

*

IN THE HIGH COURT OF DELHI

%

Date of Decision : 14.05.2009

+

CRL.A. 513/2001

AVDESH ...Appellant
Through: Mr.Sumeet Verma, Advocate.

versus

STATE ...Respondent
Through: Mr. Pawan Sharma, Advocate

CRL.A. 300/2002

VIDHYA LAL ...Appellant
Through: Ms.Padma Priya, Advocate.

versus

STATE ...Respondent
Through: Mr. Pawan Sharma, Advocate

CRL.A. 301/2002

SANTOSH PANDEY ...Appellant
Through: Mr.V.K.Raina, Advocate.

versus

STATE ...Respondent
Through: Mr. Pawan Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR KOCHHAR

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **PRADEEP NANDRAJOG, J.** (ORAL)

1. We notice that the counsel nominated by the Legal Services Authority for appellant Vidhya Lal has not been appearing in the instant matter which has remained on Board for the last four days to await representation from his counsel, we had requested Ms.Padma Priya, Advocate to assist us for appellant Vidhya Lal. We formally appoint her as Amicus Curiae for appellant Vidhya Lal and fix her fee at Rs.5,000/-. Noting that Mr.Sumeet Verma was appointed Amicus Curiae vide order dated 18.7.2003 in Crl.Appeal No.513/2001 and his fee has not been fixed at yet, we fix his fee at Rs.5,000/-.

2. Vide impugned judgment and order dated 30.1.2001, the appellants have been convicted for the offence of having entered into a conspiracy to kidnap for ransom Master Ashish as also for the offence of having kidnapped for ransom Master Ashish and demanded ransom for his release. For both offences, sentence imposed upon the appellants is to undergo imprisonment for life and to pay a fine in sum of Rs.15,000/- each (for each offence); in default of payment of fine, to undergo imprisonment for a period of two years.

3. Co-accused Choukat and Ramesh Pandey have been acquitted.

4. The incriminating circumstances held established by the learned Trial Judge against the appellants are:-

(a) Accused Santosh Pandey. In view of the testimony of Surya Pratap Singh PW-2 it has been held that it stood established that on 7.7.1995 at about 10.30 AM the kidnapped child Master Ashish was seen being taken away by Santosh. The second incriminating circumstance against accused Santosh is his absconding from the tenanted premises on 7.7.1995 as deposed by his landlord Ratti Ram Sharma PW-6. Lastly, the report Ex.PW-14/A of the handwriting expert, as per which the suspect writings Q-6, Q-7 and Q-9 were opined to be in the handwriting of Santosh; the comparison being with reference to the specimen writings of Santosh S-15 to S-26. The suspect writings Q-6 and Q-9 are ransom notes received by the father of the kidnapped child. The suspect writing Q-7 is a ransom note.

(b) Accused Vidhya Lal. The incriminating evidence against accused Vidhya Lal is the report Ex.PW-14/A of the handwriting expert as per which the suspect writings Q-1, Q-2 and Q-5 were opined to be in the handwriting of Vidhya Lal; the comparison being with

reference to the specimen writing S-1 to S-14. The suspect writings Q-1 and Q-2 are the ransom notes received by the father of the kidnapped child. The suspect writing Q-5 is the writing on the postal envelope in which ransom notes were sent.

- (c) Accused Avdesh. The evidence against accused Avdesh is his act of absconding from the tenanted premises on 7.7.1995 as deposed to by his landlord Ratti Ram Sharma PW-6 and the report Ex.PW-14/A of the handwriting expert as per which the suspect writings Q-3, Q-4 and Q-8 were opined to be in the handwriting of Avdesh; the comparison being with reference to the specimen writing S-21 to S-41. The suspect writings Q-3 and Q-8 are the ransom notes received by the father of the kidnapped child. The suspect writing Q-4 is the writing on the postal envelope in which ransom notes were sent.

5. At the trial Satender Singh PW-1, the father of Ashish, at whose complaint the FIR Ex.PW-3/A, was registered deposed that on 7.7.1995 he received a telephonic call at his office that his son Ashish had been kidnapped by someone and as he was tracing his son, he was informed by Surya Pratap Singh PW-2, who runs a kiriyana shop near his house, that he

had seen Ashish with Santosh which facts he stated in his complaint to the police. He deposed that on 16.7.1995 he received two letters by post demanding ransom in sum of Rupees Two Lakhs informing that the ransom has to be paid on 25.7.1995. He deposed of receiving further ransom notes. He deposed that the five ransom notes received by him from time to time were Ex.PW-1/A1 to Ex.PW-1/A5. He further deposed that the specimen handwriting of the accused were taken in his presence by the investigating officer.

6. PW-2 Surya Pratap Singh deposed that he was an ex-serviceman and was running a provision store. That on 7.7.1995, on his way to Faridabad to attend a marriage, at around 10:30 AM he saw accused Santosh with Ashish. That he knew Santosh as he used to reside in the same colony. On his return from Faridabad he learnt that Ashish was not traceable and hence informed PW-1 that he had seen his son with Santosh.

7. Ratti Ram Sharma PW-6 deposed that in June 1995 Santosh and Avdesh took on rent a room from him at a monthly rent of Rs.300/- and that both absconded on 7.7.1995.

8. Ashok Kumar Sharma PW-7 deposed that Santosh and Avdesh were his tenants in a building in Hari Nagar,

Badarpur, New Delhi i.e. the same colony in which the kidnapped child and his father as also PW-2 resided.

9. We need not note any evidence pertaining to the investigation conducted, as indeed nothing turns thereon.

10. It is not in dispute that the specimen writings of the appellants were obtained by the investigation officer when the appellants were in custody. Their identification as required by the Identification of Prisoner's Act 1920 was not got done. Nor were orders obtained by the Court of competent jurisdiction to obtain the sample handwritings of the accused.

11. In a decision dated 5.3.2009 disposing of Crl.Appeal No.682/2008 '*Santosh @Bhure vs. State*' and Crl.Appeal No.316.2008 '*Neeraj vs. State*', noting the decision of the Constitution Bench of the Supreme Court reported as 1962(3) SCR 10 *State of Bombay vs. Kathi Kalu Oghad & Ors.* as also the decisions of the Supreme Court reported as AIR 1980 SC 791 *State of U.P. vs. Rambabu Mishra* and 1994 (5) SCC 152 *Sukhwinder Singh & Ors. vs State of Punjab*; in relation to the said decisions, the Division Bench of which, one of us namely Pradeep Nandrajog, J. was a member, recorded as under:-

“18. Unfortunately, for the prosecution, the charge against Neeraj has to fail for the simple reason Neeraj's specimen handwriting was obtained by the

police when he was in their custody. No permission was taken from the Court concerned to obtain his specimen handwriting.

19. Learned counsel for the State urges that a Constitution Bench of 11 Judges of the Supreme Court, in the decision reported as 1962 (3) SCR 10 State of Bombay vs. Kathi Kalu Oghad & Ors. has upheld the constitutional validity of compelling an accused to give specimen handwritings. It has been held that the same does not contravene Article 20(3) of the Constitution of India and thus the fact that the police obtained the specimen handwriting of Neeraj when he was in their custody does not invalidate the said act. Learned counsel was at pains to point out that the Constitution Bench of the Supreme Court was considering three references pertaining to three views taken by the High Court of Bombay, Punjab and West Bengal pertaining to compelling an accused to give his specimen handwriting, fingerprints and specimen signatures respectively and that in the latter two cases the palm and finger print impressions as also the specimen signatures were obtained with the permission of the magistrate concerned but in the first case pertaining to the Bombay High Court the specimen handwritings were taken when the accused was in police custody. Thus, learned counsel urged that the Constitution Bench upheld the action of taking specimen handwriting by the police when the accused was in police custody.

20. It may be noted that the Constitution Bench of the Supreme Court was dealing with the issue whether to compel an accused to give his blood sample, palm and fingerprints impressions, signatures and handwriting etc. would or would not be violative of Article 20(3) of the Constitution of India which made it unconstitutional for a person to be a witness against himself. The Constitution Bench held that to be a witness means to give evidence. It was held that giving handwriting samples or fingerprints or palm impressions did not tantamount to giving evidence and that when a handwriting sample or a fingerprint or a palm impression was obtained by the police it did not amount to compelling an accused to be a witness against himself.

21. In the decision reported as AIR 1980 SC 791 State of UP vs. Rambabu Mishra, with reference to the decision of the Constitution Bench in Kathi Kalu Oghad's case (supra) in para 7 it was observed as under:-

“7. S.73 of the Evidence Act was considered by us in State (Delhi Administration) v. Pali Ram, AIR 1979 SC 14 where we held that a Court holding an enquiry under the Criminal Procedure Code was entitled under S.73 of the Evidence Act to direct an accused person appearing before it to give his specimen handwriting to enable the Court by which he may be tried to compare it with disputed writings. The present question whether such a direction, under S.73 of the Evidence Act, can be given when the matter is still under investigation and there is no proceeding before the Court was expressly left open. The question was also not considered in State of Bombay vs. Kathi Kalu Oghad, AIR 1961 SC 1808, where the question which was actually decided was that no testimonial compulsion under Article 20(3) of the Constitution was involved in a direction to give specimen signature and handwriting for the purpose of comparison.”

22. In para 3 to 6 and para 8 of the decision in Rambabu Mishra's case (supra) it was observed as under:-

“3. Section [73](#) of the Evidence Act is as follows:

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications to finger-impressions.

4. The second paragraph of Section 73 enables the Court to direct any person present in Court to give specimen writings "for the purpose of enabling the Court to compare" such writings with writings alleged to have been written by such person. The clear implication of the words "for the purpose of enabling the Court to compare" is that there is some proceeding before the Court in which or as a consequence of which it might be necessary for the Court to compare such writings. The direction is to be given for the purpose of 'enabling the Court to compare' and not for the purpose of enabling the investigating or other agency 'to compare'. If the case is still under investigation there is no present proceeding before the Court in which or as a consequence of which it might be necessary to compare the writings. The language of Section 73 does not permit a Court to give a direction to the accused to give specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the Court. Further Section 73 of the Evidence Act makes no distinction between a Civil Court and a Criminal Court. Would it be open to a person to seek the assistance of the Civil Court for a direction to some other person to give sample writing under Section 73 of the Evidence Act on the plea that it would help him to decide whether to institute a civil suit in which the question would be whether certain alleged writings are those of the other person or not? Obviously not. If not, why should it make any difference if the investigating agency seeks the assistance of the Court under Section 73 of the Evidence Act on the plea that a case might be instituted before

the Court where it would be necessary to compare the writings?

5. We may also refer here to Section 5 of the Identification of Prisoners Act, 1920, which provides:

5. If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the CrPC, 1898, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:

Provided that no order shall be made directing any person to be photographed except by a Magistrate of the first class:

Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

Section 2(a) of the Act defines "measurements" as including "finger impressions and foot print impressions".

6. There are two things to be noticed here. First, signature and writing are excluded from the range of Section 5 of the Identification of Prisoners Act and, second, 'finger impressions' are included in both Section 73 of the Evidence Act and Section 5 of the Identification of Prisoners Act. A possible view is that it was thought that Section 73 of the Evidence Act would not take in the stage of investigation and so Section 5 of the Identification of Prisoners Act made special provision for that stage and even while making such provision, signature and writings were deliberately excluded. As we said, this is a possible view but not one on which we

desire to rest our conclusion. Our conclusion rests on the language of Section 73 of the Evidence Act.

xxx xxx

8. The view expressed by us in the earlier paragraphs, on the construction of Section 73, Evidence Act was the view taken by the Madras High Court in T. Subbiah v. S.K.D. Ramaswamy Nadar AIR 1970 Mad. 85, the Calcutta High Court in Farid Ahmed v. the State AIR 1960 Cal 32 (Mitter J., at page 32). and Priti Ranjan Ghosh and Ors. v. The State (1973) 77 Cal WN 865, the High Court of Punjab and Haryana in Dharamvir Singh v. State 1975 Crl. L. J. 884, the High Court of Madhya Pradesh in Brij Bhushan Raghunandan Prasad v. The State AIR 1957 Madhya Pradesh 106, the Orissa High Court in Srikant Rout v. State of Orissa 1972 (2) Cuttack Weekly Reporter 1332 and the Allahabad High Court in the judgment under appeal. A contrary view was taken by the Patna High Court in Gulzar Khan and Ors. v. State AIR 1962 Patna 255 and the High Court of Andhra Pradesh in B. Rami Reddy and Ors. v. State of Andhra Pradesh, 1971 Crl. L.J. 1519 (A.P.). We do not agree with the latter view. We accordingly dismiss the appeal and while doing so we would suggest that suitable legislation may be made on the analogy of Section 5 of the Identification of Prisoners Act and provide for the investiture of Magistrates with the power to issue directions to any person, including an accused person, to give specimen signatures and writings.”

23. In the decision reported as 1994 (5) SCC 152 Sukhvinder Singh & Ors. Vs. State of Punjab, noting that the specimen writing of Sukhvinder Singh was obtained by the police when he was in police custody, notwithstanding the fact that Sukhvinder Singh had admitted in his statement under Section 313 Cr.P.C. that he gave the specimen handwriting it was held that the opinion of the handwriting expert had to be excluded while considering the evidence against Sukhvinder Singh. We note that the said

evidence brought on record inculpatory evidence against Sukhvinder Singh in respect of ransom letters Ex.P-A and Ex.P-C alleged by the prosecution to be in the handwriting of Sukhvinder Singh.

24. Thus, excluding the opinion of the handwriting expert pertaining to the letter recovered by the police from the left pocket of the deceased, we are left with only one piece of evidence against Neeraj. The same is the recovery of a knife at his instance.”

12. Thus, the report Ex.PW-14/A of the handwriting expert has to be excluded while considering the evidence, for the reason, no orders were obtained by the competent court to obtain the specimen writings of the appellants nor were the provisions of the Identification of Prisoner’s Act 1920 complied with.

13. Thus, there is no incriminating evidence left against accused Vidhya Lal. He has to be acquitted.

14. Excluding the report Ex.PW-14/A even qua Avdesh, the only incriminating evidence left would be his act of absconding. But, absconding by itself can never be sufficient circumstantial evidence where from the only conclusion possible is the guilt of the accused. Thus, on the solitary incriminating evidence of absconding, even Avdesh would be entitled to be acquitted as the same is insufficient to hold that he is guilty.

15. Excluding the report Ex.PW-14/A qua Santosh, two incriminating evidences remain. The first is his seen walking away with the kidnapped child at around 10:30 AM on 7.7.1995, the day when the child went missing and his act of absconding.

16. Santosh has to account for the child because the kidnapped child was not related to him nor was the child entrusted to Santosh. He who entices and walks away with a minor has to account for the child and render explanation of the circumstance under which he did so. We find that Master Ashish, as deposed to by PW-1, was aged four years. Obviously, his lawful guardians were his parents. By taking away Master Ashish Kumar, whose whereabouts till date are not known, it can safely be said that Santosh had kidnapped the child.

17. Unfortunately for the prosecution, with the failure of proof of the ransom notes emanating from any of the accused persons, the charge under Section 364-A cannot be held established against Santosh, qua whom the only offence which emerges is the offence punishable under Section 363 of the Indian Penal Code.

18. We allow Crl.Appeal No.300/2002 and Crl.Appeal No.513/2001 filed by Vidhya Lal and Avdesh and set aside their conviction. We acquit them of the offences they were charged of.

19. We partly allow Crl.Appeal No.301/2002 filed by Santosh Pandey. We set aside his conviction for the offences punishable under Section 120-B IPC and Section 364-A IPC, but convict him for the offence punishable under Section 363 IPC, for which offence, we punish him to undergo rigorous imprisonment for a period of seven years and pay a fine of Rs.5,000/-; in default of payment of fine to undergo simple imprisonment for a period of three months.

20. Whereas appeal paper books show that accused Vidhya Lal and Avdesh who were released on bail managed to avail their freedom by producing solvent sureties to the satisfaction of the learned Trial Judge. Since they have been acquitted, we discharge the personal bonds and surety bonds furnished by said accused.

21. In the appeal filed by Santosh, it is not clear whether even he secured his freedom by furnishing a solvent surety. Santosh was admitted to bail vide order dated 24.9.2003. Subsequently, vide order dated 23.1.2004 the

surety amount was reduced. A letter has been received from the jail on 28.3.2004 informing that Santosh is still in jail.

22. When the appellants were admitted to bail they had already undergone sentences as under:-

- (a) Avdesh : Ten years and seven months.
- (b) Vidhya Lal : Eight years and three months.
- (c) Santosh Pandey : Eight years and ten months.

23. Thus, appellant Santosh Pandey has already undergone a sentence in excess of what has been imposed by us. If he is still in jail, we direct his immediate release. If he has secured his freedom pursuant to the orders dated 24.9.2003 as modified vide order dated 23.1.2004, we discharge his personal bond and surety bond.

24. Copy of this order may be sent to the Superintendent, Central Jail, Tihar for necessary action.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR KOCHHAR, J.

May 14, 2009
Dharmender