

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.51 of 2007

Arising Out of Jamalpur PS.Case No.-133 Year- 2001 Thana -District- MUNGER, giving rise to Sessions Case No. 777 of 2002

Balmiki Mandal, son of Tamam Mandal, resident of Village Hussain, P.S. Medni
Chauki, District Lakhisarai

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellant : Shri Pankaj Kumar Sinha, Advocate
Shri Kamal Kishore Jha, Advocate
Shri Diwakar Sinha, Advocate
Shri Raunak Kumar Singh “ Pankaj”, Advocate
For the Respondent : Shri Abhimanyu Sharma, A.P.P.

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 13-02-2015

The solitary appellant Balmiki Mandal is aggrieved by and dissatisfied with the judgment of conviction passed by the learned Presiding Officer, Fast Track Court-V, Munger in Sessions Case No. 777 of 2002 on 29.11.2006 by which he was held guilty of committing the offences under Sections 364-A and 120-B of the Indian Penal Code. The sentence, after the appellant was convicted

on 29.11.2006, was passed upon the appellant after hearing him on 30.11.2006, and he was directed to suffer rigorous imprisonment for life as also to pay a fine of Rs. 5,000/-, else, to suffer another period of rigorous imprisonment for six months.

2. P.W.14 Ravi Shekhar Sharma alias Chhotu, a child of around six years, was going to his school on 20.8.2001 with his sister P.W. 5 Shilpi Kumari. A Maruti Van of white shade was parked by the side of the road which was in a *Gali* and as soon as the two children were passing by the side of that Van the occupants of that Van picked up P.W. 14 Ravi Shakhhar Sharma alias Chotu to take him inside the Van and further, it speeded away with him. P.W. 5 Shilpi Kumari, the sister of P.W. 14 Ravi Shekhar Sharma alias Chhotu, ran back to her house weeping to inform her parents P.W.2 Asha Devi and P.W. 11 Surendra Prasad Sharma that her little brother had been kidnapped and taken away by the criminals in a Maruti Van.

3. P.W.11 Surendra Prasad Sharma went to the Police Station and filed his written report (Ext.2) on the basis of which the F.I.R. of the case was drawn up on the same day of incident dated 20.8.2001 and the investigation had proceeded. We are deprived of the advantage of knowing as to how the investigation had proceeded to end in submission of the charge sheet. But, what transpired from the lower court records is that two charge sheets were



submitted at the close of the investigation. The first charge sheet was sending up this appellant Balmiki Mandal with accused Pankaj Kumar Jha, Sakaldeo Mandal, Jai Prakash Sah, and Bablu Mandal while other charge sheet was sending up accused Jago Mahto and showing accused Bhadai Sao, Bhalra Yadav, and Lalchand Sahni as absconders. The trial proceeded against six accused persons after framing charges under Sections 364-A and 120-B of the Penal Code, which ended in acquittal of others than the present appellant Balmiki Mandal, as noted above.

4. During the course of trial fourteen witnesses were examined, out of whom P.W. 7 Gopal Krishna Kumar, P.W. 12 Mahendra Paswan and P.W.13 Rajeshwar Mandal were witnesses to seizure memos. They appear stating that they had signed the documents either on account of being forced to do so by the Officer-in-charge of the Police Station or they signed on the plain papers without anything being written over it. Out of the remaining eleven witnesses P.W. 6 Parmanand Sharma, P.W. 8 Uday Kumar Sharma and his two sons P.W. 9 Bikram Kumar Sharma and P.W. 10 Santosh Kumar Sharma were declared hostile, because they had not identified the accused persons as participants in commission of kidnapping of the little child. Even the father of the victim and the informant of the case P.W. 11 was also declared hostile inasmuch as he was not



identifying any of the accused persons. But, at any rate, the evidence of the informant P.W.11 Surendra Prasad Sharma and those that of P.W. 6 Parmanand Sharma, P.W. 8 Uday Kumar Sharma, P.W. 9 Bikram Kumar Sharma and P.W. 10 Santosh Kumar Sharma clearly indicated that P.W. 14 Ravi Shekhar Sharma alias Chhotu had indeed been kidnapped by four criminals who were sitting in the white-colour Maruti Van for the purpose of kidnapping the victim. The mother of the victim P.W. 2 Asha Devi, indeed, as in the case of the father of P.W. 14, who is the informant of the case, and other witnesses, did not see the occurrence as an eye witness. They had known about the incident on account of rumours having spread like a wild fire as generally happens in such cases and on account of having been told by P.W. 5 Shilpi Kumari about the kidnapping of the little child. P.W. 2 and P.W. 11 appear stating that they had been told about the incident by Shilpi Kumari (P.W.5). P.W. 5 Shilpi Kumari also stated in her examination-in-chief that she had narrated the story of her brother P.W. 14 having been kidnapped to her parents.

5. However, two persons, namely, P.W. 3 Md. Nausad and P.W. 4 Pankaj Sah appear telling the court that they had seen the kidnapping being committed as per the story narrated by P.W. 11. P.W. 3 Md. Nausad was more elaborate in describing the incident. He narrated the fact that he was standing by the side of the



place of occurrence when he saw three-four persons sitting in a white colour Maruti Van and the driver of the Van was slim and by his side was sitting another person and two persons were sitting in the rear seat. He had also given the description of the two criminals who were sitting in the rear seat and was stating that the vehicle was facing towards east. Chhotu alias Ravi Shekhar Sharma (P.W. 14) was going with a girl, i.e., P.W.5 and as soon as they came, the engine of the vehicle was ignited and Chhotu alias Ravi Shekhar Sharma was dragged inside the vehicle and the vehicle sped away. P.W. 3 stated that he noted the number of the vehicle and raised an alarm and the vehicle was seen speeding away by leaving the place. However, we do not have any reason to hold that a case of kidnapping was made out only against the present appellant Balmiki Mandal as submitted by learned counsel appearing for the appellant.

6. The story which was narrated by P.W. 11 may not have been supported in a bigger detail as may appear narrated by P.W. 3, but P.W. 4 Pankaj Sah, who was declared hostile for some reason, also was corroborating generally the incident that the little child Ravi Shekhar Sharma alias Chhotu was kidnapped by use of a white colour Maruti Van by the criminals and it was incidentally that the victim, the son of Surendra Prasad Sharma, i.e. P.W. 14, had been recovered.

7. The most important witness was P.W. 5 who happens to be the sister of the victim P.W. 14 and she has narrated the incident in her own manner with full details and necessary facts. We are satisfied after considering the evidence of P.Ws. 3,4 and 5 that indeed an incident of kidnapping of Chhotu alias Ravi Shekhar Sharma, P.W. 14 had taken place on 20.8.2001.

8. While criticizing the variance in number of the vehicle given in the written report and in the statements of the witnesses, we may simply point out that this Court is not considering as to what was the number of the vehicle which was used in kidnapping of the child. Any vehicle was used in kidnapping of the child because there is no dispute over this fact that the child had not been kidnapped. It is an admitted fact that P.W. 14 had been kidnapped which fact appears corroborated by the eye witnesses generally and especially by the evidence of P.W. 14.

9. Ravi Shekhar Sharma alias Chhotu was a child somewhere around six years. He was picked up when he was ambling with his sister to his school. We cannot tell it in deeper details sitting in the court the feelings of a child of such a tender age who had been separated from his/her parents and had been taken to disastrous atmosphere unknown to him. Like a prudent person one can appreciate the evidence but we find while considering his evidence



that the witness had narrated that firstly he was picked up by the criminals and taken away and he did not have any reason to make contradictory statement on account of tender age. Indeed he did not have any reason to make false allegation, even the story which had been told by his father after he had received information from his daughter P.W. 5. He was simply informing the court as to the manner in which he was kidnapped while P.W. 14 was telling the truth to the court that when he was ambling up to the school with his sister P.W. 5 he was picked up by four persons to be taken inside the vehicle and the vehicle speeded away and when he attempted to cry then he was gagged by use of a *Gamcha* and was taken to different places in the village and in the township of Bhagalpur and lastly, he was brought to Kahalgaon where he was put under wrongful confinement of accused Dinesh Mandal from where the police arrested this appellant Balmiki Manal and recovered the child.

We have all reasons to place reliance upon the evidence of P.W. 14. He was subjected to very strenuous and lengthy cross-examination on facts stated by him before the police or before the Magistrate who had recorded his statement under Section 164 Ct. P.C.

10. Shri Sinha, learned counsel for the appellant, was placing the statement of the victim recorded under Section 164



Crt.P.C. and was requesting us to consider that the facts which were stated in the statement recorded under Section 164 Cr. P.C. were not stated by him in the court. We appreciate the submission, but we have already noted that the child was around six years when he was kidnapped. He was stating the facts as satisfactorily as he could. He was gagged with the use of *Gancha* put around his mouth. He was taken to alien places, the surroundings of which were never known atmosphere to him. The child was amidst persons who were criminals and heartless and who did not care for the tender age of the child and were putting him to serious torture and ill-treatment. These circumstances can very well convince us that some contradictions might have been made by the victim in his statement recorded immediately after he was recovered. He must not have been in a state of mind to be consistent and forthright in making his statement as he was very frightened on account of being put to trauma and must not have dawned upon his conscience so as to be consistent on all the factors. In that view of the matter, even a fact was not stated or a fact which was necessary to be spoken for placing reliance, to us, does not appear any material contradiction in the evidence of the witness.

11. A serious and pertinent argument was raised that the facts may not constitute an offence under Section 364-A of the Penal Code. This argument we have considered with all

seriousness and we are inclined to hold that indeed the offence under Section 364-A does not appear constituted from the evidence adduced by the prosecution witnesses.

12. It is true that P.W.14 was kidnapped and was wrongfully confined, but there is no allegation that any hurt was caused to him. There is no evidence indicating that any amount was demanded to be paid by the parents in lieu of the life of the victim or in lieu of the victim being set free. There is no evidence on this aspect of the case and, as such, the offence under Section 364-A of the Indian Penal Code, to us, also appears not made out. However, this has to be concluded on the strength of the evidence available to us that the victim had definitely been taken away and was wrongfully confined. In that view of the matter, we find that an offence under Section 368 of the Indian Penal Code was clearly constituted against the appellant along with an offence under Section 365 of the Penal Code. As such, we modify the order of conviction passed upon the appellant from that under Section 364-A of the Indian Penal Code to Sections 365 and 368 of the Indian Penal Code.

13. That persuade us to consider as to what sentence is required to be passed upon the appellant.

14. In the facts of the case and in view of the conviction of the appellant under Sections 365 and 368 of the Indian

Penal Code, we direct the appellant to suffer rigorous imprisonment for three years and to pay a fine of Rs. 15,000/- and in case of non-payment of fine, to suffer another period of rigorous imprisonment for 1 and ½ years.

15. The appellant is in custody since 29.11.2006, i.e., for over eight years and, as such, appears to have served out a total period of imprisonment of 4 and ½ years, which could be in sum and substance be the substantial sentence as also the sentence of fine as has been ordered in lieu of non-payment of the same. The appellant is directed to be released forthwith, if he is not wanted in any other case.

16. The appeal is dismissed with the above modification in the order of conviction and sentence

(Dharnidhar Jha, J)

(Gopal Prasad, J)

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