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IN THE HIGH COURT OF DELHI AT NEW DELHI

CRIMINAL APPEAL NOS. 647 & 749 OF 2009
CRIMINAL APPEAL NOS. 361 & 397 OF 2010

Judgment reserved on: 07.4.2010

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Date of Decision: 30.04.2010

1) CRIMINAL APPEAL NO. 647 OF 2009

NADEEM

... Appellant

through :

Mr. J.S. Kanwar, Advocate

VERSUS

STATE

... Respondent

through:

Mr. Lovkesh Sawhney, APP

2) CRIMINAL APPEAL NO. 749 OF 2009

SITARA

... Appellant

through :

Ms. Anita Abraham, Advocate

VERSUS

STATE

... Respondent

through:

Mr. Lovkesh Sawhney, APP

3) CRIMINAL APPEAL NO. 361 OF 2010

MUMTIAZ

... Appellant

through :

Mr. Siddharth Aggarwal, Advocate

VERSUS

STATE

... Respondent

through:

Mr. Lovkesh Sawhney, APP

4) CRIMINAL APPEAL NO. 397 OF 2010

Judgment reserved on: 13.4.2010

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Date of Decision: 30.04.2010

KHALIL @ KAPIL

... Appellant

through :

Mr. Galib Kabir/Mr. Avninder Singh Advocate

VERSUS

STATE

... Respondent

through:

Mr. Lovkesh Sawhney, APP

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?

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2. To be referred to the Reporter or not?
 3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. This appeal arises out of the conviction of appellants Nadeem, Khalil @ Kapil, Mumtaz and Sitara under Section 364 -A of Indian Penal Code, 1860 vide order dated 7th July, 2009 passed by learned Additional Session Judge. The appellants have been sentenced to undergo rigorous imprisonment for life, and to pay fine of Rs. 20,000/- each, and in default of payment of fine, to further undergo rigorous imprisonment of one year.

2. The matter relates to the alleged kidnapping of a child named Furkan, son of Sagir Ahmed (PW-2) and demand of ransom of Rs.5 lacs for releasing the said child. The prosecution version, unfolded through the testimony of certain witnesses examined before the Trial Court and believed by the Trial Court as well, is that on 28th June, 2006 at about 4.00 p.m., Furkan son of PW-2 who was aged 8 years, had gone out of the house to play in the gali. He, however, did not return back home till 7.00 p.m. PW-2 searched him in the locality but the child could not be traced. Next day, he came to know that his son was kidnapped when he received a telephone call on the telephone both of one Alimuddin (PW-1), a STD owner, on 29th June, 2006 at 4.00 p.m. That unknown caller on the said call informed PW-2 that his son had been kidnapped and ransom money of Rs. 5 lacs was demanded for return of the child. The caller also told him that he would call later to tell where the money was to be brought. The unknown caller told Sagir Ahmed that incase he complained to the police, his child Furkan would be killed. Still PW-2 Sagir Ahmed went ahead and reported the matter to the police. FIR (Ex.PW-2/A) was registered under Section 364 -A IPC. After the registration of the FIR, the police officials instructed PW-2 Sagir Ahmed to prepare a bundle of paper in the shape of bundle of currency notes.

3. On the same day i.e. 29th June, 2006 at about 9.00 p.m. the complainant (PW-2) again received a call at his mobile phone and he was told to bring Rs. 5 lacs at a given place in Mandoli jungle. On informing the police about this phone call, the

police officer reached at the house of the complainant at 9.10 p.m. Subsequently, the Investigating Officer namely Sub Inspector Om Pal Singh (PW-8) called another police official from police station to accompany them to the Mandoli Jungle where kidnapper had directed PW-2 to come along with the demanded money.

4. Thereafter, PW-2 along with the police party reached the Mandoli Village at the given place. They all went in maruti van pre-arranged by the Investigating officer. Police was at a little distance from the father of the child where kidnappers had asked him to come. When the father (PW-2) was handing over the fake currency notes (made from newspaper) wrapped in Black polythene bag to the main accused Nadeem, the other co-accused namely Mumtiaz s/o Munna Khan and Kapil S/o Haneef joined Nadeem. Meanwhile, the police officers who were present near the place watching all the happenings, arrested all three persons namely Nadeem, Kapil and Mumtaz and recovered the fake ransom from Nadeem.

5. The police officers interrogated the accused persons about the child and they told that the child was with Sitara who resides at Sangam Vihar. The disclosure statements of Kapil, Nadeem and Mumtiaz were recorded to this effect. The police officers immediately rushed to Sitara's house at Sangam Vihar on 29th June, 2006 at around 12:00 in the night and recovered child from Sitara's custody and immediately arrested her as well in the presence of lady police constable named Nisha. Disclosure statement of Sarita was also recorded. On the respective arrest of the aforesaid accused persons, arrest memos were prepared. These persons were also searched at the time of arrest and their personal search memos were prepared as well.

6. Apart from the STD owner (PW-1), Sagir Ahmed (father of Furkan and complainant) (PW-2) and SI Om Pal Singh PW-8), five more prosecution witnesses were examined to prove the aforesaid prosecution version. After the completion of the prosecution evidence, the statements of accused persons were recorded under Section 313 Cr.P.C. Accused Khalil @ Kapil stated that PWs have foisted a false case against him as he had left the job with PW-2 where he was working at his

“karkhana” and had joined another “karkhana” of one Irfan. Accused Nadeem and Mumtaz also stated on the similar lines. The accused persons also produced four witnesses in defence. DW-1 (Yakub) deposed that he saw the child playing inside the house on the day of incidence as well as on the next day, so the child had never being kidnapped. DW-2 (Ashok Singh) said that on the day of incidence, there was some dispute between Sagir Ahmed and accused persons about money, therefore, in that context Sagir Ahmed took the accused to the police station. DW-3 (Farukh) stated that there was a dispute between Sagir and Nadeem on the date of incidence due to non-payment by Sagir. He also stated that child had not been kidnapped. Sh. Asgar Ali who appeared as DW-4 also deposed in favour of the accused persons stating that they were falsely implicated in the case at the instance of Sagir Ahmed who had taken them to the police station on the pretext of entering into compromise.

7. Learned Additional Session Judge in his impugned judgment, after hearing the arguments, recorded the finding that the prosecution by the testimony of eight witnesses in its support, has proved its case beyond any reasonable doubt that the kidnapping of Furkan was committed by the accused personal namely Nadeem, Mumtaz, Kapil and Sitara for ransom of money of Rs. 5lakhs. The act was done by accused persons in furtherance of their common intention and consequently, the accused persons were convicted and sentenced under Section 364-A read with Section 34 IPC. Against the aforesaid conviction and sentence, all the four convicted persons have preferred these four separate appeals.

8. We may point out at this stage that PW-1 though admitted that he received a call for Sagir Ahmed (PW-2) and informed him about the said call, has not supported the prosecution version on the other aspects, inasmuch as, he has denied having any knowledge as to who was the caller or what was the conversation which transpired between the caller and Sagir Ahmed. He also stated that he did not ask Sagir Ahmed about the conversation. The Public Prosecutor, with the permission of the Court, cross-examined him and confronted him with the statement which was recorded

10

under Section 161 Cr.P.C. (Mark PW-1/A), wherein he had stated that Sagir Ahmed had told him that his son had been kidnapped and caller was also demanding Rs. 5 lacs or that the caller had threatened to kill his son on not giving the said money or that he had stated so to the police. PW-2 Sagir Ahmed and father of the kidnapped boy is the main witness. PW-3 Constable Ali and PW-4 Constable Arvind Kumar had joined the investigation. PW-4 with PW-5 Constable Arvind Kumar had helped in recovery of child. PW-6 is Head Constable Vijender who had recorded the FIR (Ex. PW-2/A), on the statement of PW-2. PW-7 Ct. Yashbir is also a witness to the recovery of child. Sub Inspector Om Pal Singh (PW-8) was the Investigating Officer.

9. Leading the frontal attack to the prosecution version and challenging the findings of the learned Additional Sessions Judge in the impugned judgment, Mr. J.S. Kanwar, Advocate who appeared in Crl. Appeal No. 647/2009, submitted that the appellants were falsely implicated by the police at the instance of Sagir Ahmed who wanted to take revenge. He argued that entire prosecution story was hollow and full of contradictions and concoctions and the prosecution had miserably failed to prove the charge under Section 364-A IPC against the appellants. Ms. Anita Abraham and Mr. Siddharth Aggarwal, Advocates reiterated the submissions made by Mr. Kanwar, Advocate with additional inputs on their part while appearing in Crl. Appeal Nos. 749/2009 and 361/2010 respectively.

10. These three appeals were heard on 7th April, 2010 and the judgment was reserved. Immediately thereafter, fourth convict namely Khalil @ Kapil also filed the appeal against the impugned judgment and conviction which was listed for admission on 9th April, 2010. Mr. Galib Kabir, Advocate who appeared for appellant in that appeal was apprised of the arguments heard in other three appeals and this fourth appeal was listed for final arguments, with the consent of the parties, on 13th April, 2010. On that day, counsel for the parties made their submissions in that appeal as

well. It is in this backdrop, we are deciding all these four appeals by this common judgment.

11. We are not undertaking the exercise of reproducing the arguments of learned counsel for the appellants, inasmuch as, we are finding force in most of these arguments. Therefore, to avoid repetition, we propose to go ahead with our reasons in accepting these appeals and to demonstrate that in our opinion, the prosecution has miserably failed to prove the charge beyond reasonable doubt. Infact the prosecution story is replete with shaky dispositions, serious loopholes and alarming gaps the benefit where of has to go to the accused persons. While recording our reasons, we shall simultaneously advert to the arguments advanced by learned counsel for the appellants as well as Mr. Lovkesh Sawhney, APP who appeared on behalf of the State. Our reasons are as follows:-

- (i) From the very start, the prosecution case fizzles out on analyzing the attitude and conduct of Sagir Ahmed, the father of the kidnapped child. He deposed that on 28th June, 2006 at about 4.00 p.m., his son Furkan, aged about 8 years, had gone out to play in the gali but he did not come back home till about 7.00 p.m. Version of the complainant is that he had searched him in the locality but he could not be traced. Strangely, he did not take any further steps thereafter. A minor and young child of eight years goes missing but the father is not bothered even when his son does not return the home entire night. Not only that, even on the next date till 4.00 p.m., he did not show any anxiety about his missing child. He did not go to the police to report the matter. He did not state as to what steps he took to trace out his child on 29th June, 2006. He has maintained a stoic silence as if he was in a meditating state for 24 hours. He does not take any initiative by making serious attempt to locate his child but comes to know about the alleged kidnapping of his child only when he receives a telephone call at the STD booth of PW-1

Alimuddin on 29th June, 2006 at 4.00 p.m. This conduct of the father, for 24 hours, whose child has gone missing, puts a question mark on the credibility of the prosecution story as to whether child at all was missing. Clearly, the factum of not lodging FIR for 24 hours is downplayed by the learned Addl. Sessions Judge and conveniently glossed over. The learned Addl. Sessions Judge has observed in this behalf "It is the normal conduct of a person to search for child, if the child is missing in the neighbourhood and wait for some time for the return of the child and once one is very sure that child would not return, one goes for the police report". Again what is not appreciated is that it would be not a normal conduct of a father to wait endlessly even when after his search attempts, he has not been able to trace the child. What the abnormal conduct is that a father of eight years of child would keep quiet and would not report the matter to the police for 24 hours and even when the child did not return whole night and the next day till 4.00 p.m. Curiously, even thereafter, as per the version of the father, he comes to know about the whereabouts of the child when he received STD Call alleging kidnapping. Till that time, he was in slumber. It is this abnormal conduct of a father which has escaped attention of the learned Addl. Sessions Judge.

- (ii) In the entire prosecution story, it has not come on record as to how the kidnapping took place. After the alleged recovery of the child from the house of appellant Sitara, neither the accused persons were questioned on this aspect nor anything from Furkan was elicited. This is really strange and major lapse in the prosecution version.
- (iii) Investigation of the case was as shady and as shoddy as possible. As per the version of PW-2, he received second call on his mobile phone and he informed the police about the same. His mobile phone was not checked to see as to whether any such call had been received. Had it

been correct, IO would have first examined the cell phone to find out from which number the call was received. No such attempt was made. More curiously, PW-2 deposed that he did not even remember his mobile phone number which had been purportedly "missed from my possession". On the day of occurrence at least, PW-2 was possessing the mobile phone. Learned counsel for the State tried to explain this lapse by submitting that due to paucity of time, the Investigating Officer possibly did not try to verify the version of PW-2 as he was concerned with the safety and recovery of the child. Even if it did not occur to the police to verify the version of PW-2 at that time as the police was more interested with in recovering the child, fact remains that no such attempt in this behalf was made even afterwards. If the mobile phone of the complainant had gone missing, he could have at least told the cell phone number to the police and on that basis record to the call received on the said cell phone and particularly call in question allegedly received at 9.00 p.m. could be collected from the service provider in order to ascertain the number and to connect the same with the accused. It was not done. It cannot be said as to whether this lapse is intentional or a grave omission. PW-2 even could not recall the mobile number while deposing in the court and did not reveal this number to the Court. Further, as pointed out above, statement of recovered child was not recorded at all to ascertain under what circumstances he was kidnapped; who were the persons who kidnapped him; what was the role of the different accused persons. We are pointing out this for the reason that as per PW-2 when he reached Mondoli Jungle with ransom money, he was approached by one person who met him and asked him about the money. Only after he handed over the black polythene bag to that person, "in the meantime two other persons also reached there". The first person whom he had handed over

the money was Nadeem and other two persons were Mumtiaz and Kapil. Whether they were parties to the alleged conspiracy or had any role could be known from the statement of Furkan.

Furthermore, the Investigating Officer (PW-8) in his statement did not talk about the cell phone call at all.

- (iv) Most material witness in the present case was Furkan, the child in question, who was allegedly kidnapped. He was not even cited as a witness and examined. He was eight years of old boy. PW-2 in his cross-examination claims that later on his son told him as to how he was kidnapped which indicates that child was capable enough to narrate the incident if it actually happened. This has given rise to legitimate argument by the appellants that prosecution story is cooked up and the appellants are framed in a false case. On the one hand, best witness is not examined. On the other hand reasonable doubt is created that a false case is foisted upon the appellants as it was difficult for the prosecution to take help of this child for setting up such a case against the appellants. Adverse inference can clearly be drawn against the prosecution for non-examination of this child and benefit thereof has to go to the appellants/accused persons. We are not convinced with the reasoning given by the learned Additional Sessions Judge for not examining the child. Though, the learned Addl. Sessions Judge was conscious of the fact that a child was very important witness in this case which observation is specifically made in the impugned judgment, at the same time this lapse is toned down and side tracked by stating that non-citing of the child was not fatal to the prosecution case as the complainant had himself joined the investigation with the IO and no adverse inference could be drawn against the prosecution in this regard. This clearly amounts to trivializing the issue. The learned Addl. Sessions Judge has failed to appreciate that non-examining of the child

would be fatal more particularly when attendant circumstances or other evidence coming on record was not sufficient to establish the culpability of the accused persons. On the proper analysis of the whole evidence, it becomes abundantly clear that it is the said child who could have thrown light on various aspects if such a kidnapping had taken place at all.

- (v) As pointed out above, PW-1 STD owner has not supported the prosecution version. He is the only independent witness in the entire case. Thus in the absence of any evidence, coming on record, it is not established that ransom call was made at all. We may also observe at this stage that in respect of so called ransom call, there are variations in the version of different witnesses which we shall point out at relevant stage hereafter. These factors also militate against the story of ransom.
- (vi) Apart from the aforesaid aspects which put a serious dent on the prosecution story, following are the material contradictions in the testimony of some witnesses which would force us to conclude that charge against the appellants is not proved beyond reasonable doubt.

These are:-

- (a) As per PW-2, first call at STD booth was received on 29th June, 2006 at 4.00 p.m. After receiving this call, he went to police Station Gokul Puri and reported the matter to the police and got the FIR registered. After the registration of the FIR, the police officer instructed him to prepare a bundle of papers in the shape of bundles of currency notes. On the other hand, as per PW-3 Ct. Ali Shabbar, it is Sub Inspector Om Pal Singh who prepared the bundles of fake currency notes. Further Sub Inspector Om Pal Singh has stated in his

statement that he was not present at the time of preparation of the bundles.

(b) There is also contradiction in the manner in which child was allegedly recovered from Sitara's custody. One witness (PW-) stated that it happened in the presence of a lady police Constable Nisha where as other witness has stated that no lady police was present. Further, according to one version, when the house at Sangam Vihar where the child was purportedly kept was knocked, Sitara opened the door and came out and child was inside. Other version is that somebody else opened the door and child was in the lap of Sitara.

(c) Most glaring contradiction is the timings at which the second police party met PW-2 and the first raiding party at railway crossing, Mandoli. It has come in the statement of PW-8 Constable Arvind Kumar that they were instructed to proceed towards Mandoli Jungle at 8.00 p.m. and accordingly they started. Significantly, PW-2 stated in his statement that he received the call at 9.00 p.m. on his mobile phone when the caller told him to come to the jungle of Mandoli with ransom money. If this call was received at 9.00 p.m. by PW-2 and only at that time the place where the ransom was to be given was disclosed, how the police officers could be told at 8.00 p.m. to go to Mandoli jungle.

(vii) Other curious aspect which needs to be mentioned is the manner in which PW-2 described the accused persons who came to receive the ransom. In this behalf, he has deposed as under:-

“When I reached in Mandoli jungle one person met me and asked about the ransom money. I

told him that I had come with ransom money and handed over the black polythene bag to that person and in the meantime two other persons also reached there. Police officials apprehended all those three persons. The name of the person who came first to me and to whom I handed over the polythene bag was revealed as Nadeem, accused present in the court today and the name of other two persons were revealed as Mumtyaz and Kapil, accused persons present in the court today.'

The manner in which PW-2 narrated the incident gives an impression that he did not know the said three accused persons and it was revealed to him later that the person to whom he handed over the money was Nadeem and he was also told that other two persons were Mumtiaz and Kapil. Fact is that he knew Nadeem since his childhood and he also knew Kapil much long prior to the incident which he disclosed when specific questions were put to him in the cross examination. In fact he admitted that Nadeem had worked with him for about 20 days, whereafter he left the job and joined some other place.

The manner in which he handed over the ransom money to Nadeem also appears to be artificial. As per his version when "one person" (i.e. Nadeem) met him and asked him about money, he handed over the black polythene bag to that person. He did not even ask as to where his child was and whether he had brought his child with him or not or that he would give the money after the child is handed over to him or at least shown to him. He did not even ask as to where the child was kept. This shows, some what unnatural conduct on the part of a father who would hand over the ransom money without first ascertaining himself that his child was safe and would be handed over to them.

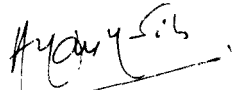
12. No doubt, minor discrepancies in the statement of witnesses are to be ignored. It is also well settled legal position that doubts in the prosecution story are treated as reasonable. It is to be ensured that they are free from a zest for abstract speculation, or free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. When we apply these

tests to the facts of this case and take into consideration all the aforesaid aspects cumulatively, a reasonable and plausible doubt is established putting a question mark on the prosecution version. We may point out here that there are more inconsistencies in the testimonies of various witnesses which are ignored by the learned Addl. Sessions Judge as trivial and not very material. We have not been influenced by those inconsistencies viz. who hired the maruti van; how many persons sat in the maruti van; what route was followed by the police party to reach at mandolin phatak as we agree with the learned Addl. Sessions Judge. However, the inconsistencies discussed by us are quite material and could not have been wished-away by labelling them as minor in nature. Some of these inconsistencies infact go to the root of the matter and make the prosecution story questionable. Benefits of these inconsistencies have to be given to the appellants. Irresistible conclusion which is drawn from the aforesaid discussion is that the prosecution has not been able to prove that child Furkan was kidnapped by the accused persons with common intention to extract ransom money from the Furkan's father i.e Sagir Ahmed (PW-2).

13. The learned Addl. Sessions Judge has disbelieved the testimony of different defence witnesses produced by the accused persons who had deposed that they had seen Furkan, boy in question, in the house of PW-2 and, therefore, he was not abducted. Though, not very convincing reasons are given for adopting this course of action, it is not necessary to deal with this aspect in view of our aforesaid discussion holding that in the first instance the prosecution itself has not been able to prove the guilt of the appellants beyond reasonable doubt.

14. The upshot of the aforesaid discussion would be to hold that the learned Addl. Sessions Judge has arrived at a wrong finding of guilt against the appellants and, therefore, conviction and sentence imposed upon the appellants is not sustainable. We accordingly allow the present appeal by setting aside the judgment and sentence awarded to the appellants.

19
15. The appellants shall be released forthwith, if they are not wanted in any other case.


(A.K. SIKRI)
JUDGE


(AJIT BHARIHOKE)
JUDGE

APRIL 30, 2010.
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