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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A. 904/2017 & CRL.M.(Bail) 1699/2017

ANIL & ORS

..... Appellants

Through: Mr.Vijay Kinger with Ms.Roopa
Nagpal, Advocates.

versus

THE STATE (THE GOVERNMENT
OF NCT OF DELHI)

..... Respondent

Through: Ms.Radhika Kolluru, APP for State.
Inspector Om Dutt, SI Samrat, PS-
Harsh Vihar/NE.
Inspector Vishal, PS-Alipur.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE I.S. MEHTA

ORDER

22.01.2018

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1. This is an appeal against judgment dated 10th August, 2017 passed by the learned Special Judge (NDPS)/ASJ, North-East, Karkardooma Courts, Shahdara, Delhi in Sessions Case No.44869/2015 arising from FIR No.27/2010, registered at Police Station ('PS') Harsh Vihar convicting the three Appellants, i.e. Anil (A-1), Nanhe @ Daya Shankar (A-2) and Jai Devi (A-3), for the offences under Sections 363/364-A/34 Indian Penal Code 1860 ('IPC'). It is also directed against the order on sentence dated 24th August, 2017 whereby, for the offence under Sections 363/34 IPC, the Appellants were sentenced to undergo Rigorous Imprisonment ('RI') for 7 years and to pay a fine of Rs.5,000 each and in default of payment of fine, to

undergo RI for a period of one year; for the offence under Sections 364-A/34 IPC, they were sentenced to undergo RI for life and to pay a fine of Rs.5000/- each and in default of payment of fine, to undergo RI for one year.

2. The case of the prosecution is set out in the charge framed against three accused by the learned Trial Court on 30th July, 2010 with the following terms:

“That on 01.02..2010 at about 5.00 pm from Gali No.7, Mandoli Extension, within the jurisdiction of PS Harsh Vihar, you all in furtherance of your common intention enticed away Priyanka aged 5 ½ years daughter of Raju Rathore and Pradeep Kumar aged about 3 years son go Raju Rathore, out of lawful guardianship without the consent of the guardian, thereby you all in furtherance of your common intention kidnapped Priyanka & Pradeep Kumar and thereby you all committed an offence punishable under section 363 IPC read with section 34 IPC within my cognizance.

Further you all in furtherance of your common intention you all kept Priyanka & Pradeep Kumar in illegal detention after kidnapping and demanded ransom of Rs.5.5 Lacs from the father of Priyanka and Pradeep Kumar for the release of Priyanka & Pradeep Kumar and thereby you all committed an offence punishable under section 364-A IPC read with section 34 IPC within my cognizance.”

3. The star witness of the prosecution was Raju Rathore (PW-1) whose two children, i.e. Priyanka aged 5 years and Pardeep aged 3 years, went missing. According to him, on 1st February, 2010, he had left his house at A-42, Gali No.7, Mandoli Chungi, Harsh Vihar, Delhi with his *theli* (cart) at around 4:30 pm for selling groundnuts. At around 5 pm, in front of Lal School, his wife (who has not been examined) came there and told him that the said two children, Priyanka and Pardeep (who again were not examined), went

missing while they were playing in the *gali* outside the house. PW-1 with his wife and other neighbours searched for the two children. When they were unsuccessful, they went to PS Harsh Vihar and lodged a complaint which was registered as FIR No. 27/2010.

4. According to PW-1 on 5th February, 2010 he received a ransom call on his mobile phone with the caller asking him to arrange Rs. 5.5 lakhs for the release of his children by 13th February, 2010. The caller told him that both the children were in his custody. The caller then also told him that he would call to tell him where the amount was to be delivered. The caller threatened PW-1 not to disclose the fact to the police or else he would face dire consequences.

5. PW-1 then stated that on 8th February, 2010 he received another call from the same person on his mobile phone. He was again warned against disclosing this fact to the police.

6. What happened thereafter is the subject matter of controversy with PW-1 not supporting the prosecution when he deposed in the Court. In his statement to the police which was recorded earlier he had stated how he had gone with the police to the Anand Vihar Bus Terminal on 13th February, 2010 and there he witnessed A-1 being over powered by the police at around 1.30 pm “when he was moving there”. In his cross-examination by the APP in the Trial Court PW-1 denied that he had identified A-1 as the person residing near his house. He denied that A-1 had been searched in his presence and from his search one mobile phone of Nokia make was recovered. PW-1 denied that in his presence the phone was checked and on

checking the last call it was found to have made to the mobile phone of PW-1. He denied that when A-1 was asked about the said call he could not give a satisfactory reply.

7. PW-1 even failed to support the prosecution about A-1 having been asked by the police as to why he had come to Delhi from village Baheta Rampur and A-1 having disclosed that he had kidnapped both the children with the connivance of his brother-in-law (A-2) and how they both had made ransom calls from mobile number ending with “829” with the number being activated from “Kayam Ganj”. He also denied the suggestion that A-1 thereafter got arrested A-2 as well as A-3 “from the park of Anand Vihar Bus Terminal” and that “my both children were recovered from there.”

8. In his initial examination in chief in Court, PW-1 came up with a very different story about his having gone along with the police officials in a private vehicle on 8th February, 2010 to Saheganj in U.P and that one ‘Daya Shankar’ the brother-in-law of A-1 was arrested from his house. He stated that when Daya Shanker was interrogated he led the police to A-1 and after A-1 was arrested, he disclosed that both children were in the custody of A-1’s mother (A-3) who in turn was in the house of his *mausi* in another village. According to PW-1 thereafter A-1, A-2 along with PW-1 and police officials went to the said village which was at a distance of 12-13 kms. They reached there at around 10:00/10:30 pm and there they found A-3 lying on a cot with the children after which she also was arrested and both the children were recovered. According to PW-1 they all then returned to Delhi.

9. It is thus seen that PW-1 does not support the prosecution's version of how A-1 was located; how he was arrested at the Anand Vihar Bus Terminal; how a mobile phone was recovered from his personal search which was found to be the phone used to make the ransom calls to the mobile phone of PW-1; how subsequently A-2 and A-3 were also arrested from the Anand Vihar Bus Terminal and even the children were recovered from there.

10. In his further cross-examination by the accused which happened within 10 days from his examination-in-chief on behalf of A-1 and A-3 he stated “it is corrected that my children were not recovered from the accused persons present in the court today.” This obviously meant all the three accused persons present in the Court. He further added “I did not go through the contents of the documents before putting my signature on the same.” In other words he completely demolished the case of the prosecution as regards the involvement of the three accused in the abduction of his own two children and the manner of recovery of the two children.

11. Unfortunately for the prosecution, barring this star witness PW-1 there is no other witness to speak for the abduction and subsequent recovery of the two children. Even Janved Singh (PW-2) a resident of village Baheta Rampur turned hostile.

12. All that the prosecution was able to produce before the Trial Court as evidence were the call detailed records (‘CDR’) of the mobile phone from where the ransom calls were supposed to have been made. Unfortunately for the prosecution even this, which at the highest was a corroborative evidence,

was rendered useless with the recovery of the mobile phone from A-1 not being shown as witnessed by PW-1. The arrest memo of A-1 does have the signature of PW-1. However, the personal search memo (Ex.PW-1/C) and the seizure memo of the mobile phone (Ex.PW-9/A) do not bear the signatures of PW-1 as witness. The seizure from A-1 of the mobile from which the ransom calls were made, was perhaps the most crucial evidence if at all the CDR produced of such mobile phone was to be of any use to the prosecution.

13. It is surprising that the Trial Court has proceeded to convict the three accused on this evidence which can hardly inspire confidence. It is a matter of concern that the Trial Court has simply gone by the testimonies of the three policemen i.e. Constable Kavinder (PW-9), HC Harender Kumar (PW-10) and Investigating Officer ('IO') Inspector Virender Singh Punia (PW-11).

14. Learned APP sought to suggest that with PW-1 having spoken of the recovery of the children from the house of the *mausi* of A-1, that portion of his evidence was sufficient to return a finding of commutation of the offence under Section 363 at least by A-3 if not from A-1 and A-2.

15. The Court is unable to agree with the above submission. Either PW-1 is speaking the truth or he is not. A witness who clearly states that his children were not recovered from the three accused in the Court and who is unable to support the prosecution about the children having been recovered from the Anand Vihar Bus Terminal or even of the mobile phone having been received from A-1, cannot be trusted to speak the truth when he talks about

the 2 children having been recovered from a village in U.P. Since PW-1 is both untruthful and unreliable no part of his evidence could have been relied upon to return a finding of guilt against the accused.

16. As already noticed the CDRs can only be a corroborative evidence and not a substantive evidence in a matter of this nature. Had the prosecution been able to convincingly prove the recovery from A-1 of the mobile phone which was used to make the ransom calls, the prosecution's case may have been somewhat on a stronger footing. That crucial piece of evidence having been handled carelessly, with the whole story of the arrest of A-1 and the recovery of the mobile phone being projected as having taken place in the presence of PW-1 with no signature of PW-1 on such seizure memo, the inevitable result is that the prosecution case collapsed. It is indeed surprising that the trial Court on this kind of an evidence proceeded to convict the 3 accused for offences as serious as Section 363 and Section 364A IPC and proceed sentence them to rigorous imprisonment for life.

17. The Court, therefore, sets aside the impugned judgment dated 10th August, 2017 and the impugned order of sentence dated 24th August, 2017 of the trial Court. The Court acquits the Appellants of the aforementioned offences. The Appellants will be set at liberty forthwith, unless wanted in any other case. They will fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest.

18. The appeal is allowed but, in the circumstances, with no orders as to costs. The application is disposed of.

19. The trial Court record be returned forthwith along with a certified copy of this judgment.

20. Order Dasti under signatures of the Court Master. A certified copy be delivered forthwith to the concerned Jail Superintendent through a Special Messenger.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 22, 2018

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