

(2016) 06 DEL CK 0056
In the Delhi High Court
Case No : Criminal Appeal No. 875 of 2001

Dharam Vir

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 02-06-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 120B, 344, 366A, 368, 392

Citation : (2016) 167 AIC 704 : (2016) 231 DLT 408 : (2016) 3 JCC 1535

Hon'ble Judges : Pradeep Nandrajog and Mukta Gupta, JJ.

Bench : Division Bench

Advocate : Mr. Ajay K. Sharma and Ms. Rupali Sharma, Advocates. in Criminal Appeal No. 875 of 2001, Mr. Mohit Mathur, Sr. Advocate instructed by Mr. Manoj Pant, Advocate. in Criminal Appeal No. 976 of 2001, for the Appellant; Mr. Varun Goswami, APP. in Criminal Appe

Final Decision : Disposed Off

Judgement

Mukta Gupta, J.—Vide impugned judgment dated September 29, 2001, Dharam Vir the appellant in CRL.A. 875/2001 and Shyam Kumar, his two sons Lokesh Kumar and Manoj Kumar and his wife Anita the appellants in CRL.A. 976/2001 were convicted for offences punishable under Sections 364-A/368/344 and Section 392 read with Section 120-B IPC. Vide order on sentence dated October 01, 2001 they were awarded imprisonment for life with a fine of Rs. 500/- for offence punishable under Section 364-A/120-B IPC, rigorous imprisonment for 7 years with a fine of Rs. 500/- for offence punishable under Section 368/120-B IPC, rigorous imprisonment for a period of 3 years and a fine of Rs. 500/- for offence punishable under Section 344/120-B IPC and rigorous imprisonment for 10 years with fine of Rs. 500/- for offence punishable under Section 392/120-B IPC.

2. During the pendency of appeals, appellant No.1 and appellant No. 3 in CRL.A.976/2001 i.e. Shyam Kumar and his son Manoj Kumar passed away and thus appeal qua the appellant Nos. 1 and 3 stood abated. Thus, in the present

appeals we are concerned with the conviction and order on sentence regarding Dharam Vir, Lokesh Kumar and Anita.

3. The prosecution case hinges on the testimony of Bir Kumar Jain @ Sonu PW-8 who claims to have been kidnapped for ransom and his deposition in Court is as under:

"On 22nd February 1996 at about 12/1 PM I was sitting at the shop of my uncle Mahavir Prasad Jain accused Lokesh, who is present in the Court, whom I knew prior to the date of occurrence came to me and asked me to accompany him to Gurgaon as he had to bring sum of Rs. 2 lakhs from there. I had then accompanied him and both of us entered Gurgaon in the vehicle of the accused which was an Esteem. There we took the car to a house in a colony, but I do not know the name of the colony and I accompanied him inside the house. There in that house accused Shyam, who is present in the Court (the witness has correctly identified the accused) and one other person who is not present in the Court today. There Lokesh slapped me and then he put chloroform against my nose and accused Shyam gave me an injection and thereafter I fell unconscious. When I regained consciousness I found myself in a house at Jaipur. There also accused Lokesh, Shyam Kumar and one another were present. They force me to write a letter to my uncle Mahavir Prasad. Ex.PW-8/A is the same letter which was got written by me by the accused persons namely Lokesh, Shyam Kumar and one another person which is addressed to my uncle (Tauji) which is in two sheets. I was also made to write letter Ex.PW-8/B which is addressed to my mother. Both the letters are in my hand and bears my signatures. A demand of ransom was raised in both the letters by way of ransom for releasing me. There at Jaipur I was kept by tieing in chains and the lock used to be put on the chains tied with an iron rods of the window. There used to be some lady in the house but I did not see her. I was kept in Jaipur for a month and thereafter they brought me back to Gurgaon. Even in Gurgaon I was kept in the house where I had initially been taken and there also I was kept confined in a room tied with a chain and there also they forced me to write a letter to my uncle (Tauji) and my mother, again said letters were not got written in Gurgaon, but I was forced to demand money as a ransom money for my release and that was taped in an audio cassette. After 2/4 days i.e. on 3.4.1996 Police reached there. Police brought me to Delhi after untieing me from the chains.

On 5.4.1996 I was taken to Jaipur by the Police, where I identified the place where I was kept confined. When I was kept confined in Jaipur by accused Lokesh and Shyam Kumar and one another person, they had taken my diamond ring which I was wearing and they had kept the same with someone in Jaipur. They had also taken my gold chain with pendant and had kept it with someone. On my visit to Jaipur with Police on 5.4.1996, Police had also taken accused Lokesh who had been arrested. There he led the Police to two different persons and from one person my ring was recovered and from another person chain with locket was recovered. I had identified both the gold chain and diamond ring.

Both were seized vide memo Ex.PW-8/C and D respectively which bears my signatures at point A.

I have brought the diamond ring and gold chain with pendant which I have received on superdari from the Court. They are the same which accused had taken from me and were later on recovered at the instance of accused Lokesh. Diamond ring is Ex.P1 and the gold chain with pendant is Ex.P2.

I was taken from Delhi to Gurgaon by the accused Lokesh who is present in the Court. My statement was recorded in the Court of Magistrate under Section 164 Cr.P.C. (At this stage a sealed envelope which is in the torn condition is opened and its contents is taken out. Ex.PW-8/E is my statement under Section 164 Cr.P.C. which bears my signatures at point A. (At this stage examination in chief of witness is deferred as the tape recorder having facility of recording from cassette to cassette has not been brought by the witness. The witness states that he would bring the cassette with the recording facility tomorrow. The case is also fixed for prosecution evidence.

(At this stage a sealed parcel having the seal of RL is opened and its contents are taken out. Cassette No.E is played on the cassette player. The witness identifies and states that it is his voice. The cassette is Ex.P3 and its transcript is Ex.P3/X. Ex.P3 is the same cassette having my voice which was recorded at Gurgaon).

(At this stage another cassette is played on the cassette player. Cassette is Mark A. The witness after listening to the same states that it is in his voice and was recorded either at Jaipur or at Gurgaon. The cassette is Ex.P4 and its transcription is Ex. P4/X).

There was a third person apart from Lokesh and Shyam Kumar in Gurgaon, who was being named as Ashok, in the house in Gurgaon where I was taken and kept confined. That Ashok is not today present in the Court. I did not see any lady along with Lokesh and Shyam in Jaipur where I was kept confined.

(At this stage, learned APP seeks permission of the Court to cross-examine this witness on this point as he is resiling from his earlier statement made to the Police.)"

4. In cross-examination by learned APP, Bir Kumar Jain admitted recording of his statement by the Police on April 03, 1996 after he was recovered by the Police. He admitted that he had stated to the Police that he was taken to a house at Gurgaon by Lokesh wherein his father Shyam Kumar and one Dharam Vir whom he also known as Ashok was present. When Dharam Vir was shown to the witness he stated that the accused present in Court looked like Dharam Vir (Aisa sa hi tha). He further accepted the suggestion that when he was taken to Jaipur in a car he regained consciousness and saw Lokesh, Shyam Kumar and Dharam Vir. He further stated that besides the above mentioned three persons he used to hear the voice of one boy and one lady in Jaipur who used to serve the food but he has not seen their faces.

5. In cross-examination by learned counsel for appellants, Bir Kumar Jain admitted that he used to sit at the Halwai shop of his uncle at South Extension and his father did not sit at the shop as he was sick. At the time of incident he was residing with his uncle Mahavir Prasad Jain at South Extension whereas his parents used to live at Dariba, Chandni Chowk with his grand-parents. He was paid no salary by his uncle being the nephew. He got acquainted to Lokesh about two months prior to the incident as he was introduced by one Amit resident of South Extension. Though neither Lokesh had come to his house nor he had visited the house of Lokesh, prior to the incident, he had gone with Lokesh 4/5 times. He never introduced Lokesh to any of his relations at the shop nor did he tell anyone while leaving the shop with Lokesh on February 22, 1996. He stated that there was no criminal case against him but there were some criminal cases against his father. After leaving the shop with Lokesh on February 22, 1996 he had gone to a shop at Yusuf Sarai to get a pager. From there he accompanied Lokesh to Gurgaon. In the shop at Yusuf Sarai he alone went inside and Lokesh stood outside. When he left his uncle's shop with Lokesh he told that he would return in 1-1½ hour as the same was the time taken to come back from Gurgaon. He admitted that he was not medically examined after his recovery, though he stated that in Gurgaon and Jaipur he was beaten. He was confronted with the portions of his previous statement which he had materially improved in his deposition. According to him he was chained with the window when the Police recovered him. He denied the suggestion that he was not taken from Gurgaon to Jaipur and back from Jaipur to Gurgaon in a car. He stated that while travelling from Gurgaon to Jaipur and Jaipur to Gurgaon he was made unconscious. He stated that he used to write letters at the instance of accused Shyam. He did not notice marks of chain on his legs. He was suggested that Ex.PW-8/A and PW-8/B were not written by him under any threat and that he was deposing falsely.

6. It is the case of the prosecution that after Ravi Kumar Jain PW-9 uncle of Bir Kumar Jain lodged the FIR No.110/1996 at PS Kotla Mubarakpur on February 26, 1996 informing that a ransom call had been received, phone numbers 4693642 and 4621022 were kept under observation. As per the report, phone calls demanding ransom were received from different places including Palika Bazar, Connaught Place, Chandigarh, Dehradun, Meerut etc.. Though efforts were made to track the origin of the phone calls but all in futile. A letter purportedly written on March 09, 1996 by Bir Kumar Jain was received followed by another letter purportedly written on March 24, 1996 with an audio cassette containing the voice of PW-8 kept under a stone near the Board of Wild Life Sanctuary at the shooting range road was received. However still there was no clue of the kidnappers. On a secret information Lokesh was apprehended on April 03, 1996 near Aaya Nagar Terminal and a case FIR No.198/1996 under Sections 186/353/307 and Section 27 Arms Act was registered. Prosecution claims that pursuant to arrest Lokesh disclosed about house No.1594, Sector-10A, Housing Board Colony, Gurgaon where a raid was conducted and Bir Kumar Jain @ Sonu was recovered. Thus Shyam Kumar, his other son Manoj Kumar and his wife

Anita who were all residents of that house at Gurgaon and one Dharam Vir were arrested. Sonu was found kept bound with chains and lock and a bottle of chloroform was also found in the room.

7. As noted above the only allegation against Anita was that she was the owner of the house. No overt act is attributed by Bir Kumar Jain @ Sonu the sole witness against Anita and thus judgment of conviction and order on sentence qua her are liable to be set aside only on this count, as merely being the owner of the house with no participative role either passive or active being attributed, and there being no evidence of meeting of mind, she could not have been convicted with the aid of Section 120-B IPC as well.

8. Learned counsel for the appellant Dharam Vir contends that Dharam Vir has not been identified by Bir Kumar Jain @ Sonu in the Court on more than one occasion. Further no specific role has been attributed to Dharam Vir. Dharam Vir has not been named anywhere and the third person along with Lokesh and Shyam was named as Ashok. It is not the case of Bir Kumar Jain that his eyes were closed and a period of nearly 40 days i.e. from February 22, 1996 to April 03, 1996 was sufficient for him to recognise Dharam Vir categorically if he was one of the persons along with Lokesh and Shyam who performed any overt act. Bir Kumar Jain has failed to categorically identify Dharam Vir. As per deposition of Bir Kumar Jain, one other person named Ashok was involved was not present in the Court. He reiterated in his examination-in-chief that the third person named Ashok was not present in Court. Only on cross-examination by the learned APP when Dharam Vir was shown to the witness he stated "Aisa sa hi tha". Thus there is merit in the contention of learned counsel for the appellant that Dharam Vir has not been identified as in his examination-in-chief Bir Kumar Jain stated that the third person who was named as Ashok was not present in the Court. Even on cross-examination by learned APP all he said was "Aisa sa hi tha". Thus Dharam Vir is entitled to the benefit of doubt.

9. Learned counsel for Lokesh argues that the story put up by the prosecution is palpably false and concocted which is apparent from the fact that FIR No. 111/1996 was registered at 5.25 PM at PS Kotla Mubarakpur whereas present FIR No. 110/1996 was registered at 11.00 PM as deposed to by PW-1. From February 22, 1996 to April 03, 1996 there was nothing with the Police to connect Lokesh with the offence. Lokesh was arrested in a very dramatical manner and FIR No. 196/1996 at PS Mehrauli was foisted on him in which he has been acquitted by the learned Trial Court on April 27, 1996. The said acquittal having not been challenged by the State, the decision has become final. The arrest of Lokesh being shrouded in mystery the subsequent recovery of Bir Kumar Jain pursuant to his disclosure cannot be relied upon. Though it is the case of Bir Kumar Jain that he was taken away by Lokesh in his Maruti Esteem car 4020 and when Lokesh was arrested he was arrested in the said car, the ownership of the said car has not been linked to Lokesh. Further the alleged car was not identified by Bir Kumar Jain. There is no identification of the voice of the callers making

ransom calls. Thus there is no evidence to connect that the ransom calls were made by Lokesh. The instrument which recorded the voice of Bir Kumar Jain into cassettes has not been recovered. The seizure memos bear the date of March 30, 1996 though the seizures were made on March 24, 1996. Version of Bir Kumar Jain is full of contradiction and probabalizes the defence of Lokesh. Though it is the case of Bir Kumar Jain that he stayed with his uncle but this fact has not been deposed to by his uncles. Antecedents of father of Bir Kumar Jain are suspect. Despite the fact Bir Kumar Jain claims that he was chained and locked throughout his custody of nearly 40 days no medical examination was done to show that he suffered abrasions or bruises or contusions. Though chloroform is stated to have been recovered, however the same was not sent to FSL for examination. Version of Bir Kumar Jain is palpably false and unreliable and since it is not corroborated on any point by any other evidence on record appellant Lokesh is entitled to the benefit of doubt.

10. The explanation of Lokesh in his statement under Section 313 Cr.P.C. was that he was acquainted with Sonu as he had visited Lokesh's house once or twice in Gurgaon with him before the incident, however he was not involved in his kidnapping and was falsely implicated in the case.

11. It is well-settled that conviction can be based solely on the testimony of a victim however when there are gaps in the story of the victim, as a rule of prudence the Court should seek corroboration of his evidence. Though it is the case of the prosecution that phone numbers 4621022 and 4693642 belonging to the complainant were kept on observation and ransom calls were received on the said phones on various dates from Palika Bazar, Connaught Place, Chandigarh, Lajpat Nagar, Meerut etc., however there is no investigation whatsoever as to who made the ransom calls. Further it is the case of Bir Kumar Jain himself that all along Shyam and Lokesh were with him, in such a situation it was not possible for Lokesh to have gone to Chandigarh and made telephone calls for ransom. Though Bir Kumar Jain stated that the two letters were written by him and voice recording was also by him, however the same were not connected with any voice sample or the hand-writing expert's opinion. Further there is no evidence as to how first letter was received. The version of the Police officers that after Lokesh made the disclosure statement they raided the Gurgaon premises for which they scaled the wall from the rear side to enter the house is highly unreliable. Neither was the chloroform bottle produced in the Court nor was it sent to FSL. No MLC of Bir Kumar Jain was got conducted to substantiate that he was kept in chains. The testimony of PW-3 the owner of the house at Jaipur is also of no avail as he does not speak about the presence of Bir Kumar Jain at Jaipur. All he says was that the room was rented to Lokesh Kumar. According to his version when he went to the house 3-4 times he found it locked and only once he found Lokesh in the house and in March 1996 the house was vacated after handing over the keys to Sadhu. Thus this witness does not corroborate the testimony of Bir Kumar Jain that Lokesh kept him at Jaipur in that house for one month.

12. In view of the serious gaps in the testimony of Bir Kumar Jain which is not corroborated on any particular by any other evidence on record it would be unsafe to base the conviction of appellant Lokesh for the offences noted above. Consequently, Lokesh is also granted the benefit of doubt. The impugned judgment of conviction and order on sentence are set aside. The appellant Dharam Vir, Lokesh and Anita are on bail. Their bail bonds and surety bonds are discharged.

13. Appeals are disposed of.

14. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

15. TCR be returned.