

A.F.R.

Neutral Citation No. - 2024:AHC:132307

Court No. - 86

Case :- CRIMINAL APPEAL No. - 1736 of 1992

Appellant :- Suraj Din And Other

Respondent :- State

**Counsel for Appellant :- S.D. Misra, Arvind Kumar
Srivastava, Shashibind Kumar Srivasatava**

Counsel for Respondent :- A.G.A.

Hon'ble Nalin Kumar Srivastava, J.

1. Present criminal appeal has been preferred by the appellants against the judgement and order dated 1.9.1992 passed by the IInd Additional Sessions Judge, Fatehpur in Sessions Trial No.82 of 1989 (State vs. Surajdin and others), convicting and sentencing the appellants for the offence punishable under Section 365 IPC to undergo one year's rigorous imprisonment and a fine of Rs. 200/- with stipulation of default clause.

2. Brief facts of the case, as culled out from the record, are that five named accused persons Surajdin, Sri Narain, Lallu @ Ram Prasad, Ram Kishore and Shiv Shanker, who happens to be son-in-laws and close relatives of the informant, having grudge with the informant Smt. Laxmaniya on account of some land dispute came to her house on 2.12.1988 at about 6.00 a.m. when she alongwith her husband Ghasitey was warming before fire at the door of her house and made assault upon Ghasitey and abducted him in order to kill him. F.I.R. was lodged by Smt. Laxmaniya, wife of Ghasitey on 4.12.1988 at 9.15. a.m.

3. Investigation of the case proceeded. The Investigating Officer recorded the statements of the witnesses, inspected the spot and prepared site plan. Further, he arrested the accused Lallu and Surajdin and on pointing-out of Surajdin recovered Ghasitey from his (Surajdin) house in presence of Raghubir and Laxmi Narain and prepared recovery memo Ext. ka-5. He also recorded the statements of the recovery witnesses and thereafter

handed over Ghasitey to the complainant by preparing the memo of supurdginama Ext. ka-7. After completing the investigation, charge-sheet Ext. ka-6 against the accused appellants was submitted. Concerned Magistrate took the cognizance and the case, being exclusively triable by Sessions Court, was committed to the Court of Sessions.

4. Accused persons appeared before the trial court and charge under Section 364 IPC was framed against them. Appellants denied the charge and claimed their trial.

5. Trial proceeded and to bring home the charge against the accused / appellants, prosecution has examined in all six witnesses, who are as follows:

1	Smt. Laxamaniya	PW-1 (informant)
2	Ghasitey	PW-2 (abductee)
3	Sheo Prasad	PW-3
4	Sheo Narain	PW-4
5	Laxmi Narain	PW-5
6	S.I. Sitaram Shukla	PW-6 (Investigating Officer)

6. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1	Written report	Ext. A-1
2	Chik F.I.R.	Ext. A-2
3	Carbon copy of G.D.	Ext. A-3
4	Site Plan	Ext. A-4
5	Recovery Memo	Ext. A-5
6	Charge sheet	Ext. A-6
7	Supurdginama	Ext. A-7

7. After conclusion of evidence, statements of accused appellants were recorded under Section 313 CrPC, wherein they pleaded their false implication and claimed the prosecution evidence to be false and concocted. Accused Surajdin denied that he had lodged any case before the Consolidation Officer in the name of Ghasitey raising objections in mutation proceedings. Further, since accused Lallu @ Ram Prasad committed default in

appearance and his attendance could not be procured, his case was separated vide order dated 20.6.1992.

8. PW-1 – Smt. Laxmaniya, is the informant of the occurrence. She has supported the contents of the written report and also the entire prosecution case including the abduction of her husband.

9. PW-2 - Ghasitey is the abductee. He has stated the name of accused persons and the manner in which he was kidnapped by the miscreants.

10. PW-3 and PW-4 – Sheo Prasad and Sheo Narain, who, according to the prosecution version, are the witness of incident of abduction of Ghasitey by the accused persons but they did not support the prosecution version and therefore they were declared hostile by the prosecution.

11. PW-5 – Laxmi Narain is the recovery witness of the abductee but he denied that Ghasitey was recovered from the house of Surajdin on his pointing out. He was also declared hostile by the prosecution.

12. PW-6 Sub-Inspector Sita Ram Shukla, is the Investigating Officer of the case, who has proved the proceedings of investigation in his testimony and has proved the site plan Ext. ka-4, recovery memo Ext. ka-5, charge sheet Ext. ka 6 and supurdginama Ext. ka-7.

13. On the basis of aforesaid oral and documentary evidence, learned trial court recorded the conviction of the accused and sentenced them, as mentioned herein-above.

14. Heard Shri Arvind Kumar Srivastava, learned counsel for the appellants and the learned AGA for the State.

15. The impugned judgment and order has been assailed on various grounds by the learned counsel for the appellants.

16. It is submitted by the learned counsel for the appellants that the trial court has recorded the conviction of the appellants

only on the basis of unreliable and sketchy evidence adduced by the prosecution. It is further submitted that there is no eye witness of the alleged occurrence of abduction and the ocular evidence of the independent witnesses does not support the prosecution version. The only witness of the alleged incident of abduction is Smt. Laxmaniya, who is the wife of Ghasitey. She alongwith her husband Ghasitey kept grudge with the accused persons and they managed a false implication of the accused persons only for the sake of some property dispute. There was no cogent evidence on record that the accused Surajdin ever impersonated himself for Ghasitey and moved any application before the Tehsil Court on his behalf. It is also submitted that the present appellants were having no motive to commit the crime. F.I.R. in the matter was lodged belatedly without any plausible explanation thereof. The prosecution has miserably failed to prove the guilt of the accused appellants beyond reasonable doubt. The ingredients of offence under Section 364 IPC are completely missing from the scrutiny of prosecution evidence and that is why the trial court could not convict the appellants under Section 364 IPC and subsequently they were punished under Section 365 IPC and the evidence on record was never sufficient to hold the appellants guilty for any offence whatsoever. The trial court misread the facts and evidence on record and passed an illegal order warranting interference by this Court.

17. On the other hand, learned AGA vehemently opposed the defence version. It has been submitted that the incident of abduction is based upon the cogent and reliable eye witness account. PW-1 and PW-2 had absolutely no motive for the false implication of their own son-in-laws in a serious case of abduction. It is also submitted that the prosecution story is well proved beyond reasonable doubt on the basis of oral and documentary evidence and the appeal deserves to be dismissed.

18. I have considered the rival submissions made by the learned counsel for the parties and have gone through the entire record carefully.

19. Undoubtedly, in this matter the prosecution case rests upon ocular evidence. PW-1 Smt. Laxmaniya, the wife of the abductee, is the eye witness of the incident of abduction. She has proved the prosecution case as mentioned in the F.I.R. and in her examination-in-chief she had named all the five accused persons participating in the commission of the crime and the manner in which the victim was lifted and carried by them has also been explained by her. Admittedly, three of the accused persons facing trial Surajdin, Ram Kishore and Sri Narain are the son-in-laws of the informant Smt. Laxmaniya and the victim Ghasitey. She has further stated that her husband Ghasitey prior to the incident under reference had transferred his land in the name of Bhola and Sheo Nandan, the other son-in-laws of the informant. All the accused persons have been identified by her in the course of recording of her evidence before the trial court. The reason for animosity and grudge has also been explained by her and she states that after transfer of land in the name of Bhola and Sheo Nandan the other son-in-laws got angry and a forged case was also filed by accused persons Dayaram, Surajdin and Sri Narain in the name of her husband, which was confronted by Ghasitey, husband of the informant after appearing before the Court concerned. This witness has also proved the written report Ext. ka-1. Delay in lodging the F.I.R. has also been explained by her that when her report was not lodged at police station Jahanabad, she came to Bindki and an application was got typed there and again it was given at police station Jahanabad. In her cross-examination no inconsistent statement has been given by her. Since three accused persons were her own son-in-laws, she could very well identify them. Moreover, the incident happened in the

morning and the abductee and PW-1 were very well in a position to identify the accused persons.

20. PW-2 Ghasitey is the star witness from the prosecution side. He is the abductee and corroborating the testimony of PW-1 Smt. Laxmaniya, he has also explained the reason of animosity between both the sides. In his examination-in-chief he has also explained that Surajdin and Shiv Shanker having rifle came to his house alongwith three other accused persons and he was caught hold and thereafter abducted by them. He was brought to the house of Surajdin and locked in a room and he managed to be released from confinement when police came there. He has also explained that the police retrieved him from the house of Surajdin after unlocking the chain of the door. He has also stated that Surajdin and Sri Narain assaulted him with fist but however, none of the other co-accused persons made any assault upon him.

21. PW-3 Shiv Prasad and PW-4 Shiv Narain are said to be the eye witness of the incident of abduction, however, both are hostile witnesses. PW-3 categorically states that he did not see as to who was the person who took Ghasitey with him and he was not present in the village on that day. In the same manner PW-4 also states that some persons had abducted Ghasitey about two years back but he did not see any assailant. This witness has also been declared hostile by the prosecution and does not support the prosecution case in material terms.

22. PW-5 Laxmi Narain is the witness of factum of the recovery of the abductee from the house of Surajdin, but however, in his examination-in-chief he completely denies to be a witness of the incident of recovery of Ghasitey on the pointing of accused Surajdin. In his cross-examination he has stated that after receiving the information of recovery of Ghasitey, he went to police station Jahanabad alongwith Raghuvir and Laxmi Narain

where the police obtained his signature over the recovery memo but he never knew as to what was written in it.

23. PW-6 S.I. Sitaram Shukla is the Investigating Officer of this case and he also deposed on behalf of Head Moharrir Narendra Kumar Katiyar as a secondary witness and has proved the chik F.I.R. and registration G.D. as Ext. ka-2 and Ext. ka-3, respectively. This witness in his evidence has affirmed the investigation proceedings and also proved the site plan Ext. ka-4, recovery memo Ext. ka-5, charge sheet Ext. ka-6 and supurdginama Ext. ka-7. He has been tested in the cross-examination by the defence but his entire evidence is consistent on the point that abductee Ghasitey was recovered from the house of accused Surajdin. He has stated in the cross-examination that at the time of arrest of named accused Surajdin no public witness was present. There is no inconsistency in the entire testimony of PW-6 Investigating Officer.

24. The accused persons though in their statement under Section 313 CrPC have claimed that the entire prosecution evidence is false and fabricated but to show their innocence they have not adduced any defence evidence.

25. In the earlier part of this judgment, it has been clarified that albeit there is a delay in lodging the F.I.R. but it must be kept into the mind that the informant - Smt. Laxmaniya is a rustic and illiterate lady and after abduction of her husband she was all alone and after wandering here and there she succeeded in lodging the F.I.R. when the application was given to the Dy. Superintendent of Police, Bindki, Fatehpur and on his order F.I.R. was lodged and that caused delay in lodging the F.I.R., hence, delay in lodging of the F.I.R. is well explained in the facts and circumstances of the case. Interestingly, the written report was typed on 2.12.1988 i.e. the same day when the incident of abduction happened. The F.I.R. has been lodged on the basis of written report Ext. ka-1 and since Ext.ka-1 was prepared on the

same day when the incident occurred it rules out any deliberation or consultation before the lodging of the same. A prompt F.I.R., no doubt, strengthens the prosecution case and if delay in lodging the same is explained properly it helps the prosecution to prove its case beyond reasonable doubt.

26. In Mehraj Singh Vs. State of U.P., (1994) 5 SCC 188, while emphasising the importance of recording a prompt F.I.R., the Hon'ble Supreme Court observed as under :

"FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story."

27. In Thulia Kali Vs. State of Tamil Nadu reported in (1972) 3 SCC 393 the Hon'ble Supreme Court held as under.

".....first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the report can hardly be overestimated from the standpoint of the accused."

28. Similarly, in Kishan Singh through LRs Vs. Gurpal Singh and others reported in (2010) 8 SCC 775 the Hon'ble Supreme Court held that *"Prompt and early reporting of the occurrence by the informant with vivid details gives assurance regarding truth of its version. In case, there is some delay in recording the FIR the complainant must give an explanation for the same. Undoubtedly, delay in lodging FIR does not make the*

complainant's case improbable when such delay is properly explained."

29. In the facts of this case, it is also evident that the victim did not receive any injury. PW-2 in his deposition states that he was assaulted by fisting by Surajdin and Sri Narain but since the injuries might not be serious or visible no medical examination was conducted in respect of the abductee of this case.

30. The motive of the incident has also been well explained by the prosecution. Although it is a case based on eye witness account wherein element of motive loses its significance but what the law requires is that if the prosecution claims any motive behind the crime, it must prove it. From the perusal and analysis of the evidence of PW-1 and PW-2 it is clear that the motive behind the incident, which was actually the transfer of property of the abductee in favour of his two son-in-laws, has been established by PW-1 and PW-2 and their evidence is consistent on the point of motive and also affirms the contents of the F.I.R. itself.

31. It is true that two independent witnesses of the incident of abduction PW-3 and PW-4 have been declared hostile but if the legal position with respect to the appreciation of evidence of a hostile witness is translated into the facts and circumstances of the case in hand, it is a trite law established in a catena of decisions that the entire testimony of a hostile witness cannot be discarded and the relevant part of his testimony, which is favourable to the prosecution, may be taken as admissible and relevant piece of evidence and the prosecution no doubt can rely upon it.

32. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat***, 1999 (8) SCC 624 has held that evidence of a hostile witness can be relied upon to the extent it supports the

version of prosecution and it is not necessary that it should be relied upon or rejected as a whole.

33. *Ramesh Harijan vs. State of U.P.* , 2012 (5) SCC 777, in another decision wherein the Hon'ble Apex Court has held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

34. In *State of U.P. vs. Ramesh Prasad Misra and another* , 1996 AIR (Supreme Court) 2766, the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon.

35. From the above propositions of law, it is evident that the evidence of a hostile witness cannot be ignored totally and the relevant portion of his entire testimony may be taken into consideration. In this matter, PW-3, though declared hostile by the prosecution, in his examination-in-chief asserts that someone had abducted Ghasitey in the year 1988 in winters. Hence, this witness proves the incident of abduction and he also makes some positive statements in respect of relationship of the abductee and the accused persons. The husband of the informant - Smt. Laxmaniya was in fact abducted, as the prosecution claims, and this fact finds corroboration from the statement of PW-3 in his examination-in-chief and despite being hostile witness, the incident of abduction has been affirmed by this witness. In the same fashion the incident of abduction has also been proved by PW-4. Despite being a hostile witness, he affirms the incident of abduction of Ghasitey, though he states that he did not see the assailants. Therefore, from the evidence of PW-3 and PW-4, the

hostile witnesses, it is established that Ghasitey, husband of the informant Smt. Laxmaniya, was really abducted in the incident and this part of the evidence of PW-3 and PW-4 is admissible and relevant so far as the prosecution case is concerned.

36. In the same manner, PW-5, who is said to be the witness of recovery of the abductee, also states that some miscreants had abducted Ghasitey from his house, though the factum of recovery of Ghasitey from the house of the accused Surajdin is denied by him. It is significant to see that he has proved his signature over the memo of recovery of Ghasitey Ext. ka-5 but he denies the subject matter written therein.

37. The incident of recovery of Ghasitey and his supurdgi in favour of his wife, the informant, has been proved by PW-6, Investigating Officer. The memo of recovery has also been proved by him as Ext. ka-5 whereupon the signatures of Laxmi Narain PW-5 and Surajdin and T.I. of other witness Raghubir are visible. PW-6 has made a categorical statement that he had recovered the abductee before the witnesses Raghubir and Laxmi Narain. PW-6 further states that accused Surajdin was arrested at Amauli Khajua Tiraha, though there was no public witness present at that time. It is also pertinent to mention here that the place of incident of abduction has been shown as Ext. ka-4 site plan, which has been proved by PW-6. This document is in conformity with the version of F.I.R. and statements of PW-1 and PW-2. Hence, the place of occurrence is also certain and fixed in this matter, which further strengthens the prosecution case.

38. Hence, on the basis of oral and documentary evidence, the prosecution has proved its case beyond reasonable doubt, but however, conviction of accused persons under Section 365 IPC was recorded by the trial court and not under Section 364 IPC for which they were charged.

39. This Court has got an opportunity to go through the impugned judgment and order. The submission of the learned counsel for the appellants made before this Court and before the trial court as well expresses the plea that the intention of the accused persons for abducting Ghasitey was not to commit his murder. This submission ought to be seen in entirety of facts and circumstances of this case. The abductee Ghasitey was kept under confinement secretly and wrongfully in the room of Surajdin but he was never put in danger of life and further no ransom was demanded by the accused persons for the sake of his release. The victim was never abducted in order to murder or to be so disposed of as to be put in danger of being murdered. The prosecution evidence falls short of the required evidence to establish the offence under Section 364 IPC. In the entirety of the circumstances, as mentioned above, the trial court proceeded to record the conviction of the accused appellants not under Section 364 IPC but under Section 365 IPC. It was a case of mere abduction where the intention of the accused persons was only to cause the victim to be secretly and wrongfully confined and such offence comes under the purview of the definition of Section 365 IPC which says like this :

"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."

40. At the same time, it is also desirable to have a glance upon the provisions of Section 364 IPC, which are as under :

"364. Kidnapping or abducting in order to murder.—

Whoever kidnaps or abducts any person in order that such person may be murdered or

may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

41. From the close scrutiny of the prosecution case and evidence, as discussed here-in-above, and in the light of the definitions, as mentioned here-in-above which include essential ingredients to establish an offence under Sections 364 IPC and 365 IPC, this Court finds that the trial court has committed absolutely no illegality in convicting the appellants under Section 365 IPC in place of Section 364 IPC.

42. Upon careful analysis and consideration of the settled legal position in the backdrop of the facts and circumstances of the present case, I am of the opinion that the conclusion arrived at by the learned trial court in the impugned judgment and order is in accordance with law and the evidence available on record. The impugned judgment is the result of the thoughtful consideration and cautious scrutiny of the evidence on record, oral as well as documentary. Thus, this Court is of the view that the prosecution has been able to establish the guilt of the accused appellants under Section 365 IPC beyond reasonable doubt and to the satisfaction of the judicial conscience of the Court.

43. The part of sentence is also under challenge and viewed by this Court cautiously. Awarding sentence in a matter is always a difficult task which requires balancing of various considerations. The principle of law is well settled that the principle of proportionality between the punishment and crime cannot be brushed aside and the sentence must be just and proper. No doubt the concept of proportionality permits of discretion to the Court but the same has to be guided by certain principles. Hon'ble Supreme Court in **Raj Bala vs. State of Haryana & Ors** (passed in Special Leave Petition (Crl.) Nos.4099-4100 of 2015), has observed that neither the personal perception of a Judge nor

self adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. There can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. Similarly an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment. A Court while imposing sentence has to keep in view the various complex matters in mind. In respect of certain offences, sentence can be reduced by giving adequate special reasons but the special reasons have to rest on real special circumstances.

44. In the instant case, criminal machinery came into motion about 36 years ago and the present appeal has been pending for a long period of 32 years. There is nothing on record to show that the appellants are previous convict or having any criminal antecedents. Also the accused-appellants alone cannot be held responsible for long delay in disposal of this appeal. At present appellant no.1 Surajdin is 77 years old, appellant no.2 Ram Kishore is 57 years old, appellant no.3 Sri Naraina is 67 years old and appellant no.4 Sheo Shanker is 74 years old. It has been submitted and also finds support from the record that the appellants remained in custody for about one month. Neither any injury has been caused by the accused appellants to the abductee nor any ransom was demanded by them for the sake of his release. Hence, considering all aspects of the matter, in my view, no useful purpose would be served by sending accused-appellants in judicial custody at this stage, rather in the aforesaid special circumstances, it would be in the interest of justice if in lieu of one year's rigorous imprisonment they may be sentenced for the period already undergone by them in this case and also sufficient fine may be imposed upon them which would be an

adequate punishment to them in the entire circumstances of this case. The appellants, who are old men at present should be repenting men.

45. Resultantly, the appeal is partly allowed. The conviction of the appellants for the offence under Section 365 IPC is upheld but the sentence of one year's rigorous imprisonment awarded by the trial court vide impugned judgment and order is converted into the period already undergone by them alongwith a fine of Rs. 2,000/- each. Appellants are on bail. They need not surrender. Their bail bonds are cancelled and sureties are discharged. The amount of fine shall be deposited within two months from today failing which the appellants will have to undergo for ten days simple imprisonment as default sentence.

46. A copy of this order alongwith trial court record be transmitted to the Sessions Judge, Fatehpur for necessary compliance.

Order Date :- 7.8.2024

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