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

% *Date of decision: 19.07.2023*

+ CRL.L.P. 5/2020 & CRL.M.A. 60/2020

STATE Petitioner

Through: Mr.Tarang Srivastava, APP with
SI Devender Kumar PS Welcome

versus

SHER MOHD. @ SHERU & ORS Respondents

Through: Mr.Harsh Prabhakar, Advocate on
the panel of Delhi High Court Legal
Services Committee
Mr.Dhruv Chaudhry & Mr.Adeeb
Ahmad, Advocates with respondents
No. 1 to 3 in person

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T (oral)

Crl.M.A. 60/2020

1. Present application has been filed seeking condonation of delay of 49 days in filing the present leave to appeal petition.
2. For the reasons stated in the application, delay of 49 days in filing the present petitioner seeking leave to appeal, is condoned.
3. Application is accordingly disposed of.

**Crl.L.P.5/2020**

4. The present petition under Section 378(1) read with Section 482 of the Cr.P.C., 1973, has been filed on behalf of the appellant/State seeking Leave to Appeal against the acquittal of the respondents vide judgment dated 03.08.2019 passed by the learned Court of Sessions (POCSO), Shahdara District, Karkardooma Court, Delhi in FIR No. 595/2014, registered at P.S. Welcome for the offences under Sections 328/363/364-A/120B/34 IPC.

5. The brief background of this case, as noted in the impugned judgment dated 03.08.2019, is that Noor-E-Muzassim, complainant made a complaint regarding kidnapping of Victim Amaan, while victim Amaan and Zeeshan were returning to their home on scooty after playing football. When they reached behind the MCD office, they fell as a motorcycle hit them from behind. The pillion rider of the motorcycle gagged the mouth of Amaan and made him sit on the motorcycle. Thereafter, he went to the house of the victim and told everything to the mother of victim. On same day, FIR u/s 363/34 IPC was registered. On 19.10.2014, father of victim made a statement in the Police Station that he had received a call for ransom of Rs.60 lakhs, which he expressed his inability to pay and so, the amount was reduced to Rs.25 lakhs. He along with Saleem and Zakir, reached at Old Railway Station at about 4:30 am, where two boys came on motorcycle and Rs.25 lakhs, the amount of ransom was given to them. After sometime, a telephonic call was received stating that victim child will be present at IP Depot. At about 5:30 am, they reached abovesaid place and found his son (victim) who was having black mark on his face.



Thereafter, statement of victim under 161 Cr.P.C. was recorded wherein he stated that he was kidnapped by two persons who were wearing helmet. The victim was got medically examined and his statement u/s 164 Cr.P.C. was recorded.

6. On 26.10.2014, on the information of secret informer, accused Sher Mohd. @ Sheeru was called for inquiry and he disclosed about the involvement of co-accused Tariq @ Mamu and Azeem @ Raja in kidnapping. After analyzing the CDR, Rs.5 lakhs bundle/ wad of currency notes and one mobile phone make Tata Indicom were seized from him (Sher Mohd.) and his disclosure statement was recorded. At the instance of Sher Mohd., accused Tariq was interrogated and Rs.7,24,000/- was recovered from his possession; his disclosure statement was recorded wherein he accepted the factum of snatching one mobile phone, make Samsung and making a call for ransom. The said mobile phone was recovered and checked and was found to be stolen, in respect of which FIR No.469/2014, u/s 356/379/34 IPC was registered at PS New Friends Colony. Further, a glass bottle from Jheel Park was also recovered which was used to make the victim unconscious.

7. On 28.10.2014, accused Sher Mohd. produced Rs.1,02,000/- from second floor of his house which was part of the ransom money. Remaining amount of Rs.1,52,000/-; the jeans bag in which ransom money was received and one mobile phone make Nokia was also seized from his house.

8. Thereafter, at the tip of secret informer, accused Azeem @ Raja was apprehended outside Karkardooma Court and his mobile phone make



Samsung was seized. Thereafter, CDR of three mobile phones of accused persons were got analyzed and the location of accused Tariq was also found near the place of occurrence.

9. Statement of witnesses u/s 161 Cr.P.C. were recorded and accused persons were medically examined. On 23.12.2014, when the accused persons appeared in the Court for judicial remand, victim child identified accused Tariq and Azeem. After completion of investigation, chargesheet for the offence punishable u/s 328/363/364-A/120-B/34 IPC was filed in the Court.

10. Pursuant to filing of the chargesheet, charge u/s 363/364-A/328 read with 120-B IPC was framed against the respondents /accused, to which they pleaded not guilty and claimed trial.

11. During the course of trial, prosecution examined 11 witnesses. The witnesses included the Complainant (PW-2); child victim (PW-3A); father of victim (PW-3); Doctor (PW7) who conducted the MLC; Assistant Director FSL (PW-8) to prove voice exhibits and Senior Scientific Assistant (PW-9) to prove the DVD. It is noted in the impugned judgment that IO of this case was only partly examined in chief and since he failed to appear thereafter, his evidence could not be read.

12. During the course of evidence before the trial court, the material prosecution witnesses i.e. Complainant (PW-2); child victim (PW-3A) and father of victim (PW-3) did not support the case of prosecution. Hence, the learned trial Court in its impugned judgment noted that there was no incriminating evidence against the accused persons, therefore, statement u/s



313 Cr.P.C. was not recorded. After conclusion of trial, learned Trial Court vide impugned judgment held as under:

“I have perused complaint, statement of the victim made in the court, statement recorded u/s 161 Cr.P.C and statement recorded under S. 164 Cr.PC. Victim and his father have not supported the prosecution case despite their cross-examination at length by Ld. Addl. PP for the Slate. Therefore there is nothing incriminating on record against accused persons. The statement recorded in the court has to be given precedence over any other statements which are only corroborative in nature. Accused persons could not be identified, recovery could not be proved as IO did not appear, material witnesses have turned hostile. Therefore, keeping in view statement of witnesses including minor victim recorded in this Court, I am of the opinion that accused persons are entitled to acquittal.”

13. The learned Trial Court further observed in the order dated 03.08.2019 and directed as under:

“Vide separate Judgment of even date, I am of the opinion that prosecution has miserably failed to prove the offences/ charges against accused persons. Accordingly, all the accused persons namely Sher Mohd. @ Sheru, Tariq @ Marnu and Azeem @ Raja are acquitted of the charges. Their bail bonds stands cancelled and sureties discharged, however, they are directed to furnish separate personal bonds and surety bonds in the sum of Rs.10,000/- each u/s 437 A Cr.PC for period of six months within a week.”

14. It is against the aforesaid impugned judgment dated 03.08.2019 that the present appeal has been filed on behalf of the respondents/ State on the ground that the trial Court has erred in holding that PW-1, PW-2, PW-3 and



PW-4 did not support the case of the prosecution against the accused persons/respondents though they had not denied the factum of kidnapping of PW-3 and payment of ransom of Rs.25 lakhs to the kidnappers/respondents. The factum of kidnapping and payment of ransom was proved before the trial court and still the learned trial court did not consider that the complainant could have been under fear while not supporting the case of the prosecution.

15. Learned APP for State further submitted that the learned trial court failed to appreciate that during FSL, the voice sample of victim Amaan and accused Tariq @ Mamu tallied, which is corroborative piece of evidence to prove the conspiracy of kidnapping against ransom and even the eye-witnesses have nowhere denied the prosecution case.

16. Learned APP for State also submitted that factual aspect of recovery of cash from the possession of the accused persons/respondents has been ignored by the learned trial court. With regard to the non-examination of investigating officer (PW-10), learned APP submitted that he was on leave when summons were served upon him for evidence on 01.06.2009 and so, the closing of prosecution evidence was not justified. Hence, setting aside of the impugned judgment is sought by the appellant-State.

17. To the contrary, learned counsel for the respondents /accused submitted that the prosecution has not been able to prove its case during trial. Learned counsel submitted that primary witnesses including the victim as well as father of the victim, did not support the case of the prosecution. Also the investigating officer of this case did not appear in the



witness box to substantiate the allegations leveled against the accused persons in the FIR in question. The learned Trial Court has rightly acquitted the accused persons/ respondents and the present appeal deserves to be dismissed.

18. Pertinently, the FIR in question was recorded on the complaint of the complainant PW-2 Noor-E-Muzassim who in its cross examination before the trial court has deposed that he did not remember the number of motor cycle and could not see the faces of motorcyclists, who had lifted Amaan on bike and took him away. When he was asked to identify the respondents/accused persons, this witness PW-2 replied that he could not identify them.

19. PW-3, the child victim, in his deposition though had accepted that he was kidnapped by two persons on motorcycle, however, he could not identify the respondents/accused persons before the court. The victim has during his examination accepted that he was kidnapped, kept in a dark room, tortured and physically hit by the kidnappers, however, he did not identify the respondents/accused persons as his kidnappers.

20. Similarly, PW-4, father of the PW-3 victim also did not support the case of the prosecution. Lastly, it was submitted by learned counsel that the petitioner/State has not been able to prove its case before the learned trial court and thus, dismissal of the present petition is sought.

21. Upon hearing learned counsels representing both the sides and on perusal of the impugned judgment, deposition of witnessed examined as well as the other material placed on record, this Court finds that the factum



of kidnapping PW-3 has been accepted by all the prosecution witnesses, however, none of the witness has been able to identify the accused persons/respondents. The complaint (PW-2) did not remember the number of the motor cycle of the kidnappers nor did he could see their face. The victim (PW-3) stated that he was kept in a dark room and hence, could not identify the accused persons. PW-4, father of the victim, though in his cross-examination accepted that he had received a call from an unknown caller that his son was in his possession and demanded Rs.60 Lacs as ransom amount, which was negotiated to Rs.25 Lacs and paid to the kidnappers; but denied the suggestion that the said ransom amount was demanded by or paid to respondents/accused. This witness (PW-4) in his cross-examination stated that he had never seen the respondents/accused and denied the suggestion put-forth by petitioner-State that he was won over by these accused or that he is deliberately not identifying the respondent/accused.

22. So far as the assertion of appellant/ State that IO could not be examined before the trial court due to his being on leave, this Court finds that during the course of hearing, learned APP did not bring to the notice of this Court that any application seeking reopening of prosecution evidence was ever made before the trial court, nor any such assertion has been made in the present petition.

23. The learned trial court in the impugned judgment has observed that accused persons could not be identified; recovery could not proved in the absence of examination of the Investigating Officer and other material witnesses turned hostile, so, the accused persons are entitled to acquittal. In



the considered opinion of this Court, due to non-examination of Investigation Officer before the trial court and with the resiling of other material witnesses, the prosecution has not been able to establish its case before the learned trial court and so, the respondents/ accused have been rightly acquitted of the offences charged with in the present FIR case.

24. As far as the objection of petitioner-State with regard to release of Rs.20,05,000/- to PW-4 (father of victim) on *superdari* by the trial court is concerned, the learned trial court in the impugned order dated 03.08.2019 has held that the victim has stated that Rs.25 lacs was given to the kidnappers and the accused persons have not claimed the money seized and so, the money shall remain with the father of the child. In the considered opinion of this Court though the identity of the accused has not been established during trial, however, there is sufficient incriminating evidence to prove factum of kidnapping and extortion of money from the victims and so, refrain to interfere in it.

25. With aforesaid observations, the present petition stands accordingly dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

JULY 19, 2023
ab/r

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