

GAHC010195722017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/34/2017

ANANTA DEBNATH

VERSUS

THE STATE OF ASSAM

2:SRI MANOJ MAZUMDAR
S/O-LT. MADHUSUDHAN MAZUMDAR
R/O-SANTINAGAR
W/NO.2
P.S.-KOKRAJHAR
DIST.-KOKRAJHAR
ASSAM

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MALASRI NANDI

For the appellant : Mr. R Sarma, Amicus Curiae

For the State respondent : Ms. B Bhuyan,
Addl. Public Prosecutor, Assam.

Date of hearing : 16.08.2023

Date of Judgment : 21.08.2023

JUDGMENT AND ORDER (CAV)

(M. Zothankhuma, J.)

Heard Mr. R Sarma, learned Amicus Curiae appearing for the appellant. Also heard Ms. B Bhuyan, learned Additional Public Prosecutor, appearing for the State respondent.

2. The present appeal has been preferred against the judgment dated 01.03.2017, passed by the learned Sessions Judge, Kokrajhar in Sessions Case No. 33/2016, by which the appellant has been convicted under Section 364(A) IPC and sentenced to undergo rigorous imprisonment for life with a fine of Rs. 5,000/-, in default simple imprisonment for 3 (three) months.

3. The brief facts of the case is that an FIR dated 18.07.2015 was submitted by PW-1, who is the father of the kidnapped victim Manash Mazumdar, with the Officer-In-Charge of Kokrajhar Police Station, stating that at about 3:30 pm on 17.07.2015, the appellant had taken away his son by taking him for a walk. Despite searching for his whereabouts, they could not trace his son. He accordingly prayed that necessary action should be taken to recover his son.

4. Pursuant to the FIR, Kokrajhar P.S. Case No. 633/2015 under Section 365 IPC was registered.

5. During investigation of the case, 8 (eight) persons were initially

arrested. Thereafter, the appellant was arrested on 30.07.2015, when he was with the boy Manash. The Investigating Officer (PW-7) thereafter submitted the charge-sheet, on having found a *prima facie* case under Sections 120(B)/365/364(A)/344/369 IPC against the appellant and the other 8 (eight) persons arrested earlier. Charge was framed against all the arrested persons under Section 364(A)/34 IPC, to which they pleaded not guilty and claimed to be tried.

6. The learned Trial Court thereafter examined 7 (seven) prosecution witnesses and after examination of all the accused persons under Section 313 Cr.PC, the learned Trial Court came to a finding that the appellant was guilty of having committed the offence under Section 364(A) IPC. However, the learned Trial Court acquitted all the other 8 (eight) co-accused persons, on coming to a finding that the prosecution had not been able to prove the guilt of the other co-accused persons.

7. The appellant's counsel submits that out of the 7 (seven) prosecution witnesses, only the evidence of PW-1 (father of the victim) and PW-7 (Investigating Officer) are relevant to decide the case. He submits that as there is nothing to prove that a demand for ransom had been made by the appellant and that the abducted boy would be put to death or would have been hurt unless the ransom was paid, it could not be said that PW-1 (father of the boy) was under apprehension that the boy would be killed or hurt if ransom was not paid. As such, the provisions of Section 364(A) IPC would not be attracted in this case and at best, the appellant could have been convicted under Section 365 IPC.

8. The appellant's counsel submits that the evidence of PW-1 shows that the appellant had been apprehended/caught by PW-1's uncle, Madhab Mazumdar and another person named Chinmay Dey, when the appellant had brought the victim's son to the Bangal Bazar, where PW-1 was to hand over Rs.50,000/- as ransom. The appellant was thereafter taken to the house of PW-1 and a call was made to the Additional SP. Thereafter, the Police came to the house of PW-1 and took away the appellant. On the other hand, the evidence of PW-7 (IO) is to the effect that he had apprehended the appellant along with the victim boy, when the appellant was crossing a road along with the victim on 30.07.2015 in an auto rickshaw.

9. The appellant's counsel submits that the contradictory stands taken by PW-1 and PW-7, with regard to apprehending the appellant, cast a doubt on the testimony of PW-1. Further, there being no proof with regard to any ransom being asked for by the appellant from PW-1 and as there is no evidence to the effect that ransom calls were made by the appellant to PW-1, Section 364(A) IPC could not be attracted to the case. He also submits that in the cross-examination of PW-1, PW-1 states that he did not tell the Police that he had made 20/30 calls to the appellant. He further stated that the ransom demands had not been made in the appellant's voice. Further, the mobile number with which calls were made to PW-1 did not belong to the appellant. He further submits that the mobile phone of the appellant was not seized by the Police to prove that the appellant's phone had been used for making any ransom call to PW-1.

10. The appellant's counsel submits that PW-1's uncle, Madhab Mazumdar and the other person Chinmay Dey had not been examined as prosecution witnesses. He further submits that no questions were put to the appellant at the time of his examination under Section 313 Cr.PC, to enable him to make an explanation with regard to the issue of kidnapping and whether he had asked for ransom to be paid.

11. Ms. B Bhuyan, learned Additional Public Prosecutor, on the other hand submits that as PW-1 had earlier deposited Rs.3,00,000/- as ransom amongst the trees on the Karigaon road and had also taken along another ransom amount of Rs.50,000/- to Bangal Bazar, to be paid to the appellant, from where his uncle Madhab Mazumdar and another person named Chinmay Dey had apprehended the appellant with his son, clearly goes to show that a ransom call had been made by the appellant. She further submits that as the abducted boy had been missing for 13 (thirteen) days prior to being found, there was reasonable apprehension on the part of the PW-1 that his son would have been killed or hurt, if the ransom amount was not paid. PW-1 accordingly did not inform the Police with regard to the payment of ransom being made, as he was afraid that his son would be killed or hurt, if the said information was given to the Police. She submits that as the fact of the kidnapping of the victim boy is not in doubt, there is no infirmity with the impugned judgment passed by the learned Trial Court. Accordingly, the same should be upheld.

12. We have heard the learned counsels for the parties.

13. The evidence of PW-1, who is the father of the abducted boy, is to

the effect that when he was having his meal inside his house, he called for his son Manash. However, his wife told him that the appellant had taken Manash away. As the appellant used to take his son for a walk on earlier occasions, he made a call to the appellant. However, the appellant did not respond to his calls. He thereafter made 20/30 calls to the appellant, but there was no response as the appellant's mobile was switched off. Thereafter, he lodged the FIR. On the following day, some person made a call to him and demanded Rs.50,00,000/- as ransom, to set his son free. Repeated calls were then made to him demanding ransom. PW-1 thereafter took an amount of Rs.3,00,000/- and left the said amount amidst the trees in the Karigaon road. After two days, an unknown person made another call to him demanding Rs.50,000/-. Responding to the call, PW-1 went to Bangal Bazar with the amount, as per instructions received. When the appellant was seen bringing along his son in Bangal Bazar, PW-1's uncle Madhab Mazumdar and one Chinmay Dey, who were accompanying PW-1, caught hold of the appellant. He further states that he did not give information to the Police earlier because he feared for his son's life, if he failed to give the money on that day. The appellant was thereafter brought to the house of the PW-1, wherein the people who had gathered there attempted to assault the appellant. On PW-1 making a call to the Additional SP, the Police came and took the appellant.

In his cross-examination, PW-1 states that on seeing the appellant taking away his son, he asked him where he was taking his son. The appellant then replied that he was going to purchase chocolate for the boy. PW-1 also states in his cross-examination that he did not tell the Police that he had given Rs.3,00,000/- to the kidnappers, because the Police had asked him not to pay ransom. He also denies the suggestion that he had not stated before the Police

that the appellant had kidnapped his son, while he was away from home. He also states in his cross-examination that the demand for ransom had not been made in the appellant's voice.

14. The evidence of PW-2 and PW-3 is that they had heard that the son of PW-1 had been kidnapped.

15. The evidence of PW-4 is to the effect that PW-1 was his nephew. PW-4 states that after he received information about the son of the PW-1 being missing, he informed PW-1 that he had seen boy Manash on the lap of the appellant.

However, in his cross-examination, PW-4 states that he did not tell the Police that he had seen the abducted boy on the lap of the appellant, as the Police did not ask him about the same.

16. The evidence of PW-5 is to the effect that PW-1 was his brother-in-law and that the incident took place around 3:00 pm on 17.07.2015. On the evening of the day of the incident, the appellant came to the house of the PW-1 and repaired rickshaws. Thereafter, the appellant took away the abducted boy to treat him with chocolates. They were informed in the evening that the boy had not returned. Phone calls were made to the appellant's mobile, which was switched off. Thereafter, ransom calls were made to the mobile of PW-1 demanding ransom, for releasing the boy. The first demand was for Rs.50,00,000/-. Chinmay Dey thereafter handed over Rs.3,00,000/- to someone. Thereafter, another demand of Rs.50,000/- was made some thirteen days after the incident. Madhab Mazumdar and Chinmay Dey apprehended the appellant

and brought him to his brother-in-law's house. The appellant was beaten up and Police was informed. Thereafter, the Police came and took the appellant.

In his cross-examination, PW-5 denies the suggestion that he did not tell the Police that the appellant had taken away the boy to give him a chocolate treat. He also denies the suggestion that he did not state before the Police that Chinmay had handed over Rs.3,00,000/- to someone or that Chinmay and Madhab had not apprehended the appellant.

17. The deposition of PW-6 is to the effect that when he visited the Kokrajhar Police Station about a year ago, Police obtained his signature on a piece of paper. However, he did not know why his signature was obtained.

18. The evidence of PW-7, who is the Investigating Officer is to the effect that an FIR had been submitted by PW-1 on 6:30 pm on 17.07.2015, stating that the appellant had taken PW-1's son for a walk and since then, both of them had gone missing. PW-7 also stated that he engaged secret informers in several places and arrested some accused persons. On 30.07.2015, the appellant was apprehended while he was crossing a road with the victim. He also stated that he submitted the charge-sheet, wherein he found that the appellant and 8 (eight) other persons had hatched a plan for kidnapping the abducted boy. Thereafter, ransom demands were made by other co-accused persons from the appellant's mobile.

In his cross-examination, PW-7 states that PW-1 did not tell him that the appellant had demanded an amount of Rs.3,00,000/- from him or that his wife had seen the appellant taking away Manash. He also denied the suggestion that he did not apprehend the appellant, while the appellant was with the boy

Manash.

19. In his examination under Section 313 Cr.PC, the appellant had denied that he had kidnapped the boy Manash or that he was involved in the kidnapping of Manash.

20. The learned Trial Court, on considering the evidence adduced by the prosecution witnesses, came to a finding that though there were incriminating materials against all the accused persons, the circumstantial evidence could not form a complete chain to enable the learned Trial Court to come to a finding that the 8 (eight) co-accused persons were guilty of the offence under Section 364(A) IPC. Insofar as the present appellant was concerned, the learned Trial Court came to a finding that the prosecution was able to prove that the appellant had kidnapped the boy, as he had been seen taking away the boy and also had been seen with the boy, at the time of recovery of the boy. Further, as there was demand for ransom for releasing the boy, the learned Trial Court came to a finding that the prosecution was able to prove that the appellant had committed the offence under Section 364(A) IPC. Consequently, the 8 (eight) co-accused persons were acquitted from the charge under Section 364(A) IPC, except for the appellant.

21. A perusal of the impugned judgment of the learned Trial Court does not show that the appellant had made any demand for ransom. However, as he had been seen taking the child away and he had also been seen at the time of recovery of the child, besides the fact that the child had been missing for 13(thirteen) days, the learned Trial Court came to a finding that the appellant was guilty of the offence under Section 364(A) IPC.

22. To the first issue raised by the learned Amicus Curiae that the appellant could at best be convicted under Section 365 IPC and not under Section 364(A) IPC, we would have to reproduce the above said Sections of law for consideration.

***“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.*

***365. Kidnapping or abducting with intent secretly and wrongfully to confine person.—** Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”*

23. In the present case, the appellant had allegedly taken the boy Manash for a walk with the purpose of treating him chocolates. The evidence of PW-1 shows that the appellant used to take his son for a walk on earlier occasions also. The issue is whether any ransom demand had been made by the appellant to PW-1 for release of his son. There is nothing in the evidence to show that the appellant had made a demand for ransom. Though PW-1 had stated that he had dropped of Rs.3,00,000/- in the trees in the Karigaon road and had later taken another amount of Rs.50,000/- for payment as ransom, the fact remains that no information to the said effect has been given by PW-1 to the Police. On the other hand, the appellant was apparently apprehended 13(thirteen) days' later along with the abducted boy on 30.07.2015. If we are to assume that no demand for ransom had been made by the appellant for release of the boy, then

there was no reason for the appellant to have confined the boy in wrongful custody for 13(thirteen) days.

24. The evidence adduced by the prosecution witnesses does not indicate that the appellant had made any threat to PW-1 or to the family of the abducted child that the child would be killed or hurt, if ransom was not paid. As such, in the absence of evidence to that effect, it cannot be said that PW-1 was under apprehension that his son may be put to death or hurt, if he did not pay the ransom demand. On the other hand, the fact that the boy had been abducted and confined wrongfully for 13(thirteen) days is not disputed and an inference could arise that there was a reasonable apprehension on the part of PW-1, that his son would be killed or hurt if the ransom demand was not met.

25. With regard to whether the appellant had made any demand for payment of ransom, no evidence has been led/produced by the prosecution to show whether any calls had been made from the mobile phone of the appellant to PW-1. Though PW-1 had stated that calls had been made demanding ransom, the proof of the calls having been made would have to be proved by submission of a certificate under Section 65B of the Evidence Act, as laid down by the Supreme Court in the case of **Anvar P.V. -Vs- P.K. Basheer & Ors.**, reported in **(2014) 10 SCC 473**. In the present case, no secondary evidence has been produced by the prosecution and as such, it cannot be proved that the appellant had made any calls demanding ransom to PW-1.

26. Similarly, with regard to whether the appellant had made any threat to PW-1 threatening to cause death or hurt to the abducted boy, the prosecution

has again failed to lead any evidence on that line. Though PW-1 has stated in his cross-examination that he did not inform the Police regarding payment of ransom to be made by him as his son could have been killed, there is nothing in his evidence to show that PW-1 had been warned by the appellant not to give information to the Police. On the other hand, the evidence of PW-1 in his cross-examination is to the effect that the Police had asked him not to pay any ransom and it was because of the said fact that he did not inform the Police that he had attempted to pay the ransom of Rs.50,000/- to the kidnapper(s). As such, the evidence recorded by the learned Trial Court does not show that the appellant had anything to do with the alleged apprehension of PW-1 that his son would be killed, if ransom had not been paid.

27. The evidence of PW-1 shows that the initial demand for ransom was Rs.50,00,000/-. However, no reason has been given by PW-1 as to why he had allegedly dropped off Rs.3,00,000/- as ransom, in the trees in the Karigaon road, in the absence of any evidence being adduced that the kidnapper(s) had agreed to be paid Rs.47,00,000/- less. The above being said, the evidence of PW-5, who is the brother-in-law of PW-1, is to the effect that the Rs.3,00,000/- ransom amount had been handed over by Chinmay Dey to someone and another demand for Rs.50,00,000/- was made thereafter. The evidence of PW-5 is also to the effect that it was not the appellant who demanded ransom.

28. The above contradictory stands taken by PW-1 and PW-5, with regard to handing over of Rs.3,00,000/- and the asking for the ransom demand is known only to PW-1 and PW-5. They have not even bothered to inform the Police about the said alleged transactions. The Police have also not made any attempt to

recover any money from the appellant or the acquitted co-accused persons. The charge-sheet was also forwarded by the Police to the Court of the learned Chief Judicial Magistrate on 11.08.2015, i.e. after 12(twelve) days after recovery of the boy and arrest of the appellant. As such, there was ample time for PW-1 and PW-5 to have informed the Police that they had already paid Rs.3,00,000/- earlier and that PW-1 had been carrying Rs.50,000/- for payment of ransom, on the date the appellant was arrested/ apprehended by the Police or the uncle of PW-1. However, the charge-sheet is conspicuously silent, with regard to the stand taken by PW-1 and PW-5 that ransom amount of Rs.3,00,000/- had been initially paid and also with regard to the demand of ransom amounting to Rs.50,000/- as per PW-1's testimony and Rs.50,00,000/- as per testimony of PW-5.

The above gives rise to an inference that something is amiss and a doubt is created as to whether any demand for ransom had been made at all by anybody. Also the manner in which the appellant had been apprehended is also peculiar, given the contradictory evidence of PW-1 and PW-7. Also, if Rs.50,000/- ransom was to be given on the day the appellant was apprehended, the testimony of PW-7 is conspicuously silent on the ransom amount.

29. The evidence of PW-1 shows that on asking for his abducted son, while having his meal inside his house, his wife had told him that the appellant had taken Manash away. There is nothing to show that the said information had caused any alarm to PW-1 or his wife. The evidence of PW-4 is also to the effect that he had seen Manash sitting on the lap of the appellant. The evidence of PW-5 is that the appellant repaired his rickshaws in the house of PW-1 and the boy had been taken away by the appellant for giving him a chocolate treat.

The fact that the witnesses knew that the appellant had taken away the boy, to give him a chocolate treat, implies that they had no cause for alarm with the action of the appellant. It is also surprising that a kidnapper or abductor would kidnap or abduct the boy in full view of their family and known persons. A doubt/suspicion also arises as to whether there was any kidnapping of the boy or was it a case of wrongful confinement. Be that as it may, the evidence adduced shows that the boy had been missing for 13(thirteen) days and it was the appellant who had taken away the boy on 17.07.2015. The boy was then recovered on 30.07.2015 when he was seen with the appellant in Bangal Bazar.

30. On considering all the above facts and the evidence recorded by the learned Trial Court, we do not find that a case under Section 364(A) IPC has been made out. On the basis of the evidence adduced, we hold that the prosecution has not been able to prove the guilt of the appellant beyond all reasonable doubt, for committing an offence under Section 364(A) IPC. However, we are of the view that the prosecution has been able to prove the guilt of the appellant, for having committed the offence under Section 365 IPC.

31. Accordingly, we convict the appellant under Section 365 IPC and sentence him to undergo rigorous imprisonment for 6(six) years with a fine of Rs.5,000/- (Rupees Five Thousand), in default, to suffer simple imprisonment for 2(two) months. The period of imprisonment already undergone as an Under Trial Prisoner (UTP) and as a convict shall be set off. Consequently, the impugned judgment dated 01.03.2017 passed by the learned Sessions Judge, Kokrajhar in Sessions Case No.33/2016 is modified to the extent indicated above. Send back the LCR.

32. In appreciation of the assistance provided by the learned Amicus Curiae, the appropriate fee payable to him should be paid by the State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant