

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.976 of 2011

Arising Out of PS.Case No. -0 Year- null Thana -null District- EASTCHAMPARAN(MOTIHARI)

Narayan Nat S/O Shahid Nat R/O Village - Mahnua, P.S. Turkoliya, District - East Champaran

.... Appellant/s

Versus

The State Of Bihar

... Respondent/s

with

Criminal Appeal (DB) No. 1059 of 2011

Arising Out of PS.Case No. -0 Year- null Thana -null District- EASTCHAMPARAN(MOTIHARI)

Harendra Giri S/O Late Prasad Giri Resident Of Village - Bailghatti, P.S.- Turkaulia, District- East Champaran

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

with

Criminal Appeal (DB) No. 1062 of 2011

Arising Out of PS.Case No. -0 Year- null Thana -null District- EASTCHAMPARAN(MOTIHARI)

Md. Sahnawaz @ Shahnawaz

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (DB) No. 1109 of 2011

Arising Out of PS.Case No. -0 Year- null Thana -null District- EASTCHAMPARAN(MOTIHARI)

- 1. Arun Rai S/O Jalwshwar Rai, R/O Vill- Madhopur, P.S.- Trukaulia, Distt- East Champaran.
- 2. Umesh Rai S/O Ramdeo Rai R/O Village- Pathkhaulia, P.S- Turkaulia, Distt- East Champaran.

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

with

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Criminal Appeal (DB) No. 1209 of 2011

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Arising Out of PS.Case No. -242 Year- 2007 Thana -null District- Eastchampan(Motihari)

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1. Suresh Sah S/O Sri Madho Sah Resident Of Village- Mahanwa Bazar, Belwa
Bairagi Tola, P.S.- Turkaulia, District- East Champaran.

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (DB) No. 976 of 2011)

For the Appellant/s : Mr.

For the Respondent/s : Mr.

(In CR. APP (DB) No. 1059 of 2011)

For the Appellant/s : Mr.

For the Respondent/s : Mr.

(In CR. APP (DB) No. 1062 of 2011)

For the Appellant/s : Mr.

For the Respondent/s : Mr.

(In CR. APP (DB) No. 1109 of 2011)

For the Appellant/s : Mr.

For the Respondent/s : Mr.

(In CR. APP (DB) No. 1209 of 2011)

For the Appellant/s : Mr.

For the Respondent/s : Mr.

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CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA PRAKASH)

Date: 24-02-2016

1. The Appellants have been charged under Sections 364A of the Indian Penal Code and 25(1-b)A, 26, 35 of the Arms Act and convicted under Section 364A/34 of the Indian Penal Code and sentenced to go Rigorous Imprisonment for life and fine of Rs. 5,000/- and in default of six months Rigorous Imprisonment by judgment dated 16/21.09.2011 passed in Sessions Trial No. 105 of 2008 by the Additional Sessions Judge 8th Motihari, East Champaran.

2. The case of the prosecution according to Md. Taiyab

Hussain (P.W. 4) is that on 26.12.2007 at about 7.20 P.M when his son Md. Munna @Firoj aged about 32 years was returning after having closed his shop on Hero Honda Motor Cycle bearing no. BRO 5B 8764, one white Bolero vehicle chased him and two persons got down and seated him in the back seat and forcibly took him towards Motihari to Saraiya. His motor cycle was left at that place. Having heard about the occurrence, he went there to confirm this fact and informed the police as also that there were two mobile sets with the victim. A case against unknown was instituted on his information on 26.12.2007.

3. It appears that Munna@ Firoj was recovered from the house of the Appellant Suresh Sah and produced before the Court for statement under Section 164 Cr.P.C. He supported the factum of his kidnapping.

4. During trial the prosecution examined 10 witnesses.

After hearing the counsels and going through the evidence we are inclined to maintain the conviction. The reasons why we have reached such a decision will be reflected in the manner of discussion of the witnesses below.

5. P.W. 1 Kaushar stated that on the date of occurrence while he and the victim were preparing to leave, a green colour Bolero came in which about 5-7 persons were seated called him and said that the light was not working so the victim was asked to proceed and he offered to get it repaired and then he left on his motor cycle. He later

learnt that Munna @Firoj had been kidnapped. He identified two persons in Court namely, Appellants Umesh Rai and Narayan Nat as being the two persons who were sitting on the driving seat.

In cross-examination he stated that faces of the accused were uncovered but he had not claimed to identify the accused before the police nor had he been summoned for taking part in the Test Identification Parade. He also stated in Court that it was a dark night and that he was seeing Umesh first time.

6. P.W. 2. Md. Afroz is the brother of the victim. He stated that on 26.12.2007 at about 7.30 P.M while his brother was returning he was kidnapped and was recovered after eight days. He also stated that demands of Rs. 30 lacs as ransom was being made on his neighbor's mobile and on his own mobile.

In cross-examination he does not say anything which is worthy of note and is limited to the factum and corroborating the story of kidnapping and demands of ransom.

7. P.W. 3 Deo Lal Rai stated that on 31.12.2007 some calls were received on his mobile asking him to get him to speak with the father or brother of the victim at which he sent the mobile to their house. However, he did not know as to what was the conversation and he later learnt that demands of Rs. 30 lacs as ransom had been made.

In cross-examination he clarified that no demands of ransom has been made from him personally.

8. P.W. 4 Md. Taiyab Hussain, who is the informant,



corroborated the factum of kidnapping of his son and demands of ransom of Rs. 30 lacs from the mobile of his son Munna @Firoj. He further stated that they also threatened that the victim would be killed if the demand was not fulfilled. Later, he was informed by the police that his son, who had been confined, having been bound with chains and lock, had been recovered from the house of the Appellant Suresh Sah and his wife, acquitted accused Prema Devi. The victim disclosed how he had been confined as also the names of Appellants Md. Sahnawaz @ Sahnawaz, Harendra Giri Bipin Betha and Umesh Rai.

In cross-examination, he denied that he had any enmity with Umesh Rai and admitted he did not attend any Test Identification Parade. He also stated that after his release his son had come at home on 3rd January in the evening at 3 O clock when he disclosed the names of the accused persons.

9. P.W. 5 Md. Firoz @Munna is the victim who said that on 26.12.2007 at around 7.00 P.M he was preparing to go to the house of Ajay Mishra to administer injection to his child. Just then a green colour Bolero bearing BR-22P-0451 came, out of which one person asked him to get the light fixed. He told Kaushar (P.W. 1) to get it repaired and he himself departed. The very same Bolero vehicle over took him and stopped his vehicle. Six persons emerged from the vehicle one of whom pointed a pistol on his head. The rest started to assault and caught him. They then pushed him into the car and fled away towards Saraya Chowk. A little ahead, Bolero vehicle slowed



down and Appellant Arun Rai disembarked and car proceeded. More than a hour later they reached some place where he was kept in an orchard and then ½ hour later he was made to walk to certain distance and taken to a house where he was bound with chains and lock and his mobile bearing 9852488969 was taken. He was kept confined for eight days, in which duration, he was given water and food to drink. On 02.01.2008 at about mid night he heard some sounds outside the house and then he was recovered by the police. The Appellant Suresh Sah and his wife Prema Devi were apprehended, who he identified as the persons who used to keep guard over him. He explained that even though he was blind-folded but he used to see by pulling the cover down. Appellant Suresh Sah disclosed the names of Appellant Sahnawaz that he was also with him and alos that of with Harendra Giri. These persons were demanding ransom from his own mobile and threatened that if demand was not fulfilled, he would be killed.

After recovery by the police, he was produced before the Magistrate and his statement was recorded which he proves as Ext 2. When he reached home he learnt that a demand of ransom of Rs. 30 lacs was being made.

He identified the Appellant Narayan Nat who had pointed pistol on him, Appellant Sahnawaz who had covered his face, Appellant Suresh Sah who had caught hold of his neck and Appellants Harendra Giri, Arun Rai as also Umesh Sah and his wife Prema Devi.



In cross-examination he stated that he had seen Prema Devi and Appellant Suresh Sah on the days when he had been confined in a room. He further stated that the place from where he was recovered, the police also seized chain and locks of which seizure list was prepared and on which signature of Appellant Suresh Sah and Prema Devi was taken. He further stated that on 03.01.2008 at around evening he was let off by the Police and produced him the next day in Court. In Thana Hazat, Appellants Narayan Nat, Suresh Sah, Harendra Giri, Umesh Rai, Arun Rai, Sahnawaz Hussain, Bipin Betha and accused Bipin were locked up when his statement was recorded. Even before he was examined, the police had got him to identify the accused persons and had given the details of their specific roles. He conceded that the police had not got the Test Identification Parade conducted and that he had not known any of the accused persons by name earlier. He clarified that none of the accused persons had covered their faces. His attention was drawn to the earlier statement recorded under Section 164 Cr.P.C only to the manner of occurrence which is not of great value.

10. P.W. 6 Anil Kumar, the Investigating Officer stated about recording of the fard beyan and institution of the first information report which is Ext. 3 and recovery of a hero motor cycle and a mobile with sim bearing no. 9852488969. He stated that these articles were recovered from the possession of Appellant Narayan Nat of which he prepared a seizure list in the presence of witnesses.



On 03.01.2008, at about 12.30 mid night from the house of Appellant Suresh Sah, victim Firoz@Munna who had been recovered bound with chains and covered with cloth articles such as chain-lock, rope and some other things were recovered. The Appellant Suresh Sah and his wife Prema Devi were found sleeping. A seizure list was prepared of the said articles and also given to Appellant Narayan Nat which is proved as Ext. 3/1 on 03.01.2008 at 02.30 P.M. From near the house of Appellant Harendra Giri, a Bolero vehicle bearing no. B.R.22P 0851 of which the left light was damaged, was found and seized of which a seizure list was prepared which is Ext. 3/1.

On the same day at about 04.30 A.M Appellant Sahnawaz was arrested and from his possession, a pistol was recovered of which also a seizure list was prepared and marked as Ext. 3/3. Then Arun Rai was arrested and from his possession a mobile along with sim bearing no. 9852306396 was recovered which is marked as Ext. 3/4. He then stated that as to how the fard beyan was recorded and he inspected the place of occurrence and described the same. He also disclosed about some informer had given information about the occurrence.

He sent an application to the senior officer to take print out of phone calls which were being made from the mobile of the victim and tower locations. He also described the place from where the victim was recovered being the house of Appellant Suresh Sah who was found along with his wife and children. He stated that the victim



after recovery, identified the Appellants Narayan Nat, Suresh Sah and Bipin Betha as also Prema Devi. He recorded the confessional statement of the accused which is marked as Ext. 5. He proves the document showing the print out of the phone calls used for tracing the miscreants. He conceded that he had not taken permission for holding Test Identification Parade. He conceded that he did not produce the mobile phone which had been recovered from the possession of the Appellant Narayan Nat before the Court nor did he make any enquiry with regard to motor cycle. Once again he explains that a raid had been conducted on 03.01.2008 but he had not taken any permission with regard to search warrant. He also stated that the victim had not taken names of the miscreants nor had he stated that they had covered their face. He conceded that for recovery of the arms from the possession of the Appellant Sahnawaz, a separate case had been instituted. There is nothing else which is of any importance in the cross-examination of this witness.

11. P.W. 8 Gopi Shrivastava was the Judicial Magistrate who had recorded the statement of the victim and others under Section 164 Cr.P.C.

In cross-examination he stated that the victim had not taken the names of Umesh Rai, Suresh Sah and Narayan Nut and had not disclosed the full details of Raj Kishore Sah and Prema Devi or the names of Appellants Harendra Giri and Bipin Baitha.

12. P.W. 9 Ram Pukar Singh is the Officer-in charge of

Chotani who stated that on 03.11.2008, in his presence mobile phone along with sim bearing no. 9973976811 was recovered of which a seizure list was prepared which is marked as Ext. 10.

13. P.W. 10. Raj Kumar is the Judicial Officer who recorded the statement of the informant Md. Taiyab Hussain and his son Firoz Ansari under Section 164 Cr.P.C and is more or less formal in nature.

14. One Ram Pravesh was examined as Court witness no. 1 who brought the materials such as chain lock, mobile phone, revolver and Bolero vehicle as also motor cycle before the Court.

15. The defence examined four witnesses.

16. D.W. 1 Ram Chandra Rai and D.W. 2 Ashok Rai were examined on the point that there was some kind of dispute between the Appellant Arun Rai and the informant.

17. D.W. 3 Bharat Sah and D.W. 4 Ramgya Sah who were seizure list witnesses of recovery of motor cycle from the possession of Appellant Narayan Nat have stated that nothing was recovered in their presence from his possession.

18. Learned counsel for the Appellants submits that admittedly only evidence against the Appellants is the identification of the victim in Court which should be disbelieved for the following reasons :

(i) There was no means of identification which would attach authenticity to the subsequent identification in Court especially

since the consistent story is that it was a dense dark foggy night and none except Appellant Arun Rai was known to the informant.

(ii) Identification in Court is not reliable. For which reasons he relied upon a decision in **Shaikh Umar Ahmed Shaikh v. State of Maharashtra** reported in **1998 SCC 103** and **Ravi v. State Rep. by Inspector of Police** reported in **AIR 2007 SC 1729**.

(iii) The further submission is that the victim was recovered from the house of Appellant Suresh Sah is doubtful since none of the witnesses to the recovery have been immediately examined by the prosecution which benefit should go to the accused in view of the established principles once again reiterated in **Sarah Mathew v. Institute of Cardio Vascular Diseases** reported in **AIR 2014 SC 448**.

19. In order to appreciate the argument in the background of the evidence led by the prosecution, we will have to look into the charge which the Appellants have faced.

20. Admittedly they were charged under Section 364A and convicted under the same which makes it important to consider the two aspects which are germane to the issues :

(i) The fact of forcible removal of a person without his will.

(ii) Demands of ransom by the Accused.

So far as the first part of the ingredient is concerned, we find that there are consistent statements of P.W. 2 Md. Afroz, P.W. 4

Md. Taiyab Hussain and victim Md. Munna @ Firoj himself (P.W. 5) that he had been forcibly taken away by some persons.

As for the next ingredient as to whether threats have been meted out to P.W. 5 if ransom was not paid. We find that P.W. 2. Md. Afroz has stated that phone calls were made to his mobile as well as on the mobiles of his neighbour demanding ransom. This fact has been supported by P.W. 3 Deo Lal Rai that somebody had called on his mobile asking to the brother or father of the victim. This fact has been supported by Md. Taiyab Hussain (P.W. 4) as also by the victim Md. Munna @ Firoj himself.

In such circumstances, evidently the ingredients of Section 364 A IPC are fulfilled.

21. Now to discuss the evidence appearing against the present Appellants, we find from the evidence of P.W. 1 Kaushar that he was the person who had been approached to repair the light of Bolero on which later the victim was kidnapped. He identified Appellants Narayan Nat and Umesh as the two accused in Court who were seated in the Bolero. He asserted that their faces were uncovered. However, he had not claimed to identify these persons before the Investigating Officer.

22. P.W. 5 Md. Firoz@Munna the victim identified the Appellant Arun Rai who was known to him as one of the kidnappers who had got off the Bolero after it had driven to a certain distance. He identified the Appellant Narayan Nat having pointed pistol on him

and the Appellant Sahnawaz having held his face. He also identified Appellants Suresh Sah and Harendra Giri.

Thus we find whereas Appellant Narayan Nat had been identified in Court by P.W. 1 and the victim P.W 5, Appellant Umesh had been identified only by P.W. 1 but not by the victim who had also identified Appellants Harendra Giri, Md. Sahnawaz, and Arun Rai.

23. The further evidence against the Appellant Narayan Nat is that the mobile of the victim was recovered from his possession as stated by P.W. 6 the Investigating Officer but we find that he was not given a recovery memo nor was it produced in Court. In such circumstances, we are not inclined to rely on this part of the evidence as regards Appellant Narayan Nat.

As for evidence against Harendra Giri, we find that the Bolero Jeep on which the victim had been kidnapped was recovered from near his house.

24. Now the only point for consideration is as to whether the identification first time in Court can be relied upon. The first argument in this regard is that when there was no means of identification, their identification in the car or a dark and foggy night is improbable.

25. We find from the evidence of the victim that he had asserted that the accused persons had uncovered their faces and he was driven to quite a distance in which period the possibility of them

being identified by the victim cannot be ruled out. The identification of Suresh Sah who was with the victim along with his wife Prema Devi for next eight days also lends authenticity to his identification in Court.

26. We also take note of the fact that in the present case Narayan Nat was arrested by the Investigating Officer on 02.01.2008 and it is thereafter on 03.01.2008 at around mid night that the victim was recovered from the house of the Appellant Suresh Sah and on the same day Harendra Giri was arrested on the basis of the Bolero parked near his house. At 04.30 P.M Appellant Sahnawaz was arrested. We, thus, find that the sequence in which the police proceeded it appears both the accused and the victim were brought together to the Police Station. In such circumstances, when the victim has categorically stated that he identified the accused persons at the Police Station it indicates that the investigation was proceeding in the correct direction which is the sole reason for holding a Test Identification Parade and hence in the facts of this case not conducting a Test Identification Parade is not fatal.

At this juncture it is to be noted that repeatedly Courts have held that Test Identification Parade is not a substantive piece of evidence but it is merely to ensure that the investigation was proceeding on the right lines.

For this reason we have to reject the submission of the Appellants that the prosecution case is completely demolished

because of failing to hold the Test Identification Parade and identification in the Court for the first time in police lock up has no sanctity.

27. In the case relied upon by the Appellants reported in 1998 SCC 103, we find that the facts of the case is that the Appellants therein had been identified by two the witnesses i.e. P.W. 2 and P.W. 12 during investigation. However, the Test Identification Parade held was rejected by the Special Court for the reasons that it was not authentic. In such circumstances, the Hon'ble Supreme Court held that identification of the Appellants first time in Court was not fit to be relied upon. There is no principle of law governing this aspect of the case and on the contrary there have been decisions that identification in Court for the first time can be treated reliable evidence.

28. We can find such a discussion of variation in the facts of the case reported in AIR 2007 SC 1729 which has also been relied upon by the Appellants where the Apex Court held in paragraph 17 & 18 as follows :

“17. It is, no doubt true that the substantive evidence of identification of an accused is the one made in the Court. A judgment of conviction can be arrived at even if no test identification parade has been held. But when a first information Report has been lodged against unknown persons, a test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him. The witnesses were not very sure as to whether they had seen the appellant before. Had the accused been known, their identity would have been disclosed in the First Information Report. PW-1 for the first time before the court stated that he had known the accused from long before, but did not know their names earlier, although he came to know of their names at a later point of time.

18. In a case of this nature, it was incumbent upon the prosecution to arrange a test identification parade. Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the concerned witnesses or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification”.

29. Hence in the facts of the present case we are inclined to place absolute reliance on the identification of the Appellants by the victim in Court and thus showing their complicity and hence finding no merit in the Appeal, the same is rejected.

(Anjana Prakash, J)

(Rajendra Kumar Mishra, J)

Prakash/-
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