

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.REV.P. 61/2009 & CRL.MA 1324/09, CRL. (MB) 146/09

VIKAS CHAUDHARY Petitioner
Through Mr. G.K. Kaushik, Advocate

versus

STATE Respondent
Through Mr. U.L. Watwani, APP.
Mr. Sidharth Luthra, Senior Advocate with
Mr. Rakesh Makhija, Ms. Arundhati Katju &
Mr. Aditya Singla, Advocates for complainant.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

ORDER
13.03.2009

1. The challenge in this petition under Sections 397 & 482 of the Code of Criminal Procedure, 1973 (CrPC) is to an order dated 2nd January 2009 passed by the learned Additional Sessions Judge (ASJ), Delhi holding that the petitioner cannot be held to be a juvenile on the date of the commission of the offence and thereby rejecting the application filed by the petitioner for sending him before the Juvenile Justice Board (JJB) for trial.

2. The background to the filing of the present case is that a complaint was lodged by Vimal Chaddha with the Police Station Ashok Vihar that his 20 year old son Prakash Chaddha @ Sunny, who had gone out with his friends

on 18th January 2003 had not returned, and was missing. FIR No. 34 of 2003 was registered on that basis. On the next day, 19th January 2003, the first of the ransom calls was received by the complainant. The petitioner Vikas Chaudhary was suspected by the police of having committed the offence. It appears that soon thereafter on 21st January 2003, an order permitting interception of the landline phone number of the complainant and a mobile phone was passed by the competent authority. The petitioner was, however, arrested only on 4th May 2003. At the end of the investigation a charge sheet was filed on 22nd July 2003. Inter alia the charge sheet recorded that the last of the ransom calls was made to the complainant on 11th March 2003 by the petitioner, even after the complainant's son Prakash Chadha had been murdered. The case of the prosecution is that the kidnapped boy was murdered on 18th January 2003 itself.

3. The recording of the prosecution's evidence commenced on 3rd February 2005. On 31st May 2005 the petitioner filed an application stating that he was a juvenile on the date of the commission of the offence, i.e., 18th January 2003 and therefore his case should be transferred to the JJB for trial. The school leaving certificate produced by the petitioner showed his date of birth to be 20th January 1985.

4. The said application was dismissed by the court of the learned ASJ on 24th August 2005 after recording that the Bone Age X-Ray showed him to

be between 22 and 25 years. The trial court rejected the school leaving certificate and preferred the medical evidence. The trial court concluded that the petitioner's age on the date of incident was around 19 years and 5 months.

5. The said order dated 24th August 2005 was challenged by the petitioner in this Court by way of Crl. Rev (P) No. 751 of 2005. By an order dated 31st August 2006, this Court allowed the revision petition and remanded the case to the learned ASJ to consider the matter afresh since the veracity of the school leaving certificate and the transfer certificate submitted by the petitioner was not in doubt. It was directed that if it appeared to the learned ASJ that the petitioner was a juvenile on the basis of the material on record, he should be sent to the JJB for further proceedings.

6. On remand, a fresh order was passed by the learned ASJ on 20th January 2007, opining that the school leaving certificate, even if genuine, could not alone be relied upon and that the trial court had to consider all other facts and circumstances. The trial court again referred to the Bone Age X-ray examination. It also took note of conviction slip dated 4th May 2003, filled on the basis of the information given by the accused, which mentioned his age to be 19 years. Accordingly, the learned ASJ reiterated the earlier view that the petitioner was not a juvenile on the date of the commission of the offence.

7. The order dated 20th January 2007 was again challenged by the accused in this Court by way of a Crl. Rev. (P) No. 156 of 2007. By judgment dated 11th September 2007 this Court allowed the revision petition and set aside the order of the learned ASJ. This Court held that the trial of the petitioner should be before the JJB and therefore would be separated from the trial of the other accused.

8. Aggrieved by the aforementioned order dated 11th September 2007, the complainant Vimal Chadha filed a Special Leave Petition in the Supreme Court of India. By a judgment dated 27th May 2008 in *Vimal Chadha v. Vikas Choudhury 2008 CriLJ 3190 (SC)*, the Supreme Court set aside the order dated 11th September 2007 passed by this Court. The Supreme Court observed that in view of the judgment of the Constitution Bench in *Pratap Singh v. State of Jharkhand (2005) 3 SCC 551*, the relevant date for determining whether the accused was a juvenile was the date on which the offence took place. Thereafter in para 12 of the decision in *Vimal Chadha* it was observed as under:

“12.What would be the date on which offence has been committed in a given case has to be decided having regard to the fact situation obtaining therein.

Indisputably our Criminal Laws contemplate a continuing offence. Section 472 of the Code of Criminal Procedure reads as under:

472. Continuing offence.

In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.

If an offence has been a continuing offence, then the age of the juvenile in delinquency should be determined with reference to the date on which the offence is said to have been committed by the accused. It may be true that the prosecution proceeded on the basis that the entire offence had taken place on 18th January, 2003. We have, however, been taken through the charge-sheet, from a perusal whereof it appears that the appellant had been getting calls for payment of ransom despite the fact that the deceased had, in the meanwhile, been killed.

It is one thing to say that a missing report has been filed on a particular date but it is another thing to say that in a case of this nature when the actual offence(s) had taken place would remain uncertain.

Giving calls for payment of ransom is an offence. In case of murder coupled with abduction in a given case may be considered to be a continuous offence.”

9. The Supreme Court in *Vimal Chadha* also referred to the following observations in para 39 of its earlier judgment in *Ravinder Singh Gorkhi v. State of U.P. 2006 (5) SCC 584*:

“39. We are, therefore, of the opinion that until the age of a person is required to be determined in a manner laid down under a statute, different standard of proof should not be adopted. It is no doubt true that the court must strike a balance. In case of a dispute, the court may appreciate the evidence

having regard to the facts and circumstances of the case. It would be a duty of the court of law to accord the benefit to a juvenile, provided he is one. To give the same benefit to a person who in fact is not a juvenile may cause injustice to the victim.”

10. Ultimately the following direction was issued by the Supreme Court in

Vimal Chadha:

“We have, however, been informed that the effect of Model Rules having come into force and, if so, the applicability thereof may have to be considered in a given case but keeping in view the facts of the case, we are of the opinion that the matter may be considered afresh in the light of the provisions of Section 472 of the Code of Criminal Procedure by the learned trial court.

The judgment of the trial court is set aside accordingly. The appeal is allowed.

Applications for impleadment, modification/clarification of order dated 2.11.2007 and bail have become infructuous and are dismissed as such.”

11. Consequent upon the aforementioned judgment of the Supreme Court in ***Vimal Chadha***, the matter was once again heard by the learned ASJ. In the impugned order dated 2nd January 2009 the learned ASJ referred to Section 472 CrPC and observed as under:

“If an offence has been a continuing offence, then the age of the juvenile in delinquency should be determined with reference to

the date on which the offence is said to have been committed by the accused. Although, it is true that the prosecution has been proceeded on the basis that the entire offence has taken place on 18.01.2003, however, from the perusal of the charge sheet, it also appears that the complainant (the father of the deceased Parkash Chaddha @ Sunny) had been getting calls for payment of ransom despite fact that the deceased Parkash Chaddha @ Sunny had, in the meanwhile, been killed.

Giving calls for payment of ransom is an offence. In case of murder coupled with abduction in a given case can be considered to be a continuing offence.

In my considered opinion, there is force in the contentions of Ld. Addl. PP for the State and Ld. Counsel for the complainant that this Court being the Court of sessions and the Trial Court too has power to determine the age of the accused/applicant juvenile by virtue of the provisions contained in Sub Section 2 of the Section 6 of the Juvenile Justice (Care and Protection of Children) Act, 2000. Moreover, the directions of the Hon'ble Supreme Court for the Trial Court (whereby it has been specifically directed that the question of determination of the age of the accused/applicant juvenile should be considered afresh in the light of the provisions contained in Section 472 of the Code of Criminal Procedure, which talks about continuing offence) is meant only for this Court, where the trial has been going on and the case qua the applicant/accused has never been separated.

The offence of murder coupled with the abduction can be considered as a continuing offence and in such circumstances, the date of ransom calls are significant for the purpose of determination of the age of the applicant/accused. The last ransom call, which was made on 11.03.2003, is the cut of date

for the purpose of determination of age of the accused/applicant Vikas Choudhary and on the said date of occurrence, according to the certificate produced and relied upon by the applicant, he was a major. As such the applicant cannot be held as a juvenile and therefore, the application for sending him to the Juvenile Board contains no merits and hence the same is hereby dismissed.”

The present petition has been filed challenging the aforementioned order dated 2nd January 2009.

12. It is submitted by the learned counsel for the petitioner that in terms of the judgment of the Supreme Court in *Vimal Chadha*, the case should have been remanded to the JJB and not the learned ASJ. According to him, it is in terms of the Juvenile Justice (Care and Protection of Children) Act, 2000 [JJ Act] and it is the JJB which is empowered to determine such question. Secondly, it is pointed out that none of the charges framed by the learned ASJ relate to any offence arising out of the ransom calls made by the petitioner on 11th March 2003. In fact the charges have been framed on the basis that the entire offence took place on 18th January 2003 on which date admittedly the petitioner was a juvenile. It is then submitted that the order passed under Rule 419A of the Indian Telegraph Rules 1951 as amended by the Indian Telegraph (First Amendment) Rules, 1999 read with Section 5 (2) of the Indian Telegraph Act, 1885 permitting interception of messages or calls on the telephone numbers of the complainant's landline and the mobile number, was passed on 21st January 2003 after the date of the

Crl.Rev. (P) No. 61/2009

alleged offence and was valid for a period of ninety days. According to the petitioner, therefore the call purportedly made on 11th March 2003 was possibly fabricated by the police itself. He also doubted the veracity of the calls recorded on the cassette which was handed over to the investigating agency on 2nd May 2003, i.e., long after the making of the ransom calls. According to the learned counsel for the petitioner, the making of ransom calls on 11th March 2003 at the best would attract the offence of cheating and could not be equated to the substantive charge under Section 364A IPC read with Section 120B IPC, Section 302 read with Section 120 IPC and Section 201 IPC for which the petitioner has been charged along with two other co-accused.

13. Mr. U.L. Watwani, the learned APP for the State submits that the order passed by the Supreme Court in *Vimal Chadha* is unambiguous. In terms thereof the trial court was to consider whether the ransom call made on 11th March 2003 constituted a continuing offence in relation to the substantive offence under Section 364A IPC. It was submitted that the learned ASJ correctly came to the conclusion that it was indeed a continuing offence and on that date admittedly the petitioner was not a juvenile.

14. Supplementing the submissions of the learned APP for the State, Mr. Sidharth Luthra, the learned Senior Counsel for the complainant refers to the judgments of the Supreme Court in *Malleshi v. State of Karnataka*

(2004) 8 SCC 95 and *Vinod v. State of Haryana (2008) 2 SCC 246* to emphasize that the offence under Section 364A IPC is contemplated to be a continuing offence which can be committed even after the murder of the person kidnapped for ransom. He submits that any error in the framing of the charge can be cured by invoking Section 464 CrPC.

15. Having considered the submissions of the counsel, this Court finds no merit in this petition. The contention of the learned counsel for the petitioner that the remand of the case should have been to the JJB and not to the trial court is untenable. It is plain from the Supreme Court's judgment in *Vimal Chadha* that it made a distinction between the trial court presided over by the learned ASJ and the JJB. From the operative portion of the judgment in *Vimal Chadha* it is apparent that the Supreme Court remanded the case to the trial court, which obviously meant the court of the learned ASJ. Moreover since the judgment dated 11th September 2007 of the High Court sending the matter to the JJB was impliedly set aside by the Supreme Court, the logical corollary was that the remand of the case had to be to the trial court and not the JJB.

16. Next, the issue whether the ransom calls constituted a continuing offence is considered. Even if one were to proceed on the footing that the school leaving certificate showing the date of birth of the petitioner as 20th January 1985 should alone be taken to be the relevant piece of evidence for

determining the age of the petitioner as on the date of the commission of the offence, after the judgment of the Supreme Court in *Vimal Chadha* it is no longer open for the petitioner to contend that it is 18th January 2003 which alone is the date of the commission of the offence. The case of the prosecution is that even if the date of the murder of the complainant's son is taken to be as 18th January 2003 the ransom calls were made on 19th January 2003, 10th March 2003 and 11th March 2003. If the making of the ransom calls after 19th January 2003 constitutes a continuing offence punishable under Section 364A IPC, then the petitioner would not be a juvenile as on those dates, even on the basis of the school leaving certificate.

17. Section 364A IPC reads as under:

“364A. Kidnapping for ransom, etc.

Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.”

18. The above provision covers a situation where the murder of a person who was kidnapped for ransom has already taken place, and the ransom calls continue to be made thereafter. This is plain from the wording “or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, **or causes hurt or death to such person in order to compel** the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act.....” (emphasis supplied)

19. The Supreme Court has in *Malleshi v. State of Karnataka* explained the position as under (SCC @ p.98-99):

“11. The offence of abduction is a continuing offence. This Section was amended in 1992 by Act XLII of 1993 with effect from 22.5.1993 and it was subsequently amended in 1995 by Act XXIV of 1995 with effect from 26.5.1995. The Section provides punishment for kidnapping, abduction or detaining for ransom.

12. To attract the provisions of Section 364A what is required to be proved is (1) that the accused kidnapped or abducted the person; and (2) kept him under detention after such kidnapping and abduction; and (3) that the kidnapping or abduction was for ransom.

15. In the instant case as the factual position found by the trial court and the High Court goes to show, the object of abduction

was for ransom. This was clearly conveyed to the victim PW-2. He was even conveyed the amount to be paid. It cannot be laid down as a strait-jacket formula that the demand for payments has to be made to a person who ultimately pays. By way of illustration it can be said that a rich business man is abducted. He is told that for his release his family members have to pay a certain amount of money; but money actually belongs to the person abducted. The payment for release is made by the persons to whom the demand is made. The demand originally is made to the person abducted or kidnapped. After making the demand to the kidnapped or abducted person merely because the demand could not be conveyed to some other person, as the accused is arrested in the meantime, does not take away the offence out of the purview of Section 364A. It has to be seen in such a case as to what was the object of kidnapping or abduction. The essence of abduction as noted above is causing to stay in isolation and demand for ransom. The demand in the present case has already been made by conveying it to the victim. In Netra Pal's case (supra) the High Court noted that there was no demand to pay. The factual position in that case as noted above is that the victim was a child to whom no demand could have been made. In that background the High Court took the view that Section 364A has no application as no demand has been communicated. The position factually is different here. Ultimately the question to be decided is "what was the intention? Was it demand of ransom"? There can be no definite manner in which demand is to be made. Who pays the ransom is not the determinative fact, as discussed supra."

20. The legal position was reiterated in *Vinod v. State of Haryana*.

21. In the present case, as per the prosecution version, the making of the ransom calls on 19th January, 10th and 11th March, 2003 even after murdering the deceased on 18th January 2003 would clearly constitute the offence under Section 364A IPC. The submission of the counsel for the petitioner that at the best those calls would constitute the offence of cheating is hereby rejected.

22. There is merit in the submissions of the learned Senior Counsel for the complainant that even if the charges as framed suggest that according to the prosecution the offence took place on 18th January 2003 alone the error, if any, in the framing of such charge can be cured with reference to Section 464 CrPC. The said provision reads as under:-

“464 - Effect of omission to frame, or absence of, or error in, charge.(1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may—

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge.

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”

23. In the considered view of this Court, the error in not framing a specific charge by mentioning the ransom calls made on 19th January, 10th and 11th March 2003 is a curable omission which, in terms of the judgment in *Vimal Chadha* should be corrected. The charges require to be corrected by the trial court itself and it is directed to do so without any further delay.

24. For all of the aforementioned reasons, there is no merit in this petition and it is dismissed as such. The applications also stand dismissed.

S. MURALIDHAR, J.

MARCH 13, 2009

ak