

Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi
&
The Hon'ble Justice Bivas Pattanayak

C.R.A. 77 of 2018

Sajahan Mia @ Sajan Mia
-vs-
The State of West Bengal

For the Appellant(s) : Mr. Tarique Quasimuddin, Adv.
Mrs. Zainab Tahur, Adv.
Mr. Shahnawz Alam, Adv.

For the State : Mr. R D Nandi, Adv.

Heard on : 24.11.2021

Judgment on : 24.11.2021

Joymalya Bagchi, J.:

The appeal is directed against the judgment and order dated 30.08.2017 and 31.08.2017 passed by the learned Additional Sessions Judge, First Court, Sealdah, South 24 Parganas in S.T. no. 6(6)/2016 arising out of Sessions Case No.7(5) of 2016 convicting the appellant for commission of offence punishable under Section

364A of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs.50,000/- each, in default to suffer rigorous imprisonment for one year more.

Appellant had been called upon to answer the following charge:

“That you on or about the 3rd day of March 2016 at about 8 pm at 25/2, Tangra road under Tangra PS kidnapped Ayush Roy the 6 years old son of complainant Rita Roy and kept him hostage at Sealdah in order to compel his mother to pay ransom of Rs. 20,000/- to you and thereby committed an offence punishable under section 364A of the Indian Penal Code and within my cognizance.”

Prosecution case had been set into motion on the basis of information lodged by one Rita Roy (PW 1), mother of the minor who was alleged to have been kidnapped. Rita stated that she was residing with her two minor sons namely Kaushik Roy, aged about 13 years and Ayush Roy aged about 6 years at 25/2 Tangra Road, Tangra, Kolkata 15. Appellant was known to her elder son Kaushik and regularly visited her house. Appellant also expressed affection towards her younger son Ayush and used to offer him chips, lozenges, biscuits etc. On 03.03.2016 appellant had come to her house with a packet of chips brought from a nearby shop and handed it over to Ayush. Thereafter, appellant left the house. Upon finishing the chips, Ayush followed the appellant saying that he wanted to urinate. Thereafter, Ayush was untraceable. She

suspected that appellant had removed the child. She prayed for recovery of Ayush and steps be taken against the appellant. On the strength of the aforesaid information, Tangra P.S Case no. 65 dated 04.03.2016 under section 363 IPC was registered for investigation. It is the further case of the prosecution that two days later Rita (PW 1) had received phone call on her mobile from the appellant demanding Rs. 20,000 for returning her son. On the next day, appellant again made a phone call on her mobile and asked her to come at Sealdah fish market with a sum of Rs. 20,000/- to take back her son. When she went to the fish market, she found her son Ayush was standing near a cold drink shop but the appellant was not present. The child was recovered and in course of investigation, the appellant was arrested from Bihar. In presence of witness (PW 6), investigating officer (PW 5) recovered a mobile phone from the accused. In conclusion of investigation, charge sheet was filed and the appellant was put on trial to answer the aforesaid charge.

In the course of trial, the prosecution examined 5 witnesses to establish its case and exhibited a number of documents.

In addition thereto, trial court exercised its power under section 311 Cr.P.C and examined the minor Ayush as a child witness (CW 1).

In conclusion of trial, the trial court by the impugned judgment and order dated 30.08.17 and 31.08.2017 convicted and sentenced the appellant, as aforesaid.

Learned counsel appearing for the appellant argues that the prosecution has miserably failed to prove its case. There is no evidence that appellant had kidnapped the minor. No call detail records have been exhibited to show that phone calls were made by the appellant to P.W 1 demanding ransom. Manner and circumstance of recovery of the minor from Sealdah fish market is also shrouded in mystery. No local witness was examined. Trial court ought not to have relied on the inconsistent and unreliable evidence of child witness CW 1. Hence, he prays for acquittal.

On the other hand, learned counsel appearing on behalf of the State submits that evidence of the mother (PW 1) and her sister (PW 4) clearly show that the victim had been kidnapped by the appellant and ransom had been demanded for his relief. Child was subsequently recovered and he deposed that he had been detained by the appellant for five days in Bihar. Hence, the prosecution case is proved beyond doubt.

To bring home the guilt of an accused under section 364 A , I.P.C., it is to the prosecution to prove there was kidnapping or abduction and there was reasonable apprehension that kidnapped/abducted person may be subjected to hurt or death unless ransom money is not paid.

Let me examine whether the aforesaid ingredients have been proved or not in this case.

Kidnapping of the minor:

Rita Roy (PW 1) deposed that the appellant had come to her house on 03.03.16 at 7.30 p.m.. He enquired whether he would bring tea or not. When she replied in the affirmative, he went to the tea stall to bring tea. After taking tea, the appellant took away her younger son Ayush stating that he would purchase chips but they did not return. The aforesaid deposition of PW 1 is in stark variation to the earlier statement made by her to police which was treated as FIR. In the FIR she stated that appellant came on 03.03.2016 at 8 p.m.. The appellant had come to her house with a packet of chips and gave it to Ayush. Thereafter, the appellant left her house. Upon finishing the chips, Ayush followed the appellant saying he would urinate. Thereafter, Ayush was untraceable. Thus, there is clear dichotomy in the evidence of PW 1 in court and her version in the FIR with regard to manner and circumstance in which the child left the house. If the FIR is to be believed, the appellant had not taken away the child stating that he would purchase chips as deposed by PW 1 in court. Hence, I am constrained to hold that evidence of PW 1 does not establish that the appellant had taken away the child from her residence on the excuse of purchasing chips. On the other hand impression gathered from the FIR is that child left the house stating that he would urinate soon after the appellant had gone. Hence, kidnapping of the child cannot be said to be established through the evidence of PW 1. Evidence of other witnesses namely,

PWs 2, 3 and 4 show that they came to know of the incident from PW 1 and are hearsay in nature. Hence, there is no legally admissible and unequivocal evidence led by prosecution to prove the appellant had kidnapped the child from his residence.

Demand of ransom by the appellant:

PW 1 claimed two days after the kidnapping, appellant made a phone call on her mobile and demanded Rs. 20,000/- for return of her son. After one day, he again made a phone call calling upon her to come to Sealdah fish market with a sum of Rs 20,000/- and take back her son.

P.W 3 and 4 claimed that they had heard from PW 1 that the appellant had demanded Rs. 20,000/- for returning of the son. However, in cross-examination PW 3 resiled from his statement and it appears PW 4 had not made such statement to police during investigation. PW 1 claimed she received ransom call two days after kidnapping i.e on 05.03.2016, though she did not lodged any complaint with regard thereto to the police. No general diary or subsequent statement of PW 1 informing the police with regard to such ransom call has been proved by the investigating officer. Although the investigating officer deposed that he seized the mobile phone by PW 1 to establish communication between the appellant and the said witness, no call detail records of the relevant dates have been exhibited to establish that there were telephonic

exchanges between the appellant and PW 1 on the fateful dates when the ransom demands were allegedly made. In the absence of any contemporaneous complaint being lodged by PW 1 with the police with regard to ransom calls and in view of the non-production of the call detail records of PW 1 probalising telephonic conversation with the appellant, I am constrained to hold that the prosecution has not been able to prove the demand of ransom by the appellant beyond reasonable doubt.

Recovery of the minor:

Even recovery of the minor is shrouded in mystery. While PW 1 stated that she had received a ransom call calling upon her to come to Sealdah fish market with Rs. 20,000/- and take back her child from the appellant and she had proceeded with the police to the spot, investigating officer (PW 5) claimed that he had received source information that kidnapped boy would be kept at a cold drink shop at Sealdah Kolley Market. Accordingly, the officer informed PW 1 and both of them went to the spot to recover the child. Thus, the version of the aforesaid witnesses with regard to manner in which the child was recovered are contradictory to one another and does not inspire confidence. In addition thereto, no local witness in the market was examined to prove the recovery of the minor. It is clear that prosecution has not been able to prove its

case of recovery of the minor from the Sealdah fish market beyond reasonable doubt.

Evidence of the minor, Ayush (CW 1):

The minor had not been examined by the prosecution. Under such circumstances the trial court had invoked its power under section 311 Cr.P.C and examined the minor Ayush aged around 7 years as CW 1. The court had interrogated the minor with regard to his competence to depose and upon being satisfied recorded his evidence as child witness. Ayush Roy in chief deposed that the appellant took him to Bihar in a train where he stayed for five days. He made phone calls to his mother demanding Rs. 20,000/-. However, in cross examination he did a volte face and stated that police had accompanied him to court and had tutored him prior to making the deposition. He further claimed that the police had tutored him to say Sajahan demanded Rs. 20,000/-. He also deposed that he did not go to Bihar.

It is settled law that the evidence of a child witness is to be assessed with utmost care and circumspection. It is common knowledge minors, even if competent to depose, are most susceptible to tutoring. If one analyses the evidence of the minor Ayush it would appear that his evidence is not only a product of tutoring by the police as admitted by him in cross-examination but suffers from inherent contradictions and weaknesses. In chief, the

witness claimed that he was kept in Bihar for five days. This version of the child witness is patently absurd as he was recovered from Sealdah fish market within three days of his disappearance. Moreover, the minor is completely silent with regard to manner and circumstances in which he was recovered from the market as claimed by PW 1 and others. These lacunae in the evidence of the minor render his version unreliable and in the backdrop of possible tutoring, I do not consider it prudent to base the conviction of his evidence.

In the backdrop of the aforesaid facts, I am of the opinion that it was incorrect on the part of the trial judge to accept such inherently absurd and wholly inconsistent evidence of the child witness to establish the prosecution case.

In the light of the aforesaid discussion, I am constrained to extend the benefit of doubt and acquit the appellant of the charges levelled against him.

Appellant Sajahan Mia shall be forthwith released from custody, if not wanted in any other case, upon executing a bond to the satisfaction of the trial court for a period of six months in terms of section 437A of the Code of Criminal Procedure.

The appeal is, accordingly, allowed.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellant within a week from the date of putting in the requisites.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

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