

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. Appeal No. 704/2003**

% Date of Order : May 5, 2009

LAL BABU Appellant
Through : Ms.Anu Narula, Advocate.

VERSUS

STATE Respondent
Through : Ms. Richa Kapoor, APP

+ **Crl. Appeal No. 61/2004**

PREM KUMAR Appellant
Through : Ms.Rakhi Dubey, Advocate.

VERSUS

STATE Respondent
Through : Ms. Richa Kapoor, APP

+ **Crl. Appeal No. 533/2007**

MANGAL Appellant
Through : Ms.Anu Narula, Advocate.

VERSUS

STATE NCT OF DELHI Respondent
Through : Ms. Richa Kapoor, APP

CORAM :-

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

PRADEEP NANDRAJOG, J. (Oral)

1. Being unconventional, for reasons which would be evident hereinafter, we note the reasoning of the learned Trial Judge while convicting Mangal, Prem Kumar and Lal Babu for the offence of having kidnapped for ransom Santosh Kumar and simultaneously acquitting co-accused Singheshwar and Ram Babu. Needless to state, the three convicted accused have been sentenced to undergo imprisonment for life for the offence punishable under Section 364A IPC. For the offence of kidnapping punishable under Section 363 IPC all have been sentenced to undergo rigorous imprisonment for two years as also to pay a fine of Rs.2000/- each. Both sentences to run concurrently.

2. The reasoning of the learned Trial Judge is in paras 10, 11 & 12 of the impugned judgment and order dated 25.7.2003. The same reads as under:

“10. I am, however, not convinced with the

prosecution case that accused Singheshwar and Ram Babu were also involved in this crime. The prosecution had sought to establish its case against the aforesaid two accused on the basis of the statements made by PW Santosh and PW Ghanshyam. The Id. Addl. P.P. has referred to the statement of PW Santosh wherein he has stated that accused Mangal had taken him to shop No.9, Azadpur Market where accused Singheshwar, Ram Babu, Lal Babu and Prem were also present. All five of them had talked amongst them and accused Singheshwar had also given money to accused Lal Babu. The Id. Addl. P.P. has also drawn my attention to the testimony of PW Shanshyam, according to whom, the ransom call received at his residence was made by accused Ram Babu and Singheshwar whose voices were recognised by him on telephone. The Id. Addl. P.P. has further drawn my attention to the testimony of PW Ramesh Chander who was a PCO owner and had established that a telephone call was received from Lal Babu who had called from Bihar and wanted to talk to Singheshwar. The Id. Addl. P.P. has forcefully contended that even though PW 4 Ramesh Chander has resiled from his earlier statement made to the police still he had established the fact that a call had been received on 9.4.2001 from a person who claimed to be one Lal Babu called from Bihar and wanted to talk to Singheshwar. My attention has also been drawn to the statement of PW 5 Vinod. According to him, Lal Babu had called up from Samastipur in Bihar and had talked to accused Singheshwar on 9.4.2001. I have considered the contentions of the Id. Addl. P.P. but I am not convinced about the truthfulness of the prosecution case against accused Singheshwar and Ram Babu.

11. After the recovery of Santosh from Bihar by ASI Sahansar Pal his (Santosh) statement U/s 161 Cr.P.C. was recorded by him wherein Santosh had claimed that he was taken to Shed No. 9, Azadpur Mandi by accused Mangal where Lal

Babu, Ram Babu, Prem and Singheshwar were also standing. They all had talked amongst them, whereafter Ram Babu and Singheshwar had left that place. In this statement Santosh had nowhere alleged that accused Singheshwar had also given money to accused Lal Babu. In his testimony on oath Santosh has admitted that he does not know what talk took place between Singheshwar and Lal Babu. In his testimony on oath Santosh had alleged that he did not know accused Ram Babu, Lal Babu and Prem prior to 7.4.2001. However, in his statement U/s 161 Cr.P.C. it was stated by him that he knew all five accused prior to that day. The statement of Santosh was recorded U/s 164 Cr.P.C on 21.4.2001. In this statement, Santosh makes no mention that accused Singheshwar and Ram Babu were also present in the Mandi where he was taken by his servant Mangal. He also does not mention that Singheshwar had given money to accused Lal Babu in his presence.

12. The evidence led on record to the effect that accused Lal Babu had made a call to accused Singheshwar and Ram Babu from Bihar is not very convincing. PW 4 Ramesh Chander has resiled from his earlier statement made to the police and has claimed that he had never made a statement to the police. PW 5 Vinod has also turned hostile and was cross-examined by the Id. Addl. P.P. Much credence cannot be given to the testimony of this witness because his statement was recorded by the investigating officer after much delay. As per this witness, he had received a call on his PCO on 9.4.2001 and had informed the IO about the same on the same day. However, his statement was recorded only on 21.4.2001 after Santosh had already been recovered by the police. Assuming for the sake of argument that the police was informed by PW Ramesh Chander and PW Vinod Kumar about a telephone call which were received from Lal Babu at Delhi by Singheshwar and Ram Babu, the police must have been alarmed and would have arrested or interrogated Singheshwar and

Ram Babu in respect of those calls. The record shows that the investigating officer had not taken any action against accused Singheshwar or Ram Babu even after receipt of these calls. There is no force in the statement of PW Ghanshyam that the ransom call at his telephone was made jointly by Singheshwar and Ram babu and that he had recognised their voices. Had it been so, the police would have taken action against both these accused who were present in Delhi throughout. In fact it appears that Singheshwar and Ram Babu were already in the custody of the police immediately after registration of this case. In this regard the testimony of DW 1 Harinder Singh is quite important. Singheshwar was residing in his house as a tenant in April, 2001. As per this witness, on 7th & 8th April, 2001 PW 6 Basheshwar Sharma had come to his house and had taken Singheshwar accused along with him. In the evening he had learnt that the police had arrested accused Singheshwar. Basheshwar Sharma has been examined by the prosecution as PW 6. Indeed the police came to know about the residential address of the accused Mangal from this witness and had associated him in the search of the accused as well as the victim. It was Basheshwar Sharma who had told the complainant and the police that accused Mangal was a resident of his village. As per Basheshwar Sharma on 8.4.2001 the police had taken away him as well as Singheshwar to the police station. He had then accompanied the police to Bihar in search of the accused. He was let off by the police after it was satisfied that he was not involved in the alleged crime. The testimony of DW 1 Harinder Sigh and PW 6 Basheshwar Sharma suggests that accused Singheshwar and Ram Babu were in the custody of the police right from 8th April, 2001. This is evident from the fact that after 8.4.2001 the police had not gone in search of accused Singheshwar and Ram Babu despite the fact that it was informed by PW Ghanshyam about the ransom call having been made by these two accused or by the PCO booth

owners PW 4 Ramesh Chander and PW 5 Vinod about the telephone calls received from Lal Babu in the name of Singheshwar and Ram Babu. In the result, I hold that the prosecution case against accused Singheshwar and Ram Babu is not free from all shadow of doubt. I am inclined to acquit accused Singheshwar and Ram Babu by giving them the benefit of doubt. I order accordingly."

3. It is apparent that co-accused Singheshwar and Ram Babu have been given the benefit of doubt with reference to the statement of Santosh (the kidnapped child) recorded under Section 164 Cr.P.C. soon after he was rescued.

4. It is apparent that the learned Trial Judge has found variations of a material nature and/or improvements in the statements of Santosh recorded under Section 161 Cr.P.C.; Section 164 Cr.P.C. and as made in the court.

5. A perusal of the impugned decision shows that father of Santosh namely Ghanshyam PW-3 had sought to prove ransom demands being raised on him by means of telephone calls ostensibly received by him on 10.4.2001. Since the telephone i.e. the telephone of Ghanshyam was put under surveillance the call was traced to a telephone installed in a temple at Shalimar Bagh. As per Ghanshyam, he could recognise the voice of the callers; namely Ram Babu and

Singheshwar as he knew them and recognised their voice.

6. The learned Trial Judge has disbelieved said testimony of Ghanshyam as unsatisfactory.

7. From a perusal of the testimony of the kidnapped child, it is apparent that the appellants were not in Delhi on 10.4.2001 and obviously could not be the persons who made the telephone call when the father of the kidnapped child claimed ransom call being made on him.

8. The problem which we are facing in hearing of the appeal is that the entire trial court record is missing and inspite of attempts being made for the last three years, the same has not been located. An inquiry has been ordered as to who is the responsible for the loss of the trial court record, which we note got lost when the trial court record was sent to the translation branch for preparation of a paper book.

9. The compilation which has been compiled for our consideration, and as placed before us, does not have the evidence of all the witnesses of the prosecution and the documents proved at the trial.

10. The problem has been compounded for the reason the police file available with learned counsel for the State has the deposition of the witnesses of the prosecution but minus the documents which have been proved at the trial.

11. The biggest problem is that the statement of Santosh recorded under Section 164 Cr.P.C. is neither with the counsel for the appellants nor with the counsel for the State nor in the police file; much less with us.

12. The importance of appreciating what the child told the Magistrate under Section 164 Cr.P.C. is evident to any person with even bare knowledge of the law on evidence, as indeed, the learned Trial Judge has heavily relied upon the same while acquitting the co-accused.

13. An issue has arisen for consideration, being whether the appellants were instructed by Singheshwar and Ram Babu to keep the child with them and they i.e. Singheshwar and Ram Babu were to keep the booty or whether all the accused were to share the booty. We note that while deposing in the court the kidnapped child has stated that the appellants left for the village with him after receiving money from Singheshwar and Ram Babu.

14. Is it a case where Singheshwar and Ram Babu were the architects and the beneficiaries of the crime with the role of the appellants simply restricted to keeping the child with them, for which they had received the consideration and thereafter release the child as per instructions of Singheshwar and Ram Babu? Or, was it, as noted above, a joint venture of

five partners, each to share the fruits of the crime?

15. In the absence of the record, which unfortunately cannot be reconstructed in full, inasmuch as copies of the proved documents are neither with the counsel for the appellants or with the counsel for the State, we express our handicap in considering the matter in detail.

16. Needless to state a conviction for the offence punishable under Section 364A IPC mandates the minimum sentence of imprisonment for life and therefore a greater responsibility is cast on us to consider with care and circumspection the evidence led at trial.

17. We note that appellant Prem has undergone an actual sentence of eight years and twelve days as of today. Appellant Mangal has undergone an actual sentence of seven years and ten days as of today. Appellant Lal Babu has undergone a sentence of a little over seven years. We are unable to calculate the exact sentence undergone by him for the reason, from time to time, he has been admitted to interim bail and said period would have to be discounted; but we note that his actual sentence undergone for a period of a little over seven years as of today.

18. It has seriously not been disputed before us, that on the truncated evidence available with us, it would be

improper to hold that the appellants are guilty of the offence of kidnapping. Complete evidence not being available, everybody would be handicapped while considering whether the offence punishable under Section 364A IPC is made out or not.

19. Under the circumstances, faced with a hobsons choice, we dispose of the appeals, partially allowing the same.

20. We set aside the conviction of the appellants for the offence punishable under Section 364A IPC. We acquit the appellants of the said charge. We affirm the conviction of the appellants for the offence punishable under Section 363 IPC.

21. Since, for the offence punishable under Section 363 IPC, the maximum sentence prescribed is imprisonment for seven years, a sentence which all the appellants have undergone, we pass no formal order of sentence.

22. The appeals stand disposed of in terms above.

23. Noting that appellants Prem and Mangal are in jail, we direct that they should be released forthwith, if not required in any other case.

24. Noting that appellant Lal Babu has been admitted to interim bail which continues as of today, we discharge the

bail bond and surety bond furnished by him.

25. Copy of this order be sent to the Superintendent,
Central Jail, Tihar, for necessary compliance.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

May 5, 2009
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