

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 426 of 2005

**Md. Anwar Hossain & Anr.
-Vs-
The State of West Bengal**

For the Appellants : Mr. Amitava Karmakar
Mr. Arup Kumar Bhowmick

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 08.06.2023, 01.08.2023, 12.09.2023, 06.10.2023

Judgment on : 08.01.2024.

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order of conviction dated 21st May, 2005, passed by the Learned Additional Sessions Judge, 1st Fast Track Court, Malda, in Sessions Trial No. 8(9)/2003, arising out of Sessions Case No. 253/2002, (G.R. No. 928/99) arising out of Gazole Police Station Case No. 88/99 under Sections 364/34 of the Indian Penal Code and convicting the appellants for alleged offence punishable under Section 365 of the Indian Penal Code and sentenced the appellants to undergo rigorous imprisonment for 6 years each and to pay a fine of Rs. 1000/- each in default to suffer simple imprisonment for 3 months more.

2. The prosecution case precisely stated that on 10.6.99 at about 4 P.M. the appellants came to the house of the complainant and coerced her son Asiruddin the appellants to their house and kept him roped. At about 3 A.M. she came to know from neighbor Fazlul Haque that her son escaped after slitting the rope. She could not find her son on search. She suspected that the appellants concealed her son with an intention to kill him.
3. On the basis of the said written complaint, Gazole Police Station case being No. 88/99 dated 17.6.99 under Section 364/34 of the Indian Penal Code was initiated.
4. After completion of investigation, charge sheet under Section 364/34 of Indian Penal Code was submitted against the appellants.
5. The appellants, pleaded not guilty to the charges framed against them and claimed to be tried. The specific defence was they were totally innocent and had not committed any offence as alleged.
6. The prosecution in order to prove its case examined 11 (eleven) witnesses and exhibited certain documents.
7. Learned Advocate for the appellants submitted that-
 - i. The ingredients of the offence charged not having been established the convictions of appellant are not at all sustainable in law.
 - ii. The Learned Judge did not consider the evidence that PW-3 never stated before the Investigating Officer that the accused persons took away Asiruddin by a Bicycle and that the witness did not state before Investigating Officer that heavy shower prevented him from going to the house of the accused persons at the time of occurrence and that the

witness did not state to Investigating Officer that he requested the accused persons not to take away his brother until his parents arrived.

- iii. The Learned Judge erred in holding that *“the fact of heavy rain is not all concerned of Court’s investigation. Courts investigation is to detect whether the accused person abducted Asiruddin or not. It matters very little to Court whether it rained on that very day or not. Similarly, it also matters very little how the accused persons caught away Asiruddin from his house whether by Bicycle or by anything else. So, mere omission of the words “Bicycle” does never go, as it appears to me to discredit the testimony of the witness. In my opinion, such variations of trivial nature are likely to arise in the statement of a person when a person gives same nature of statement after a long lapse of time. Be that as it may, I am not prepared to accept the view of Learned defence Lawyer that the testimony of PW-3 is to be brushed aside merely for the reason that there cropped up some variations. By the deposition of PW-3, it is established that the accused persons came to the house of Asiruddin on the very date of occurrence and forcibly caught away him to their house.”*
- iv. The Learned Judge did not consider the evidence of PW-4 that in his cross-examination it has come to light that there was a large gathering of 200/300 villagers at the house of the victim boy when the incident took place and that none of those villagers raised any protest against the accused persons nor did any of them obstruct the accused persons on their way whilst they were taking away the victim boy to their house.

The family of the victim boy had good relation with those villagers which transpired from the cross-examination of PW-4.

- v. The Learned Judge erred in holding that *“In my opinion, this contention of Learned Lawyer appears to be unacceptable to me. I cannot hold that no incident as stated by the witness every happened solely on the ground that none of the villagers assembled did not come forward either to protest against the accused persons or to rescue the victim boy from the clutches of the accused person. The order of the day cannot be lost sight of and the order of the day is that people play ostrich now-a-days even if an incident takes place in presence of them. So I find no reason to disbelieve the testimony of PW-4.”*
- vi. The Learned Judge did not consider the evidence of PW-4 that he did not state to Investigating Officer that he accompanied by wife of Bhodu and others went to the house of the accused persons and that the accused persons did not come to the house of Asiruddin on a Bicycle and took away Asiruddin on that Bicycle.
- vii. The Learned Judge erred in holding that *“In my opinion, this kind of variation does not at all strike at the root of the veracity of the witness. Human memory is never infallible and due to this reason some variations may naturally crop up in the statement given at different times by the same person.”*
- viii. The Learned Judge did not consider the evidence of PW-9 that during cross-examination of PW-9, he has stated thus in the opening words *“I am stating all these for the first time before the Court”*. This version of the

witness does not appear to be correct, may be it is the result of misunderstanding of the question put to him by the Learned cross-examining Lawyer.

- ix. The Learned Judge erred in holding that *“under such circumstances, I feel compelled to say that the above quoted statement of the witness is nothing but the offshoot of his misunderstanding of the question put to him by cross-examining Lawyer.”*
- x. The Learned Judge erred in holding *“It is not in the evidence that there is any kind or animosity between these witnesses and the accused persons. In absence of such animosity, I find no reason to opine that the witnesses might testify falsely against the accused persons. I fully believe upon the versions of the witnesses as discussed above and do hold that it is established by the testimony of those witnesses that the accused person forcibly caught away Asiruddin @ Bhodu on the date of occurrence to their house and kept him roped with a cot in a room of their house.”*
- xi. The Learned Judge did not consider that there was inordinate delay in filing the F.I.R. and this delay had not been properly explained by the prosecution and therefore the prosecution should not be relied upon.
- xii. The Learned Judge erred in holding that *“In my opinion a mother has rightly acted like a mother and the explanation given by her regarding the delay in lodging the F.I.R. appears to be quite satisfactory to me and for this reason I find no clue to case any doubt on the prosecution version of the case merely on the ground that F.I.R. was lodged 7 days after the*

occurrence. In the instant case, F.I.R. has not been proved and it has not been exhibited. In this regard, I say and say only that the fact of the F.I.R. not being proved is no ground for acquittal of the accused persons.”

- xiii. There was an enmity between the appellants and the victim regarding theft of money at Punjab, where they were working.
 - xiv. The prosecution totally failed to establish the guilt of the accused persons and that is why the accused persons are entitled to be acquitted.
8. The Learned Advocate for the State submitted that the evidence of PW-3 is credible and on the basis of his evidence, the appellants can be convicted.
 9. A circumspection of the prosecution witnesses revealed as follows:
 - i. PW-1 Saharjan Bibi, is the complainant of this case. She is the mother of boy who was allegedly abducted at the time of abduction she was not at home, later on she came to know the fact from her grand children. She was not an eyewitness to the occurrence.
 - ii. PW-2 Tamijuddin, the father of Asiruddin. He stated in his evidence that he was not at home at the time of occurrence. After three days he came back and heard about occurrence.
 - iii. PW-3 Samsher Ali, the brother of Asiruddin. He stated in his evidence that he was present and requested the accused persons not to take away his brother. At 4 P.M. he heard from one Fazlul that the hands and legs of his brother were tied by rope with a cot. At about 3 A.M. again he got information from Fazlul Rahaman his brother fled away by cutting rope.

- iv. PW-4 Fazlul Rahman. He stated in his evidence that he was on the road, that beside the house of the victim at the time of occurrence. Further he stated that at the time of occurrence there was heavy storm and sower. There were other villagers. He stated in cross-examination that 200/300 villagers were present at the time of occurrence.
- v. PW-5 Md. Nazir Hossain, he is the co-villager of the accused and the victim.
- vi. PW-6 Abdul Rajjak, he is co-villager and declared hostile.
- vii. PW-7 Sabina Bibi, Wife of the victim. She stated that after abduction she went to the house of accused persons with Fazlul and Matibur and found her in that condition.
- viii. PW-8 Latifun Harque. The neighbour.
- ix. PW-9 Matiur Rahman. Neighbour of the victim and the accused.
- x. PW-10 Sub-inspector Tarak Chandra Pal, the I.O. of this case.
- xi. PW-11 S.I. Snehashish Mukherjee.
- xii. PW-1 stated that the victim, Asiruddin Sk. was her son. About 4 years ago at 4 pm, upon her return from her daughter's residence, she was informed by her grandchildren that the accused persons had allegedly abducted her son. She stated that the accused persons had forcibly taken her son to their house. PW-1 attempted to confront these individuals at their residence, but was impeded by torrential rain and storm, necessitating her return home. Subsequently, at 3am, PW-4 apprised PW-1 that her son had been

restrained with a rope by the accused, but had managed to escape by severing the rope. Upon visiting the house of the accused to reclaim her son, she was informed by the mother of the accused that her son had absconded. PW-1 was further told that an article of her son's clothing, specifically a "ganjee", was left on the premises, which she then retrieved. At the time of this encounter, the accuseds were reportedly not present at their residence. Thereafter, PW-1 proceeded to the police station, where she lodged an F.I.R. against the accused persons, under the suspicion of abduction and possible homicide, as her son remained unaccounted for at that juncture.

- xiii. During cross-examination, PW-1 acknowledged that her son was employed alongside PW-4 in Delhi, but was unable to confirm whether her son had absconded to Delhi with PW-4's belongings. She also disclosed that she had no interaction with her son following his return from Delhi and prior to the alleged abduction. Furthermore, PW-1 provided information regarding her son's marital status, noting that he was married to PW-7, who, at the time of the incident, was residing at her maternal home and subsequently remarried. PW-1 mentioned that *"Soleman lost some money and that he apprehended and therefore that my son committed the theft of money."*
- xiv. PW-2 identified the victim as his son, Asiruddin. He clarified that his absence at the location of the incident on the day it occurred,

returning after two days subsequent to the event. He recounted that the incident in question transpired approximately four years prior to his testimony. PW-2 stated that prior to the incident, the accused, Anwar, along with his son and PW-4, were engaged in employment together in Punjab. During this period, a sum of money belonging to Anwar was reportedly stolen, leading Anwar to suspect his son as the perpetrator of the theft. In an effort to resolve this matter, PW-2 conveyed to Anwar his willingness to reimburse the alleged stolen amount on the condition that his son, if indeed responsible for the theft, would not be subjected to any form of retribution from Anwar upon his return. Despite this arrangement, PW-2 alleged that upon his son's return from Punjab on the day of the incident, the accused forcibly seized his son's bicycle and took it to their residence. PW-2's wife attempted to confront the accused at their residence, but her efforts were thwarted by torrential rain. He further stated that the police visited his residence to conduct an investigation of the matter, yet his son remained missing at that time.

- xv. During cross-examination, PW-2 revised his initial statement regarding the timeline, asserting that he returned three days after the incident, having been apprised of the events by his family and fellow villagers. He also corrected the timeframe of the police's visit to his house, stating it occurred seven days following the incident, rather than immediately after.

xvi. PW-3 identified the victim as his brother. He recounted that the incident in question occurred approximately four years ago. At the time of the incident, PW-3 was at his residence. He observed his brother returning home from Punjab at around 4pm. Subsequently, the accused individuals arrived at the residence and forcibly apprehended his brother, who was in a state of illness, along with his bicycle, and transported him to their house. PW-3 described the onset of heavy rain, which hindered his ability to follow the accused to their house. He, along with his family, entreated the accused to refrain from removing the victim from the premises, suggesting that the matter be resolved upon the arrival of the victim's parents. However, these appeals were reportedly disregarded by the accused, who proceeded to take the victim away. This action was also met with requests from villagers to the accuseds to desist from harming the victim, but to no avail. PW-3 further stated that at approximately 9 pm, PW-4 ventured to the accused's house to retrieve the victim. Upon return, PW-4 reported to PW-3 that the victim had been found bound by ropes to a cot within the accused's house. At about 3 am, PW-4 conveyed additional information, allegedly provided by the accused Anwar, that the victim had severed the ropes and fled. During the incident, PW-3 was accompanied at his house by his wife and several villagers. PW-3 mentioned that the backdrop to the incident involved a theft in Punjab of money belonging to Anwar, with the

victim being suspected of the theft. He claimed that the incident led to a grudge held by Anwar against the victim, culminating in the alleged kidnapping upon the victim's return. This assertion was corroborated by PW-7 and PW-8.

- xvii. During cross-examination, PW-3 acknowledged that his intervention during the abduction was limited to verbal attempts. He also stated that he had no conversation with his brother following the latter's return from Punjab, and that he did not travel to Punjab in search of his brother.
- xviii. PW-4 stated that he was a resident of the same village as the victim and his family and was familiar with them. The incident in question occurred four years prior to his testimony. PW-4 recounted that, before the incident, he was employed alongside the accused, Anwar, and the victim in Punjab. During this period, Anwar experienced a loss of money and subsequently suspected the victim of theft.
- xix. PW-4 and Anwar returned to their respective residences, followed by the victim, who came back due to an illness. Upon learning of the victim's return, the accused persons proceeded to the victim's house, where they allegedly abducted the victim using the victim's own bicycle. This incident was witnessed by PW-4. Thereafter, he along with other villagers, implored the accused to refrain from committing the alleged crime, but their pleas were disregarded. The accused then transported the victim to their home. After the

torrential downpour ceased, PW-4 visited the accused's residence around 9pm and observed the victim tied to a cot. He demanded the victim's release, which the accused refused. He then cautioned Anwar of his accountability should any harm befall the victim. After informing the victim's family of these events, PW-4 returned home. At approximately 3 am, Anwar informed PW-4 that the victim had escaped by severing the ropes. PW-4 relayed this information to the victim's family, and a subsequent search for the victim ensued, though it was unsuccessful.

- xx. During cross-examination, PW-4 clarified the timeline of employment in Punjab, stating that the victim was already working there when he joined, and Anwar commenced work approximately five to six months later. PW-4 also noted that around 200 to 300 villagers were present at the scene when the victim was being taken away by the accused, and clarified that there was no animosity between the victim and these villagers.
- xxi. PW-6 stated a lack of awareness regarding the incident that transpired on 10.6.99. PW-6 additionally stated that he had not been subjected to interrogation by the police concerning the said incident. Subsequently, the prosecution declared PW-6 as a hostile witness.
- xxii. PW-9 stated Anwar conveyed to him that the victim had committed theft, specifically of a sum of money belonging to Anwar, and subsequently absconded. Furthermore, PW-9 mentioned that

following the period during which the victim could not be located, he formed an assumption that the victim had been murdered by the accused persons.

- xxiii. PW-10, who served as the S.I. of Police at Gazole police station on 30.3.2000, deposed regarding his role in the investigation of case no. 88/99, dated 17.6.1999. As the Investigating Officer, his duties encompassed examining witnesses, recording their statements, interrogating the accused persons, and ultimately preparing and submitting the charge sheet against the accused.
- xxiv. During cross-examination, PW-10 relayed that PW-4 had informed him that he had entrusted his locker key to the victim for a duration of two years prior to the incident. However, on the day of the incident, when the victim was not found, they accessed the locker and discovered Rs. 1,400/- missing along with a shirt and pant. PW-10 acknowledged having received two statements from the victim, dated 17.6.1999, and 3.8.2000. However, he only recorded the statement provided on 3.8.2000. Furthermore, he admitted to have not recording statements from PW-2, PW-3, PW-9, and PW-6. Significantly, PW-10 mentioned that PW-6 had revealed to him that the accused, Anwar, and PW-4 had forcibly taken the victim from their house at 4 pm.
- xxv. PW-11 served at the Gazole police station. He stated that the formal F.I.R. was marked as Ext. 2. During investigation, he visited the place of occurrence, prepared the rough sketch map along with

index, examined the witnesses, recorded their statements and conducted an unsuccessful raid to arrest the accused persons. The sketch map was marked as Ext.3.

10. Section 365 of the Indian Penal Code reads as follows:

“365. Kidnapping or abducting with intent secretly and wrongfully to confine person - *Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*”

11. In ***Dharm Das Wadhwani v. State of UP.***¹ : (SCC pp. 272-73), the Hon’ble Supreme Court held as follows:

14. The question then is whether the cumulative effect of the guilt-pointing circumstances in the present case is such that the court can conclude, not that the accused may be guilty but that he must be guilty. We must here utter a word of caution about this mental sense of “must” lest it should be confused with exclusion of every contrary possibility. We have in Shivaji Sahabrao Bobade v. State of Maharashtra, explained that proof beyond reasonable doubt cannot be distorted into a doctrine of acquittal when any delicate or remote doubt flits past a feeble mind. These observations are warranted by frequent acquittals on flimsy possibilities which are not infrequently set aside by the High Courts weakening the credibility of the judiciary. The rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of legitimate inferences flowing from evidence, circumstantial or direct. At the same time, it may be affirmed, as pointed out by this Court in Kali Ram v. State of

¹ (1974) 4 SCC 267

H.P., that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from him.”

12. In order to attract the provisions of Section 365 of the Indian Penal Code, the element of abduction of a person should take place for the purpose of secretly and wrongfully confining him. In the instant case the victim was supposedly withdrawn from his house in the presence of two sons and their wives and seven of their children as stated by PW-1 in his cross-examination. It was within the knowledge of PW-1, PW-2, PW-3, PW-4 that the victim was forcefully taken by the appellants to their house in their presence and the said prosecution witnesses did not raise any alarm or prevent the accused persons from coercive dislocation of the victim to their house. PW-7 along with Fazlul, i.e. PW-4, and Motibul had been to the house of the accused persons and saw him captivated by the appellants, however, did not report the same instantly to the police that the victim had been wrongfully confined by the appellants. The prosecution witnesses as aforesaid who were aware of the presence of the victim at the house of the accused persons were surprisingly inactive to rescue the victim from such wrongful confinement. They did not inform the police nor sought for the assistance of the villagers in order to rescue the victim and masqueraded the fact of torrential rain to have hindered them from taking any kind of recourse to save the victim. The prosecution story cannot be believed since there was no secrecy of confinement and identification of the appellants at the spot by independent witnesses specifically the police to have nabbed in spite of sufficient time to report the incident of such wrongful confinement to the police.

13. It is clear and uncanny that the family members of the victim, despite knowledge of such wrongful confinement, did not take redressive steps. The fact of the victim to flee himself and escape from the house of the appellants has been based on hearsay. There had been an enmity between the parties and the victim was accused of theft of money of the appellants and the possibility of false implication of appellants on that score cannot be ruled out.
14. In view of the above discussions, the prosecution cannot be said to have proved its case beyond reasonable doubt and accordingly the instant criminal appeal is allowed.
15. Under such facts and circumstances, the judgment and order of conviction dated 21st May, 2005, passed by the Learned Additional Sessions Judge, 1st Fast Track Court, Malda, in Sessions Trial No. 8(9)/2003, arising out of Sessions Case No. 253/2002, (G.R. No. 928/99) arising out of Gazole Police Station Case No. 88/99 under Sections 364/34 of the Indian Penal Code is set aside.
16. The instant criminal appeal being CRA 426 of 2005 stands disposed of.
17. There is no order as to cost.
18. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
19. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)