

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.237 of 2011

WITH

Criminal Appeal (DB) No. 300 of 2011

WITH

Criminal Appeal (DB) No. 148 of 2011

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AGAINST THE JUDGMENT OF CONVICTION, DATED 21.01.2011,
AND THE ORDER OF SENTENCE, DATED 02.02.2011, PASSED BY
SHRI VIJAY KUMAR JAIN, 7TH ADDITIONAL SESSIONS JUDGE,
PATNA, IN SESSIONS TRIAL NO. 70 OF 2010, ARISING OUT OF
GANDHI MAIDAN POLICE STATION CASE NO. 383 OF 2009

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NISHANT KUMAR VERMA @ ROCKY @ NISHAN VERMA, SON OF
LATE BHOLA PRASAD, RESIDENT OF MOHALLA BAKARGANJ
KALAMYA GALI, POLICE STATION GANDHI MAIDAN, DISTRICT
PATNA

.... **APPELLANT (IN CR. APP. (DB) NO. 237 OF 2011)**

WITH

BARUN CHANDRA @ VARUN CHANDRA, SON OF LATE KAMAL RAJ,
RESIDENT OF GRAND DAYANAND APARTMENT, FLAT NO. B-2,
SHALIMPUR AHRA, POLICE STATION GANDHI MAIDAN, DISTRICT
PATNA

.... **APPELLANT (IN CR. APP. (DB) NO. 300 OF 2011)**

WITH

1. VIJOY PRASAD, SON OF LATE RAM CHARITAR SAW
2. KANTI DEVI, WIFE OF SHRI VIJOY PRASAD, RESIDENT OF
VILLAGE PAIGAMBERPUR, POLICE STATION BANIYAPUR,
DISTRICT SARAN

.... **APPELLANT (IN CR. APP. (DB) NO. 148 OF 2011)**

VERSUS

THE STATE OF BIHAR

.... **RESPONDENT (IN ALL CASES)**

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Appearance :

(In all cases)

For the Appellants : Mr. Birju Prasad, Advocate
Mr. Vikram Deo Kumar, Advocate
For the State : Mr. Ajay Mishra, APP
Mr. A. Sharma, APP
Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH
JUDGMENT AND ORDER
ORAL
(Per: HONOURABLE THE ACTING CHIEF JUSTICE)
Date: 25-05-2016

Under challenge, in the present appeals, is the judgment of conviction, dated 21.01.2011, passed, in Sessions Trial No. 70 of 2010, by learned 7th Additional Sessions Judge, Patna, and the order, dated 02.02.2011, whereby sentence has been passed against the accused-appellants.

2. By the impugned judgment, learned trial Court has convicted the accused-appellants, under Sections 364A and 120B of the Indian Penal Code. Following their conviction, under Sections 364A and 120B of the Indian Penal Code, the accused-appellants have been sentenced to undergo life imprisonment and pay fine of Rs.25,000/- each and, in default of payment of fine, further to undergo rigorous imprisonment for a period of one year. Both the sentences have been directed to run concurrently.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be described thus:

(i) On 14.09.2009, at about 07:30 AM, when Shrestha Sanjay, who is son of Kalpana Shrivastava (PW 2), and Sanjay Kumar Shrivastava (PW 5), was going, as a



student, to Christ Church School, at Gandhi Maidan, Patna, along with some other children from his house by an auto, one person came and sat inside the auto. While the auto was turning to the right side, the said person, showing a pistol, threatened the driver of the auto rickshaw, Md. Jahir (PW 6), and told the driver to take the auto to a different direction. Frightened by the threat, when the auto rickshaw driver reached near the second gate of Hotel Maurya, the said person got down from the auto, and One Honda motorcycle, on which two persons were sitting, came from behind. One of the two persons got down from the motorcycle, came to the auto rickshaw and forcibly lifted Shrestha Sanjay and all of them took away Shrestha Sanjay on a motorcycle.

(ii) The driver of the auto rickshaw (PW 6) orally informed the police near the St. Xavier School about the occurrence. The police, in turn, informed Shrestha Sanjay's mother, Kalpana Shrivastava (PW 2). When the police arrived at the house of Kalpana Shrivastava (PW 2), she gave a *fardbayan*, which was reduced into writing by the police and, treating the said *fardbayan* as *First Information Report*, Gandhi Maidan Police Station Case No. 383 of 2009, under Sections 363/364A/365 of the Indian Penal Code, was registered against three unknown accused persons.

(iii) The victim child, Shrestha Sanjay, was moved



from place to place and, eventually, taken to the house of one Vijoy Prasad and forcibly made to stay there. In the meanwhile, the police, on the basis of various information gathered, reached the said house, where Shrestha Sanjay (i.e., the kidnapped child) was kept detained. The police recovered the child and arrested accused Vijoy Prasad, Vijoy Prasad's wife, Kanti Devi, and Shashi Kumar.

(iv) During the course of investigation, the police, on the basis of further materials uncovered, arrested accused Nishant Kumar Verma @ Rocky and Varun Chandra and, on completion of investigation, a *charge sheet* was laid, under Sections 364A/120B of the Indian Penal Code, against five accused persons, namely, (i) Nishant Sharma @ Rocky, (ii) Varun Chandra, (iii) Shashi Kumar, (iv) Vijoy Prasad, and (v) Kanti Devi.

4. At the trial, when charges, under Section 364A read with Section 34 and 120B of the Indian Penal Code, were framed against all the five accused aforementioned, they pleaded not guilty thereto.

5. In support of their case, prosecution examined altogether 11 (eleven) witnesses including the Investigating Officer. The accused were, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure and, in their examinations aforementioned, the accused denied that they

had committed the offences, which were alleged to have been committed by them, the case of the defence being that of denial. No evidence was adduced by the defence.

6. Having, however, reached the finding that the accused-appellants were guilty of the offences as indicated above, learned trial Court has convicted them accordingly and, consequent thereupon, sentences have been passed against the accused-appellants as have been mentioned above.

7. Aggrieved by their conviction and the sentences, which have been passed against them, the four accused aforementioned, as convicted persons, have preferred these appeals.

8. Since all the three appeals having arisen out of the impugned judgment of conviction, dated 21.01.2011, and the impugned order of sentence, dated 02.02.2011, these appeals have been heard together and are being disposed of by this common judgment and order.

9. We have heard Mr. Birju Prasad and Mr. Vikram Deo Kumar, learned Counsel, for the appellants. We have also heard Mr. Ajay Mishra, Mr. A. Sharma and Mr. Sujit Kumar Singh, learned Additional Public Prosecutor, for the State.

10. While considering the present appeals, what needs to be pointed out, at the very outset, is that the case of



the accused Shashi Kumar was segregated, he, having found to be a juvenile by the learned trial Court, and made over to the Juvenile Justice Board, Patna. As far as accused Varun Chandra is concerned, he has taken a plea, in the appeal, that he was a juvenile at the time of the alleged occurrence. By order, dated 17.11.2011, an enquiry was ordered by this Court on the question of juvenility of accused Varun Chandra, and the report received, in this regard, shows that accused Varun Chandra was, indeed, a juvenile at the time of the alleged occurrence. His case, therefore, needs to be dealt with according to the Juvenile Justice (Care and Protection) Act, 2000, and we order accordingly.

11. Coming to the appeals preferred by the remaining convicted persons, it needs to be noted that it is the evidence of the kidnapped child (PW 7), which is pivotal in nature and, therefore, his evidence needs to be taken note of. In substance, what PW 7 has deposed is that on 14.09.2009, his mother left him in the auto, which was to take him to his school, but, on the way to his school, when the auto took a turn from Gandhi Maidan, one person, Rocky, came and sat inside the auto and took out his pistol and asked the driver of the auto rickshaw to turn to another side. PW 7 has also deposed that when the auto reached near a big hotel, Varun got him (PW 7) seated on a motorcycle and he (Varun) sat in



the middle of the motorcycle; whereas Rocky was sitting behind all of them and they took him (PW 7) forcibly on that motorcycle. It is the further evidence of PW 7 that the accused told him that they had lost their money and if he (PW 7) accompanied them, his (PW 7's) father will pay them the lost money and if he (PW 7) refused, they would kill him and the accused persons took him (i.e., the victim child) to the village of accused Shashi, firstly, by a bus and, then, by a train and, while staying in the village of accused Shashi, police reached there four days after his kidnapping and brought him (i.e., the victim) child to his house from there. PW 7 has identified accused Rocky, who was present in the dock as one of the kidnappers. PW 7 has further claimed that the accused persons were talking among themselves and, thus, he came to know the names of the accused persons.

12. From a close and minute reading of the evidence of PW 7, what clearly transpires is that he has named accused Nishant @ Rocky as the person, who had taken him away. It is, however, of immense importance to note that contrary to the claim made by PW 7 that he had known the name of accused Rocky, strangely enough, PW 7 in his statement, which has been recorded by the Magistrate, under Section 164 of the Code of Criminal Procedure, did not mention any such statement, meaning thereby that PW 7 had



not known the name of accused Nishant @ Rocky. This apart, during his examination, PW 7 has admitted that his mother and aunt had told him, pointing out towards accused Rocky, on the date of recording of his evidence, that he (i.e., the said accused Rocky) was Rocky. It is in the evidence of PW 7 that from a conversation, which the kidnappers were having with each other, he had come to know the name of Rocky.

13. In the light of the evidence, which we have pointed out above, it is too hazardous to place implicit reliance on the evidence of PW 7 as regards the evidence given by him naming accused Rocky as the person, who had taken him away. Though we may have placed reliance on his evidence that the person, who has been named Rocky, was the one, who had taken him away, we notice that on account of discrepancies with which suffers the evidence of PW 7, his evidence is not of the nature, which can become the sole basis for conviction of accused Rocky.

14. It is trite that the witnesses, ordinarily, fall into three distinct categories, namely, (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. If the witness is *wholly reliable*, his evidence can be implicitly relied upon and such a witness's testimony can be made basis for conviction of an accused. Similarly, when a witness is found to be *wholly unreliable*, no reliance can at all

be placed on his evidence and his evidence has to be rejected outright. When, however, a witness is found to be *neither wholly reliable, nor wholly unreliable*, his evidence cannot be accepted as true unless his evidence is found to have been corroborated by some credible independent evidence, direct or circumstantial.

15. The evidence of the eye-witnesses, which the prosecution has adduced in the present case, cannot be safely relied upon unless the same is found to have been corroborated by some credible independent evidence, direct or circumstantial.

16. It is also an undisputed position of law that one infirm witness cannot be treated to have corroborated the evidence of another infirm witness meaning thereby that witnesses of same brand cannot be taken to have corroborated each other. Thus, when a witness is *neither wholly reliable nor wholly unreliable*, his evidence cannot be taken to have been corroborated by a witness of the same brand, namely, a witness, who is *neither wholly reliable nor wholly unreliable*, for, evidence is not to be counted, but weighed. It is not the number of the witnesses, which determines the outcome of a trial; rather, it is the inherent falsity or truth of the evidence given by the witness, which decides the outcome of trial. If each one of a large number of

witnesses is found to be *wholly unreliable*, their evidence cannot become acceptable as true merely because a large number of similar brand of witnesses has corroborated each other.

17. A reference, with regard to the above position of law, may be made to the case of Muluwa, S/o Binda and others Vs. The State of Madhya Pradesh, AIR 1976 Supreme Court 989, wherein the Supreme Court has observed as follows :

"It is elementary that the evidence of an infirm witness does not become reliable merely because it has been corroborated by a number of witnesses of the same brand; for, evidence is to be weighed not counted. Since the evidence of P.Ws. 5 and 6 suffered from the same infirmities as that of Smt. Jugatia, it cannot be said that the trial Judge had no basis, whatsoever, for stigmatising it as unreliable."

(Emphasis is added)

18. Situated thus, it is clear that merely because some persons, claiming themselves to be eye-witnesses, have given evidence describing the occurrence in tune with each other, their evidence cannot be made basis for holding them truthful witnesses, when their evidence is belied by the

medical evidence on record unless their evidence is found to have been corroborated by credible independent evidence, direct or circumstantial.

19. The other relevant evidence implicating accused Rocky is that of PW 6 (Md. Zahir). We, therefore, come to the evidence of PW 6, His evidence is that the occurrence took place, on 14.09.2009, between 07:30 AM and 08:00 AM, when he was going to Christ Church School after taking the boys on his auto rickshaw and when he turned towards right side of Ram Gulam More, one person came and sat inside the auto and told him (PW 6) to turn left at the point of pistol and threatened to shoot him if he did not obey him and, out of fear, PW 6 turned his vehicle towards Maurya Hotel and when he reached near the second gate of the hotel, the accused got the auto stopped. It is the further evidence of PW 6 that one Honda Splendor motorcycle with two persons sitting on it came from behind and one person got down and came to the auto and lifted Shrestha Sanjay, the victim child, and took him on the motorcycle and the person, sitting in the auto, told PW 6 not to raise *hulla*, or else, he would shoot him. Thereafter, PW 6 turned the auto and informed the police, present near St. Xavier School, about the occurrence and told them that Shreshta Sanjay had been kidnapped and, then, he reached Christ Church School and informed the

Guard about the occurrence and the Guard, in turn, informed the Principal about the occurrence. It is the evidence of PW 6 that the owner of the auto rickshaw also reached there and he took the driver to the house of Shrestha Sanjay, where the police also reached.

20. Though, PW 6 has identified accused Nishant @ Rocky by his name, he has admitted, in his cross-examination, that accused Rocky had been shown to him by the police and it was the police, who had given his (Nishant's) name as Rocky.

21. Situated thus, even PW 6's testimony cannot be made the sole basis for conviction of accused Rocky.

22. As far as accused persons, Vijoy Prasad and Kanti Devi, are concerned, it may be pointed out that accused Shashi is their nephew and there is no overt act attributed to either Vijoy or Kanti showing that they were involved in the alleged act of kidnapping of Shrestha Sanjay.

23. The above discussion of the evidence leads us to the evidence of Investigating Officer (PW 11), whose evidence is that on 14.09.2009, at about 07:48 AM, he received information that a school boy, named Shrestha Sanjay, had been kidnapped from Frazer Road, opposite Hotel Maurya, and, then, he reached the house of the victim and recorded the *fardbayan* of mother of the kidnapped child,



Kalpna Shrivastava. It is the evidence of PW 11 that on 15.09.2009, the informant, Kalpna Shrivastava, told him that a call was made at 05:54 PM on her mobile No. 9430813207 from telephone No. 06123263912, in the said conversation it was admitted by the caller that the victim child was under his custody and demanded one crore rupees, as ransom, for his release. PW 11 has deposed that the informant received two more calls, from telephone Nos. 06123263912 and 06123217498 and the caller threatened the informant that if one crore rupee was not paid to him, he would kill the victim child and, on receiving such information from the informant, PW 11 obtained the call details. It is the further evidence of PW 11 that the informant received many calls from different mobile numbers as regards the *ransom* and PW 11 obtained the call details report of all the mobile numbers used for demand of ransom and, during investigation, he obtained the address of holder of one of the mobiles, bearing No. 9334198610 and reached the address and came to know that a lady used to live there and his son was using that mobile number, and on the information given by that lady, the police arrested Varun Chandra and Nishant Verma and seized mobile sets, one broken SIM of Aircel, bearing no. 9852751632 and others bearing 9973323404 and 9852560809. PW 11 also seized a chit of paper on which "Car



No. BR 1W 4795, Silver Maruti 800, goes to Christ Church, Gandhi Maidan, by tempo at 8 AM – comes between 2 to 3, mother's phone no. is –woman 9835489198" was written and mobile no. 9430813207 was written in separate lines after the above words. PW 11 has further deposed that seizure list was accordingly prepared by S.I. Vinay Kumar, Gandhi Maidan, and, on the basis of the statement of accused Nishant Verma, PW 11 conducted raid at village Paigambarpur and, on the clue given by accused Varun Chandra, the kidnapped child was recovered from the house of accused Vijay Prasad and arrested accused Vijay Prasad, his wife, Kanti Devi and his nephew, Shashi Kumar.

24. From the evidence given by the Investigating Officer (PW 11), though what transpires is that he found, at the place of recovery of the kidnapped child, accused Vijay Prasad, Kanti Devi and Shashi Kumar; yet as far as accused Shashi Kumar is concerned, he has been found to be juvenile and his case has been dealt with by Juvenile Justice Board and so far as accused Vijay Prasad and Kanti Devi are concerned, there being no such incriminating evidence, which could connect the accused with the charge of kidnapping of the child, prosecution's case cannot be said to have been proved beyond reasonable doubt as against accused Vijay Prasad and accused Kanti Devi.



25. Having regard to the nature of evidence, which has come on record, we are clearly of the view that the evidence adduced by the prosecution fell short of the standard of proof, which is demanded in a criminal trial, and in the face of such evidence, the accused-appellants, namely, Nishant Kumar Verma @ Rocky, Vijay Prasad and Kanti Devi could not have been held guilty of the offence charged with. At any rate, in the light of the evidence on record, they ought to have been accorded, at least, benefit of doubt.

26. In the result, and for the reasons discussed above, these appeals stand allowed. The impugned conviction of the accused-appellants and the sentences passed against them by the judgment and order, under appeal, shall accordingly stand set aside. The accused-appellants, namely, Nishant Kumar Verma @ Rocky, Vijay Prasad and Kanti Devi, are held not guilty of the offences, which they were charged with, and they are acquitted of the same under benefit of doubt.

27. Because of what have been pointed out above, the conviction of accused-appellant, Varun Chandra and the sentence passed against him, by the judgment and order, under appeal, are set aside and his case is remanded to the Juvenile Justice Board, Patna, for being dealt with in accordance with law.

28. Let accused-appellants, Nishant Kumar Verma @ Rocky, Vijay Prasad and **Varun Chandra**, be set at liberty, forthwith, unless they are required to be detained in connection with any other case.

29. So far as accused-appellant, Kanti Devi, is concerned, she is already on bail. Her bail bond is hereby cancelled and her sureties shall stand discharged.

30. The Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the Lower Courts Record.

(I. A. Ansari, ACJ.)

(Chakradhari Sharan Singh, J.)

Prabhakar Anand/-

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