State Vs Vijay and ors.

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Court : Delhi

Decided On : Sep-30-2010

Judge : Mr. Anil Kumar ; Mr. Suresh Kait. J J.

Acts : Indian Penal Code (IPC) - Section 363, 364A ,120B

Appeal No. : Crl.M.A No. 14603/2010.

Appellant : State

Respondent : Vijay and ors.

Advocate for Pet/Ap. : Ms.Richa Kapoor, Adv.

Judgement :
1. Whether reporters of Local papers may be YES allowed to see the judgment?

2. To be referred to the reporter or not? NO

3. Whether the judgment should be reported NO in the Digest?

ORDER

This is an application seeking exemption from filing the certified copies of the annexures. Allowed subject to just exception. This is an application by the petitioner under Section 5 of the Limitation Act seeking condonation of delay of 51 days in filing the petition for leave to appeal against the order dated 30th March,

2010 and 31st March, 2010 convicting and sentencing respondent No.1 under Section 363 of Indian Penal Code and acquitting respondent Nos.1 to 4, all the respondents under Section 364-A of Indian Penal Code. The applicant has contended that copies of the orders were received on 5th April, 2010 and thereafter the report was prepared and was sent to different officers to consider the case and to decide to file petition for leave to appeal leading to 51 days delay. The applicant has contended that considering the averments made in the application, there is sufficient grounds for condoning the delay. For the reasons stated in the application, delay of 51 days in filing the petition for leave to appeal is condoned and the application is allowed.

1. The petitioner/state has sought leave to appeal against the orders of conviction and sentence dated 30th March, 2010 and 31st March, 2010 whereby respondent No.1 has been convicted under Section 363 of Indian Penal Code and sentenced to undergo rigorous imprisonment for 4 years and to pay a fine of Rs.2,000/- and in default to undergo simple imprisonment for 1 month under Section 363 of Indian Penal Code, however absolving him of the charge under Section 364A of Indian Penal Code and also absolving respondent Nos.2 to 4, namely Raju, Ashok Kumar and Pappu of the charges under Sections 364A and 120B of Indian Penal Code in Sessions Case No.56/1/08, titled as State v. Raju & Others arising from F.I.R.No.750/2005, under Sections 364A & 120B of Indian Penal Code, PS Najafgarh.

2. The petitioner is aggrieved by acquittal of respondent Nos.2 to 4 of charges under Sections 364A and 120B of Indian Penal Code and conviction and sentence of respondent No.1 under Section 363 only and not under Section 364A of Indian Penal Code.

3. The learned counsel for the petitioner/State has been heard in detail and the record of the trial court which had been requisitioned has also been perused and the evidence led before the trial court has been considered to determine the pleas and contentions of the learned counsel to decide whether the petition for leave to appeal should be granted or not.

4. The learned counsel for the petitioner/State has very emphatically contended that there is sufficient evidence to establish that a ransom call was received by the complainant, Sh.Jitender Saini who was examined as PW-2 as he has deposed orally about it. According to him, even though the prosecution failed to carry out the voice test identification and also failed to get the call record of STD Booth and produced the same and even did not seize the cell phone of the complainant, the oral evidence of PW-2 regarding having received a ransom call from Vijay an ex-employee demanding Rs.5/-lakhs is sufficient to establish that the demand for ransom was received and he should have been convicted under section 364 A of IPC also. Similarly it is contended that the evidence against the other respondents is also sufficient to convict them of the said charge and conspiracy among all the respondents.

5. This is settled law that in reversing the findings of acquittal the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused which is rather fortified and strengthened by the order of acquittal passed in his favour. Even if on, fresh scrutiny and reappraisal of the evidence and perusal of the material on record, the High Court is of the opinion that another view is possible or which can be reasonably taken, then the view which favours the accused should be adopted and the view taken by the trial Court which had an advantage of looking at the demeanour of witnesses and observing their conduct in the Court is not to be substituted by another view which may be reasonably possible in the opinion of the High Court. For this reliance can be placed on 2009(1) JCC 482=AIR 2009 SC 1242, Prem Kanwar v. State of Rajasthan; 2008 (3) JCC 1806, Syed Peda Aowlia v. the Public Prosecutor, High Court of A.P, Hyderabad; Bhagwan Singh and Ors v. State of Madhya Pradesh, 2002 (2) Supreme 567; AIR 1973 SC 2622 Shivaji Sababrao Babade & Anr v. State of Maharashtra; Ramesh Babu Lal Doshi v. State of Gujarat, (1996) 4 Supreme 167; Jaswant Singh v. State of Haryana, 2000 (1) JCC (SC) 140. The Courts have held that the golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A

miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent.

6. To grant of leave to State against an order of acquittal the High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusions and findings in place of the findings recorded by the trial Court, if the findings are against the evidence or record or unsustainable or perverse. However, before reversing the findings of acquittal, the High Court must consider each ground on which the order of acquittal is based and should record its own reasons for accepting those grounds. This is also no more res integra that the High Court should give proper considerations to matters such as the views of the trial judge as to the credibility of the witnesses; the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; the right of the accused to the benefit of any doubt and slowness of the Appellate Court in disturbing the finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

7. Perusal of the statement of PW-2 Sh.Jitender Saini reveals that he had deposed that on 14th November, 2005 he had received a call and the callers were Vijay, Ashok Kumar and Raju. Regarding the first call he did not specify that this was the call only from Vijay, or from Ashok Kumar, or Raju, or all the three spoke to him and demanded ransom for kidnapping the child. From his testimony, it is not clear whether all the three accused talked to him simultaneously, or one of them demanded ransom on the phone and he heard other two Ashok Kumar and Raju in the background. In the circumstances, it could not be inferred that the first call for alleged ransom was made by Sh.Vijay only. Though he stated that second call on the same date i.e. 14th November, 2005 was received after one hour from Raju threatening him that if Rs.5/-lakhs were not paid, his kidnapped son will be killed, however, this deposition is contrary to his statement under section 161 of Cr.P.C where he had stated that the call was made by Ashok.

8. In the cross-examination, the complainant PW-2 rather stated that he received information that accused Vijay had kidnapped his child on 14th November, 2005 in the evening from Sh.Sanjay and he told about this to the police. He categorically

stated that before getting information from Sanjay he had not received any information of any kind about kidnapping of his son. His relevant cross-examination on 25th January, 2007 is as under:- ".....For the first time I received information that accused Vijay has kidnapped my child on 14th November, 2005 in the evening. I received this information from Sh.Sanjay on 14th November, 2005 in the evening. I told this information to the police in the evening of 14th November, 2005 itself. I did not receive any information regarding the same before 14th November, 2005. I did not receive any information of any kind before or on 14th November, 2005 except the information received through Sh.Sanjay. It is correct that I received a telephonic call from the police station Bakewar, Itawaha (UP) on 16th November, 2005."

9. The PW-2 had not deposed that he had received any call from Sh.Sanjay. According to him, the ransom call was made by Vijay on 14th November, 2005 along with Ashok Kumar and Raju and after one hour, he had received another call from Raju. Had he received the phone calls for ransom on 14th November, 2005 would he not know that his child had been kidnapped for ransom? In that case, the said witness who is the complainant and father of the kidnapped child would not have deposed that the information that Vijay has kidnapped his child on 14th November, 2005 was from Sh.Sanjay only. In view of the specific statement of PW-2, it was imperative for the prosecution to have seized the cell phone of the complainant and to ascertain its IME number. This was neither deposed by the said witness, nor established by the prosecution whether the alleged ransom call was received on the mobile phone of the complainant or at his STD Booth. The call record of the STD Booth has not been produced. In the circumstances, there is no documentary evidence to establish that ransom calls were received by the complainant on 14.11.2005. On the basis of the oral statement of the complainant also it cannot be inferred that he had received ransom calls from the accused and to that extent his statement cannot be relied on.

10. The complainant, Sh.Jitender Saini in his statement under Section 161 of Criminal Procedure Code stated that he had received phone call from Ashok Kumar on 14.11.2005 and not Raju and he could identify the voices of Vijay and Ashok Kumar as Ashok Kumar used to come to Vijay at his shop. In the

circumstances, the trial Judge has noticed the improvement made by the said witness who had stated in his statement under Section 161 of Criminal Procedure Code that Ashok Kumar had demanded the amount and had made second ransom call and it was not disclosed in the statement under section 161 of Cr. P.C that Raju had made the second ransom call. In the cross- examination, the said witness had also admitted that he could not identify accused Raju and Sonu by names. If complainant could not identify Raju and Sonu even by name, then how could he identify their voices? The complainant had not heard them earlier as Vijay was not in the habit of making friends and voice test identification was not done during the investigation. In the circumstances, the inferences drawn by the trial court that the complainant could not have identified their voices cannot be held to be unsustainable or perverse so as to entail interferences by this Court, or to grant leave to appeal to the petitioner as no perversity in the findings of the Trial Court has been pointed out.

11. The trial court has also noticed and observed that prosecution has not produced any call record, though the complainant had deposed that he had received a ransom call from Vijay on his STD Booth, and therefore, it was incumbent upon the investigating officer to have collected the call record to find out the truth in the statement of the complainant as to whether he had received any ransom call. The failure of the prosecution to establish that any ransom call was made has also been inferred on the basis of the testimony of PW-14, ASI Ishwar Dutt who did not make any attempt to verify whether the complainant PW-2 had received any ransom call as in his deposition he could not disclose the telephone number and mobile number on which the ransom call was received at the house of the complainant. He had admitted that he had not even informed about the time or collected any detail of the STD line phone on which alleged ransom calls were allegedly made by the respondents/accused.

12. Another factor which weighed with the trial court was that the demand for ransom has not been established by the testimony of PW-3 who has alleged that he had heard the accused planning to kidnap the child of the complainant on 8th November, 2005, however, he did not inform about this fact either to the police or to other co-villagers and he informed the complainant Sh.Jitender Saini only on

14th November, 2005 which is also admitted by Sh.Jitender Saini complainant in his cross-examination deposing that he only came to know about the kidnapping of his child from Sh.Sanjay and from no one else in the evening of 14th November, 2005. Sh.Sanjay PW-3 also did not depose that kidnapping was done or was planned for any demand or for any ransom. PW-3 was not declared hostile and in the circumstances, the trial court did not give much credence to his testimony for inferring that there was a demand for ransom made from the complainant. Rather the trial court has held that PW-3 appears to be a witness introduced in the case with a purpose to give the colours of kidnapping for ransom to the case.

13. The learned Additional Public Prosecutor is unable to show any other fact established on record which has not been taken into consideration by the trial court which will make inferences of the trial court perverse or unsustainable.

14. The plea that two ransom calls were received by the complainant was not propounded in the statement initially recorded under section 161 of the Cr. P.C but was disclosed by the complainant, father of the kidnapped child in his supplementary statement recorded under Section 161 of Criminal Procedure Code where he had deposed that he had received two ransom calls. In the statement under Section 161 of Criminal Procedure Code, the complainant stated that ransom calls were received from Vijay and Ashok Kumar whereas in his statement before the Court, it was alleged that first ransom call was received from Vijay, Ashok Kumar and Raju, and second ransom call was received from Raju. In the circumstances, the inferences of the trial Court that there is no cogent evidence with regard to any planning or criminal conspiracy to kidnap the child cannot be termed to be unsustainable or perverse or not based on the evidence on record.

15. The prosecution has also failed to produce reliable evidence that complainant had accompanied police from Delhi to bus stand Itawaha on 15th November, 2005 as the prosecution case is that on 14th November, 2005, ASI Ishwar Dutt along with PW-2 Sh.Jitender Saini,PW-4, one Sh.Sarjeet Saini, a relative of PW-2 and constable Sh.Rakesh had left for Itawaha and had reached Itawaha during noon time on 15th November, 2005. However, PW-2 Sh.Jitender Saini, the complainant did not testify at all that Sh.Sarjeet Saini, his relative had accompanied him to bus

stand pursuant to the ransom call allegedly received from the accused. The statement of PW4, Sh.Sarjeet, brother- in-law of the complainant has contradictions inasmuch as he stated that the complainant was given a bag with a direction to go to bus stand and no one came to collect the money, however, no clarification was sought about the date of the visit and in these circumstances, the probable inference is that they had not gone to Itawaha on 14th November, 2005 and 15th November, 2005. Even if it is feasible to draw another inferences by this Court that evidence reflect that these two persons had gone on 14.11.2005 and had reached Etawah on 15.11.2005, it will not be appropriate to substitute the findings of the Trial Court with this inference. These persons with policemen had not visited Etawah is further augmented by the fact that no DD entry has been proved that police officials with the complainant and his relative had left for Itawaha on 14th November, 2005, nor any entry at the police station Itawaha to prove their presence in the said District has been produced and proved. In the circumstances, neither prosecution had established that there was a ransom call made on 14th November, 2005, and nor that two police officers along with the complainant and his brother-in-law had gone to Itawaha. In the circumstances, the findings of the trial court, in the opinion of this Court does not suffer from any perversity, nor any such facts or pleas have been raised or shown by the learned counsel which will reflect any unsustainability in the findings of the trial court.

16. The learned Additional Public Prosecutor, Ms.Richa Kapoor has also not been able to show any cogent evidence or fact which will show or establish cogent link between Vijay/accused who has already been convicted under Section 363 and the other accused namely, Ashok Kumar, Raju and Pappu on the basis of evidence on record or that they had conspired. In the circumstances giving benefit of doubt to accused namely Ashok Kumar, Raju and Pappu cannot be faulted nor it can be held that the findings of the trial court are perverse or unsustainable and are not on the basis of record.

17. No other grounds have been raised by the learned counsel except those which have been considered and dealt with hereinabove and in the circumstances, there are no grounds to grant leave to appeal to the petitioner. There are no compelling or substantial reasons for interfering with the orders of the trial court, nor

conclusions of the trial court are unreasonable or that the findings are against the evidence on record. The petition for leave to appeal in the circumstances is without any merit, and therefore, is dismissed.