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

+ CRL.L.P. 238/2016
STATE

..... Petitioner

Through: Mr.Tarang Srivastava, APP for State.
ASI Puran Singh, PS Gokalpuri.

versus

SHAMSHAD

..... Respondent

Through: Mr.S.U. Miraz, Adv.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER

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03.05.2017

The respondent was put to the trial in the Court of Metropolitan Magistrate on the accusations of having kidnapped daughter of the first informant *i.e.* (PW-5) aged about 8 years, from out of the guardianship of her father (PW1) at about 7.00 p.m. on 28.04.2007 and thus on the charge for the offence punishable under Section 363 of Indian Penal Code, 1860 (IPC) on the basis of evidence presented through the report under Section 173 Code of Criminal Procedure, 1973 (Cr.P.C.), submitted on 02.06.2007, upon conclusion of investigation into First Information Report (FIR) No.290/2007 of PS Gokalpuri. The FIR (Ex.PW2/A) had been earlier registered on the basis of the statement of first informant *i.e.* PW1, vide Ex.PW1/A at 10.40 a.m. on 22.09.2007. On the conclusion of the trial in the said criminal case, bearing serial No.(RBT 117/14), the Metropolitan Magistrate found the respondent guilty and, thus, convicted him vide judgment dated 29.05.2015. By subsequent order passed on 30.06.2015, he was awarded rigorous imprisonment for three years with benefit of set off under Section 428 Cr.P.C. besides direction for compensation to be paid.

The respondent assailed the aforesaid judgment by criminal appeal No.21/2015 in the Court of Sessions which was allowed by judgment dated 07.10.2015 by the Court of ASJ-03 (North-East) thereby setting aside the order of conviction and sentence.

The State is before this Court by way of this petition seeking leave to appeal under Section 378 (4) Cr.PC. On notice, respondent has appeared through counsel. Learned Public Prosecutor for the petitioner and learned counsel for the respondent have been heard and the record has been perused.

Having heard both the counsel and gone through the evidence, this Court is of the view that the opinion expressed by the first appellate court cannot be said to be perverse or impossible to be arrived at.

The first informant, while lodging the FIR, had not indicated as to who had taken away his daughter (then aged about 8 years) who he had earlier sent out with her brother (PW-6), who was one year senior to her at that point of time. The only description that the children had been able to give at the stage of investigation was that the person in question was a young man.

The recovery of the kidnapped child is stated to have been effected, by the I.O. (PW-7), assisted by a constable (PW-4), on the basis of some secret information leading to recovery memo (Ex. PW1/B) being prepared on 29.04.2007, shown attested by PW-1 and PW-4. Going by the evidence of PW-4 and PW-7, at the time of search for and recovery of the girl, on the basis of the secret information, the first informant (PW-1) had joined the investigation. The presence of PW-1 at such stage, however, was refuted by PW-5 during her testimony.

Undoubtedly, PW-5 and PW-6 did identify the respondent as the person who was responsible for the former (PW-5) being taken away on 28.04.2007. But then it has to be remembered that both these witnesses were

children of tender years and their evidence was being recorded after six years of the event. During the entire investigation, no test identification parade was conducted *vis-a-vis* the respondent. The testimony of PW6, sibling of the kidnapped child, without test identification parade being arranged is not found safe to draw assurance or to be the basis of conviction.

The investigating officer seems to have relied more on recovery of the kidnapped child from the custody and control of the respondent. It is here that the proceedings recorded by him, and evidence adduced at the trial, essentially his own testimony as also the testimony of PW-4 are belied not only by PW-5 but also, and more importantly, by PW-1, the first informant himself, who deposed that he had been informed by telephonic call about one O' clock in the night that his daughter had been traced in Kapashera. It is only thereafter that he claims to have gone to the said area and found his daughter present.

In above view, it is difficult to believe the evidence of police witnesses about the circumstances leading to the recovery of the child from the custody of the respondent.

The view taken by the first Appellate Court, therefore, cannot be faulted.

The petition stands dismissed.

R.K.GAUBA, J

MAY 03, 2017
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