(2005) 10 CAL CK 0013

Calcutta High Court

Case No: Criminal Appeal No. 171 of 2001

Uttam Kirtonia		APPELLANT
	Vs	
State of West Bengal		RESPONDENT

Date of Decision: Oct. 6, 2005

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 311
- Penal Code, 1860 (IPC) - Section 203, 302, 34, 364

Citation: (2006) CriLJ 2328

Hon'ble Judges: Debiprasad Sengupta, J; Arun Kumar Bhattacharya, J

Bench: Division Bench

Advocate: Shekhar Bose and P. Edulzi, for the Appellant;Animesh Goswami, R.R. Biswas and Minoti Gomes, for the Respondent

Final Decision: Allowed

Judgement

Debiprasad Sengupta, J.

This appeal is preferred against the judgment and order of conviction and sentence dated 16-11-00 and 17-11-00 respectively passed by the learned Additional Sessions Judge, Nadia in Sessions Trial No. V (January) 2000 (Sessions Case No. 5(1) of 1998) thereby convicting the accused-appellant u/s 364 of the Indian Penal Code and sentencing him to suffer R.I. for 10 years and to pay a fine of Rs. 2,000/-, in default to suffer S. I. for a further period of 1 year.

2. The prosecution case, in short, was that on the basis of a complaint lodged by PW-1, Chabbi Rani Saha, a case was registered with Kalyani Police Station on 18-9-93 u/s 203 I.P.C. In the First Information Report it was stated that on 17-9-93, i.e. on the date of Vishwakarma Puja at about 21.30 Hrs. the younger brother of P.W. 1 namely Uttam Saha aged about 22 years came to her hotel along with the accused-appellant Uttam Kirtonia and as they were hungry, the victim wanted some food from his elder sister (PW-1) and they were provided with ''Parota and ghugni'' and after

taking food both of them left the place by boarding a train at 10.00 p.m. and went to Silpanchal to witness a ''jatra'' show. It is the further case of the prosecution that on the following day i.e. on 18-9-93 at about 5.00 a.m., PW-1 came to know from some other persons that her brother Uttam Saha was lying dead in a fallow land near the ladies hostel of Kalyani University. The de facto-complainant (PW-1) firmly believed that accused Uttam Kirtonia and his friends were responsible for the death of her brother. On completion of investigation charge sheet was submitted by the police and the learned trial Judge after considering the materials placed before him framed charge u/s 302/34 of the Indian Penal Code against the accused-appellant and his brother Mintu Kirtonia. Thereafter a petition was filed on behalf of the defence with a prayer for splitting up the trial of accused Mintu Kirtonia as he was a minor on the date of alleged offence. Thereafter records were prepared and the present trial was split up from the minor accused Mintu Kirtonia.

3. To prove its case, the prosecution examined as many as 12 witnesses while none was examined on behalf of the defence. The defence was a plea of innocence and false implication. The further defence of the accused was that he did not accompany the deceased Uttam Saha in the hotel of PW-1 Chabi Rani Saha and that deceased Uttam Saha had an illicit relation with one Purnima Sarkar and another notorious criminal of that area named Raghu Kirtonia had also love affairs with the said lady and deceased Uttam Saha might have been killed by his anti-parties.

4. PW-1 Chhabi Rani Saha was the elder sister of victim Uttam and she was the de facto-complainant of the case. She stated in her evidence that she did not know how her brother Uttam Saha died. She further stated in her evidence that about six years ago, her brother Uttam and the present accused-appellant had been to her hotel at Kalyani Main Line Station at about 9.30 p.m. Her brother wanted some food and she gave him ''parota and ghugni'' which was taken by victim Uttam and the present appellant. After taking such food both of them went to Silpanchal by train at about 10.00 p.m. for witnessing a ''jatra'' performance. On the following morning at about 6,00 a.m., she got an information that her brother Uttam Saha had been murdered and his body was lying by the side of ladies hostel of Kalyani University. She rushed to the place and found her brother lying dead. In her cross-examination, she stated that the genital part of her brother Uttam was separated from his body. She did not have any knowledge as to whether Uttam had love affairs with Purnima Sarkar or not. She further stated that she subsequently came to learn that there was some tussle in between her brother Uttam and one Raghu Kirtonia. PW-2 Biswajit Sarkar, who was a resident of Kalyani Ghosphara, was a witness to the inquest report over the dead-body of Uttam Saha. PW-3 Prasanta Saha was the elder brother of deceased Uttam Saha. He stated in his evidence that on the date of incident at about 9.30 p.m., his brother accompanied by Uttam Kirtonia went to their hotel and demanded some food from his sister (PW-1) and they were provided with ''parota and ghugni''. After taking such food both of them proceeded towards their house after boarding a train at 10.00 p.m. On the following morning he came to learn that

his brother Uttam was murdered. He also stated that he did not know any person named Uttam Kirtonia (appellant). In his cross-examination, he stated that he did not have any knowledge as to whether his brother was murdered out of love affairs with Purnima or not. PW-4 Satyabati Das was the niece of accused Uttam Kirtonia and she was declared hostile. PW-5 Sadhan Kumar Saha was the scribe of the F.I.R. He did not have any knowledge about the incident of murder and as per instruction of PW-1, he wrote the complaint, on the basis of which, the F.I.R. was registered. PW-6 Abhijit Bhattacharjee was S.I. of Police, who received the written complaint from PW-1 on the relevant date and recorded the F.I.R. PW-7 Deb Kumar Saha was another elder brother of the deceased Uttam Saha and he was a witness to the seizure of some blood stained clothes, which were seized by the police. PW-8 S. I. Jyotirmay Basu held inquest over the dead-body and he also seized one blood-stained napkin, one pair of shoe, one white colour polyester punjabi and one teri-cotton fullpant with soil and mud. PW-9 was a police constable, who brought the dead-body of Uttam Saha to Ranaghat Sub-Divisional Hospital for P. M. Examination, PW-10 S.I. Kalyan Ghosh was another investigating officer, who collected the F.S.L. report and on completion of investigation submitted charge-sheet. PW-11 Dr. Partha Sarathi Saha held post mortem examination over the dead-body of Uttam Saha on 18-5-93. On examination, he found multiple, small abrasion over anterior neck and he found that hyoid bone was fractured and alcohol was found in the stomach of the deceased. Death, in his opinion, was due to strangulation, which was ante mortem and homicidal in nature. PW-12 was also an investigating officer of the case and during investigation, he sent blood-stained clothes to F.S.L. for examination.

5. Mr. Bose learned Advocate appearing for the appellant submits that there was no ingredients of offence to justify the conviction u/s 364 of the Indian Penal Code. Where there was nothing in the evidence on record to indicate that the accused-appellant had the intention at the time they made deceitful misrepresentation that the deceased would be murdered or would be so disposed of as to be in danger of being murdered, it was not possible to uphold the conviction of the accused-appellant. In support of his contention, Mr. Bose relies upon a judgment of this Court reported in Upendra Nath Ghose Vs. Emperor, . In the said judgment, it was held that it must be proved that the accused person charged with the offence had the intention at the time of abduction that the person abducted would be murdered or would be so disposed of as to be put in danger of being murdered. The prosecution, therefore, has to prove that the accused had that particular intention at the time he took away the victim. It was held in the said judgment as follows :

To establish an offence punishable u/s 364, Penal Code, it must be proved that the person charged with the offence had the intention at the time of the abduction that the person abducted would be murdered or would be so disposed of as to be put in danger of being murdered". It was further held in the said judgment that in a case depending on circumstantial evidence the question of motive is of great importance

and it was the duty of the learned Judge to emphasise this absence of motive which was a circumstance in favour of the accused. Mr. Bose also relies upon a judgment of this Court reported in Nedo Kar and Others Vs. The State, . In the said judgment it was held that in order to bring home a charge under this section, the judge or the jury must be satisfied that at the time when the accused took away the victim, they had the intention to cause his death. The next judgment relied upon by Mr. Bose on this point is reported in Abdul Gaffur Khan Vs. The Emperor . In the said judgment it was held by the Division Bench of this Court that in order to establish a charge of abduction in order to murder, when the case is one of abduction by deceitful means, it is not enough for the prosecution merely to prove certain circumstances under which the abducted person was induced to go, nor even to prove a mere representation. They must prove that there was a misrepresentation that the particular misrepresentation was the result of a plan to murder and that it was one by which the abduced person was himself deceived and was induced to go. Relying upon the aforesaid judgments it is submitted by Mr, Bose that in the evidence on record in the present case there is nothing to indicate that at the time when the accused took the victim he had intention to cause his death. It is in the evidence of PWs- 1 and 3 that the victim along with the present appellant had been to the hotel of PW-1 and wanted some food. Food was supplied to the victim and his companion and after taking such food they left the hotel of PW-1 for witnessing a ''jatra'' performance. PW-3 the brother of the victim has stated in his evidence that after taking food in the hotel of PW-1 both the victim and the appellant proceeded towards their home. So there was contradiction in the evidence of PWs-1 and 3 regarding the destination of the victim and the appellant after taking such food.

6. Mr. Bose next argued that although it is in the evidence on record that after commission of murder the genital part of the victim was severed from his body, from the P. M. report, it appears that the autopsy surgeon, who held the post mortem over the dead-body of the victim, found the dead-body intact. Mr. Bose further points out that although the wearing apparels were seized from the house of the appellant there is no evidence to show as to whom those wearing apparels belonged. Such seized articles were neither sealed nor labelled and those were not produced in Court. It further appears that such articles were sent to F.S.L. about 30 months after those were seized by the police and there was no explanation from the side of the prosecution to explain such delay in sending those articles to F.S.L. for examination. Mr. Bose submits that although charge was framed in the present case u/s 302 I.P.C., the prosecution failed to prove such charge against the accused-appellant, but the learned Judge convicted the accused-appellant u/s 364 I.P.C. although the ingredients of offence u/s 364, I.P.C. was totally lacking in the present case.

7. The learned Advocate appearing for the State/respondent pointed out the subsequent conduct of the accused after the commission of the offence. It is submitted by the learned Advocate of the State that although the incident took

place on 18-9-93, the accused could be arrested on 29-11-93 i.e. more than two months after the incident. Such abscondance of the accused is a very strong circumstance to prove the guilt of the accused. But we are unable to accept such contention. Mere abscondance or disappearance of the accused by itself can not form the basis of conviction- Even innocent person may, when suspected on grave crime be. tempted to evade arrest such being the instinct of self preservation. When a finger of false accusation is raised, any innocent person may behave like a guilty one to avoid a false charge or harassment in the hands of police. According to the learned Advocate of the State although charge was framed u/s 302 I.P.C. against the accused and although such charge could not be proved, the learned Judge was justified in convicting the accused-appellant u/s 364, I.P.C. Such conviction and sentence do not suffer from any illegality and the present appeal having no merit is liable to be dismissed.

8. We have heard the learned Advocates of the respective parties. We have also scrutinised the entire evidence on record. We find from the evidence on record that there is no ingredient of the offence u/s 364 I.P.C. To prove a charge under the said Section it is necessary for the prosecution to prove forcible compulsion or inducement by deceitful means and object of such compulsion or inducement must be the going of a person from any place. To prove a charge under this section, the prosecution must prove that there was a misrepresentation, that the particular misrepresentation was the result of a plan to murder and that it was one by which, the abducted person was himself deceived and induced to go. In order to bring home a charge u/s 364, I.P.C. the prosecution must establish that at the time when the victim was taken away the accused had the intention to cause his death.

9. From the evidence on record it appears that some wearing apparels were seized by the police, but we find that such Alamats were not produced in Court during trial of the case. About 30 months after such articles were seized, those were sent to F.S.L. for chemical examination and nobody knew as to where such articles were kept so long. From the evidence of PW-8, S.I. Jyotirmay Basu it appears that he has stated in his evidence that two persons of Ghoshpara were cited as eye-witnesses in this case and they were one Archana and Debkumar. But no attempt was made by the prosecution to produce the said two witnesses before the Court. The learned trial Judge also could have taken recourse to Section 311 of the Code of Criminal Procedure for examination of those two witnesses but no such attempt was made.

10. In view of the discussion made above, we find sufficient merit in the submission made by Mr. Bose, the learned Advocate appearing for the accused-appellant. We are of the view that the prosecution has failed to prove the charge u/s 364 of the Indian Penal Code and we find that there is really no evidence to bring home the charge u/s 364, I.PC. against the appellant and accordingly we allow the present appeal. The judgment and order of conviction and sentence as passed by the learned trial Judge is set aside. The accused-appellant is acquitted of the charge u/s

364, I.P.C. and he may be set at liberty forthwith.

11. A copy of this judgment along with L.C.R. may be sent down to the Court below immediately.

Arun Kumar Bhattacharya, J.

12. I agree.