IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRA 546 of 2017
With
CRAN 1 of 2017 (Old No. CRAN 4177 of 2017),
CRAN 2 of 2017 (Old No. CRAN 5281 of 2017),
CRAN 3 of 2020 (Old No. CRAN 3750 of 2020)

Soumik Roy

-Vs-

State of West Bengal

For the Appellants: Mr. Milan Mukherjee, Sr. Adv.,
Ms. Kabita Mukherjee, Adv.,
Mr. Manas Dasgupta, Adv.,
Mr. Biswajit Manna, Adv.

For the State: Mr. Swapan Banerjee, Adv.,
Mrs. Purnima Ghosh, Adv.

Heard on: January 21, 2021.
Judgment on: March 5, 2021.

BIBEK CHAUDHURI, J. : –

1. The instant appeal is directed against the judgment and order of conviction dated 31st August, 2017 and 1st September, 2017 respectively passed by the learned Additional Sessions Judge, 5th Court at Howrah in Sessions Trial Case No.24 of 2016 convicting the appellant under Section

354A/376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for one year for the offence under Section 354A of the Indian Penal Code and also to suffer rigorous imprisonment for seven years and to pay fine of Rs.5000/- in default to suffer a further rigorous imprisonment for six months for the offence under Section 376 of the Indian Penal Code.

2. The appellant has assailed the judgment and order of conviction and sentence passed by the trial court on the ground that the prosecution failed to produce the statement made before the police at the first instance immediately after the occurrence and the written statement of the defacto complainant which is treated by the police as FIR is not as FIR, but a statement made by her under Section 161 of the Code of Criminal Procedure and this being the position, the so-called FIR is hit by Section 162 of the Code of Criminal Procedure.

3. Secondly, there are infirmities in the evidence of the victim lady. Though the testimony of the prosecutrix could be acted upon and be the basis of conviction without being corroborated in material particulars, if her testimony is trustworthy and free from infirmities, there are infirmities in the oral evidence of the prosecutrix and therefore, it cannot be taken as the solitary foundation for the conviction of the appellant.

4. Thirdly, the prosecutrix went to have an X-ray of her waist in a diagnostic centre at Bally in the district of Howrah. For the purpose of conducting X-ray, she wore a gown provided to her by the diagnostic centre. The appellant was a technician, of X-ray department of the said

diagnostic centre. As a technician he naturally touched the victim lady, corrected her posture and position on the X-ray table and the victim lady might think that she was inappropriately touched. There is absolutely no evidence to show that the victim lady was sexually harassed or she was revised by the appellant when the appellant allegedly inserted his finger inside the vagina of the victim lady.

5. Fourthly, some employees of the said diagnostic centre were examined by the Investigating Officer and they were cited as witnesses in the charge-sheet on behalf of the prosecution. During trial, however, the prosecution failed to examine those witnesses. The said witnesses deposed as defence witnesses and stated that they were present at the time of conducting X-ray of the waist of the victim lady and the appellant did not commit any offence as alleged by her. The learned trial judge failed to appreciate the evidence adduced by the defence in proper perspective and convicted the appellant only on the basis of sole testimony of the prosecutrix.

6. It is also urged by the learned Counsel for the appellant that when two plausible views with regard to an incident are forthcoming, the court shall accept the version that supports the accused and the accused would have been acquitted from the charge on benefit of doubt. On the above grounds, the judgment and order of conviction passed by the learned trial judge is under challenge in the instant appeal.

7. Let me now state the salient facts of the case:-

That on 11th January, 2015 at about 8.45 hours the defacto complainant and her husband went to LASCO Medicare Centre at Bally for X-ray of her waist. Before conducting X-ray, one lady staff of the said diagnostic centre helped the defacto complainant to wear the X-ray gown and then she left the place closing the door of the X-ray room. Then a technician laid the defacto complainant down on the X-ray table for X-ray of her waist. At that time he touched her breast and then turned her on the opposite side and inserted his finger into her rectum. There was no other person except the defacto complainant and the said technician in the X-ray room at that time. After her X-ray being done she came out from the X-ray room and informed the incident to her husband. Then they called her family members over phone and also informed the police. Police came there and took the said technician to custody. Subsequently, the defacto complainant came to know the name of the appellant.

On the basis of the said complaint, police submitted charge-sheet against the appellant under Section 345A/376 of the Indian Penal Code.

The case was committed to the Court of Sessions. Subsequently it was transferred to the 5th Court of the learned Additional Sessions Judge, Howrah for trial. The accused/appellant pleaded not guilty when the charge was framed and read over and explained to him.

During trial prosecution examined six witnesses. Amongst them defacto complainant deposed as PW1 and PW2 is her husband. PW3 is the Medical Officer attached to T.L Jaiswal Hospital. He conducted Medico Legal Examination of the defacto complainant and prepared a report which was marked as exhibit-2/1 during trial of the case. PW4 is a close relative of the defacto complainant. PW5 is a seizure witness and PW6 is the Investigating Officer of Bally P.S Case No.6 of 2015 which was registered on the basis of written complaint filed by the prosecutrix.

8. Mr. Milan Mukherjee, learned Senior Counsel on behalf of the appellant submits that from the written complaint it is found that after her X-ray was done, the defecto complainant came out from the X-ray room and informed her husband that the technician laid her down on the X-ray table and touched her breast and inserted his finger in her rectum. Thereafter he inserted his finger in her vagina twice. After narrating the incident to her husband, she called her family members to the said diagnostic centre over phone. Then she informed the incident to Bally Police Station over phone. Police came to the said diagnostic centre and took the appellant to the police station. Subsequently she came to know that the name of the said technician is Soumik Ray who committed the offence upon the defacto complainant. Showing the contents of the FIR it is submitted by Mr. Mukherjee that the defacto complainant first informed the matter to the police over phone. Acting on such phone call, police came and took the appellant to the police station. As per rule of

business, it is the bounden duty of the Police Officer to record the information which they received over phone from the defacto complainant in the GD Book maintained by the police station. The said GD Book has not been produced during trial of the case. It is, therefore, not possible for the court to ascertain as to whether the said telephonic call was a cryptic information about the incident or a detailed statement of the said incident. If the telephonic version contained detailed information about the incident, such information ought to have treated as the FIR and the statement which was considered as FIR, and on the basis of which Bally P.S Case No.6 of 2015 was registered should be treated not as FIR but a statement of the defacto complainant made under Section 161 of the Code of Criminal Procedure.

9. It is further pointed out by the learned Senior Counsel for the appellant that the telephonic information made by the defacto complainant must be held to be detailed information about the incident because acting on such information police came to the said diagnostic centre and took the appellant to the police station. Thus, it is contended by Mr. Mukherjee that the prosecution withheld the first information made by the defacto complainant to the police immediately after the occurrence over telephone. The concerned GD Book was not placed during trial of the case and only on this ground, the appellant is entitled to get the benefit of doubt.

10. It is further submitted by Mr. Mukherjee, the learned Senior Counsel that the victim defacto complainant is a married lady aged about

41 years at the relevant point of time. From the sketch map it is ascertained that there are series of rooms in a row in the said diagnostic centre where different diagnostic works of the other patients were being conducted. Had it been the fact that the appellant inappropriately touched the private parts of the defacto complainant, it was very natural for her to raise alarm but she did not shout at the time of occurrence. She did not tell the incident to any other person of the said diagnostic centre. The investigation officer examined other employees of the said diagnostic centre and recorded their statement under Section 161 of the Code of Criminal Procedure but the said witness were not examined by the prosecution. They were however examined as DW1 and Dw2 by the defence. DW1 Smt. Kalpana Bhowmick stated in her evidence that on 11th January, 2015 during the X-ray of defacto complainant, she along with the appellant and one Prosenjit Malick were all-along present in the X-ray room. The husband of the defacto complainant was also present at the time of conducting her X-ray in the X-ray room. Prosenjit Malick deposed in this case as DW2. At the relevant point of time he was posted as Senior Radiographer at LASCO Medical. The appellant used to work at the relevant point of time as a junior technician under DW2. On 11th January, 2015, DW2, the appellant and a lady of attendant, namely, Kalpana Bhowmick were present inside the X-ray room at the time of conducting X-ray of the defacto complainant. Her husband was also present in the X-ray room.

11. It is submitted by Mr. Mukherjee that there is no reason to disbelieve the evidence of DW1 and DW2. From their evidence it is ascertained that at the time of X-ray of the defacto complainant, they were present in the X-ray room. Thus it was not possible for the appellant to commit such offence in presence of other members of staff in the X-ray room.

12. Even assuming but not admitting that the defacto complainant had felt that the appellant touched her body inappropriately or that he inserted finger into her vagina, it might so happen that the appellant had to touch her to help her to lie down on the X-ray table in correct position and posture for taking perfect X-ray image of her waist. There is also no reason to disbelieve the evidence of DW1 and DW2. Thus, when two views are forthcoming regarding the incident, it was the duty of the court to accept the view that was in favour of the accused because in such case the accused was entitled to get benefit of doubt.

13. Learned P.P-in-Charge, on the other hand has supported the finding of the learned trial judge and submits that there is no infirmity in the finding arrived at by the learned trial judge and the instant appeal is liable to be dismissed.

14. Having heard the learned Counsels for the appellant and the respondent and on perusal of the entire materials on record as well as the judgment delivered by the learned trial judge I like to state at the outset that depending on the facts of the case, it could be clearly stated that the police arrested the appellant before the official complain was lodged on

the basis of a telephonic information made by the defacto complainant after the incident. The learned Senior Counsel for the appellant tried to impress upon me that non production of the relevant GD Book is fatal for the prosecution, because had the GD Book been produced, it might have been found that the said telephonic information was actually the first information report recorded by the police officer in the GD Book. However in the case of **Lalita Kumari vs. Government of U.P** reported in **(2014) 2 SCC 1**, the Hon'ble Supreme Court held that the absence of GD will not vitiate the FIR. It may at best be treated as a lapse on the part of the prosecution but, the merit of the case would be determined on the basis of the evidence adduced by the witnesses during trial of the case.

15. In the case of **Ramsin Bavaji Jadeja vs. State of Gujarat** reported in **MANU/SC/0670/1994,** the Supreme Court laid down that if the telephonic message is cryptic in nature and the officer-in-charge, proceeds to the place of occurrence on the basis of that information to find out the details of the nature of the offence itself, then it cannot be said that the information, which had been received by him on telephone, shall be deemed to be First Information Report. The object and purpose of giving such telephonic message is not to lodge the First Information Report, but to request the officer-in-charge of the police station to reach the place of occurrence. On the other hand, if the information given on telephone is not cryptic and on the basis of that information, the officer-in-charge is prime facie satisfied about the commission of a cognizable offence and he proceeds from the police station after recording such

information, to investigate such offence, then any statement made by any person in respect of the said offence including about the participants, shall be deemed to be a statement made by a person to the police officer "in the course of investigation", covered by Section 162 of the Code of Criminal Procedure. That statement cannot be treated as First Information Report. But any telephonic information about commission of a cognizable offence irrespective of the nature and details of such information cannot be treated as First Information Report.

16. Again in **Damodar vs. State of Rajasthan** reported in **MANU/SC/0726/2003**, the Supreme Court has observed that even when the telephone message is not cryptic and on the basis of information, the officer-in-charge of the police station is prima facie satisfied about the commission if a cognizable offence and he proceeds from the police station after recording such information to investigate such offence, then any statement made by any person in respect of the said offence including about the participants shall not be deemed to be a statement made by a person to the police officer in the course of investigation covered by Section 162 of the Code of Criminal Procedure.

17. In the instant case it is found from the FIR as well as evidence of defacto complainant that she informed the incident to the local police over phone and on the basis of such information police came to the said diagnostic centre and took the appellant to the police station. There is no cross examination to the defacto complainant on the point as to whether she made detailed report over phone to the police officer or not.

18. Prosecution case cannot be disbelieved altogether and thrown away on the ground that no relevant GD Book was produced by the prosecution. Relying on the ratio laid down in Damodar (supra) even if a telephonic information discloses commission of cognizable offence which led the police to rush to the PO, such information might not be treated as FIR. In the instant case Bally P.S Case No.6 of 2015 was registered on the basis of the written complaint submitted by the defacto complainant. So, the said written complaint is the FIR and the learned trial judge did not take any wrong decision while treating the said written complaint as FIR of this case.

19. It is a well known and well followed principle in criminal jurisprudence that the prosecution is under obligation to prove the guilt of the accused beyond reasonable doubt. In this case the accused has clearly mentioned the presence of two more people in the X-ray room at the time of conducting X-ray of the defacto complainant. They are Kalpana Bhowmik (DW1) and Prasenjit Malik (DW2). The said witnesses confirmed the fact that no such incident took place in the X-ray room in their presence. It is very surprising that the prosecution did not cross examine the defence witnesses and contradict their statement on oath with their previous statement recorded by the Investigating Officer under Section 161 of the Code of Criminal Procedure to raise a doubt about their credibility. Standing in such a situation, I can safely say that the prosecution has failed to prove that the appellant is guilty beyond reasonable doubt. The prosecution has proved the presence of the victim

and the accused in LASCO during 8.48 am, however it failed to prove the acquisitions of rape on the accused. The Supreme Court in the case of **Krishnan & Anr. vs. State represented by Inspector of Police** reported in **MANU/SC/0505/2003 : (2003) 7 SCC 56** was pleased to hold that the doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favour other than the truth and to constitute reasonable doubt, it must be free from any over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons 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. This principle is also laid down in the case of **Ramakant Rai vs. Madan Rai & Ors.** reported in **(2002) 12 SCC 395**.

20. The criminal justice system does not need the prosecution to prove absolute guilt of the accused but when there are two eye witness presented before the court who accepted their presence and claimed that no such event had taken place on that day and the prosecution failed to cross examine them and raise a doubt about credibility of their evidence, then there is an actual doubt present in this situation as to whether the incident actually took place or not.

21. Last but not the least, I have already recorded that the victim lady was accompanied by her husband to the diagnostic centre for X-ray of her waist on the date and time of occurrence. When the alleged offence was

committed upon, her she did not raise any alarm. Even she did not make any objection against the alleged act of the appellant. She silently allowed the offence to be committed upon her. Only after she came out from the X-ray room she told the incident to her husband. What was very natural and probable for them at that juncture is first to make a complaint against the appellant to the management of the said diagnostic centre. However without making such complaint to the management of the said diagnostic centre, she informed the matter to her family members and then to the police.

22. By not examining the members of staff of the said diagnostic centre who were examined during investigation by the Investigating Officer, the prosecution tried to suppress the truth behind the incident.

23. In view of such circumstances I am not in a position to affirm the judgment and order of conviction and sentence passed against the appellant by the learned Additional Sessions Judge, 5th Court at Howrah in Sessions Trial Case No.24 of 2016.

24. Accordingly the instant appeal is allowed on contest, however, without costs.

25. Accordingly the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 5th Court, Howrah in Sessions Trial Case No.24 of 2016 against the appellant is set aside.

26. The appellant is acquitted from the charge under Sections 354A/376 IPC, set at liberty and released from the bail bond.

27. Let a copy of this judgment be sent to the learned trial court along with lower court record.

(Bibek Chaudhuri, J.)