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

+ **CRL.L.P. 483/2018**

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Judgment reserved on 28 November, 2018
Judgment pronounced on 19th December, 2018

STATE

....Petitioner

Through : Mr. Ravi Nayak, APP for the State with IO
SI Girish Kumar, D-810-PIS 16950183,
Special Cell, NDR, Lodhi Colony &
Inspector Umesh Barthwal, Special Cell

Versus

JAIDEEP & ORS.

....Respondents

Through: Mr. Ajay Burman, Senior Advocate with
Ms. Tanya Harnal, Ms. Sadhvi Gaur,
Mr. Sahil Verma for respondent No. 2.
Mr. Dinesh Malik, Mr. Manish Malik and
Mr. Akash Saini, Advocates for respondents
No. 1, 3 and 4.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. Acquittal of respondents recorded by the learned Additional Sessions Judge-02/Fast Track Court, New Delhi District, Patiala House Courts vide its order dated 06.04.2018 passed in Sessions Case No. 174/2013 arising out of FIR No. 71/2005 under Sections 364-A/120-B of the Indian Penal Code (hereinafter referred to as "**IPC**") and 25 of the Arms Act, has led to the filing of the present criminal leave petition.

Facts of the case

2. The case of the prosecution in a nutshell is that on 25.02.2005 PW-3 Rajender Kumar Sharma, father of the victim-1 reported in Police Station that his son PW-1 Rahul Sharma (Victim-1) residing with his family in 12-A, Ist Floor, Underhill Lane, Civil Lines, Delhi had left for his shop at Chawri Bazar with his driver PW-2 Zakir (Victim-2) in Lancer Car No. DL 1CG 7555 magic black colour. At about 3:30 p.m., his wife called him on his mobile number but failed to contact him, thereafter, she made another call to PW-2 on his mobile number who informed her that PW-1 is inside the shop. Later again she tried to contact PW-1 as well as PW-2 but failed to establish any contact with them.
3. At about 5:30 p.m., PW-3 received a ransom call from the landline No. 23286929 of PW-1 shop, from a person who introduced himself as Shakir. According to PW-3, another call was received by him and he was made to speak to PW-1, who said that *"They have brought me to some unknown place. You don't worry."* Thereafter, PW-3 spoke to the person who was on the telephone and asked him as to how much money he could give to seek release of PW-1 and informed him that he will call on the next day. After sometime, car of PW-1 was found at VIP parking of New Delhi Railway Station. On the complaint of PW-3 an FIR in the instant case was registered and entrusted to PW-20 Inspector Gulam Sabir, who carried out the investigation in the matter and efforts were made to trace the victims. The kidnappers demanded Rs. One Crore as ransom for release of PW-1. The CDR revealed the location of the caller as Greater Noida and surrounding area. In the

interregnum, negotiation were going on for release of victims and payment of ransom amount. On 27.05.2005, the matter was transferred to Special Cell and was further entrusted to PW-27 SI Girish Kumar. The amount with the kidnappers was settled at Rs.20 Lacs and as per the direction of the kidnappers the currency was kept in a black handbag. A team was constituted to lay a trap but the kidnappers failed to turn up and on the same day, at about 11:00 p.m., Ms. Shivani wife of PW-1 received another call from the kidnappers asking her to deliver the money near Petrol Pump after Hindon River Bridge, Ghaziabad. Ms. Shivani along with PW-4 reached there and at about 11:30 p.m. four persons in a yellowish Esteem came there and took the bag containing Rs.20 Lacs promising to release the victims near Cross Road Sector-37, Noida near BP Petrol Pump on the Surajpur - Greater Noida Road.

4. A trap was laid around the area and at about 3:30 p.m. one Maruti Esteem was noticed coming from Surajpur Greater Noida, which dropped two persons being PW-1 and PW-2. Since the car took a U-turn towards Surajpur (Greater Noida), the same was followed by a team deployed by the Special Cell and after a chase, the car was intercepted and three persons being accused Sunil Bhatti, accused Ashok Kumar Mishra and accused Upender Kumar were apprehended. On search a katta of .315 bore, two live bullets and Rs.2.50 lacs were recovered from the possession of accused Sunil Bhatti and the same were seized. One knife was recovered from the dash board of the car and the same was seized. In the meanwhile, PW-1, the victim and his father PW-3 also reached the spot. PW-1 identified all the accused

persons as kidnappers. Accused Ashok Mishra got recovered a suitcase from the rear seat of the car which was opened by code 011 and Rs.6 lacs was recovered and seized. All three accused persons were arrested. Accused Upender got recovered his share of ransom amount from his house. Thereafter, accused persons led the police officials to F-90, Alpha-II, Greater Noida, UP, which was identified by victim PW-1 as the house where he along with his driver was kept as hostage. At about, 6 a.m. accused Satish Kumar and accused Gajinder were found inside the said house and were identified by PW-1 as the persons who guarded him and brought eatables. Rs.1.50 Lacs and Rs.2.00 Lacs along with one mobile phone each were recovered from the possession of accused Satish and accused Gajinder, respectively. Accused persons got recovered a knife from the kitchen of the house, being used to threaten the hostages. All the articles were seized. Accused Ashok Mishra got recovered the black colour leather bag in which the ransom amount was delivered and the same was identified by PW-3. Both accused persons were also identified by PW-1. Thereafter, accused persons led the police party to G-149, Beta II, Greater Noida, UP where accused Jaideep and accused Gokharan were present. Both accused persons were interrogated and arrested. Accused Jaideep got recovered a black colour small bag containing Rs.3.00 Lacs from drawer of the bed and accused Gokharan got recovered Rs.2.50 Lac and a country made pistol with a round, one round was recovered from the right pocket of his pant. Accused Ashok got recovered five mobile phones. Accused Upender Kumar got recovered Rs.2.50 Lac from his house. All these articles were

seized after following the due procedure. PW-1 identified these accused persons. All accused persons were thoroughly interrogated and revealed that accused Ashok Kumar Mishra and accused Upender Kumar had planned and executed the kidnapping and they all conspired the kidnapping just 12 days before the incident and every member was assigned work as per the plan. They further disclosed that Accused Jaideep selected the victim, borrowed the Esteem Car used in the crime and he along with accused Sunil Bhatti managed mobile phone and SIM card without identity proof. Accused Upender managed a rental accommodation at F-90, Alpha-II, Greater Noida where the hostages were kept. Accused Sunil Bhatti and accused Gokaran managed arms and ammunition and rest everything was planned and managed by accused Ashok Mishra, Satish and Gajinder. After completion of investigation, chargesheet under Section 364-A/120-B of the IPC was filed against the accused persons before the concerned Court.

5. Charge for the offences punishable under Section 364-A/120-B was framed against the accused persons to which they pleaded not guilty and claimed to be tried. A separate charge under Section 25 of Arms Act was also framed against the accused Sunil Bhatti and accused Gokharan.
6. To bring home the guilt of the accused persons, the prosecution examined 28 witnesses in all including two separate witnesses.
7. During trial, accused Ashok Kumar Mishra and accused Gokharan had died whereas accused Upender Kumar was declared proclaimed offender. The statements of remaining accused persons were recorded

under Section 313 of the Code of Criminal Procedure wherein they denied all the incriminating evidence put to them and alleged false implication and reiterated their innocence. Accused persons refused to lead any evidence in their defence except accused Sunil Bhatti, who examined DW-1, Manager from RBI.

8. Upon completion of trial and on examining materials available on record, the learned Trial Court came to the conclusion that the prosecution had failed to prove its case against the accused persons.

Arguments addressed on behalf of State

9. Assailing the impugned judgment, Mr. Nayak, learned counsel for the State vehemently argued that since the findings recorded by the trial court were perverse based on conjectures and surmises and on mistaken appreciation of evidence, the impugned judgment was erroneous in law and suffered from serious infirmities; that the Trial Court failed to appreciate the oral evidence as well as documentary evidence in right perspective; that the Trial Court erred in not accepting the intercepted recorded voice of accused Ashok Kumar Mishra and Upender, for want of certificate under Section 65B of the Indian Evidence Act and placed reliance on the case of the ***Anvar P. V. Versus P. K. Basheer reported in (2014) 10 SCC 473***; that the Trial Court failed to appreciate that the accused persons have been rightly identified by the victims PW1 and PW2 and there was no reason to falsely implicate them; that minor contradictions/lacunas in the testimonies of the witnesses which do not go to the root of the case cannot be held to be fatal to the case of the prosecution and placed reliance on the case of ***Tehsildar Singh & Anr. Vs. State of UP***

reported in AIR 1959 SC 1012, Pudhu Raja & Anr. Vs. State reported in JT 2012 (9) SC 252 and Lal Bahadur Vs. State (NCT of Delhi) reported in (2013) 4 SCC 557; that the Trial Court failed to appreciate that since the accused persons were arrested in the presence of the victim, no judicial TIP was required to be conducted; that the police did not summon anybody from the neighbouring houses where the accused persons were arrested as no public is willing to indulge in police action against criminals.

Arguments addressed on behalf of respondents

10. Refuting the arguments advanced by learned APP for the State, Mr. Burman, learned senior counsel for the respondent No. 2 contended that the trial court has rightly come to the conclusion that the prosecution failed to prove the case against the accused persons beyond the reasonable doubt and hence, the impugned judgment does not warrant any interference. He further contended that there were material discrepancies and contradictions in the testimonies of the witnesses, which creates serious doubt in the story set up by the prosecution. He further added that the learned Trial Court has not fell into any error by refusing to accept the evidentiary value of CDs and CDRs placed on record as the same has not been complied with the mandatory requirement of Section 65B of the Evidence Act.
11. Learned counsel appearing on behalf of rest of the respondents adopted the arguments addressed on behalf of the learned Senior Counsel appearing for the respondent No. 2.

12. We have heard the learned counsel for State at length, perused the record and also examined the impugned judgment rendered by the trial court.

Testimonies of the witness, arrest and recovery of ransom amount

13. The first and foremost contention of learned Counsel for the State is that testimonies of PW-1 and PW-2 are trustworthy and the trial court failed to appreciate their testimonies in right perspective. At the outset, we deem it appropriate to rummage through the main prosecution witnesses.
14. PW1 Rahul Sharma, the victim was one of the witness in whose presence accused persons were arrested and ransom money was recovered. As far as the ransom money which was recovered from the possession of accused Sunil Bhatti is concerned, PW1 deposed that *"Currency amounting to Rs.2 Lakhs and above were recovered from a cloth bag from the dicky (boot) of the esteem."* He further deposed that *"Accused Gajender and Satish were found at the spot and some money was recovered from them, I cannot say the amount. Again said, I had not seen any money being recovered from the above said accused but only I had been shown the sealed parcels by the police. Thereafter, I was taken to another house in the same area where accused Jaideep was found along with accused Gokharan. Police recovered currency notes from the drawer of a table belonging to Jaideep while currency notes were also recovered a bag from in possession of Gokharan. Four police officials had accompanied me to the house of the Jaideep where Gokharan was found. Thereafter, police party took me to special cell at Lodhi Colony where my*

statement was recorded and I was also asked to identify the case property i.e. country pistols, currency notes and a esteem car (golden) which I identified correctly.

15. During cross examination, PW-1 admitted that he had signed the seizure memo of recovery and identification at Lodhi Road, Special Cell, Delhi which was prepared by the Special Cell itself and no proceedings were recorded at Sector-37, Noida.
16. PW-2 Zakir, another victim deposed that "On 29.02.2005, we were shown a desi katta, one more desi katta, two knives, two cartridges and one piece of rope was also shown with which we were tied. During cross examination, this witness admitted that he had not signed any document at the spot."
17. PW-3 Rajender Kumar Sharma, father of the victim PW-1, another witness of recovery of ransom amount and katta from the possession of accused Sunil Bhatti categorically stated in his cross examination that "The dikki of the Esteem Car was opened and checked and found containing some cash, knife and katta." Therefore, the alleged recoveries of Katta, catridges and currency notes made from the pant and coat of the accused is doubtful.
18. The case of the prosecution was that after dropping the hostages i.e. PW-1 and PW-2, the golden/yellowish colour Maruti Esteem Car bearing no. DL 6CC 5862 took 'U' turn, was chased by the police party, intercepted and the accused persons were overpowered. In the meantime the PW-1 alongwith his father reached the spot and the three accused were identified by the victims and thereafter the victims accompanied the police officers during the entire investigation and

recoveries of cash, katta and live cartridges were made in presence of the victim. However, perusal of the record shows that PW-4, Tara Chand Sharma (father in law of PW-1) deposed that '*at about 03:00 am the Esteem car reached and dropped Rahul and Zakir and I alongwith Shivani took Rahul and Zakir (PW-2) in our car to Laxmi Nagar*'. PW-13, Inspector, V. N. Jha deposed that accused person were handed over to him only on 03.03.2005 at around 09:30 am., though, the records shows that arrest was made in his presence. The record further reveals that as per the prosecution during apprehension/arrest of the accused persons at Greater Noida, the victims were present with the police officials. However, as per PW-24, Pawan Singh, Nodal Officer (Idea Cellular), the location of Mobile phone no. 9891724881 (which belonged to Zakir Ali) on 28.02.2005 at about 06:51 a.m. is in the area of Daya Nand Vihar, Delhi. It has further come on record that PW-1 and PW-2 signed the documents in the office of Special Cell instead of the place of arrest and recoveries. Further, the seizure memo Ex. PW1/G with respect of katta and live cartridges recovered at the instance of accused Sunil Bhatti and admitted document Ex.PW26-DY i.e. photocopy of seizure memo of katta and live cartridges wherein the signatures of victim Rahul Sharma or Inspector Umesh Barthwal are not appearing. Moreover, the disclosure statement Ex.PW26/E of accused Sunil Bhatti suggest that the ransom amount was recovered from his possession whereas another disclosure Ex.PW26/DA of accused Sunil Bhatti, which is an admitted document (being photocopy of the original) by the prosecution witness shows that the ransom amount was got recovered by the accused from his house

situated in village Chithera. A collective reading of the aforesaid material shows that the recovery of Katta, cartridges, currency notes at the instance of the accused persons and also the arrest of the accused were planted by preparing fabricated documents at a later stage.

19. Similarly, Ex.PW1/K and the admitted document Ex.PW26-DB by the prosecution witness, clearly points out the contradictions in the denomination of currency notes recovered at the instance of accused Sunil Bhatti.

Absence of public witness

20. Undoubtedly, the non-joining of public witnesses is not fatal to the prosecution case. But, in the instant case, the arrest of accused persons, recovery of ransom amount and weapon were from a highway or a residential area, but none of the witness including the police official deposed that any effort was made to ask the public/neighbours to join the investigation. Moreover, the accused persons were arrested from area of Noida or Greater Noida, which territorial jurisdiction lies in Uttar Pradesh, but the investigating agency failed to bring on record that any efforts were ever made to call or request the Uttar Pradesh police to join the investigation. Under these circumstances, the failure on the part of the investigating agency, by itself, casts serious doubt on the story set up by the prosecution.

Inadmissibility of Electronic Evidence

21. The prosecution placed on record the intercepted recorded voice of accused Ashok Kumar Mishra and Upender and Call Detail Records, which was rejected by the Trial Court for want of Certificate under Section 65-B of the Indian Evidence Act.

22. In *Anvar P.V. vs. P.K. Basheer* reported in (2014) 10 SCC 473, the Apex Court has held that :

22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence Under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia special bus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements Under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23. In a recent case titled as *Sonu vs. State of Haryana* reported in (2017) 8 SCC 570, while discussing the admissibility of electronic evidence, the Apex Court has observed that :

31. *Electronic records play a crucial role in criminal investigations and prosecutions. The contents of electronic records may be proved in accordance with the provisions contained in Section 65B of the Indian Evidence Act. Interpreting Section 65B(4) , this Court in Anvar's case held that an electronic record is*

inadmissible in evidence without the certification as provided therein. Navjot Sandhu's case which took the opposite view was overruled.

24. Applying the settled law to the present case, we find that prosecution failed to produce any certificate under Section 65-B of the Indian Evidence Act to prove the electronic evidence and in the absence of a certificate under Section 65-B the CD & CDRs, relied upon by the prosecution becomes inadmissible.

Conclusion

25. Under the facts and circumstances as stated above, the evidence of the prosecution witnesses is neither cogent nor credible or trustworthy hence cannot be believed. Reading the testimonies of witnesses together one finds that there are severe contradictions in their version with regard to recovery of ransom amount and weapons allegedly used to threaten the victims, which makes the case of prosecution highly doubtful. Moreover, the witnesses have been cross examined at length and material improvements have been noticed therein. In the instant case, the recovery was made from a residential area where public witnesses are easily available but by not calling the public witnesses or by not making effort to collect public witnesses at the time of the alleged recovery, casts serious doubt in the story set up by the prosecution. After the close scrutiny of the material available on record and considering the peculiar facts and circumstances of this case, it can be safely concluded that the prosecution has miserably failed to prove beyond reasonable doubt the presence and involvement of the accused persons in the commission of the crime.

26. Accordingly, we are of the considered view that the findings arrived at by the learned Trial Court are in consonance with the settled law and the same does not warrant any interference. Resultantly, the present leave petition being devoid of any merit is dismissed.
27. Trial Court Record be sent back along with a copy of this order.

SANGITA DHINGRA SEHGAL, J

SIDDHARTH MRIDUL, J

DECEMBER 19TH, 2018
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