

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 13th May, 2015

+CRL.A. 191/2013 & CrI.M.B.No.10536/2014

BIJENDER SINGH @ TITOO

..... Appellant

Through: Ms.Arundhati Katju with Mr.Ali
Choudhary, Advocates

versus

STATE OF (NCT) DELHI

..... Respondent

Through: Ms.Ritu Gauba, Additional Public
Prosecutor for the State alongwith SI
Neeraj Kumar from Police Station
Mandawali Delhi.

+CRL.A. 195/2013 & CrI.M.B.No.10793/2014

ASHOK KUMAR YADAV

..... Appellant

Through: Mr.Ajit Sharma, Advocate

versus

STATE OF (NCT) DELHI

..... Respondent

Through: Ms.Ritu Gauba, Additional Public
Prosecutor for the State alongwith SI
Neeraj Kumar from Police Station
Mandawali Delhi.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The appellants Bijender Singh alias Titoo and Ashok Kumar Yadav

challenges the impugned judgment and order on sentence dated 22.12.2012 and 07.01.2013 passed by learned Additional Sessions Judge in Sessions case No.51/2011 arising out of FIR No.571/2004 u/s 363/365/34 IPC vide which they were convicted under Section 365/34 IPC and were sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.1000/- in default, to undergo simple imprisonment for one month.

2. Prosecution case, succinctly stated, is as follows.

Anil Kumar (PW-2) made a complaint alleging *inter alia* that he is running a grocery shop at Shop No.302, Krishna Puri, Main Road, Mandawali, Delhi. On 28.10.2004 at 1.00 pm, his son Aman aged about two and a half years was present at the shop. His nephew Deepak who was also running a grocery shop nearby came to his shop and took Aman with him. Thereafter, Anil Kumar went to take lunch and when he returned back he did not find his son Aman. He went to the shop of Deepak to enquire but the shutter of the shop was down. After sometime Deepak came there and on enquiry from him about Aman, Deepak told him that Aman was not with him. He made a call on 100 number regarding missing of his son. He suspected that his son Aman has been kidnapped.

3. Investigation of the case was conducted by PW-10 SI Swaraj Singh. He got the portrait of the suspect prepared on the basis of description given by the neighbours. On 02.11.2004, the Investigating Officer received an information from Police Station Ginnore that a child belonging to Delhi has been recovered from there, as such, he alongwith complainant and other police officials went to Ginnor where Inspector Yogender Kumar (PW-11) met him and told that boy Aman was recovered from the possession of accused Bijender Singh. Bijender Singh was interrogated and the child was

brought to Delhi. On the intervening night of 2-3.11.2004, accused Deepak was apprehended from his house. Accused Bijender Singh was also arrested on 25.07.2005. Accused Ashok surrendered in the Court and was arrested. After completing investigation, chargesheet was filed against all the accused under Section 363/365 IPC.

4. Initially the trial was conducted by the learned Metropolitan Magistrate, however, in view of the notification dated 04.08.2010 victim being minor at the time of incident and trial of offences concerning Protection of Child Right Act, 2005 was to be conducted by a designated Court, as such, the case went to Additional Sessions Judge. Charge under Section 365/34 IPC was framed to which accused pleaded not guilty and claimed trial.

5. In order to substantiate its case, prosecution in all examined 11 witnesses. All the incriminating evidence was put to the accused while recording their statement under Section 313 Cr.P.C wherein they denied the case of prosecution and alleged false implication in this case. Accused Bijender Singh took the defence that he was picked up by U.P Police from his shop on 01.11.2004. Thereafter he was falsely implicated in a case under Section 307 IPC and 25 of Arms Act and thereafter in this case. He examined himself as DW-1 and proved the certified copy of the judgment Ex.DW1/A vide which he was acquitted for offence under Section 307 IPC and 25 of Arms Act. He also examined DW-2 Ashok Kumar in support of his case.

6. After scrutinising the evidence led by the prosecution and the defence taken by the accused, vide impugned judgment dated 22.12.2012 accused Deepak was acquitted of the charges levelled against him. However, both

the appellants were convicted under Section 365/34 IPC and sentenced, as mentioned hereinabove.

7. Feeling aggrieved, separate appeals have been preferred by the appellants.

8. Assailing the findings of the learned Trial Court, learned counsel for appellant Bijender Singh alias Titoo submitted that the statement of complainant PW-2 Anil Kumar does not further the case of the prosecution in as much as his statement is confined to lodging report regarding missing of his son and that he saw Bijender at the police station. PW-3 Attar Singh is the only public witness who is not hostile. He does not mention anything against Bijender Singh but speaks about co-accused Ashok Kumar Yadav taking the child. The other two witnesses PW-4 and PW-5 did not support the case of prosecution. Further, prosecution case is that the child was recovered from the custody of accused Bijender. In order to substantiate this case, three witnesses PW-6 Constable Chander Pal, PW-8 Constable Omkar Singh and PW-11 Inspector Yogender Singh were examined. Constable Omkar Singh did not support the case of prosecution whereas testimony of PW-6 and PW-11 suffers from various discrepancies. Furthermore, the appellant examined himself as DW-1 besides examining DW-2 both of whom deposed that appellant was falsely implicated in this case because he refused to bribe U.P. police, however, no credence was given to the defence evidence. Furthermore, according to the prosecution case, accused Bijender Singh fired at the police officials and weapon of offence was recovered from his possession, however, the same was not believed by the U.P Sessions Court and he was acquitted of the offence alleged against him. Once the incident itself was found false then the factum of recovery of child from the

possession of accused goes. Even assuming that the prosecution has proved that the child was recovered from the appellant even then offence under Section 365 IPC is not made out. As such, accused is entitled to be acquitted.

9. Challenging the findings of the learned Trial Court, learned counsel for the appellant Ashok Kumar Yadav submitted that the main accused was Deepak who has been acquitted by the learned Additional Sessions Judge. No recovery has been effected at the instance of this accused. The Trial Court has primarily relied upon the testimony of PW-3 for convicting the appellant as according to this witness, he had lastly seen the child with the accused. However, although this witness states that he informed the complainant about this accused taking child with him but complainant nowhere deposed so. Moreover, according to this witness, he had seen the accused taking the child at 10.30 pm whereas according to the complainant, the child went missing at about 1.30 pm. Besides that, there is no incriminating evidence against this accused. No test identification of this accused was got conducted. Under the circumstances, the prosecution has failed to bring home the guilt of accused beyond reasonable doubt and accused is liable to be acquitted.

10. Rebutting the submissions of learned counsel for the appellants, learned Additional Public Prosecutor for the State submitted that it was a case of kidnapping of a child of two and a half years but a case of kidnapping for ransom in substance was diluted due to fear of life of child by the complainant. The child was rescued from the lap of accused Bijender Singh while trying to flee away on apprehending arrest on suspicion by U.P police at Ginnor after firing at police party and hence onus under Section

106 of Evidence Act lies on the accused which he has not duly discharged. Testimony of last seen witness establishes that the kidnapped child was last seen in the company of both accused and even the prosecution witnesses got sketch of the accused prepared. Recovery of child from the custody of both accused by independent police of different area also establishes the guilt of the accused and as per Section 114(e) of Evidence Act, a presumption arise that all official acts are genuinely performed. It is further submitted that the maximum sentence under Section 365 IPC is upto 7 years and the learned Trial Court has already exercised great clemency and has awarded only three years imprisonment which is liable to be enhanced. As such, the appeals be dismissed and compensation be awarded to the victim of the crime.

11. Before considering the rival submissions of learned counsels for the parties, it will be in fitness of things to have a brief narration of the testimony of the material witnesses examined by the prosecution.

12. PW-2 Anil Kumar is the complainant and father of victim Master Aman. His testimony is confined to the missing of his child on 28.10.2004 at about 1-1.30 pm and thereafter recovery of the child on 02.11.2004 from Ginnor. He further deposed that accused Bijender was apprehended by the local police and he was informed that the child has been recovered from his possession.

13. PW-3 Attar Singh was running a building material shop at Krishna Puri. According to him, on 28.10.2004 at about 10.30 am he saw accused Ashok taking away a child in a cycle rickshaw. The child was crying and on his questioning, the accused told him that the child usually cry. When he returned back to his house at about 1-1.30 pm then he came to know that the child of Anil Kumar, his neighbour, was missing. He informed Anil Kumar

that he had seen the child with Ashok Kumar whom he knew by face as he used to sell Golgappas and used to purchase goods from the shop of Anil Kumar. He gave the description of the said accused and got the portrait of the suspect prepared.

14. PW-4 Ashok Kumar merely deposed that all the three accused were known to him as Deepak was running a grocery shop. Accused Ashok was selling Golgappas in the area while accused Bijender sells potatoes.

15. Testimony of PW-5 Rawat Singh is confined to the fact that he went alongwith the complainant to police station for lodging the complaint regarding missing of his son.

16. PW-11 Inspector Yogender Singh, then SHO, PS Ginnore, Distt. Badayun has deposed that on 02.11.2004 he alongwith his staff reached at Indra Chowk, Babrala Chowk for searching criminals. On receipt of secret information that two persons who kidnapped one child were sitting near Bhola Crasher at Dhanari road, they reached there. On seeing them, one of the accused ran away while the other who was holding a baby in his lap fired upon them with the intention to kill them. They saved themselves and apprehended accused Bijender. One countrymade pistol of .315 bore was recovered from right hand of accused and baby was recovered from left side lap of accused. On formal search of accused, two live cartridges were recovered from right pocket of his pant and one empty cartridge was found in the chamber of countrymade pistol. Accused disclosed the name of other accused who ran away from there as Ashok Kumar Yadav. He also disclosed that he, accused Ashok and his associates had brought the child from Delhi. He got FIR under Section 307 IPC and 25 of Arms Act registered at police station Ginnor. He also informed police station Mandawali. Concerned

investigating officer alongwith the complainant came to police station Ginnor. After completing all legal formalities custody of the child was handed over to his father.

17. PW-6 Constable Chander Pal was accompanying PW-11 at the time of incident and has corroborated the testimony of PW-11.

18. PW-8, retired driver Constable Omkar Singh was also accompanying PW-11 and PW-6. He deposed that at Indra Chowk, SHO received a phone call thereafter they reached at Bhola Crasher. After some time he heard noise of fire. Thereafter SHO and other staff members came back to the vehicle alongwith one person and one small child. However, he did not depose about the alleged incident of firing by accused Bijender and recovery of child from his possession, as such, was declared hostile.

19. So far as accused Ashok Kumar Yadav is concerned, the prosecution case rest on the testimony of PW-3 Attar Singh who, as seen above, has deposed that he saw accused Ashok taking a child in a cycle rickshaw at about 10.30 am and thereafter on coming to know that child of Anil Kumar is missing, he informed him that he had seen the child with Ashok Kumar who used to sell Golgappas and used to purchase goods from the shop of Anil Kumar. Except for the testimony of this witness, there is no other incriminating evidence against Ashok Kumar Yadav. A minute scrutiny of of testimony of this witness goes to show that the same is not sufficient to establish the guilt of the accused beyond reasonable doubt in as much as according to the complainant, the child went missing at about 1.30 pm whereas according to this witness, he had seen accused Ashok taking a child at about 10.30 am. Moreover, he nowhere deposed that the child who was being taken by Ashok Kumar Yadav was the child of the complainant.

Furthermore, according to him, on coming to know that child of Anil Kumar was missing, he informed Anil Kumar that he had seen accused Ashok Kumar who used to sell Golgappas with him. However, testimony of complainant is conspicuously silent regarding any such information given to him by PW-3 Attar Singh. Not only that, if the testimony of this witness is believed as correct that on the very day of missing of the child i.e., 28.10.2004, he had informed the complainant regarding taking away of his child by Ashok Kumar then as per rukka only an information was given by the complainant regarding missing of his child, on the basis of which DD No.25A was recorded. Thereafter, on 29.10.2004 the complainant went to police station and gave a statement regarding missing of his child by some person on which the FIR was registered at 10.45 pm. Had PW-3 Attar Singh informed the complainant as deposed by him then there was no occasion for the complainant not to mention the name of Ashok Kumar Yadav in the initial complaint Ex.PW-1/A. Not only that, even in his deposition before the Court he nowhere deposed so. Furthermore, there is material improvement in the testimony of this witness that Ashok Kumar Yadav used to sell Golgappas in the area and also used to purchase goods from the shop of Anil Kumar whereas no such statement was made by him under Section 161 Cr.P.C. Besides that the complainant did not even identify Ashok Kumar Yadav in the Court. He only identified accused Deepak since he was his nephew and Bijender who met him at the police station. Under the circumstances, his sole testimony implicating accused Ashok Kumar Yadav which does not find corroboration from any other material on record is not sufficient to establish beyond reasonable doubt that this accused kidnapped the child belonging to Anil Kumar. That being so, findings of learned

Additional Sessions Judge qua this accused cannot be sustained.

20. As regards accused Bijender Singh is concerned, the material witnesses are PW-6, PW-8 and PW-11. It has come in their testimony that on the basis of secret information that two persons who kidnapped one child were sitting near Bhola Crasher at Dhanari Road, the police party reached the spot where on seeing them, one of the accused ran away while accused Bijender Singh who was holding a baby in his lap fired at the police officials however he was apprehended and countrymade pistol was also recovered from him. Slight discrepancies have appeared in their testimony, however, the same do not go to the substratum of the case. Moreover, it is to be kept in mind that the incident took place on 02.11.2004 whereas these witnesses came to depose in the Court in the year 2012 i.e. after a lapse of about 8 years. Human memory is bound to lapse due to passage of time and some concession has to be given which occurs due to this passage of time. Moreover, there are catena of decisions to the effect that minor discrepancies and inconsistencies cannot be given undue importance. The Court has to see whether inconsistencies go to the root of the matter and affect the truthfulness of the witnesses while keeping in view that discrepancies are inevitable in case of evidence of witnesses, who speak thereafter long lapse of time.

21. Hon'ble Supreme Court in ***Gangabhavani v Rayapati Venkat Reddy and Ors*** 2013(11) SCALE 132 held:

*“9. In **State of U.P. v. Naresh** (2011) 4 SCC 324, this Court after considering a large number of its earlier judgments held:*

In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a

serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.

*A similar view has been reiterated by this Court in **Tehsildar Singh and Anr. v. State of U.P.** AIR 1959 SC 1012; **Pudhu Raja and Anr. v. State**, Rep. by Inspector of Police JT 2012 (9) SC 252; and **Lal Bahadur v. State (NCT of Delhi)** (2013) 4 SCC 557).*

10. Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence.”

22. Similar view was taken in **Sidhan v. State of Kerala**, 1988 Cr.L.J. 470; **Krishna Pillai v. State of Kerala**, AIR 1981 SC 1237; **Kurai and Anr. v. State of Rajasthan** (2012) 10 SCC 433; **Sohrab v. State of Madhya Pradesh**, AIR 1972 SC 2020; **Krishna Mochi & Ors. vs. State of Bihar**, (2002) 6 SCC 81.

23. In the instant case also, except for minor variations, the witnesses stood the test of cross-examination.

24. Moreover, merely because they are police officials there is no reason to disbelieve their testimony which on material aspect remained unimpeachable. The testimony of police personnel have to be treated in the same manner as testimony of any other witnesses and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies, as much in favour of police personnel as of other person and it is not a proper judicial approach to distrust and suspect them without good ground. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down as held in ***Karamjit Singh vs. State (Delhi Admn.)*** 2003 5 SCC 291, ***C.Ronald & Anr. vs. Union Territory of Andaman & Nicobar Islands***, (2011) 12 SCC 428. In ***Sunil Clifford Daniel vs. State of Punjab***, (2012) 11 SCC 205, Apex Court referred to ***State of Govt. of NCT of Delhi vs. Sunil and Anr.***, (2001) 1 SCC 652, wherein Court held as under:-

“20.....But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.

21. We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust.....At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way round. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the

statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions."

25. Although, it is true that this accused was tried for offence under Section 307 IPC and 25 of Arms Act arising out of the same incident wherein he was acquitted by Ginnor Court but learned Trial Court was right in observing that Court was not bound to accept the appreciation of facts done by that Court and disbelieve the statements of PW-6 and PW-11. It is not in dispute that the child was recovered from Ginnore which is fortified by the fact that on receipt of information from PW-11, PW-10 SI Swaraj Singh alongwith other staff and the complainant reached Ginnor where they were informed that the child Aman was recovered from the possession of accused Bijender Singh. Custody of the child was handed over to complainant at police station Ginnor vide Ex.PW-2/B. Ex.PW-6/A is the seizure memo regarding recovery of victim Master Aman from the possession of accused Bijender Singh and recovery of countrymade pistol from the possession of this accused. These documents further support the statement of police officials that accused Bijender was apprehended by the police of police station Ginnor on 02.11.2004 and victim child was recovered from his possession.

26. Accused has taken a plea that he was running a Kiryana Shop at Sahu

Kara District Badayun, U.P and police officials used to demand money from him for running the shop and on refusal, he was falsely implicated in this case. He had examined DW-2 Ashok Kumar Gautam in support of his defence however this witness admitted that police officials never demanded any money from him however the explanation furnished by him is that his counter was inside the shop whereas goods of accused Bijender used to be kept outside the shop. Accused admitted in his cross-examination that he could not tell the date when bribe was demanded by the police officials and he did not make any complaint about this fact to any superior authority at any point of time. Moreover, according to PW-4, accused Bijender used to sell potatoes at Mandawali, Delhi and his testimony was not challenged by the accused as he was not cross-examined at all. This falsifies the statements of DW-1 and DW-2 that accused was running a Kiryana shop at Sahu Kara. Even otherwise, there was no reason for them to get the accused implicated in this case as well while allowing the real culprit to go scot free.

27. Under the circumstances, learned Trial Court was right in observing that so far as this accused is concerned, it was proved that the child who was kidnapped on 28.10.2004 was recovered from the possession of this accused from the area of Police Station Ginnor, U.P. on 02.11.2004. Since the recovery of child was effected from the possession of this accused, it was for him to explain as to how child came in his possession which he has failed to explain. As such, it is to be taken that during this period, he was kept secretly and wrongfully confined. Under the circumstances, there is no infirmity in the order passed by learned Additional Sessions Judge qua this accused.

28. That being so, Crl. Appeal No. 191/2013 filed by Bijender Singh is

dismissed while Crl. Appeal No.195/2013 filed by Ashok Kumar Yadav is allowed. His conviction and order on sentence dated 22.12.2012 and 07.01.2013 are set aside. He be set at liberty, if not wanted in any other case.

Trial Court record be sent back along with the copy of the judgment.

Copy of judgment be sent to Superintendent Jail for information and compliance.

(SUNITA GUPTA)
JUDGE

MAY 13, 2015
mb