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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A. 12/2011

RAJESH KUMAR

..... Appellant

Through : Thakur Virender Pratap Singh Charak and Ms.
Shubhra Pushpendar Singh Charak, Advocates.

versus

STATE (GNCT OF DELHI)

..... Respondent

Through : Sh. Lovkesh Sawhney, APP.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G. P. MITTAL

ORDER

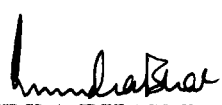
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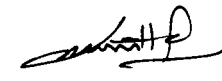
06.07.2011

CRL.A. 12/2011, Crl. M. (Bail) 15/2011 in CRL.A. 12/2011

By a separate order, the conviction and sentence recorded by the Trial Court are hereby altered; instead of the appellant's conviction under Section 364A IPC, we hold that he is guilty of offence punishable under Section 365 IPC. As far as his sentence is concerned, we note that the incident occurred on 18.02.2006. The appellant has apparently been in custody throughout. He has thus undergone nearly 5 ½ years' sentence. Having regard to the overall facts and circumstances, we are of the opinion that the ends of justice would be served if the sentence is confined to the period undergone.

In view of the above conclusions, the appellant shall be set at liberty forthwith. Release Warrants be issued immediately through the Superintendent Jail.


S. RAVINDRA BHAT, J


G. P. MITTAL, J

JULY
'ajk'

06, 2011

Signature Not Verified

Signing Date: 13.08.2024 7:08:35
Certify that the digital and physical file have
been compared and the digital data is as per
the physical file and no page is missing.

RAJESH KUMAR

..... Appellant

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| 1 | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2 | To be referred to Reporter or not? | YES |
| 3 | Whether the judgment should be reported in the Digest? | YES |

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. This judgment will dispose of an appeal directed against the judgment and order of the learned Additional Sessions Judge dated 12.08.2010 and 20.08.2010 in S.C. No.120/2008. By the impugned judgment, the appellant was convicted for committing offences punishable under Section-364A/34 IPC.

2. The prosecution alleged that Ravi @ Tinku (who deposed as PW-1 and referred to hereafter as such) went in search of his elder brother Raman - who deposed as PW-4 - in

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the evening of 18.02.2006 around 7:00 PM. Apparently Raman used to drive a vehicle for collecting proceeds of the day's sale of vegetables delivered to various customers in the morning. PW-1 did not return; the prosecution alleged that his father PW-3 had been contacted telephonically twice the same evening at 10:15 PM and 11:20 PM. The callers had told him that PW-1 was in their custody and would be released only upon his giving him ₹ 50,000/- as ransom at Mundka Phatak. PW-3 informed the police at 2:30 AM on 19.02.2006 and thereafter went home. It was further alleged that on 19.02.2006 PW-3 again received another phone call in the morning around 07:30 AM when his son's abductors reiterated the demand for ransom. PW-3 informed the telephone number since his telephone instrument had a caller I.D. display. It is alleged that PW-12 placed a call to the same number and later ascertain that the abductors had made a telephone call from a PCO situated at Agar Nagar, Prem Nagar-III. He led the police party and raided the premises where PW-1 had been detained. The appellant and one Dinesh were arrested the same day. After investigating the case, the appellant was charged for committing an offence punishable under Section-364A/34 IPC. Dinesh being a juvenile was sent for trial before the Juvenile Justice Board. The prosecution alleged that there were two other accused; however, they could not be arrested.

3. The appellant entered the plea of not guilty and claimed trial. The prosecution relied upon the testimonies of 12 witnesses besides exhibits produced before the Trial Court. After considering the materials placed before it, the Court convicted the appellant as charged.

4. Learned counsel for the appellant urges the impugned judgment is unsustainable because the conviction is based on the testimonies of PW-1 and PW-3 which are unsubstantiated in material particulars. It is urged that the so called demands made on telephone were never proved. In this regard, learned counsel submitted that the combined effect of testimonies of PWs 5, 6 & 7 showed that PW-5 only could identify the co-accused i.e. the juvenile Dinesh as someone who had placed the call from his PCO booth on 19.02.2006. Similarly, PW-6's testimony merely reveals that the police party had gone to his PCO sometime in February with a boy who had stated that he made a

phone call from there the previous night and that the witness had identified that boy and corroborated what was stated by him. The witness identified Dinesh and named another one as Chotu. Similarly, urged the Counsel, the testimony of PW-7 only proved that someone had called from the PCO manned by him on 19.02.2006; it was Dinesh who was facing trial before the Juvenile Justice Board. Having regard to the combined testimony of these witnesses, stated counsel for the appellant, the prosecution failed to prove that the appellant was in any manner connected with the incident, and certainly had neither demanded any ransom nor was in any way connected with the demand for ransom allegedly made through telephone on two days i.e. 18.2.2006 and 19.2.2006. Learned counsel highlighted that the testimony of PW-1 did not prove the prosecution's allegation of his having been forcibly abducted, detained against his wishes and threatened either with death or bodily harm so as to fulfill the ingredients necessary for proving offences under Section-364A IPC. It was argued that the PW-1's version of having been encircled and forced to accompanying the accused was highly improbable. Learned counsel highlighted that the spot where the incident occurred was crowded and a weekly market was normally held on Saturdays. Furthermore, submitted the counsel, the possibility of anyone - much less a young healthy boy aged 18 years - voluntarily accompanying or even being forced to accompany three others against his wishes, on foot, for more than a kilometer, was extremely remote. This had to be weighed with the prosecution's inability to prove a demand for ransom. It was emphasized that even though the prosecution was able to specify the telephone numbers where the calls were received (i.e. the telephone of PW-3), it made no attempt to secure any evidence to corroborate the calls made on the three occasions alleged by that witness. It was submitted that the entire story of demand having been made over telephone was believed by the Trial Court which recorded a conviction, in this regard, on the sole uncorroborated story of PW-3.

5. Learned counsel argued that the prosecution's version about the raid and the appellant's arrest cannot be believed because the seizure memo Ex.PW-1/B recording rescue of the victim expressly stated where PW-1 was rescued. However, this was not supported either by PW-1 (who deposed that his father was not present at that time) nor

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by PW-3, who stated that he was in the police post and that all documents were prepared there. It is submitted that this discrepancy or contradiction goes to the root of the manner and falsified entire prosecution story about the circumstances surrounding about the rescue of PW-1. Learned counsel argued that very crucially PW-3 did not anywhere state in the deposition that while demanding ransom, the abductors had threatened his son - PW-1 with bodily harm or threatened to kill or even remotely suggested anything to cause apprehension about the safety of PW-1. It was submitted that PW-1, in this regard, differed from statement recorded by him during the course of investigation i.e. PW-3/A. The prosecution, however, did not choose to seek permission of the Court to put leading questions to the said witness which injected the fatal infirmity to its allegations.

6. Learned counsel submitted that PW-3's depositions established that he along with neighbors went to the spot around 11:20 PM after receiving the telephone call. However, the prosecution did not choose to associate any such neighbour in the investigation nor cite them as witness. Had anyone in fact accompanied PW-3, their versions were material and would have lent assurance to the Court when it chose to record a conviction as it did. It was further argued that the testimony of prosecution witnesses also revealed that the place of incident where the kidnapping incident took place was in the midst of the crowded area. PW-1 did not anywhere depose that he was forced to go along with the abductors against his wishes or that they had threatened him with any weapon or harm. Furthermore, other omissions such as failure to recover a bicycle said to have been used by PW-1 (in the deposition made by PW-1) and the conflicting versions of PW-3 on this, also undermine the credibility of prosecution's allegations.

7. Learned counsel argued that for any prosecution to succeed in a case involving Section-364A, it necessarily had to establish threat of death or bodily injury or reasonable apprehension of harm to the victim, a demand for ransom and a threat of bodily injury or death of the abducted person. In this case all that the prosecution at best could be said to have proved was the abduction of the appellant. It neither proved the demand nor threat

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of bodily injury to the victim - PW-1. In these circumstances, the conviction and sentence returned by the impugned judgment is unsustainable.

8. The learned APP submitted that the prosecution did establish all the necessary ingredients to make out the offence. It was submitted that the combined testimony of PW-5, 6 & 7 established that the co-accused Dinesh and another boy had indeed made telephone calls on the three occasions - two in the night of 18.02.2006 and one at 07:30 AM on 19.02.2006. The identity of Dinesh i.e. the co-accused was established through the testimonies of PWs 5, 6 & 7. So far as the appellant is concerned, there was no doubt about his identity or role since he was apprehended from the premises from where the victim PW-1 was rescued; it was as if he was caught red handed. Learned APP urged that PW-3's testimony read along with that of PW-8 and PW-12 also established that in the morning of 19.02.2006, after receiving the call from the telephone number-25185671, the police was informed, the latter (PW-12) made a call and ascertained that the caller had returned the telephone call and immediately ascertained the locality from where the abductors were operating. The police party thereafter reached the spot at 02:30 and caught the appellant as well as Dinesh and at the same time rescued the victim - PW-1.

9. Learned counsel submitted that in all material particulars, the necessary ingredients for proving the offence under Section-364-A IPC had been established i.e. abduction which was proved by PW-1 who clearly deposed having been encircled at the relevant time and taken away, detained overnight and thereafter kicked on face. It is submitted that depositions of PW-3 also established that ransom demand had been made. Having regard to the peculiar facts whereby PW-1 was kept against his wishes and the further circumstance of his having been kicked on the face, the prosecution also established a reasonable apprehension that in the event of failure to fulfill the ransom demand, the victim would be harmed or would receive bodily injury.

10. It was argued that the appellant's submissions to undermine the credibility of PW-1's deposition cannot be accepted because he stayed overnight and could identify all the four abductors. The appellant could not despite cross examination shake that part of his

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deposition. Similarly, the testimony of PW-5, 7 & 8, if read together with that of PW-3, corroborated the telephonic demands made on the three occasions. The learned APP highlighted that there was no necessity to identify the appellant since the prosecution had never alleged that he went to make a telephone call or demanded ransom from PW-3. His role was that of an accomplice who had the common intention along with the other accused and, therefore, was implicated under Section-34 IPC.

11. The learned APP submitted that so far as the question of place of arrest or recovery etc. are concerned, the discrepancies pointed out in this regard are neither substantial nor grave as to undermine the prosecution's story altogether. Learned counsel argued that minor variations between the statements recorded during investigation - of the witnesses - and in depositions before the Court, are bound to happen due to passage of time and unless they are of fundamental character, the Court should not be swayed by the *minutiae*.

12. The prosecution case about abduction of PW-1 was attacked from inception, by the Appellant. In this regard, the improbability of such events, was highlighted. Now, according to the prosecution story, the witness was encircled and forced to accompany some boys. The prosecution could arrest only two; the present Appellant's role was alleged to be that of an accomplice. PW-1's father received two phone calls. The PCO witnesses, who manned the instruments, from which the calls were made three times, did not identify the present appellant. PW-12, a policeman, claims to have placed a call to the telephone number, which ultimately led to the rescue of PW-1. No scientific investigation, in the form of voice samples of the individual who answered the call made by PW-12, was recorded or produced in court; nor was apparently any effort made even to record the conversation. It is PW-12 who placed the call, according to his deposition. If that were the correct position, there is nothing to link the present Appellant with the demand allegedly made to PW-1's father, telephonically. Similarly, the prosecution witnesses' inability to identify the present Appellant as one who placed the call on the night of the incident, demanding ransom, has not been proved.

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13. The second important inference which the Court draws from the evidence is that PW-1 and PW-3 have contradicted themselves materially about the rescue and its immediate aftermath. The former says that his father (PW-3) did not accompany the police, as a witness, when he was rescued; the latter (i.e. the father) deposed to the contrary. Besides, PW-3 stated in cross examination, during his deposition that all papers pertaining to the raid of the premises and rescue of PW-1 were prepared in the police station, subsequently, and were signed by him there. Seemingly, this may appear to be a minor discrepancy; yet, if viewed cumulatively with PW-1's deposition, the raid and rescue of that witness, said to have been conducted in the presence of PW-3, becomes suspect. These two contradictions amount to serious material variations, which undermine the prosecution case.

14. The Appellant's counsel had urged during the hearing that in order to prove the offence under Section 364-A, the prosecution has to prove not only demand, but also a demand coupled with use or force or threat of use of force that would lead to apprehension of bodily injury in the mind of the victim, or of his relatives and family members. According to him, no prosecution witness deposed about the threat of use of force that could lead to apprehension of bodily injury to the victim. The APP urged, on the other hand, that the deposition of PW-1 clearly was that when in captivity, one of his abductors had kicked him - whether it was the present Appellant or not, his role of an accomplice, by virtue of Section 34 IPC stood established.

15. Section 364-A IPC reads as follows:

"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 intergovernmental organization 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."

16. A reading of the provision makes it clear that to prove the offence, it should be established that the abducted person, was, after abduction, either killed, or injured, or was

threatened with such acts, or the conduct of the abductors would result in reasonable apprehension of such consequence. The demand for ransom is an integral part of the offence. The conveying of ransom, coupled with threat to life, or bodily injury to the victim, either overtly, or by conduct (of the abductors) is sufficient to complete proving the offence. The object of the provision, introduced through the amendment of 1993 is to tackle the menace of kidnapping for ransom, or holding people forcibly to achieve a specific illegal objective. It is not necessary that the abducted individual's family or friends are asked to pay; the object may be totally unconnected with them; yet, the demand would not be lawful. The injury or threat to injury part of the offence is couched in such wide terms that it is inessential for the prosecution to prove that the threat element was conveyed along with the demand for ransom. As long as the threat is discernable, and proved, the offence is said to have been established.

In *Rafiq v. State*, II.R (2008) 2 Del 534 a Division Bench of this court held that:

"That apart, a mere demand of ransom amount for release of a kidnapped person, is not sufficient to attract application of Section 364 A IPC unless it is also proved that the kidnapped person was threatened with death or hurt or that the conduct of the kidnappers was such which could raise a reasonable apprehension that he could be put to death or hurt if the ransom amount was not paid. In the present case the child did not state that the appellants had at any point of time threatened to cause his death or hurt. Even the father of the child at no place in his statement testifies that the person making ransom calls had on any occasion threatened to kill the kidnapped child or cause hurt to him. The appellants at no stage by their conduct gave rise to a reasonable apprehension to the father or any member of his family that in the event of ransom amount being not paid, the kidnapped child would be put to death or hurt. The learned trial court in the impugned judgment while finding that the appellants from their conduct gave rise to reasonable apprehension that the kidnapped child would be put to death or hurt, did not spell out their particular conduct which could have given rise to the reasonable apprehension as aforesaid. There being total absence of evidence in regard to any threat to cause death or hurt to the kidnapped child and also for lack of evidence in regard to the appellants conducting themselves in a way that could give rise to a reasonable apprehension that the child would be put to death or hurt, the ransom demands simplicitor could not have brought the offence within the ambit of Section 364 A IPC."

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In the decision reported as *Malleshi v. State of Karnataka*, (2004) 8 SCC 95, the Supreme Court discussed the necessary ingredients for the offence under Section 364-A IPC in the following terms:

"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 straitjacket 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 businessman 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 364-A. 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 case¹, 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 364-A has no application as no demand had 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."

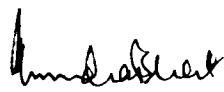
The above observations were followed in *Vinod v State of Haryana* 2008 (2) SCC 246 and *P Liaquat Ali Khan v State of AP* 2009 (12) SCC 707. In *Shyam Babu v State of Haryana*, (2008) 15 SCC 418, the essence of the provision was explained as follows:

"The wording itself suggests that when kidnapping is done with the threat to cause death or hurt to the kidnapped person or gives a reasonable apprehension that some person may be done to death or hurt or compels any Government, any foreign State or international intergovernmental organisation or any person to pay a ransom, the offence is complete."

17. The lack of evidence to connect the present Appellant with the ransom call; the failure of the prosecution witnesses to identify him, the improbability of the prosecution version about abduction of PW-1, (having regard to the age, and the distance which the

accused and he had to travel, on foot, and the further allegation that he was forced to walk through a market, and to the abductor's hideout, for more than one hour), the contradiction in the prosecution evidence regarding the manner of rescue of the victim are material and serious. But apart from these, in this Court's opinion, no prosecution witness including PW-1 testified that he was in apprehension for his life, or threatened with bodily injury, or apprehended it, through any overt or covert act by the present Appellant in the event the alleged demand for ransom of ₹ 50,000/- was not met with. The prosecution thus did not prove, beyond reasonable doubt, that the Appellant had committed the offence punishable under Section 364-A IPC.

18. For the above reason, this court holds that the impugned judgment cannot be sustained; it is accordingly set aside. The Appeal, is therefore, allowed.


(S. RAVINDRA BHAT)
JUDGE


(G.P. MITTAL)
(JUDGE)

JULY 06, 2011