custody. On further interrogation, she made another disclosure statement. In terms of the disclosure statement, he seized the school bag, exercise books, slippers and trousers of the victim on 02.09.2012 near the house of Mosaraf Mondal under a seizure list (Exhibit – 8). He sent the articles including vaginal swab of the victim for forensic examination. He submitted charge-sheet. In cross-examination, he admitted that he had not received the report of forensic laboratory. During examination, he had examined Ayeb Nabi but as he corroborated the F.I.R. he did not record his statement. He arrested one Kutubuddin and brought for ten days police custody. Prior making such prayer he recorded his statement under section 161 Cr.P.C. He proved the said statement (Exhibit – A) which reads as follows:-

“while Ajmira Khatoon left her house for her study, then I somehow too, away her in a lonely place and thereafter killed her after pressing her throat and before committing murder I tied her hands by jute rope so that she does not take any attempt and thereafter I put off her pant and jangia and also took away her ear ring. *Said person stated before me that UPARER JAMA KHULTE NA PERE TARATARI TENE NIA*

RASTER DHARE PUKURER MODDHE FELE DEI. PARAR LOK TAKHAN AJMIRA KHATOON KE KHUJTE LEGECHHE AMI DHORA PORAR VOE OR PANT, JANGIA, KANER DUL SOB JHOP E FELE DIA PALIE JAI. AMAKE SATHE KORE NILE AMI KOTHA KOTHA OIGULO FELECHI TA DEKHIE PARBO ["Since I could not undress her top wear I quickly dragged the body and threw the body in the pond. Since local people started searching for Ajmira Khatoon I got scared and left the trousers, underwear, ear rings in the bushes and fled. If I am taken along I can show where those articles are."]

He did not make any prayer for recording confessional statement of Kutubuddin before Magistrate.

20. P.W. 18, Bipul Karmakar of Ramakrisna Jewellers had identified the bill to be of his shop. He identified the pair of gold ear rings when produced before him.

21. P.W. 15 (Mustakin Gazi) and P.W. 20 (Ajgar @ Asgar Ali Mondal) are witnesses to the seizure of school bag, exercise books, slippers and trousers of the deceased. P.W. 15 deposed appellant was brought in front of house of Mosaraf Mondal. On her showing the articles were recovered. He signed on the seizure list. He identified the material object. However, P.W. 20 stated police had come in front of the house of Mosaraf Mondal. Appellant was not present. Police contacted the appellant over phone and came to learn that the bag was lying in a drain in front of house of her father-in-law, Mosaraf Mondal. Police recovered the bag. He identified the bag in Court as well as signature on the seizure list.

22. P.W. 19, Riyajul Sahaji is the seizure witness regarding recovery of a pair of ear rings. He turned hostile and did not support the prosecution case.

Analysis of the evidence on record:-

23. Analysis of the evidence on record would show the prosecution case is based on circumstantial evidence. In a case based on circumstantial evidence, the five golden principles laid down by the Apex Court in ***Sharad Birdhichand Sarda vs. State of Maharashtra***¹ are as follows:-

“153. ... (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

24. Let me examine whether the incriminating circumstances relied on by the prosecution have been established in light of the aforesaid proposition of law.

Last seen together:-

25. Learned Counsel for the State has heavily relied on P.W. 23 (Rahima Mondal) to show around 5:30 p.m. appellant had caught hold of Ajmira and

¹ (1984) 4 SCC 116

taken to her residence. He contended P.W. 23 is a reliable witness and has remained unshaken in cross-examination.

26. On the other hand, learned Counsel for the appellant submitted P.W. 23 during cross stated that she was deposing for the first time in Court. Her conduct is unnatural as she admitted she had not told her husband with regard to the incident. Her claim to have been examined by the police officer on the night of the incident is not corroborated by the investigating officer, P.W. 27. Though she claimed that she had narrated the incident to Ayub Nabi (P.W. 2), the F.I.R. maker. The fact is significantly absent in the F.I.R. P.Ws. 3 and 4, brother and mother of the deceased has also stated that P.W. 23 had seen Ajmira being dragged away by the appellant. P.W. 23 appears to be sole witness who claims to have seen the appellant dragged away Ajmira to her residence. When a fact in issue is established through the evidence of a single witness, it is the duty of the Court to analyze her evidence and see whether she is reliable or not. To do so it is necessary to test her deposition on the anvil of normal human conduct, attending circumstance and seek corroboration, if any, from other witnesses. P.W. 23 claimed on 29.08.2012 around 5:30 p.m. appellant dragging away Ajmira to her residence. Subsequently, Ajmira was missing. Searching was commenced and she joined the search. But during cross-examination, she admitted that she had not disclosed this circumstance to her husband. Though she had claimed she was interrogated by police on the very night supporting her version is coming on record.

27. On the other hand, investigating officer (P.W. 27) appears to have arrested another person, namely, Kutubuddin on 31.08.2012 as a suspect and did not interrogate appellant during 01.09.2012. This gives an impression that P.W. 23 had not disclosed this fact to the investigating officer for more than three days, i.e., 01.09.2012. Another incongruous aspect emerges from the absence of this vital incriminating fact in the F.I.R. P.W. 23 claimed she had joined the parents of the child, namely, P.Ws. 2 and 4 in the search. She had disclosed the fact she had seen the appellant dragging away the child. She disclosed that she had seen Arifan Bibi dragging away the child. This appears to be improbable because P.W. 2 with regard to the aforesaid circumstance in the F.I.R. lodged on the next day, i.e., 30.08.2012. He discloses this fact for the first time in Court. Even his son (P.W. 3) and his wife (P.W. 4) who were a part in the search were silent with regard to the search.

28. P.W. 16, (Habibur Rahaman) brother-in-law of P.W. 23 also admitted that Rahima had told him appellant had dragged away Ajmira to police and had stated such fact for the first time in Court. The aforesaid circumstances give rise to the irresistible conclusion that till 01.09.2012 the fact that Rahima had seen the appellant dragging away the child was last seen with the appellant did not come to light. It appears to have been subsequently implicated. Belated disclosure of this vital circumstance appears to be highly suspicious and gives rise to the possibility that such circumstance was concocted to implicate the appellant. Trial Judge explained away the absence of this vital circumstance in the F.I.R. on the ground that the maker (P.W. 1) may

have considered as an inconsequential circumstance and was in a distress mind. I find it difficult to subscribe to this logic. P.W. 2 claimed after hearing that appellant had dragged away Ajmira, he along with P.W. 23 had repeatedly gone to the house of the appellant to search for her. If that is so, it is difficult to believe that the said witness had treated this circumstance as inconsequential event and omitted it in the F.I.R. Even if one discounts of this fact in the F.I.R. owing to his distress state of mind, P.W. 27 claimed when the witness was subsequently interrogated he stuck to the fact in the F.I.R. and did not improve on it. Failure to disclose this incriminating circumstance even in the subsequent action shows that this circumstance was concocted belatedly and, therefore, had not seen the light of day earlier. For these reasons, these attending circumstances are inconsistent with the deposition of P.W. 2 and other witnesses regarding the fact that the appellant was seen dragging away the victim in the evening of 29.08.2012 rendered their version suspected and the said circumstance appears to have been concocted as a mechanism of the investigating officer to implicate the appellant.

Unnatural Conduct of the appellant:-

29. Prosecution also claimed that the appellant gave false explanation whereabouts of Ajmira and subsequently told P.W. 2 to search pond of Mohat Ali Mondal where the body was found. This circumstance has also not been proved beyond doubt. Firstly, this circumstance is significantly absent in F.I.R. lodged by P.W. 2. The said witness has referred to this circumstance for the first time in Court. He claimed that appellant had taken away his daughter. He

and P.W. 23 went to his house but could not find his daughter. P.W. 23, however, gave a different version. She claimed that the appellant stated that Ajmira took food in her house and left. Subsequently, appellant told them to look by the side of pond of Mohat Ali Mondal. P.W. 23 who had accompanied P.W. 2 to the house of the appellant to make inquiries stated that they were accompanied by the mother of P.W. 4. But P.W. 4 did not corroborate the said witnesses and is completely silent with regard to any visit to the house of appellant in the course of the search so is P.W. 3, brother of the deceased. As per P.W. 3 in the course of search he found the dead body floating in the pond of Mohat Ali Mondal. His mother P.W. 4 corroborated him in the regard. Their deposition is clearly at variance with that of P.Ws. 2, 16 and 23 that the appellant had asked witnesses to search in the pond of Mohat Ali Mondal. This patent contradiction in the prosecution evidence with regard to the conduct of the appellant during search strikes at the root of the prosecution case and renders this circumstance improbable.

Recovery of ear rings:-

30. P.W. 27 deposed on 01.09.2012 prior to arrest he had interrogated the appellant. The appellant made a disclosure statement (Exhibit 17). Pursuant to the statement, he took the appellant to the house of Abdul Halim Box wherein she brought out the ear ring. He seized the ear ring under a seizure list (Exhibit 9). It would be argued that the appellant was not arrested when the statement was made. This is of little relevance. Appellant had been summoned by the police and it is stated by the investigating officer (P.W. 27)

that she voluntarily appeared and made the statement before the police officer.

In ***State of U.P. vs. Deoman Upadhyaya***² the Apex Court held as follows:-

“12. ... When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the “custody” of the police officer within the meaning of Section 27 of the Indian Evidence Act.”

31. In view of the aforesaid ratio, formal arrest of the person making a statement leading to recovery is not a condition precedent for its admissibility if from circumstances on record it appears that the individual had physically appeared before the police officer and made the statement leading to the recovery. However, examination of Exhibit – 17 would show it does not disclose the place of recovery. It merely shows the appellant told P.W. 27 that she knew where the ear rings were kept. Thereafter, it is alleged the appellant accompanied P.W. 27 to the house of Abdul Halim Box and on her showing the ear rings were recovered. This aspect of the prosecution case is based on the *ipse dixit* of the investigating officer (P.W. 27) which is not supported by the independent witness (P.W. 19).

32. It is not an axiomatic proposition of law that seizure cannot be said to be proved if the independent witness does not support the prosecution case. In

²AIR 1960 SC 1125

such cases the evidence of the official witness that is investigating officer must be put to a stricter scrutiny.

33. Analyzing the evidence of investigating officer (P.W. 27) from that perspective, it appears that his conduct leaves much to be desired. Initially, on 31.08.2012 the investigating officer arrested one Kutubuddin Mondal and is said to be procured a similar disclosure statement from him (Exhibit A). Subsequently, he claimed the appellant also made similar disclosure statement and on her showing the pair of ear rings was recovered. This conduct of the investigating officer in procuring so-called disclosure statements from other suspect makes it unsafe to rely on his sole uncorroborated version as proof of recovery of the ear rings on the showing of the appellant. Hence, the prosecution case with regard to recovery of ear rings on the showing of appellant cannot be said to have been proved beyond reasonable doubt.

Recovery of school bag, books, slippers, etc. on the leading statement of the appellant:-

34. P.W. 27 deposed he arrested the appellant on 01.09.2012 and obtained police custody. During police custody on 02.09.2012 appellant made another disclosure statement (Exhibit 19). Pursuant to the disclosure statement appellant was taken in front of the house of her father-in-law, Mosaraf Monal. On her showing, a navy blue school bag, books, exercise book, slippers and trousers of the deceased were recovered. P.W. 2, 15 and 20 are the witnesses to the seizure. While P.Ws. 2 and 15 have corroborated the investigating officer, evidence of P.W. 20 strikes a discordant note. The said witness claimed the police had come to the spot alone. They talked with the

appellant over phone and came to learn that the bag was in the drain. Thereafter, bag was recovered. Manner and circumstance of recovery as depicted by P.W. 22 is different from that narrated by P.W. 2, 15 and 27. It is relevant to note P.W. 20 has not been declared hostile. Moreover, the recovery was made almost four days after the incident and that too from an open space which is accessible to all. Possibility of planting the incriminating materials cannot be wholly ruled out.

35. In the light of the aforesaid circumstances, it cannot be stated that the recovery of the bags and other articles on the leading statement of the appellant and on her showing has been proved beyond doubt. Moreover, the motive proposed by the prosecution is the theft of ear rings from the victim. Number of injuries including the injuries in the private part are noted in the body of the victim. If the intention of the appellant was to commit theft and murder the victim to screen herself from legal punishment, it is improbable that she would inflict 17 or more injuries on the body of the minor including in her private parts. It is also relevant to note forensic report with regard to the vaginal swab was not produced to rule out the possibility of sexual assault by the predator on the minor. These unexplained circumstances improbabilise the prosecution case that it was none but the appellant who had murdered the victim and committed theft of the gold ear rings.

36. Accordingly, I am of the opinion that the appellant is entitled to the benefit of doubt and may be acquitted of the charge levelled against him.

37. The appeal is, accordingly, allowed.

38. Appellant shall be forthwith released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial Court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

39. Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

40. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)