

11

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

% *Judgment Reserved on : February 26, 2010*
Judgment Delivered on : March 08, 2010

CRL.APPEAL No.194/2008

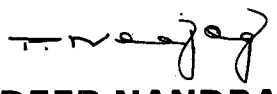
BEGHRAJ Appellant
Through: Ms.Ritu Gauba, Advocate
versus
STATE Respondent
Through: Mr.M.N.Dudeja, Advocate

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?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

For orders see Crl.A.No.672/2007.


(PRADEEP NANDRAJOG)
JUDGE


(SURESH KAIT)
JUDGE

March 08, 2010
'nks'

Signature Not Verified

Digitally Signed By: AMULYA
Certify that the digital file and
physical file have been compared and
the digital data is as per the physical
file and no page is missing.

Crl.A.No194/2008

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

% *Judgment Reserved on : February 26, 2010*
Judgment Delivered on : March 08, 2010

+ **CRL.APPEAL No.672/2007**

KIRAN Appellant
 Through: Ms.Ritu Gauba, Advocate
 versus

STATE Respondent
 Through: Mr.M.N.Dudeja, Advocate

CRL.APPEAL No.194/2008

BEGHRAJ Appellant
 Through: Ms.Ritu Gauba, Advocate
 versus

STATE Respondent
 Through: Mr.M.N.Dudeja, Advocate

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?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. As per the prosecution co-accused Dharambir, who has been acquitted, was the mastermind behind the conspiracy. At his instance, the appellants as also the juvenile

accused Sonu son of Dharambir, contrived to kidnap Deepak aged 8 years son of Radhey Shyam to extract ransom from Radhey Shyam and in the process, the appellants to whom illegal custody of Deepak was handed over by Radhey Shyam and Sonu, murdered Deepak whose body was recovered from the precincts of a sugarcane field on the National Highway Khatoli towards Meerut in the State of Uttar Pradesh.

2. As deposed to by Radhey Shyam PW-2 and Usha PW-1, the father and mother respectively of Deepak, he went missing from his house on 03.02.2004 and since Deepak could not be located Radhey Shyam reported his son being missing to the police, which information was recorded in the form of his statement Ex.PW-2/A by the Duty Officer PS Narela on 04.02.2004 and an FIR for the offence punishable under Section 363 IPC was registered on 04.02.2004 at 12:20 in the Noon. The child could not be located.

3. On 05.02.2004 a telephone call was received at telephone No.27784291 installed in the house of Gopi Chand PW-3, a neighbour of Radhey Shyam, with the caller informing Gopi Chand to call Radhey Shyam, who was summoned by Gopi Chand and was asked by the caller whether he wanted to meet his son. As deposed to by Radhey Shyam, he replied in

the affirmative. The caller told him to wait for a further call at around 12:00 Noon. But, before 12:00 Noon, at around 11 or 11:15 A.M. another call was received and Deepak spoke to him. The person calling demanded ransom in sum of Rs.2 lacs for release of Deepak and informed him that the place for delivering money would be intimated later. Since the phone of Gopi Chand had a caller ID facility, Radhey Shyam noted the telephone numbers wherefrom the calls were made and immediately proceeded to the police station to pass on said information to the police. As deposed to by SI R.K. Mann PW-17, Radhey Shyam met him on 05.02.2004 and informed him that at the number 27784291 two calls were received from telephone Nos.1396223082 and 139622211 and that the caller demanded ransom in sum of Rs.2 lacs to release Deepak and that Deepak had spoken to him. Thus, he got added in the FIR the offence punishable under Section 364A IPC and arranged a raiding party to go to district Muzaffar Nagar for the reason the two telephone numbers from where the calls were made, with reference to the area code, related to said place. Besides himself, the raiding party consisted of Ct. Ramesh Kumar PW-11 and Ct. Mange Ram PW-9. The father of the kidnapped child was also taken along and they reached Muzaffar Nagar in the

State of Uttar Pradesh. They found out from the telephone exchange that the two telephone numbers were installed at a STD shop at bus stop village Morna and a STD booth at Behra Sadat in Muzaffar Nagar District.

4. The police team managed to track down the two booths which belonged to Irfan Mohd. PW-4 and Bharat Bhushan PW-5 respectively and as deposed to by the said two persons and SI R.K.Mann PW-17 as also Ct. Mange Ram PW-9 and Ct. Ramesh Kumar PW-11, they i.e. Irfan Mohd. and Bharat Bhushan told that two persons along with a young boy had visited their telephone booths to make calls. They handed over print outs of bills Ex.PW-4/A, Ex.PW-4/B and Ex.PW-5/A by generating the same from the machine attached to the telephone number which evidence calls made from their respective STD booths to the number 27784291 on 05.02.2004.

5. As deposed to by Radhey Shyam PW-2 as also Irfan Mohd. PW-4 and Bharat Bhushan PW-5 as also the three police officers who were a part of the raiding party, when Irfan Mohd. and Bharat Bhushan gave the description of the two men, Radhey Shyam immediately guessed that one was the co-brother of Dharambir and the other was his brother-in-law i.e.

the appellants. He went to the house of the in-laws of his brother Dharambir in village Kemada near Muzaffar Nagar town where nobody was present. His aunt Gharvari told the police team that the appellant Beghraj was in village Lalpur. They went to village Lalpur and learnt that appellant Beghraj was working in Gupta brick kiln and on reaching the said brick kiln located the shed where Beghraj was staying and not only found him but even found Kiran.

6. The two were interrogated and they made separate confessional-cum-disclosure statements Ex.PW-9/A and Ex.PW-9/B informing that Deepak had been killed by them with a knife and body dumped in a Sugarcane field on the National Highway Khatoli towards Meerut. The two led the police team to a Sugarcane field and at a distance of about 250 yards from the road, lying hidden in Sugarcane field, jointly pointed out the spot informing that the dead body of Deepak was concealed within the Sugarcane and indeed the body of Deepak was found at the said spot. The body was seized vide memo Ex.PW-9/F along with a T-Shirt, a pair of chappals of Deepak as also blood stained earth and control-earth.

7. The recovery of the dead body of the child was witnessed in addition by SI Dharam Pal Singh PW-16 then posted at PS Kotwali Khatoli, a fact deposed to by him.

8. Thereafter, the appellant jointly led to a spot little away from where the dead body of the child was recovered and pointed out the spot wherefrom a knife was recovered.

9. The dead body was sent to the Mortuary where Dr.B.N.Acharaya PW-14 conducted the Post Mortem on 07.02.2004 opining on the report Ex.PW-14/A, proved by him when he appeared as a witness in court, that the child had died 38/48 hours prior to when he conducted the post mortem; which probablizes that the child had been killed around 10:00 P.M. on 05.02.2004.

10. The appellants told the police, as recorded in their confessional statements, that the crime was committed at the behest of Dharambir, the elder brother of Radhey Shyam who was found absconding from his house and was arrested on 08th February, 2004. Dharambir confessed to the crime as per his disclosure statement Ex.PW-17/I informing that since his mother had deprived him a share in the ancestral property and Radhey Shyam was the beneficiary, he hatched the plan to

kidnap Deepak and extract money from his brother. He and his son Sonu enticed Deepak and handed him over to the appellants who were to carry out the remainder of their plan.

11. For the reason the confession to the police Dharambir was inadmissible evidence, nothing further surfacing against Dharambir, he has been rightly acquitted. Being juvenile, Sonu was sent for trial before the juvenile court.

12. The appellants have been convicted on account of the dead body of Deepak being recovered pursuant to their disclosure statements and at their jointly pointing out the place from where the dead body was recovered. The second incriminating evidence against the appellants is the testimony of Dr.B.N. Acharaya PW-14 and his opinion Ex.PW-14/C that the knife got recovered by the appellants, sketch whereof was Ex.PW-14/B could possibly be the weapon with which Deepak was killed. Lastly, the testimony of Irfan Mohd. PW-4 and Bharat Bhushan PW-5, who stated in court that the appellants were the two persons who had come to their telephone booths with a young boy and rang up the numbers 2778419. The two stated that the receipts Ex.PW-4/A, Ex.PW-4/B as also Ex.PW-

5/A respectively were handed over by them to the police from Delhi.

13. Learned counsel for the appellants submitted that having not recorded the statement of Radhey Shyam's Mausi Gharvari, who as per Radhey Shyam told them the whereabouts of appellant Beghraj and further having not even examined her as a witness, testimony of Radhey Shyam that Gharvari gave them information of the whereabouts of appellant Beghraj was inadmissible in evidence, being hearsay. Second submission urged was that, as deposed to by Irfan Mohd. PW-4 and Bharat Bhushan PW-5 as also by Radhey Shyam PW-2, the appellants were brought to the booths of the said two persons and their face was shown to the said two persons and thus the credibility of the testimony of Irfan Mohd. and Radhey Shyam pertaining to the dock identification of the appellants was tainted. As a limb of the second submission, learned counsel urged that notwithstanding the preceding noted taint, no TIP being conducted further rendered unsafe the Dock Identification by the witnesses in the court for the first time. Third submission urged was that the dead body was recovered from an open field as deposed to by Radhey Shyam, Ct. Mange Ram, Ct. Ramesh Kumar, SI Dharam Pal Singh and SI

R.K. Mann and thus, urged learned counsel, that the possibility of the police having learnt about the dead body from some other source could not be ruled out thereby discrediting the recovery of the dead body at the instance of the appellants.

14. We would be failing not to note that the witnesses of the prosecution who have deposed to the recovery of the dead body have narrated facts which tend to show as if everything happened on 05th February, 2004; without there being clarity as to what part of the investigation was conducted on 05th February, 2004 and which part spilt over to 06th February, 2004. We wish to clarify on the said aspect to clear the clouds.

15. Two times being documented and hence there can be no scope of witnesses confusing on the said is the time 11 hours, 7 minutes and 47 seconds and the date 05.02.2004 recorded in Ex.PW-5/A which corresponds to the time 11:15 A.M. deposed to by Radhey Shyam when the second telephone call demanding ransom was made.

16. The other is the time on the arrest memos Ex.PW-17/C and Ex.PW-17/B which shows that the appellants were

apprehended at 5:30 P.M. and 6:00 P.M. respectively on 06.02.2004.

17. Thus, the time 11 hours, 7 minutes and 47 seconds and the date 05.02.2004 is documented as also the time of arrest being 5:30 P.M. and 6:00 P.M. on 06.02.2004 is documented.

18. It is apparent that Radhey Shyam who received the second telephone call at 11:15 A.M. on 05.02.2004 would have consumed some time to go to PS Narela and pass on the information of ransom being demanded. Further time would be consumed in recording his statement and making entry in the FIR for the offence of kidnapping for ransom. Further time would be required to find out which police officers are available so that raiding team would be constituted. A vehicle had to be arranged and modalities of the raid had to be worked upon. All this would consume time. The police party leaving Delhi by early evening is the most probable time for the reason after 11:15 A.M. by the time all afore-noted activities were over at least 3 to 4 hours would be consumed. Muzaffar Nagar is at a distance of 150 kms from Delhi and on a rickety pot-holed narrow 30 feet wide, so called National Highway, it takes at least 4 hours in reaching Muzaffar Nagar.

The earliest the police team could have reached there would be not before 7:00 or 8:00 P.M. Before the STD booth owners could be located, the location of the STD booths had to be found out. A visit was required at the local telephone exchange. This would have consumed further time. As deposed to by PW-4 and PW-5 their STD booths were not in the town of Muzaffar Nagar. The telephone booth of Irfan Mohd. was at the bus stop of village Morna. The STD booth of Bharat Bhushan was at Behra Sadat in District Muzaffar Nagar. PW-4 having deposed that the team from Delhi Police having met him at around 5:30 P.M. on 05.02.2004 is obviously an error of time stated by him.

19. The narratives of Radhey Shyam and the police personnel from Delhi commencing from their leaving Delhi on 05.02.2004 till the dead body of the child was recovered is a continuous narration for the obvious reason everything was happening in continuity and 05th getting spilt over to 06th is the most probable thing to happened keeping in view the fact that before the appellants could be apprehended, as deposed to by Radhey Shyam, when from the description of the two men who had visited the telephone booths of PW-4 and PW-5, he guessed that the two men were the appellants, he had to go to

the village of his brother co-accused Dharambir because the appellants were the relations of Dharambir and only he could give them information as to where the appellants were. Further, as deposed to by Radhey Shyam, nobody being found in the house of Dharambir, Radhey Shyam's Mausi Gharvari was contacted who gave the whereabouts of the appellants in village Lalpur with further information that Beghraj was working in Gupta Brick Kiln which had to be located in the said village, thereby consuming further time, not in minutes but in hours.

20. On the issue whether testimony of Radhey Shyam on the point that Gharvari gave them the particulars of the whereabouts of appellant Beghraj is hit by the rule against admitting hearsay evidence, suffice would it be to state that in the illuminative book on 'THE ORIGINS OF ADVERSARY CRIMINAL TRIAL' by John H. Langbein at page 239, there is a reference to "*Pursuit hearsay*".

21. The debate pertaining to admission of evidence of dead persons or those who could not be found or easily brought before the court hinged upon not admitting hearsay evidence because hearsay evidence had three deficiencies. Firstly, the maker of the statement not being put to oath, it

lacked credit because of the belief that a person under oath would, if nothing else, be scared of perjury. Secondly, the opposite party would be denied the beneficial tool of cross-examination and lastly may encourage tailor made tutored statements to be introduced by alleging the same to be made by the third party. The other view was that necessity compelled the admission of such statements for the reason why should relevant evidence be excluded in a tryst with truth. The latter point won the debate. A man in pursuit is not expected, due to necessity, to keep on recording whom he met, his or her address etc. for the reason when in pursuit, any useful information which facilitates pursuit is welcomed. A pursuit is an onward march where speed is of utmost importance and thus a person in pursuit is not to be tied down with the technicalities of making a contemporaneous record of the persons he or she met, much less requiring said person to be cited as a witness. That apart Gharvari, if examined would have thrown no light on the crime save and except telling the court that she gave the whereabouts of Beghraj to the police team and Radhey Shyam. That Radhey Shyam and the police team have traced down Beghraj within about a little over one day of receipt of the ransom call at around 1:15 A.M. on

05.02.2004, Beghraj being apprehended and formally arrested at 6:00 P.M. on 06.02.2004 itself lends credibility to the testimony of Radhey Shyam and the police officers of the steps taken to track Beghraj and Kiran.

22. That apart, pertaining to a recovery which attracts Section 27 of the Evidence Act, in what manner a person is arrested loses all importance if the place of arrest is not in dispute.

23. Now, the testimony of SI R.K.Mann PW-17 as also the two other police officers from Delhi and Radhey Shyam establish that the dead body of Deepak was recovered from a spot jointly pointed out by the appellants and that the dead body was lying concealed in a Sugarcane field at a distance of 250 yards from the main road. The date when recovery was made is 06.02.2004. It is winter time in Northern India. Bodies decompose slowly as the temperature drops. The post mortem report Ex.PW-14/A probabalizes the time of death at around 10:00 P.M. on 06.02.2004. Obviously, nobody could smell any stench; probably there was no stench emanating from the body. Thus, there is great credibility in the testimony of the witnesses of the prosecution who have deposed to the dead body of Deepak being recovered at the instance of the

appellants. The answer to the question: *wherefrom could the team of police personnel zero at the place where the dead body was recovered?* brings out the credibility of the evidence. We can think of no other answer except the knowledge of the appellant, the place where the body was dumped, a place which the police could not have accessed other than with the aid of the knowledge of the appellants.

24. Recovery of dead bodies have been held to be highly incriminating evidence as held in the decisions reported as AIR 1947 PC 67 Pulukuri Kottaya & Ors. vs. Emperor; 1989 CrLJ (NOC) 200 (Gauhati) Chakidhar Paharia vs. State of Assam; 1986 CrLJ 220 Parimal Banerjee vs. State; AIR 1963 SC 1074 Ram Lochan Ahir vs. State of West Bengal as also in a decision by a Division Bench of this Court titled Dost Mohd. & Anr. vs. State, CrL.A.No.385/2008, decided on 01st February, 2010.

25. That a knife opined to be the possible weapon of offence was recovered by the police immediately after the dead body of Deepak was recovered, the distance between the spot where the knife was recovered and where the dead body was recovered being about 15 steps coupled with the fact that the spot where the knife was recovered was pointed out jointly

by the appellants is further incriminating evidence. In the instant case the circumstance of the proximity of the place where the dead body and the knife respectively were recovered as also the proximity of the time of recovery gives greater incriminating value to the recovery of the knife, than is ordinarily attributed to the recovery of ordinary knives.

26. On the issue of PW-4 and PW-5 identifying the appellants as the ones who had visited their telephone booths along with a young boy i.e. the deceased, the controversy raised by learned counsel for the appellants can be dealt with on an alternative route. Radhey Shyam has stated that when the description of the two men was given by the owners of the telephone booth he immediately guessed that one was the co-brother of Dharambir and the other was the brother-in-law of Dharambir i.e. the appellants. That the appellants were tracked down within a few hours thereafter and got recovered the dead body of his son, is a fact which by itself lends credibility to PW-4 and PW-5 disclosing such features of the appellants wherefrom a person known to them could reasonably identify them i.e. is proof of the fact that the features of the appellants were well imprinted in the mind of the two witnesses that the two could describe the features

with such sufficient clarify and particulars that the recipient of the information was able to immediately identify the persons being described.

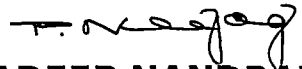
27. The peculiar circumstances of the instant case, features whereof we have brought out hereinabove pertaining to the identification of the appellants with reference to their description given by PW-4 and PW-5 to Radhey Shyam has to be factored in by us and we thus conclude that in view of the evidence brought before us any reasonable person would return the finding that there is credibility of the highest degree in the testimony of PW-4 and PW-5.

28. We may dispense an erroneous impression in the absence of the Test Identification Proceedings, in all cases Dock Identification has not to be acted upon. In the decision reported as AIR 1988 SC 345 Hari Nath & Anr. vs. State of U.P. it was observed that test identification relates to the field of investigation and evidence is what witnesses depose in court. As a rule of prudence and caution, courts rely upon a successful Test Identification by the witness of the accused as reinforcing his testimony of identifying the accused in court. But, as held in para-11 of the decision where there are reasons to accept that the witness gained an enduring impress of the

identity of the accused on the mind and the memory of the witness, courts should not increase the difficulties of the prosecution by magnifying the theoretical possibilities.

29. We find no merit in the appeals which are dismissed.

30. Since both appellants are in jail, we direct that a copy of this decision be sent to Superintendent, Central Jail Tihar to be made available to the appellants.


(PRADEEP NANDRAJOG)
JUDGE


(SURESH KAIT)
JUDGE

March 08, 2010
'nks'