

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

% *Judgment Reserved on: August 09,2016*
Judgment Delivered on: August 17, 2016

+ **CRL.A. 652/2012**

KARAMBIR

..... Appellant

Represented by: Mr. Ajay Raghav, Mr. Mayank Gupta and Mr. Arjun Sharma, Advocate.

versus

STATE OF NCT (DELHI)

..... Respondent

Represented by: Ms. Rajni Gupta, APP for the State with SI Sandeep Kumar, PS Palam Village.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Convicted for offences punishable under Sections 363/307 IPC Karambir challenges the impugned judgment dated May 10, 2012 and the order on sentence dated May 15, 2012 directing him to undergo rigorous imprisonment for a period of seven years and to pay a fine of ₹10,000/- for offence punishable under Section 307 IPC and rigorous imprisonment for a period of four years and to pay a fine of ₹5,000/- for offence punishable under Section 363 IPC.

2. Assailing the conviction learned counsel for Karambir contends that the conviction of the appellant is based on solitary evidence i.e. the testimony of the victim PW-4 who has turned hostile qua the allegation under Section 307 IPC. It is further submitted that apart from the testimony

of the victim, no independent witness was produced by the prosecution to establish that appellant kidnapped the victim PW-4 and tried to kill him. The only independent witness PW-9 Kailash did not support the prosecution case and has turned hostile. It was further alleged the motive behind the commission of the offence has not been established by the prosecution. There was no enmity between Karambir and PW-3 Sudan Kumar, father of the victim and PW-6 Tara Chand, grandfather of the victim.

3. Per contra learned APP for the State contends that the motive of the appellant to kill can be gathered from the attending circumstances. Furthermore, the injuries caused to the victim demonstrate the intention of the appellant to kill him.

4. The sequence of events leading to the prosecution filing the charge-sheet against the appellant are that on January 21, 2011, PW-6 Tara Chand, grandfather of the victim PW-4 visited PS Palam Vihar and informed ASI Omkar Singh that his grandson Aniket @ Sumit PW-4 aged 8 years who was playing near the house around 7:30 P.M. was missing. They tried to search him but when they could not find him, he came to the police station. On the basis of this information DD entry was recorded and FIR No. 19/2011 under Sections 363 IPC exhibited as Ex. PW-10/A was registered. During the course of investigation, PW-14 ASI Ram Karan sent WT message all over India regarding the missing child and also filled up the forms for publication of news regarding missing of the child on Doordarshan as well as in the newspapers. On January 22, 2011, around 6:55 A.M., PW-2 HC Umesh Kumar received a call regarding the accident of a boy at Mangolpuri Railway Station. PW-1 Dharmender Trivedi, Ambulance Officer reached at the spot and the boy who was injured and had severe head injury was taken

to Sanjay Gandhi Memorial Hospital. On January 26, 2011, PW-3 Sudan Kumar received a call that his son PW-4 Sumit was admitted in RML Hospital. The statement of PW-4 Sumit was recorded under Sections 161 and 164 Cr. P.C. Statements of other witnesses were also recorded. On January 31, 2011, PW-15 SI Surender Singh arrested Karambir on the basis of secret information received by him.

5. PW-3 Sudan Kumar deposed that on January 26, 2011, when he got the information that PW-4 Sumit was admitted in RML Hospital, he went there and saw Sumit whose right arm was amputated. The hospital authorities shifted Sumit from Sanjay Gandhi Memorial Hospital, Mangolpuri to Safdurjang Hospital where he remained admitted for ten days. He further deposed that PW-4 Sumit had told him that his 'Fufa' namely Karambir had taken him along saying that he would purchase a pet dog for him. Karambir kept Sumit in a jhuggi till 2 A.M. after which he took him to Mangolpuri Railway Station. Thereafter, Sumit did not know what happened to him and he regained his consciousness in RML Hospital. During his cross examination, he stated that Karambir is the husband of his step sister. He denied the suggestion that his relations with his step sister Suman and Karambir were not cordial.

6. PW-4 Sumit deposed that his 'fufa' Karambir took him to Mangolpuri Railway station where Karambir made him walk him. Thereafter, he made Sumit sit in a jhuggi saying that he will fetch the keys from his house. After some time, Karambir returned to the jhuggi and again took him to the railway station and after that he did not know what happened to him. During his cross examination, he denied the suggestion that Karambir had held his hand with the intention to kill him and threw him in front of the train. PW-4

Sumit was declared hostile and was confronted with his statement recorded under Section 161 Cr. P.C. which he denied.

7. PW-6 Tara Chand, grandfather of Sumit deposed in sync with the testimony of PW-3 Sudan Kumar.

8. PW-9 Kailash who was an independent witness was also declared hostile. During his cross examination, he denied the suggestion that he knew Karambir. He also denied that Karambir had come to his premises in the intervening night of 21st and 22nd January, 2011 with a child at about 9:00 P.M., stayed with him for the night and left in the morning along with the child.

9. PW-12 Dr. M. Das, C.M.O., NFSG, Sanjay Gandhi Memorial Hospital deposed that he had examined PW-4 Sumit on January 22, 2011, around 7:10 A.M. and prepared his MLC Ex. PW-12/A. He found the following injuries:

1) Crush injury in the right arm with disarticulation at shoulder.

2) Lacerated wound in the scalp in the frontal region right side exposing bone 6 cm X 3 cm irregular in margin, extended upto temporal region with multiple lacerated wounds, vault of scalp of various size.

10. PW-17 Dr. Manoj Dhingra, HOD, Forensic Medicine, Sanjay Gandhi Memorial Hospital opined that the nature of the injury was grievous in nature.

11. After the prosecution proved that the victim child Sumit was in the custody of Karambir, the onus under Section 106 of Indian Evidence Act, 1872 shifts on the appellant to prove how the injury was caused to PW-4 Sumit but the appellant has failed to discharge the onus. In the decision

reported as (2006) 12 SCC 254 State of Rajasthan Vs. Kashi Ram Supreme Court held:

“23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., Re. [AIR 1960 Mad 218 : 1960 Cri LJ 620]”

12. Thus though the onus shifted on karambir to explain as to how Sumit received the injuries however the same does not discharge the burden of proof upon the State to prove that the Appellant was possessed with the intention necessary for constituting the offence punishable under Section 307 IPC. In 2009 (12) SCC 585 Ratan Singh v. State of M.P. and Anr., their Lordship's held that whether the accused is possessed of the intention to

commit an offence punishable under Section 307 IPC or not has to be gathered from the facts and circumstances surrounding the offence.

13. In the present case, it is proved beyond reasonable doubt that Karambir enticed away PW-4 Sumit and the ingredients of the offence punishable under Section 363 IPC are made. In the present case, even from the attending facts the prosecution has failed to prove beyond reasonable doubt that Karambir had an intention to kill Sumit. Thus, one of the essential ingredients of Section 307 IPC is missing. As is evident from the MLC the injury is grievous in nature as defined under Section 325 IPC. Thus the appellant is liable to be convicted for the offence punishable under Section 326 IPC.

14. Maintaining the conviction of Karambir for offence punishable under Section 363 IPC, the conviction of Karambir is modified from Section 307 IPC to one under Section 326 IPC. He has already undergone more than 6 years of rigorous imprisonment. Thus the sentence of the appellant is modified to the period already undergone. Appeal is disposed of.

15. Superintendent Tihar Jail is directed to release Karambir forthwith, if not required in any other case. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

16. TCR be returned.

(MUKTA GUPTA)
JUDGE

AUGUST 17, 2016
‘vn’.