

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.784 of 2009

Arising Out of P.S.Case No. -133 Year- 2007 Thana –Alamganj District- PATNA

Balram Paswan son of Baijnath Paswan, resident of village-Ambedkar Nagar, Sikandarpur, Police Station-Town, District-Muzaffarpur.

.... Appellant

Versus

The State of Bihar

.... Respondent

with

Criminal Appeal (DB) No. 813 of 2009

Arising Out of P.S.Case No. -133 Year- 2007 Thana –Alamganj District- PATNA

Sanjay Rajak son of Sarbjit Baitha, resident of village-Dadli Bazar, P.S. Town, District-Chapra.

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

(In CR. APP (DB) No. 784 of 2009)

For the Appellant : Shri Tribhuwan Narayan & Shri Mithlesh Kumar Vidhyarathi, Advocates.

For the State : Shri Dilip Kumar Sinha, APP.

(In CR. APP (DB) No. 813 of 2009)

For the Appellant : Shri Tribhuwan Narayan & Shri Mithlesh Kumar Vidhyarathi, Advocates.

For the State : Shri Dr. Mayanand Jha, APP.

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 14-07-2015

Aniket Kumar @ Ankit, a toddler of about six years, attending Preparatory-B Class in St. Paul's Academy, Patna City was not found by his father P.W.12 at the school gate or around it when the informant had gone to pick up the child for



brining him back home from his school. A hectic search was made by the family members along with the school staff as appears stated by P.W.1 Demis Emelius, the Principal of the said Academy and not after tracing the child out, the father and other members of his family were, lastly, taking resort to law by filing written report on 12.04.2007 at about 10.05 P.M. stating that Aniket Kumar @ Ankit had been kidnapped by some unknown kidnappers on 12.04.2007 at around 12.15 P.M.

**2.** P.W.16 S.I. Jai Prakash Singh on receipt of the written report drew up Ext-5, the FIR of Alamganj P.S. Case No.133 of 2007 on 12.04.2007 and took up the investigation. He inspected the place of occurrence recorded the statements of the Principal and other staff members of the school and, subsequently, came to know that telephone calls had been received by the father of the victim, i.e., P.W.12 Manoj Kumar Singh ( Yadav) and, accordingly, he obtained the call details of the calls made by using SIM No. 9234035492 on cellular phone No. 9431221163 which belonged to the informant.

**3.** It appears that during the investigation, it was found that the two appellants were moving in tandem from Chapra to Muzaffarpur to Patnacity, and, lastly, that the house of appellant Sanjay Rajak was searched by P.W.17 Inspector of



Police Jai Ram Sharma on 27.04.2007 in presence of P.Ws.6 and 7 to recover the school bag of the victim Aniket Kumar @ Ankit which contained the copies, books, the tiffin box, the pencil box and the school diary. The books and copies were carrying the names of Aniket Kumar @ Ankit and were also carrying landline and cellular phone number of P.W.12, the informant. Those articles were identified by P.W.12 Manoj Kumar Singh, the father of the victim Aniket Kumar @ Ankit during his evidence as appears from paragraph-14 of P.W.12. Appellant Sanjay Rajak was not arrested and it appears from the evidence of P.W.16 that he surrendered himself to the custody of the Court.

**4.** As regards appellant Balram Paswan on definite information that he had given calls to the informant for arranging money so as to paying up the ransom amount for getting back the child who was in his custody and he was arrested and both the appellants were sent up for trial.

**5.** During the trial of the case, P.W.1 Demis Emelius, the Principal of the said Academy where Aniket Kumar @ Ankit had been enrolled in Preparatory-B Class, stated that the victim child had come to his school on 12.02.2007 and he had been kidnapped from the school gate by some unknown criminals



and that he along with his staff as also the informant and others had set themselves on the search of the child but in vain. P.W.2 Anamika was the Class Teacher of the Preparatory-B and she also stated that Aniket Kumar @ Ankit had come on 24.04.2007 to attend the school which evidence was supported again by P.W.3 Shahjahan Khatoon, the maid-servant, employed by the school for looking after children who had been enrolled in the school. P.W.4 Avinash Kumar was the cousin of Aniket Kumar @ Ankit, being the son of the sister of the informant who was about 19 years of age on the day of occurrence and he stated that on 12.04.2007, he had dropped Aniket Kumar @ Ankit into his school as the informant, who used regularly to take his son to the school as also to bring him back from there, was otherwise engaged. This evidence also came from P.W.11 Punam Kumari, the mother of the victim. P.W.12 Manoj Kumar Singh also stated that on account of being otherwise engaged, it was P.W.4 Avinash Kumar, who had on 12.04.2007, dropped Aniket Kumar @ Ankit into the school and when he went to bring the child back home, he could not find him and was told by Khushbu Kumari, P.W.10, that someone had fed Aniket Kumar @ Ankit with ice-cream and had moved him away from the school with him. Khushbu Kumari (P.W.10) also supported the fact that while Aniket Kumar @ Ankit was standing at the

school gate, some unknown person who had been concealing his identities by putting a *Gamcha* on his face, fed Aniket Kumar @ Ankit with ice-cream and took him away with him. P.W.10 further identified appellant Balram Paswan as the person who had taken away the victim.

This evidence of Khushbu Kumari (P.W.10) on the identification of appellant Balram Paswan suffers from one major defect that if the man who had fed Aniket Kumar @ Ankit with ice-cream and had taken him away, had taken serious precaution of concealing his identities by concealing his face by using a *Gamcha*, then how could a little child, like, Khushbu Kumari (P.W.10) would pick up the identifying features of that particular man. In that view, we reject the evidence of Khushbu Kumari (P.W.10) as regards her evidence on identifying appellant Balram Paswan.

6. We have noted that for quite some times and till date indeed there is no clue as to after being kidnapped how the child was disposed of; whether he was murdered or he was sold out or he was put on any other job, like, begging, etc. P.W.16, however, stated that after arresting the two appellants, he had questioned them and both of them had pointed out that after kidnapping the child, they had killed him and had disposed



of the dead body by burying it in the bed of river Saryu in Chapra. If it was so and the police had definite information as was claimed by P.W.16, then the ordinary expectation of any one could have been that the police take the two accused to the place of burial of his dead body to bring it out and thus, place on record one of the clinching evidences of participation of the two accused persons. We regret to note that the police was only interested in manufacturing some evidence so as to claiming that it had indeed investigated one of the serious incidence occurring in the township of Patna and had not indeed made any real efforts on investigation of the case.

7. The participation of appellant Balram Paswan in commission of the offence to us appears not acceptable. The evidence which has come against him was that of P.Ws.11 and 12, the parents of Ankit Kumar @ Ankit. P.W.11 Poonam Kumari suspected that it was appellant Balram Paswan who had done it.

8. While P.W.11, the mother of the victim Aniket Kumar @ Ankit had made a general statement that it was appellant Balram Paswan who had committed the offence of kidnapping of her son, P.W.12 Manoj Kumar Singh, the father of the victim had given a bit different statement when he



pointed out that he had received false calls from cellular phone, asking him to arrange for the money so that his child, who was in the custody of the caller, could be released. While giving the evidence, P.W.12 Manoj Kumar Singh stated that it was appellant Balram Paswan who had given him the call. During cross-examination of P.Ws.11 and 12, it was revealed that appellant Balram Paswan had once been employed by them and on account of their acquaintance with the voice of appellant Balram Paswan, they had given evidence. However, when it comes to the evidence of identifying by voice a person, the Court has generally to be cautious in appreciating the evidence, because the electronic devices which are used in conveying the message by giving calls are most of the times misleading as regards their out put. There was no voice sample of appellant Balram Paswan or the recorded conversation which had ensued between P.W.12 and appellant Balram Paswan so as to convincing us that indeed it would have been appellant Balram Paswan who had given the call to P.W.12 Manoj Kumar Singh for arranging for the payment of ransom money for getting the child released from his custody. The evidence against appellant Balram Paswan, except to the above extent lacks completely. The evidence which we have just discussed appears to us too faint to justify raising the inference of

culpability of appellant Balram Paswan.

9. So far as the complicity of appellant Sanjay Rajak is concerned, it is indeed not the prosecution case that he had been seen picking up the child and taking him away from the very scene of occurrence. But what appears to us is that P.W.5 Raj Kumar Mahto, who also hails from the same place from where appellant Sanjay Rajak or appellant Balram Paswan had come, was stating that he ran a clandestine liquor shop in Patnacity and on 12.04.2007, the two appellants arrived at his shop with a child of about 5-6 years who was wearing clothes as per details given by the informant in his written report. It was a pink-shirt, blue pant, a pair of blue socks with black belt and a red tie around the neck of the child. P.W.5 Raj Kumar Mahto stated that the two appellants purchased a couple of bottles of liquor from him and spent two hours there with the child in consuming the liquor. P.W.5 appears acquainted with appellant Sanjay Rajak but he did not know appellant Balram Paswan and when he wanted to know about him, P.W.5 stated that appellant Sanjay Rajak told him that he was his sister's husband. We are not on those parts of evidence of P.W.5 as regards the false or wrong description of appellant Balram Paswan, we are mainly on one particular fact that the victim child Aniket Kumar @ Ankit was seen in the



company of appellant Sanjay Rajak and the description of the clothes which were given by the informant in his written report, were tallying completely with the details given by P.W.5 Raj Kumar Singh. P.W.8 Mohammad Salim who ran a hotel stated that appellant Sanjay Rajak had come to his hotel with a child of 5-6 years and requested him to serve food to that child. P.W.8 stated that he refused serving meal to the child on the ground that his hotel did not cater to the demands of a Hindu and that appellant Sanjay Rajak should take the child to some Hindu hotel. P.W.9 Ram Dayal Ram was yet another witness who stated that he had seen appellant Sanjay Rajak with the child and he had some exchange of pleasantries with him also and during that course, he suspected that appellant Sanjay Rajak had done something serious, but he did not make any further queries from appellant Sanjay Rajak. However, in the evening, he saw the photograph of the missing child on the television and then he could recall that it was the same child, who was in the company of appellant Sanjay Rajak and, as such, immediately rang up Dy.S.P., Chapra who directed him to go to Alamganj police station for giving his statement and, accordingly, he went to the Officer-in-Charge of Alamganj police station and narrated the fact of having seen the ill-fated child in the company of appellant Sanjay Rajak.

On preponderance of the evidence of the above witnesses, like, P.Ws.5, 8 and 9 what we find is that this appears established by probability that the child was seen in the company of appellant Sanjay Rajak. On the very day, his disappearance was detected by the informant or the Principal and other staff members of St. Paul's Academy.

**10.** Evidence further on participation of appellant Sanjay Rajak is lacking. However, what appears is that on suspicion, the police was probably raiding the house of appellant Sanjay Rajak and Officer-in-Charge of Alamganj police station had asked P.W.17 Jai Ram Sharma who was the Inspector and Officer-in-Charge of Chapra Town Police Station on 27.04.2007 at 10.30 A.M. conducted a search of the house of appellant Sanjay Rajak in presence of P.Ws.6 and 7 Radha Devi and Asha Devi respectively and recovered a school bag and prepared the search and recovery memo Ext-3. We have also gone through the evidence of P.W.17 Jai Ram Sharma in paragraph-1 of his evidence and we have also considered the evidence of P.Ws.6 and 7, the witnesses who had been associated with the search of the house of appellant Sanjay Rajak and we have also perused the search and recovery memo Ext-3. On consideration of the evidence of the witnesses and also the documents, we find that a black school bag over



which the letters MASCOT was written and which had three sections in it, was recovered which was containing a red colour instrument box which was empty. The recoveries were made from the first section of the bag. The second section of it was found storing a plastic covered school diary over which the name of school, i.e., St. Paul's Academy, Gaighat, Gulzarbagh, Patna-800007 was printed and at its first page, the name of victim Aniket Kumar @ Ankit, Std. Preparatory, Bari Patan Devi Road, Patna, telephone no. 0612-6529585 /9431221663 was written and fourteen copies of St. Paul's Academy over each of which there was written the name of Aniket Kumar @ Ankit, St. Paul's School, Prep and fourteen books prescribed for Preparatory Standards, over each of which was also written the name of Aniket Kumar @ Ankit. A country made gun, as per the description in the seizure memo was also recovered from the house of appellant Sanjay Rajak. P.Ws.6 and 7 have been very detailed in describing the articles which were recovered from the house of appellant Sanjay Rajak and when those were shown to P.W.12 Manoj Kumar Singh, the father of the victim, he also identified each and every article further pointing to the Court that the bag belonged to the victim Aniket Kumar @ Ankit and that was more signified by his name which appeared in each and every article besides the mention of the telephone

numbers of the landline and cellular phone belonging to the informant. This evidence has come in paragraph-14 of P.W.12.

The learned counsel during the course of argument criticizes the above evidence on recovery of the school bag containing books, copies, etc. on the ground that the articles were never put up for identification in a test identification parade by inviting the family members of Aniket Kumar @ Ankit.

**11.** We refer to Rule 236 of the Bihar Police Manual which is in two parts. Rule 236(a) relates to identification of suspected accused persons while Rule 236(b) relates to identification of articles which might be subject matter of an offence. It has been specifically mentioned in one of the parts of Section 236(b) that if some special marks were there on the subject matter of offence which could be sufficient to disclose the identity of the articles, then it was not required that the articles be placed on test identification parade and the witnesses be invited to identify them. Here in the present case, the articles, like, the bag, the copies, the books were not only containing the names of Aniket Kumar @ Ankit along with the standard in which he was studying but the school diary which was also containing his name was, besides bearing the landline numbers and cellular numbers of his father. If these



could not be sufficient material evidence so as not requiring the articles to be put on test identification parade, then there could be none. Those were sufficient factual data to signify that the articles belonged to the victim Aniket Kumar @ Ankit. No other person could have been more competent to identify them. We accept the evidence of recovery of the articles during search of the house of appellant Sanjay Rajak and we also accept the evidence of identification which was coming from P.W.12 in paragraph-14. We did not have any reason to suspect the credibility of the evidence of witnesses, like, P.Ws.6 and 7 who were equally independent in giving their evidence on being associated with the search of the house of appellant Sanjay Rajak and seizure of the school bag belonging to victim Aniket Kumar @ Ankit.

**12.** It was contended by Shri Tribhuwan Narayan, learned counsel appearing on behalf of the appellant that mere recovery of the school bag containing the books and other articles may not be sufficient evidence for convicting the appellant. We want to point out that the presumption is that if a person is found in possession of incriminating articles which were very significant as regards the commission of the offence, then the ordinary inference could be that either the person was the offender himself or he was privy to all the circumstances



under which the offence had been committed. We do not have any doubt after considering the special nature of the evidence of recovery of the school bag that the appellant was very well associated with the commission of the offence and how the child was kidnapped and again how he was disposed of were facts which were very well within the special knowledge of the present appellant. The appellant was put a very detailed question on the recovery of the bag and other incriminating articles kept therein which belonged to victim Aniket Kumar @ Ankit and what we find is that he had not put any explanation to the recovery of those articles from his possession. We in absence of any explanation raise special inference about the commission of the offence by the appellant. We have to hold him guilty of committing the kidnapping of victim Aniket Kumar @ Ankit.

**13.** The appellant has been convicted under Section 364A as also under Section 120B Indian Penal Code. We uphold the conviction of the appellant under Section 364A Indian Penal Code and further uphold the sentence which was passed upon him for committing that offence. So far as the commission of the appellant under Section 120B Indian Penal Code, is concerned in absence of credible evidence indicating that the appellant had conspired with other person or persons in

committing that offence, we acquit him of the charge under Section 120B Indian Penal Code.

**14.** After modifying the judgment of conviction and order of sentence in the manner as just indicated, we find no merit in Cr.Appeal (DB) No.813 of 2009 filed on behalf of appellant Sanjay Rajak, it is dismissed. As regards Cr.Appeal (DB) No.784 of 2009 preferred by appellant Balram Paswan in view of scanning of evidence, we acquit him after extending to him the benefit of doubt. Both the appellants are in custody. In the light of the order of acquittal passed by us in favour of appellant Balram Paswan, let him be released from prison, if not wanted in any other case.

**(Dharnidhar Jha, J.)**

**(Gopal Prasad, J.)**

Brajesh Kr/Saif.

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