

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA
AT CHANDIGARH

Crl. Appeal No.D-706-DB of 2011

Azad ... **Appellant**
v.

State of Haryana ... **Respondent**

2. Crl. Appeal No.D-707-DB of 2011

Mohd. Shakir ... **Appellant**
v.

State of Haryana ... **Respondent**

3. Crl. Appeal No.D-950-DB of 2011

Tahir ... **Appellant**
v.

State of Haryana ... **Respondent**

Date of decision: December 17, 2015.

1. *Whether Reporters of local papers may be allowed to see the judgment ?*
2. *Whether to be referred to the Reporters? yes*
3. *Whether the judgment should be reported in the Digest?*

CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MRS. JUSTICE RAJ RAHUL GARG

Argued by: Shri R.S. Sihota, Sr. Advocate with
Shri B.R. Rana, Advocate
for the appellants Mohd. Shakir and Tahir

Shri Sarfraj Hussain, Advocate for appellant Azad.

Ms. Aditi Girdhar, Advocate, amicus curiae.

Shri Vivek Saini, Assistant Advocate General, Haryana
for the respondent-State.

Raj Rahul Garg, J.

The aforementioned three appeals have been directed against

judgment of conviction dated 14.7.2011 rendered by learned Additional Sessions Judge, Gurgaon whereby all the appellants were held guilty for committing offence punishable under Section 392 read with Section 397 IPC. However, accused Tahir was acquitted for the offence under Section 25 of the Arms Act. Vide order of sentence of the even date, each one of the accused was sentenced to undergo imprisonment for life for offence under Section 364-A IPC with fine of Rs.10,000/- each, in default of payment of fine, to undergo rigorous imprisonment for six months; for offence under Section 392/397 IPC to undergo imprisonment for 10 years each with fine of Rs.5,000/-, in default of payment of fine, to further undergo rigorous imprisonment for three months.

The case of prosecution was unfolded by victim Sooyeon Kwon PW4 during the trial when she stated that she was a student of Pathways World School, Sohna-Gurgaon Road, Aravali Retreat, Gurgaon. On 25.2.2010, after attending the school, she was going to her home by a Santro car (No.0491) driven by the driver of the company. When the car reached T-junction near the school, three persons stopped the car by waiving hand. Out of them, one pushed the driver aside and took control of the car. Two persons sat on the rear seat and surrounded her. She tried to get out of the car but they did not allow her to do so. They locked the car and snatched her camera, mobile phone and one MP3 player. They demanded Rs.1.00 lac as ransom. They teased her and also tried to touch her. After half an hour, they dropped the driver of the car. After driving for about one hour, they saw a police car and then dropped her and asked her to arrange the money.

She entered a house in the nearby village and contacted the persons residing in the house. On her request, they allowed her to make a call from their telephone. First of all, she contacted the police but they were speaking in Hindi language which she was not knowing. Then she contacted in her school. She identified Azad and Tahir as the persons who were amongst the three assailants and had forcefully kidnapped her for ransom.

PW10 Karan Singh, driver of the aforesaid car bearing No.HR-26-AE-0491 when dropped out of the car, informed the police control room by making a phone call at No.100. SI Sube Singh Investigating Officer of the case reached police control room for detailed inquiry and recorded statement of SI Krishan Chand as Ex.PN and sent the same to the Police Station for registration of case (as the information given by Kawan Singh PW10 on telephone to the police, therefore, there is some discrepancy on account of misunderstanding the information in the statement Ex.PN). After making endorsement Ex.PQ, the same was sent to the Police Station for registration of the case, whereupon formal FIR was recorded.

During investigation, SI Sube Singh reached Sohna where Karan Singh driver of the looted Santro car met him. His statement under Section 161 Cr.P.C. was recorded and offence under Section 392 IPC was incorporated. After going to Police Post Mindkola where the Korean girl was recovered, recovery and handing over memo Ex.PB of the Korean girl was prepared and she was handed over to her local guardian 'Grace'. This memo was attested by 'Grace' and Jiwan Lal as witnesses. Statement of witnesses were recorded. On the demarcation of Karan Singh driver, rough

site plan of the place of occurrence was prepared as Ex.PV on 26.2.2010.

On 28.2.2010, accused Azad was arrested from Police Station Tapukara, Rajasthan and Santro car along with RC bearing registration No. HR-26-AE-0491 was recovered and the same was taken into possession vide memo Ex.PC. On 1.3.2010, accused Azad was produced in muffled face before the court and an application Ex.PW was moved before the Ilaqa Magistrate for identification parade of the accused. Since accused Azad had refused to participate in the test identification parade, therefore, learned Magistrate passed the order in this regard.

On 3.3.2010, on interrogation accused Azad suffered disclosure statement Ex.PE regarding commission of the present offence. Accused Azad also gave nishandehi of the place from where he along with his co-accused kidnapped the Korean girl.

On 3.3.2010, accused Tahir was arrested after taking permission from the learned Ilaqa Magistrate where he was produced in some other case. On interrogation, accused Tahir suffered disclosure statement Ex.PG regarding commission of the present offence (not admissible). He also gave nishandehi of the place from where he along with his co-accused kidnapped the Korean girl. Memo in this regard was prepared as Ex.PH. ASI Tara Chand signed that memo as witness.

After completion of necessary investigations, the challan was put in the court.

Finding a prima facie case against all the accused, they were charge sheeted for offence punishable under Sections 364-A and 392 read

with Section 397 IPC, whereas accused Tahir was also charged for offence under Section 25 of the Arms Act, to which the accused did not plead guilty but claimed trial.

After taking entire prosecution evidence, statements of accused under Section 313 Cr.P.C. were recorded wherein each prosecution allegation was denied by the accused and they pleaded their false implication. By way of defence, they tendered into evidence copy of judgment dated 17.3.2010 rendered in FIR No.97 of 12.3.2010 under Section 25 of the Arms Act, Police Station Sohna Ex.DB. In that case, accused Tahir was acquitted.

After hearing both the counsel for the parties and appraising the entire evidence and material on record, learned Additional Sessions Judge recorded the impugned judgment of conviction and order on sentence, as set out in the earlier part of this judgment.

We have heard Shri R.S. Sihota, Sr. Advocate with Shri B.R. Rana, Advocate for the appellants Mohd. Shakir and Tahir, Shri Sarfraj Hussain, Advocate for appellant Azad and Ms. Aditi Girdhar, Advocate, amicus curiae, and Shri Vivek Saini, learned Assistant Advocate General, Haryana for the respondent-State and have also gone through the record.

First of all, it was argued by learned Counsel for the appellants that PW10 Karan Singh informed the police by making a call on No.100 that the accused had taken away a Korean girl in a Santro car of blue colour whereas vide recovery memo Ex.PC, the Santro car recovered by the police was of silver colour. This contradiction in prosecution case itself makes it

doubtful.

The above contention of learned Counsel for the appellants is not sustainable as the victim of such like incident goes under shock, becomes nervous and perplexed. When PW10 Karan Singh was dropped out of the car, the first thing done by him was to make a call at No.100 and informed the police about the kidnapping of Korean girl in Santro car. At that time, if the same discrepancy appears in the police papers regarding colour of the car, it hardly makes any difference. The fact remains is this that Karan Singh driver of Santro car appeared as PW10 whereas the victim Sooyeon Kwon appeared as PW4. Both the witnesses remained with the accused for about half an hour or one hour. They had an opportunity to see and identify the accused. Not only this, even accused were naming each other during that period. They have also been duly identified by PW10 and PW4. Even Santro car in question was recovered from the possession of accused Azad. Under these circumstances, if initially there is discrepancy in the registration number of the car, i.e., in the series or the colour of the car, it hardly makes any difference. Above all, PW10 Karan Singh deposed that due to this snatching of his car incident and kidnapping of Korean girl, he got frightened and had given the number of the vehicle as HR-26-AN-0491 in place of HR-26-AE-0491 and further he told the colour of the car as blue but in fact the colour of the car was silver. The police recovered the Santro car from the possession of the accused with registration number ending as 0491 as well as of HR-26 series.

The next argument raised by learned Senior Counsel Shri R.S.

Sihota is this that the accused were not previously known either to PW4 or PW10. No test identification parade of the accused was conducted. It is settled proposition of law that identification of the accused for the first time in the court is no identification and is of no relevance and as such accused are entitled to be acquitted on this very ground.

The above contention of learned Counsel for the appellants is again not sustainable. It is true that in this case no test identification parade of the accused was held. In fact, an application was moved before the court by producing accused Azad in muffled face, making a prayer for conducting test identification of the accused Azad. This application was moved by the Investigating Officer. On this application, statement of accused Azad was recorded by learned Additional Chief Judicial Magistrate (Duty), Gurgaon on the very day whereby accused refused to participate in the identification parade on the pretext that since the police had shown him to the witnesses, therefore, he did not want to join the test identification parade. In fact, there is no material on the file to show that the police had shown Azad to witnesses prior to 1.3.2010. As such, accused Azad himself refused to join the test identification parade, he cannot derive any benefit now for this reason. Even otherwise, it is a case in which PW4 and PW10 had sufficient time to see and identify the accused as they remained with them in the car for about half an hour or an hour, i.e., PW10 Karan Singh driver remained with the accused for about half a hour whereas victim PW4 Sooyeon Kwon remained with the accused for about an hour. During that period, accused were also taking names of each other. As such, the aforesaid witnesses were

also knowing the names of the accused. Besides that, they could also identify accused Azad and Tahir in the court, when they appeared as witnesses against them. Under these circumstances, it cannot be said that it is a case where the witnesses had no occasion to see and identify the accused at the time of commission of the crime or that they had identified the accused only for the first time in the court. Thus, for this reason, the aforesaid contention of learned Counsel for the appellants is not tenable.

So long as the case against accused Azad and Tahir is concerned, it stands fully proved. Learned trial court has considered each and every point in detail against them and we find no illegality in the impugned judgment so far as their conviction is concerned.

However, regarding accused Shakir, the prosecution has failed to prove its case beyond reasonable doubt. Firstly for the reason that the victim PW4 Sooyeon Kwon and the driver of Santo car PW10 Karan Singh could not identify accused Shakir in the court. Of course, they identified accused Azad and Tahir but regarding third person when the question was put to the witnesses regarding his identity they expressed their doubt about his identity. As such, identity of accused Shakir could not be established beyond reasonable doubt. Secondly, on the basis of recovery of mobile phone belonging to victim PW4 Sooyeon Kwon, accused Shakir has been convicted in this case by the learned trial court observing that the accused Shakir has failed to explain his possession over the said mobile phone. He did not show as to how the stolen mobile phone Ex.P1 of PW4 came into his possession. Thus, since mobile phone of PW4 was recovered from the

possession of accused Shakir, therefore he was the third assailant as per the learned trial court. Now, if we peruse Ex.PM, i.e., recovery memo regarding mobile phone Ex.P1, it would become clear that at the time of effecting the recovery of this mobile phone from the possession of accused Mohd. Shakir, it was not identified by PW4 as the one belonging to her. In recovery memo Ex.PM, it finds mention that the mobile phone Samsung Model GT-C-3053, IMEI No.354680031281265 but there is not even an iota of evidence available on the file so as to connect this mobile phone to PW4. No documentary evidence has been brought on file in this connection that the mobile phone Ex.P1 with aforesaid IMEI number was owned or used by PW4. Even PW4 when appeared as witness, did not give her mobile phone number nor its IMEI number nor its colour or model. As such, even if the aforesaid mobile phone ex.P1 was recovered from the possession of accused Mohd. Shakir, the prosecution has failed to connect this mobile phone with victim PW4 Sooyeon Kwon. As a result, prosecution case cannot be said to be proved beyond reasonable doubt against accused Shakir, benefit of which has to go to him.

For the reasons recorded above, finding no merit in appeals bearing Crl. Appeal No.D-706-DB of 2010 and Crl. Appeal No.D-950-DB of 2011 filed by accused Azad and Tahir, maintaining the impugned judgment of conviction and order on sentence of even date against them, the same are dismissed.

However, since the prosecution has failed to prove its case against accused Mohd. Shakir beyond reasonable doubt, therefore finding

merit in appeal bearing Crl. Appeal No.D-707-DB of 2011 filed by Mohd. Shakir, it is accepted and accused Mohd. Shakir is ordered to be acquitted of the charge for which he faced trial.

Ordered accordingly.

December 17, 2015.	[Raj Rahul Garg]	[Hemant Gupta]
<i>kadyan</i>	Judge	Judge