

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 2nd March, 2010

+ **CRL.APPEAL NO.777/2001**

MAHESH KUMAR Appellant
Through: Mr.S.D.S.Rathore, Advocate.

versus

STATE Respondent
Through: Ms.Richa Kapoor, A.P.P.

CRL.APPEAL NO.980/2001

RAM ASHISH Appellant
Through: Mr.Ikrant Sharma, Advocate.

versus

STATE Respondent
Through: Ms.Richa Kapoor, A.P.P.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers 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. Vide judgment and order dated 17.9.2001, acquitting Accused No.2 Somnath for the reason no incriminating evidence surfaced against him, appellant Mahesh has been convicted for the offences punishable under Section

363/364-A IPC. Appellant Ram Ashish has been convicted for the offence punishable under Section 368 IPC. Vide order on sentence dated 21.9.2001 both have been sentenced to undergo imprisonment for life.

2. In returning a verdict of guilt against appellant Mahesh Kumar, the learned Trial Judge has held that the ransom notes Ex.PW-1/C and Ex.PW-1/D have been proved to be in the handwriting of Mahesh Kumar. The second piece of incriminating evidence used against Mahesh Kumar is the finding returned that the prosecution has successfully established that it was he who came to collect the ransom amount. Lastly, the learned Trial Judge has held that the prosecution has successfully proved that pursuant to his disclosure statement the kidnapped child was recovered from the house of co-accused Ram Ashish.

3. Qua Ram Ashish the evidence is the recovery of the kidnapped child from his house pursuant to the disclosure statement of Mahesh Kumar.

4. As regards the incriminating evidence that the ransom notes Ex.PW-1/C and Ex.PW-1/D were in the handwriting of Mahesh Kumar, we note that his sample writings were obtained when he was in police custody and the provision of Section 5 of the Identification of Prisoners Act

1920 has not been complied with. In view of the decisions reported as AIR 1980 SC 791 State of U.P. vs. Ram Babu Mishra, 1994 (5) SCC 152 Sukhvinder Singh & Ors. vs. State of Punjab and AIR 2003 SC 4377 State of Haryana vs. Jagbir Singh & Ors., we have to eschew reference to said incriminating evidence.

5. Whether the kidnapped child was recovered pursuant to the disclosure statement made by Mahesh Kumar or otherwise has become a matter of debate for the reason PW-1, the father of the kidnapped child has not fully supported the case of the prosecution.

6. With reference to how his daughter was recovered, he deposed that on the day when ransom had to be paid, he reached the spot where the ransom had to be paid and waited till 2:00 AM (night). Nobody came to collect the ransom. He deposed that next day around 10:00 PM in the night Mahesh Kumar came to him and disclosed that he was not only the author of the ransom notes but also that he had confined his daughter. He took them to Uttam Nagar from where his daughter was recovered.

7. Being declared hostile by the learned APP he denied being a witness to any disclosure statement recorded in his presence. He denied that pursuant thereto appellant Mahesh

Kumar took the police to the house of Ram Ashish in Uttam Nagar and got the girl recovered. However, he admitted his signatures on the recovery memo Ex.PW-1/H which records that after Mahesh Kumar picked up the money, he was apprehended and the money was recovered from him. He was confronted with the portion in his statement recorded by the police where it was recorded that the disclosure statement of Mahesh was recorded in his presence. He admitted that his signatures were at point 'A' on the disclosure statement Ex.PW-1/J of Mahesh. Having denied that he accompanied the police when his daughter was recovered, he admitted his signatures at point 'A' on the recovery memo Ex.PW-1/K wherein recovery of his daughter has been shown from the house of Ram Ashish.

8. As against that, the two police officers involved in the investigation, namely, Const.Satish Kumar PW-4 and SI Deen Dayal PW-5 have deposed that Mahesh Kumar came to collect the ransom amount. When he picked up the ransom amount which was kept at a spot as per his directions in the ransom note, he was arrested. He made a disclosure statement and pursuant thereto led the police to the house of Ram Ashish wherefrom Sonam was recovered.

9. We note that Sonam, the kidnapped child, was

examined as PW-2. She deposed that Mahesh Kumar had taken her away from her house but failed to answer the question as to where Mahesh had kept her.

10. It is true that PW-1 has dented the case of the prosecution by turning hostile on material points. But, PW-4 and PW-5 have fully supported the case of the prosecution. That the disclosure statement of Mahesh Kumar bears the signature of PW-1, a fact which he has admitted, that the recovery memo of the girl bears the signature of Mahesh Kumar, a fact which he has admitted, supports the case of the prosecution as proved by PW-4 and PW-5.

11. It may be true that Sonam has not stated anything as to where she was kept. But, the same appears to be due to the reason she comes from a poor background and was aged 7 years when she deposed in Court. She was about 4½ years old when the incident took place. Obviously, the young girl would not remember much.

12. It would also be of interest to note that whereas the accused chose to cross-examine PW-5, PW-4 was not even subjected to any cross-examination. Thus, we confirm two findings returned by the learned Trial Judge qua Mahesh. The first is of Mahesh Kumar being apprehended at the spot when he came to collect the ransom money and after he picked up

the ransom note he was apprehended at the spot. The prosecution has also successfully proved that after Mahesh Kumar made the disclosure statement he led the investigating officer to the house of Ram Ashish from where the young girl was recovered.

13. But, as held by a Division Bench of this Court in the decision reported as 149 (2008) DLT 306 Rafiq & Anr. vs. State the proof of a threat to the life or body of the victim, either to the victim or to the person from whom money is sought to be extracted is an essential ingredient of the offence punishable under Section 364-A IPC. Same view has been taken by the Supreme Court in the decision reported as JT 2007 (5) SC 48 Vishwanath Gupta vs. State of Uttranchal.

14. If we peruse the two ransom notes we find that in the first ransom note it has been stated that if PW-1 desires the return of his daughter he must pay the ransom in sum of Rs.15,000/-. In the second ransom note it has been conveyed that if the ransom is not paid his daughter would be sold.

15. It is obviously not a case where any threat was extended either to the victim or to her father of causing death or causing injury to the kidnapped child. We note that Kumari Sonam has not stated that she was maltreated by either accused.

16. Thus, the offence made out against Mahesh Kumar does not attract Section 364-A IPC. He has committed the offence punishable under Section 363 IPC as also the offence punishable under Section 367 IPC.

17. Qua Ram Ashish, a question would arise, whether he simply helped Mahesh in kidnapping the child or shared the same intention or knowledge as that of Mahesh.

18. Now, we have already returned a finding that the intention of Mahesh Kumar was to sell the girl if ransom was not paid.

19. Save and except the evidence of the kidnapped child being recovered from the house of Ram Ashish we find no evidence where from his intention or knowledge can be gathered.

20. Noting that the young girl has spoken not a word about Ram Ashish we are of the opinion that his conviction under Section 368 IPC by making him vicariously liable for the offence punishable under Section 367 IPC may not be sustainable. Accordingly, we hold that Ram Ashish is guilty of the offence punishable under Section 363/34 IPC.

21. The maximum sentence for the offence of kidnapping is 7 years. The maximum sentence of the offence punishable under Section 367 IPC is 10 years.

22. Noting that Mahesh has already undergone an actual sentence of 6 years and 1 month when he was released on bail and had earned remissions of 1 year and 11 months, we are of the opinion that the ends of justice would be met if Mahesh is sentenced to undergo imprisonment for the period already undergone for both offences.

23. As regards Ram Ashish we note that by the time he was admitted to bail he had already undergone a sentence of about 1 year and 6 months. But, considering the fact that his role was subsidiary and that he has no prior criminal record, further noting that he was aged 19/20 years when he participated in the commission of the crime with Mahesh Kumar, we feel that the ends of justice would be met if he is also sentenced to undergo imprisonment for the period already undergone.

24. In view of the instant decision, the appellants need not surrender or suffer any further sentence and hence the bail bond and surety bonds furnished by them are discharged.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

March 02, 2010
dkb