

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

+ **CRL.REV.No. 433/2011**

% *Judgment reserved on: 5th December, 2011*
Judgment delivered on: 15th December, 2011

MOHD. ZAKIR Petitioner
Through: Mr.Arun Sharma, Adv.
versus

STATE Respondents
Through: Ms.Rajdipa Behura, APP for the State.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide order dated 27.09.2011, this Court has passed the following order:

1. Ld. Counsel for the petitioner submits that vide judgment dated 17.09.2011, the petitioner was held guilty under Section 385 Cr.P.C. and vide order of sentence dated 24.09.2011 he was sentenced to undergo SI for one year and the fine of Rs.10,000/- Being aggrieved the petitioner assailed the aforesaid order before Sessions court. Vide judgment dated 17.09.2011, ld. ASJ has modified the order passed by the ld. MM subject to the extent that if the petitioner deposits Rs.01 lakh only in that case imprisonment would be for 06 months.

2. Vide this petition the petitioner has challenged the impugned judgment dated 17.09.2011. As per the allegation nude photographs of the complainant were sent firstly to one Parvej at Mumbai who alleged to be first fiancé of the

complainant and thereafter to one shop keeper Naved Irshad, who is neighbouring shopkeeper of the husband of the complainant, who further showed the photographs to the husband of the complainant.

3. Ld. Counsel for the petitioner further argued that the husband of the complainant and the father of the complainant were not examined. He has further pointed out that on this issue Panchayat was called in which one Qureshi was the mediator. Prosecution has also not examined Qureshi.

4. Ld. Counsel for the petitioner further submits that, the photographs as alleged have not been sent to FSL, therefore, there is no authentication of the same. Thus, ld. ASJ has wrongly decided the case.

2. Ld. Counsel for the petitioner submits that there is an unexplained delay of 7-8 years in lodging of the FIR. The court below has recorded unreasonable justification that the offence was continued to 01.04.2002 when the petitioner shown to have visited the Shop of PW-4 Naved for handing over the copy of the photographs while repeating his demand of Rs.5 Lacs. Therefore the offence continued up to 01.04.2002 while the FIR is dated 03.04.2002.

3. Ld. Counsel for the petitioner further submits that firstly, the photographs in question never sent to FSL for authenticity nor there is any witness of demand of Rs.5 Lacs from the complainant. It is also not on record that the family of the complainant was capable to meet the alleged demand of the petitioner. In the absence of the aforesaid antecedent, the petitioner cannot be convicted merely on the bald statement of the complainant.

4. PW-4 Naved had handed over only 4 photographs to the police, but there were 10 photographs available on record as Ex.P-1 collectively. It is

recorded by the Court below that PW-4 Naved had handed over only 4 photographs but the remaining 6 photographs were got recovered from the house of complainant by the petitioner after he was arrested by the police. However, since the IO of the case has not been examined, this memo could not be formally exhibited on record.

5. Ld. Counsel for the petitioner has also drawn the attention of this court to the cross-examination of PW4 Naved and has submitted that the Court below has also gone wrong while recording that when he handed over the photographs to IO vide memo Ex.PW4/A, photographs were sealed by IO. On this score, record reveals that there is nothing in the above memo to show that the photographs were sealed in any manner after being seized.

6. Ld. APP on the other hand submitted that PW-3 and PW-4 have fully proved the prosecution case. Therefore, there is no infirmity in the impugned judgment / order passed by the Court below. Accordingly, the instant petition is liable to be dismissed.

7. I note, it is recorded by the Court below that the petitioner / convict was telephonically blackmailing the complainant and her family. On this issue, ld. Counsel for the petitioner submits firstly that no call records were preserved or ever proved on record. The incident of telephonically blackmailing mentioned by PW-3 pertains to earlier attempts made by convict to blackmail complainant Ms. Bushra Khatoon. She belongs to a middle class family of middle class values and had all the apprehension of her being defamed and her reputation being ruined. The trial court has also recorded that initially they tried to sort out the matter socially in December, 2001 when the petitioner was known to have agreed initially to return the photographs and negative, but only when he is paid Rs.5 Lacs.

8. It is also on record that demand has not been made directly to the complainant and only through Shopkeeper PW-4 Naved. As per the complainant and PW-3 initially Rs.5 Lacs were demanded from the father of the complainant. It is to note that father of the complainant has not even made as a witness, therefore not examined.

9. The complainant also failed to name the place where she was taken and her photographs were clicked. The Court below has given vague reason by saying that because of dizziness which might have caused by the drinking of the so called drug in cold drink, though not the case of complainant about giving of drug but did not appreciate that she had visited the place when she was not given cold drink and therefore not knowing about the place is a strange.

10. It is not believable that after drinking the alleged cold drink, even the prosecutrix did not become vigilant to observe while going. She got lift from the accused for going back to her home and admittedly nothing was done by the petitioner nor taken any advantage of her unconsciousness, but the entire conduct of the prosecutrix has falsified the truth ness of the prosecution. The alleged photographs which are in question had not even placed before the trial court. The petitioner is convicted only on the deposition of PW-4 Naved, alleged Shopkeeper to whom the petitioner had handed over these photographs and the same were given and shown to the ex-husband of the complaint.

11. The said photographs were continued to remain with ex-husband, who had not been examined. Therefore, the prosecution story is totally failed and the conviction of the petitioner only on the mere deposition of PW-4 Naved is bad in law.

12. It is also beyond the human conduct that even as the complainant was blackmailed and threat was extended in case she would not marry then photographs would be shown to the relatives and friends, after two three days of the incident even then no complaint was made, matter was not informed to the police nor any one.

13. If it is presumed that the photographs were taken when she was in unconsciousness situation, then how does she knew that the photographs were taken and she was blackmailed. This fact could know only when the petitioner allegedly handed over the photographs to PW-4 Naved, Shopkeeper.

14. The photographs in question were sent to fiancée of the complainant namely Parvez at Mumbai. PW-3 Khalid Qureshi has deposed only that he has some evidence as he stated that the photographs were distributed.

15. Keeping the above discussion into view, I am of the opinion that the Court below has gone wrong by not appreciating the evidence properly, while convicting the petitioner.

16. Accordingly, I set aside the Judgment dated 22.09.2010, Order on Sentence dated 24.09.2010 and Appellate Order dated 17.09.2011.

17. Consequently, the petitioner is acquitted and discharge from all the charges.

18. The petitioner is on bail, therefore his personal bond and surety bond are cancelled.

19. No order as to costs.

SURESH KAIT, J

December 15, 2011

jg