(2014) 08 CAL CK 0061

Calcutta High Court

Case No: C.R.A. 527 of 2001

Om Prakash Gupta		APPELLANT
	Vs	
The State of West Bengal		RESPONDENT

Date of Decision: Aug. 18, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 428
- Penal Code, 1860 (IPC) - Section 307, 326, 354, 376, 511

Citation: (2015) 1 CHN 429 : (2014) 4 Crimes 49

Hon'ble Judges: Joymalya Bagchi, J

Bench: Single Bench

Advocate: Biplab Mitra and Trina Mitra, Advocate for the Appellant; Subir Banerjee, Advocate for the Respondent

Final Decision: Partly Allowed

Judgement

Joymalya Bagchi, J.
The judgment and order dated 21st November, 2001 passed by the learned Additional Sessions Judge, 2nd Court, Darjeeling in connection with Sessions Case No. 39 of 2001/Sessions Trial No. 12 of 2001 convicting the appellant for commission of offence u/s 307 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for five years and to pay a fine of Rs. 2000/-, in default to suffer further rigorous imprisonment for six months more has been challenged.

2. The prosecution case is as follows :

On 21.01.2000, Bijoy Laxmi Prasad, P.W. 3, had gone to Mahakal Temple to perform puja and after performing the puja at about 9 a.m. she returned to her house. Near "Hasty-Tasty" restaurant she met the appellant who was her former teacher. The appellant requested Bijoy Laxmi to come to his house. Bijoy Laxmi accompanied the

appellant. When she came to the room of the appellant, she found that the family members of the appellant were not there. The appellant shut the door from inside and tried to rape the victim. When Bijoy Laxmi protested, he poured kerosene oil on her person and set her on fire with a view to kill her. Consequently, Bijoy Laxmi and the appellant go burnt and the neighbours took them to the Sadar Hospital at Darjeeling where they were admitted. P.W. 4, Nawal Kishore, brother of the victim Bijoy Laxmi, came to the hospital hearing the news. The victim narrated the incident to Nawal Kishore at the hospital and the latter lodged a written complaint resulting in registration to the Sadar Police Station Case No. 5/2000, 21.01.2000 u/s 376/511/326/307 of the Indian Penal Code. In course of investigation, Bijoy Laxmi made statement before Dr. Mondal (P.W. 8). She was discharged from the district hospital on 01.04.2000 and was treated at Mitra''s Clinic and Nursing Home at Siliguri till 28.04.2000. In conclusion of investigation charge-sheet was filed u/s 376/511 and 307 of the Indian Penal Code against the appellant. The case, being sessions a triable one, was committed to the Court of Sessions. It was transferred to the Court of learned Additional Sessions Judge, 2nd Court, Darjeeling for trial and disposal. Charges were framed under sections 376/511 and 307 of the Indian Penal Code against the appellant. The prosecution examined as many as nine witnesses and exhibited a number of documents. It was specific case of the case of the defence that Bijoy Laxmi Prasad and the appellant suffered injuries from accidental burn due to bursting of kerosene stove. In conclusion of trial the Trial Court acquitted the appellant of offence punishable u/s 376/511 of the Indian Penal Code. However, by the selfsame judgment and order the Trial Judge convicted the appellant for commission of offence punishable u/s 307 of the Indian Penal Code and sentenced him, as aforesaid.

3. Mr. Mitra, learned senior Counsel appearing on behalf of the appellant, submitted that the case has not been proved beyond reasonable doubt. He submitted that the First Information Report had been lodged by P.W. 4 prior to his visiting the hospital and hence the prosecution case is a manufactured one. He submitted that P.W. 3 has not corroborated the version of P.W. 4 that she had narrated the incident to him at the hospital. He strenuously argued that as attempt to ravish the victim was disbelieved the allegation that the victim was set on fire by the appellant also ought to be taken with a pinch of salt. He submitted that the letters of the victim were exhibited which showed that there was an extra-marital relationship between parties improbabilising any motive of the appellant to attempt to kill the victim. Hence, the allegation of attempt to commit murder of the victim was highly improbable, more particularly when the appellant himself had suffered seventy per cent burn injury due to fire. He further submitted that Exhibit-2, the discharge certificate of Mitra''s Nursing Home showed that the victim had suffered burn injuries due to accident. He, accordingly, prayed for setting aside of the impugned judgment and order of conviction and sentence.

4. Mr. Banerjee, learned Additional Public Prosecutor submitted that the prosecution case has been proved beyond reasonable doubt. Acquittal under Sections 376/511 of the Indian Penal Code does not militate against the truthfulness of the prosecution case of

attempt to kill the victim. It was the specific plea of the defence that the victim suffered burn injury out of accidental fire. Such version is belied by the deposition of the victim in Court as well as her statement recorded in hospital, which is proved by P.W. 8. No evidence was led as to the source information relating to incorporation of the words ''accidental burn'' in the discharge certificate at Mitra Clinic. P.W. 3 did not state that she narrated such history of injury at Mitra Nursing Home. He further submitted that the defence case of accidental burn was not supported by any contemporaneous seizure of burnt/broken stove. Hence, prosecution version has been rightly believed. Therefore, the judgment and order does not call for any interference.

5. P.W. 3 the victim Bijoy Laxmi Prasad is the principal witness in this case. She has deposed that on 21st January, 2000 about 9 a.m. she had gone to Mahakal temple to perform puja. When she was returning to her house, the appellant met her near a restaurant named ''Hasty Tasty'' and requested her to accompany him to his house. She followed him to his house above Capital Cinema Hall. When the victim reached the house she found that the wife and children of the appellant were not present. The appellant stated that they had gone to Bihar. He offered her tea. She refused and wanted to leave the house. The appellant shut the door from inside. When she protested, she was molested and the appellant tried to take her to bed in the room. The victim protested at such outrageous behaviour of the appellant and started that she would complain against him to her brother and also take him to Court. The appellant got angry and poured kerosene oil on the victim from a jerican. The victim tried to extinguish the fire but failed to do so and suffered burn injury. The appellant tried to flee from the spot, but the victim caught hold of him and as a result the appellant also suffered burn injury. Neighbouring people brought them to hospital where she was treated for about two months. P.W. 4 came to the hospital and the she narrated the incident to him on the same day. She also stated the incident to the doctor (PW 8) which was reduced into writing by the latter. Subsequently she was removed to Mitra''s Nursing home for treatment. Her wearing apparels were seized. She was discharged from Mitra''s Nursing home in the last part of April, 2000. In cross-examination she admitted that various letters were written by her in Hindi, English to the appellant which were exhibited. She stated that she was examined by the police at the Sadar Hospital. She denied the suggestion that she forced the appellant to marry her. She also denied the suggestion that the appellant and herself had caught fire due to burst of kerosene stove. P.W. 4 is the brother of victim. He has stated that he received a telephonic message from the hospital staff of Darjeeling Sadar Hospital that the victim was admitted in the said Hospital. Hearing the said message, he rushed to the Sadar Hospital and the victim narrated the incident to him. Thereafter he wrote the complaint and submitted the same before the Inspector in charge of the Sadar Police Station. He has exhibited the FIR in the instant case. He has also signed the seizure of burnt list relating to the seizure wearing apparels of the victim by the police. In cross-examination he stated that he received telephonic message around 9.30 hours from the hospital and rushed to the hospital around 10 to 10.30 hours. He stated that although his sister was serious, she was able to speak and after preparing complaint he

submitted the same with the Inspector in charge of the Sadar Police Station, Darjeeling. P.W. 5 is the person who accompanied P.W. 4 to the hospital. He has been declared hostile. He however, admits that P.W. 4 said to him that he had heard about hospitalisation of his sister and had gone to the hospital. P.W. 6 has a restaurant which is above the room of the appellant. He heard hue and cry and found that the appellant and the victim were in burnt condition and shifted then to Hospital. In cross-examination, he admitted that the victim was standing and was able to speak. P.W. 7 is another brother of the victim. He has supported the prosecution case and has also proved the seizure of wearing apparels, one burnt T.V., blanket, jerican, bed sheets, ladies shoes and piece of cloth of his sister etc. from the place of occurrence. P.W. 8 is the doctor who treated the victim at the district Hospital till 1st April, 2000. He recorded the statement of the victim which was marked as exhibit 7. He also admitted that he treated the appellant who was discharged on 24th January, 2000. In cross-examination he stated that Bijoy Laxmi suffered 56% burn injury. He also stated that the appellant had suffered 70% burn injury and was referred to North Bengal Medical College for further treatment. P.W. 2 is the doctor who treated the victim from 1st April, 2000 to 28th April, 2000 and issued the discharge certificate. In cross-examination, he stated that the patient herself informed that there was accidental flame burns sustained by her. P.W. 1 received the first information report in the instant case at 10.35 hours resulting in registration of Sadar P.S. case no. 5 dated 21st January, 2000 under Sections 376/511/326/307 of the Indian Penal Code. P.W. 9 is the Investigating Officer of the case. Considering her critical condition he recorded the statement of the victim in presence of P.W. 8. He visited the place of occurrence and seized wearing apparels, one burn T.V., blanket, jerican, bed sheets, shoes and piece of cloth of the victim and prepared seizure list. In cross-examination he stated that after lodging first information report P.W. 4 accompanied him to hospital. He examined the victim on 21st January, 2000 about 11.15 a.m. He denied the suggestion that he has conducted the investigation in a perfunctory manner.

6. Analysis of the prosecution evidence shows at the earliest point of time that the victim P.W. 3 had narrated the incident to P.W. 4. As per her narration, the P.W. 4 prepared a written complaint which was treated as first information report in the instant case. Thereafter the statement of the victim was recorded by P.W. 8 Dr. Mondal who was treating her at Sadar hospital. Such statement being Ext. 7 corroborates version of P.W. 4 in his first information report. Therefore, from such contemporaneous documents namely, FIR and Ext. 7 and the evidence of PW 3, 4 and 7 it appears that prosecution version of the victim being set on fire by the appellant is established beyond reasonable doubt. It has been suggested by the defence that the victim suffered burn injuries due to accidental fire. To probabilise the same, Mr. Mitra has strenuously argued that various articles in the house were also burnt and the appellant also suffered extensive burn injuries. He drew my attention to Exhibit 2 namely the discharge certificate of Mitra Nursing Home wherein it has been stated that burn injuries were due to accidental flame. P.W. 2 in cross examination stated that the victim had made such statement to him.

7. I am unable to accept the contention of Mr. Mitra, learned senior counsel on this score. Exhibit 2 does not state that the history of injuries as narrated therein was given out by the victim herself. P.W. 3 has not corroborated such version. There is also no cross-examination of P.W. 3 on the score that she had made such statement to P.W. 2 at Mitra Nursing Home, Siliguri. At the first instance, statement was promptly recorded within two hours of the incident at Sadar Hospital being Exhibit 7. Exhibit 7 clearly shows that the victim narrated she had been set on fire by the appellant. Such version of the incident as transpiring at the earliest point of time is the most probable and has been rightly believed by the trial Judge. Ext. 2, the discharge certificate of Mitra Nursing Home was prepared much later and does not inspire any confidence as the same is not corroborated by P.W. 3. The defence of also did not confront PW 2 with such document. Hence, the version as transpiring from Ext. 2 is a hearsay piece of evidence which is inadmissible in law. When the defence plea of accidental fire is judged in the light of the earliest report of the incident as narrated by the victim to PW is being Exhibit 7 and corroborated by other prosecution evidence. I find it extremely difficult to believe that the theory of accidental burnt as floated by the defence. One cannot also ignore the fact that the contemporaneous seizures effected at the place of occurrence does not include any burnt/broken stove to probabilising the defence plea, as aforesaid. Hence, there is no doubt that the prosecution case has to be proved beyond reasonable doubt. Mere vague doubts and speculations which do not find any support from the evidence on record cannot be entitle the appellant to the benefit of doubt in this case. Mere vague apprehensions cannot masquerade as a reasonable doubt to scuttle an otherwise convincing prosecution case. In State of U.P. Vs. Krishna Gopal and Another, the Apex Court held as follows:-

"25. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amount to `proof" is an exercise particular to each case. Referring to the inter-dependence of evidence and the confirmation of one piece of evidence by another a learned author says: (See: "The Mathematics of Proof-II": Glanville Williams: Criminal Law Review, 1979, by Sweet and Maxwell, p. 340 (342).

"The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited art with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to inter guilt from the act that the dependant fled from justice. But since it is generally guilty rather than innocent people who run away, the two doubt are not to be multiplied together. The one piece of evidence may confirm the other."

Doubts would be reasonable if they are free from a seat for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it is must be free from an over emotional response. Doubts may be actual and substantial doubts as to the guilt of the accused-person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common-sense. It must grow out of the evidence in the case.

26. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective-element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common-sense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused-persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice."

8. Next comes the issue of ability/capacity of the victim narrating the incident to P.W. 4 and P.W. 8 of the hospital immediately after the incident.

9. P. Ws. 4 and 8 have categorically stated that the victim was conscious and able to speak. P.W. 5 (hostile witness) however stated that the victim was unconscious. P.W. 6 is an independent witness who brought the victim to hospital. He stated that the victim was standing and she was conscious and able to speak. From the aforesaid evidences

10. I am unable to accept the version of the defence that the victim was unconscious and not in a fit state of mind to disclose the incident to P.W. 4 and P.W. 8n respectively.

11. Finally it has been argued that as the charge u/s 376/511 of the Indian Penal Code has failed, it cannot be said that there was motive on the part of the appellant to inflict injury on her. On the other hand it was argued that as there was an illicit relationship between the parties, the same completely belies any motive of the appellant to inflict such injury on the victim. I find that the trial judge has acquitted the appellant of the charge under sections 376/511 of the Indian Penal Code on the ground that the evidence of P.W. 3 of kissing of hand of the victim and trying to take her to bed does not constitute ingredients of offence punishable under sections 376/511 of the Indian Penal Code.

12. I note with dismay that the trial judge could have recorded a conviction against the appellant for a lesser offence, that is, outraging of modesty of the victim u/s 354 of the Indian Penal Code on the basis of such evidence on record. I, however, refrain myself from expressing any opinion in the matter as no appeal has been preferred against such acquittal at the behest of the State.

13. Be that as it may, the learned Judge had not disbelieved the evidence of PW 3 as to misbehavior of the appellant towards her immediately prior to the incident. There is also

no reason to disbelieve that upon her protestation to such improper advantages the appellant got enraged and inflicted injury on the victim. It is a fact that some amorous letters between the parties were exhibited. However, such fact does not probabilise the defence version of accidental fire. On the other hand, it is probable that notwithstanding such amorous relationship as the victim was unwilling to succumb to the advances of the appellant and threatened to expose him, the latter got enraged, and attempted to kill her by setting her on fire. Hence, I am unable to accept the argument on behalf of the appellant that the motive for commission of the offence in the instant case has not been proved.

14. For the aforesaid reasons, I am of the opinion that the conviction of the appellant punishable u/s 307 of the Indian Penal Code has been proved beyond reasonable doubt.

15. Coming to the sentence, it has been argued by Mr. Mitra that the appellant has a daughter is of marriageable age. I find from the evidence that the appellant also suffered extensive burnt injury. The factual matrix of the case does not show any premeditation prior planning on the part of the appellant. On the other hand, the appellant committed the offence on the spur of the moment. There is also no criminal antecedent of the appellant and the incident had occurred 14 years ago. These extenuating circumstance persuade me to reduce the substantive sentence of imprisonment imposed on the appellant.

16. Accordingly, the appellant is sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs. 2,000/- in default to suffer rigorous imprisonment for six months more. The period of dentition already undergone by the appellant shall be set off according to section 428 of the Code of Criminal Procedure. The sentence imposed by the learned trial court is modified accordingly.

17. The appeal is allowed in part.

18. Let the lower court records and the copy of the judgment be sent down forthwith. The appellant is directed to surrender to his bail bond and serve out the remainder of the sentence within a month from date.