

(2019) 10 JH CK 0038

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No. 422, 449, 523 Of 2009

Dilip Singh @ Dilip Kushwaha And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 15-10-2019

Acts Referred:

Indian Penal Code, 1860 — Section 120B, 350, 364, 362, 364, 364A
Code Of Criminal Procedure, 1973 — Section 164, 313
Evidence Act, 1872 — Section 60

Citation : (2019) 10 JH CK 0038

Hon'ble Judges : Shree Chandrashekhar, J; Ratnaker Bhengra, J

Bench : Division Bench

Advocate : Laljee Sahay, Jai Shankar Tripathi, Mahesh Kumar Sinha, Tejo Mistry, A. K. Chaturvedy, Hadish Ansari, Amit Kr. Chaubey, Vinay Kumar Tiwary

Final Decision : Dismissed

Judgement

Shree Chandrashekhar, J

1. These three criminal appeals ; Criminal Appeal (DB) No. 422 of 2009 by Dilip Singh @ Dilip Kushwaha and Md. Jaffar Ali @ Jafar Ali, Criminal Appeal (DB) No. 449 of 2009 on behalf of Rajeev Ranjan Sah @ Chhotu Gupta and Virendra Singh @ Virendra Kushwaha and Criminal Appeal (DB) No. 523 of 2009 by Virendra Paswan, arise out of a common judgment dated 17.04.2009 in S.T Case No. 43 of 2008.

2. The learned Additional Sessions Judge, Fast Track Court-II, Seraikella has convicted the appellants, namely, Dilip Singh @ Dilip Kushwaha, Md. Jaffar Ali @ Jafar Ali, Rajeev Ranjan Sah @ Chhotu Gupta, Virendra Singh @ Virendra Kushwaha and Virendra Paswan under section 364 IPC and section 364-A IPC read with section 120-B IPC. The appellants have been sentenced to R.I for Ten years under section 364 IPC and R.I for life under section 364-A IPC read with section 120-B IPC with fine of Rs. 2000/- each and in default of payment of fine to undergo further R.I for two months. No separate sentence under section 120-

B IPC has been inflicted upon the appellants.

3. The accused, namely, Mrs. Renu Singh who was also sent up for trial has been acquitted by the learned Additional Sessions Judge extending the benefit of doubt to her.

4. By an order dated 14.10.2019, Criminal Appeal (DB) No. 422 of 2009 qua the appellant, namely, Dilip Singh @ Dilip Kushwaha who is an absconder has been dismissed in default.

5. The informant of this case is brother of one of the victims, namely, Vishwanath Garg. On the basis of his fardbeyan recorded on 18.07.2007, Chandil P.S Case No. 118 of 2007 was registered under section 364 IPC and section 364-A IPC against unknown. The victims, namely, Dipak Rai and Vishwanath Garg were recovered from a house belonging to Dr. Chandra Bhushan Mishra at Kankarbagh, Patna and the appellants, namely, Md. Jaffar Ali @ Jafar Ali, Rajeev Ranjan Sah @ Chhotu Gupta, Dilip Singh @ Dilip Kushwaha, Virendra Singh @ Virendra Kushwaha and Virendra Paswan were arrested during an encounter there. In this connection, Kankarbagh P.S Case No. 148 of 2007 was lodged. After the investigation, a charge-sheet was submitted against nine accused persons - Babua Jaiswal was killed in the encounter at Kankarbagh, Patna and Arun Kumar Rai was murdered during the trial. The accused persons, namely, Kamesh Singh @ Kameshwar Singh @ Brajesh Singh and Shailendra Paswan were shown absconders, however, Kamesh Singh @ Kamehswar Singh @ Brajesh Singh surrendered in the court and Sessions Trial No. 16 of 2009 commenced against him.

6. During the trial, the prosecution has examined 19 witnesses; the victims, namely, Dipak Rai and Vishwanath Garg were examined as P.W.8 and P.W.19 respectively. The officer-in-charge of Kankarbagh Police Station who has conducted the rescue operation has been examined as P.W. 17.

7. The prosecution witnesses - Satish Kumar Garg -P.W.2, Amit Garg-P.W.3, Chittaranjan Sharma-P.W.4, Chandramani Rai-P.W.5, Atam Prakash Kedia-P.W.6 and Jitendra Garg-P.W.7 - are the related witnesses. They have given evidence on the point of abduction of Dipak Rai and Vishwanath Garg. They are not the eye-witnesses either at the first place of occurrence or on recovery of the victims from the house of Dr. Chandra Bhushan Mishra at Kankarbagh, Patna.

8. The prosecution witnesses - Shakaldeo Ram-P.W.10(A), Manoj Kumar Thakur-P.W.11, Dhananjay Kumar Srivastava-P.W.12, Abid Khan-P.W.13, Choudhary Prakash Narayan-P.W.14, Manoj Kumar Mahato-P.W.15, Surya Bhushan Sharma-P.W.16 and Ramakant Prasad-P.W.17 - are the police witnesses. They were involved in the rescue operation and they are witness on the point of raid, exchange of fire, death of Babua Jaiswal in the encounter, recovery of the victims and arrest of four of the appellants. Testimony of these witnesses and the documentary evidence produced by the prosecution during the trial have formed the basis for conviction of the appellants under section 364 IPC and under

section 364-A IPC read with section 120-B IPC.

9. The prosecution has examined Raj Kumar Singh who is relative of the accused, namely, Dilip Singh on the point of criminal character of Dilip Singh and who according to the investigating officer has provided clue about abduction of the victims. The Judicial Magistrate, Ist Class who has recorded statement of the victims and Raj Kumar Singh under section 164 Cr.P.C was examined as P.W.10.

10. In his fardbeyan, the informant has stated that on 17. 07.2007 his brother had gone to the factory at about 10. 30 a.m on Tavera having registration no. JHO5-R-2277 which was driven by Dipak Rai, however, when he did not come back home till 9.00 p.m his nephew, namely, Amit Garg tried to contact him over his mobile phone but it was found switched off. On making enquiries he came to know that his brother had left for Tata at about 8.00 p.m. In his fardbeyan, the informant has expressed his apprehension that his brother has been kidnapped by the criminals for ransom.

11. The informant, namely, Om Prakash Garg has reiterated his statement as recorded in his fardbeyan when he was examined in the court as P.W.1. However, he has failed to identify the appellants as the persons who have kidnapped his brother and the driver for ransom.

12. The prosecution witnesses P.W.2, P.W.3 and P.W.7 have supported the informant on the point of the victims going to the factory in the morning, leaving the factory in the evening, remaining traceless and their abduction by unknown persons. These witnesses have stated that after their rescue the victims were found disturbed and frightened. P.W.4, P.W.5, P.W.6 and P.W.7 were declared hostile but their evidence cannot be discarded in entirety.

13. The victim, namely, Dipak Rai who was driving Tavera when Vishwanath Garg was returning home from the factory has deposed that when they reached near Bhuiyandih, about 1/2 kilometer from the factory, suddenly one Bolero vehicle came in front of his vehicle and stopped. Thereafter, 3-4 persons came there and started assaulting them. They forced them to lie down in the vehicle and put eye-band on them. He has stated that the accused persons used to administer injection due to which they would become unconscious. In the court, he has identified his signature on his statement recorded under section 164 Cr.P.C and he has stated that he has given his statement voluntarily. His signature on his statement under section 164 Cr.P.C has been marked as Exhibit 2. However, he has failed to identify the appellants as the persons who had abducted him. At the instance of the prosecution he has been declared hostile and he was cross-examined by the prosecution. The defence has also cross-examined him and what has been elicited from him is that whatever he has stated in the court was what Daroga Jee had made him to understand. The court has noticed the demeanor of this witness and recorded that the witness was looking frightened. To a court's query, P.W.8 has stated that he was very much frightened on the day when he was rescued and on the day of his examination in the court also, but

again he has stated that today he was not frightened.

14. The brother of the informant, namely, Vishwanath Garg who has been examined as P.W.19 has spoken about leaving his factory on Tavera with the driver, namely, Dipak Rai. He has stated that when they reached about 1/2 kilometer from the factory suddenly one vehicle came in front of them and 4-5 persons stopped them and put eye-band on them. One of the accused persons took the driving seat and they were thrust on the back seat. He has stated that in the house where they were kept there was no light. The abductors used to give them food from outside and, therefore, he could not see them. On 30.07.2007 at about 12.00 in the midnight he heard loud knocking on the door and suddenly 5-6 persons entered his room. One of them slapped the driver and told them that they are police personnel. He heard sounds of firing and about half an hour thereafter they were brought to the police station at Patna. His statement was recorded before a Magistrate at Patna. He has also identified his signature on his statement under section 164 Cr.P.C which was marked as Exhibit-4/A. But, he has failed to identify the appellants as the abductors. To a court's query, P.W. 19 has stated that he was very frightened on that day and, therefore, he could not see the persons who were arrested. In his cross-examination, P.W.19 has stated that after the incident he left Jamshedpur and shifted his family to Delhi due to fear. He has stated that the place of occurrence was dark and the accused persons had put band on his eyes and, therefore, he had no occasion to see them. The court has noticed demeanor of this witness and recorded that the witness looked frightened. During his testimony he had asked for water and after sometime his evidence resumed. In paragraph no. 11 of his cross-examination, he has again reiterated that he had no occasion to see the abductors.

15. From the aforesaid evidence of P.W.8 and P.W.19, we find that there is a good reason why they have failed to identify their abductors. However, there are other evidences which would establish complicity of the appellants in the incident.

16. The officer-in-charge of Kankarbagh Police Station who has led the rescue operation has been examined in the court as P.W.17. In his examination-in-chief, he has stated that on 30. 07.2007 he received a secret information at about 11.30 p.m about the victims of Chandil P.S Case No. 118 of 2007. On receiving the secret information he has entered it as Sanha and given information to the Sub-Divisional Police Officer of Sadar, Patna, officer-in-charge, Patrakar Nagar Police Station and officer-in-charge, Kadamkuan Police Station as well as the Police Officers of Jharkhand who were camping at Patna. He has stated that Tribhuwan Jha, Dipak Singh, Ramashish Singh, Raj Kumar Singh, Anandi Paswan and Surendra Paswan proceeded with him on a Mobile Gypsy and at about 12.30 p.m in the night they reached near the house of Dr. Chandra Bhushan Mishra. In the meantime, Deputy Superintendent of Police, Sadar, officer-in-charge of Patrakar Nagar Police Station and Kadamkuan Police Station also arrived there. P.W.17 has given a detail description of the incident which has taken place at the

house of Dr. Chandra Bhushan Mishra. He has stated about knocking of the door, the accused persons trying to flee away, exchange of fire by the accused persons, death of Babua Jaiswal in the encounter, arrest of Md. Jaffar Ali @ Jafar Ali, Rajeev Ranjan Sah @ Chhotu Gupta, Virendra Singh @ Virendra Kushwaha and Virendra Paswan after the encounter and rescue of Dipak Rai and Vishwanath Garg from the house of Dr. Chandra Bhushan Mishra. The prosecution witness, namely, Shakaldeo Ram-P.W.10(A) has also deposed about secret information, raid at the house of Dr. Chandra Bhushan Mishra, exchange of fire between the police personnel and the miscreants, arrest of four male and one female person and death of Babua Jaiswal in the encounter. P.W.11, P.W.12, P.W.13, P.W.14 and P.W.15 are the police officers who were part of the raiding team. They have also narrated the incident at the house of Dr. Chandra Bhushan Mishra. The prosecution witness, namely, Surya Bhushan Sharma-P.W.16 who was directed to lead a team of Seraikella Police and who was camping at Patna has deposed that he received an information at about 12 O'clock from Jamshedpur Police Control Room to reach at the house of Dr. Chandra Bhushan Mishra. He has also narrated the incident in the night of 30.07.2007 and presence of the other police officers who have been examined as witness during the trial. The Judicial Magistrate-P.W.10 has proved the statement of both the victims and Raj Kumar Singh recorded under section 164 Cr.P.C.

17. The learned counsels appearing for the appellants have submitted that : (i) the appellants were not identified by the victims in the dock and no Test Identification Parade was conducted, (ii) there is no evidence on demand of ransom by the appellants, (iii) Dr. Chandra Bhushan Mishra at whose house an encounter has taken place was not examined during the trial and on the same set of evidence Renu Singh, wife of Dilip Singh @ Dilip Kushwaha who is said to be the gang leader has been acquitted, (iv) the vehicles used by the victims and the accused persons were not recovered, and (v) there is no independent witness examined by the prosecution and evidence of the official witnesses is not free from doubt.

18. In the first place, it needs to be recorded that the incident that has happened in the night of 30.07.2007 in the house of Dr. Chandra Bhushan Mishra at Kankarbagh, Patna stands proved from the testimony of the prosecution witnesses, particularly, P.W.8, P.W.10(A), P.W.11, P.W.12, P.W.13, P.W.14, P.W.15, P.W.16, P.W.17 and P.W.19. Secondly, during their examination under section 313 Cr.P.C, a specific question regarding the incident on 30.07.2007 was put to the accused persons but they have simply denied the incident which, of course, is a matter of record. Thirdly, except the appellant, namely, Dilip Singh @ Dilip Kushwaha, the other appellants were arrested at the house of Dr. Chandra Bhushan Mishra and this fact has remained uncontroverted. Fourthly, on their arrest several incriminating materials were recovered from possession of the above-named four accused persons. From possession of the appellant, namely, Virendra Paswan a country-made revolver of .38 M.M with live catridges, two empty catridges and one Nokia mobile set were recovered. On search of Rajeev

Ranjan Sah @ Chhotu Gupta, one country-made pistol of .315 bore and one Nokia mobile set were recovered. Similarly from possession of Virendra Singh @ Virendra Kushwaha, one carbine of 9 M.M with smell of explosives and the barrel containing one empty cartridge of 9 M.M and a Nokia mobile set and from possession of Md. Jaffar Ali @ Jafar Ali, two magazines of 9 M.M loaded with five live cartridges and one magazine of 9 M.M loaded with live cartridges were recovered. From the house of Dr. Chandra Bhushan Mishra, five empty cartridges of 9 M.M were recovered. On recovery of arms and ammunitions, seizure-lists were prepared which were marked as Exhibit-X/2, X/3 and X/4 for identification; original of these exhibits were placed in the record of Kankarbagh P.S. Case No. 148 of 2007. Fifthly, the accused, namely, Babua Jaiswal was killed in the encounter and this may not be strictly a legal evidence, but the fact remains that on their quizzing by the police the appellants have disclosed that they belong to the gang of Dilip Sing @ Dilip Kushwaha and they had abducted Dipak Rai and Vishwanath Garg and kept them in the house of Dr. Chandra Bhushan Mishra. The formal F.I.R of Kakarbagh P.S. Case No. 148 of 2007 and fardbeyan were marked as Exhibit X and X/1 respectively for identification. The prosecution has also tendered in evidence, fardbeyan-Exhibit 1, signature of Dipak Rai-Exhibit 2/1 and Raj Kumar Singh-Exhibit 3 on their statement under section 164 Cr.P.C, formal FIR-Exhibit 5 and forwarding report-Exhibit 1/1. And lastly, both the victims were found in a room, their hands and legs were tied with ropes and they were seen in a very frightened condition.

19. Section 362 IPC defines abduction. It provides that whoever by force compels or by any deceitful means induces any person to go from one place is said to abduct that person. Criminal force is defined under section 350 IPC. It provides that whoever intentionally uses force to any person, without that person's consent, in order to committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used. A person is said to cause the motion, or change of motion or cessation of motion in three ways, namely, (i) by his own bodily power, (ii) by disposing of any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person and, (iii) by inducing any animal to move to change its motion or to cease to move.

20. The offence under section 364 IPC may involve either kidnapping or abduction of a person in order that such person may be murdered.

21. From the evidences led by the prosecution it stands proved that the appellants by using criminal force against the victims, abducted them and kept them in confinement - their hands and legs were found tied - in order to commit an offence. Now, the question is what offence the appellants intended to commit. Intention of a person can be gathered from the words; spoken or written, his conduct and the attending circumstances. The victim, namely, Vishwanath Garg

has spoken about the accused persons asking them not to be frightened as talk with his family members was going on. The presence of the appellants in the house of Dr. Chandra Bhushan Mishra with huge catches of arms and ammunitions is reflective of their intention to commit crime. They have engaged in exchange of fire with the police personnel and in the incident Babua Jaiswal has died are the facts borne from the record of the case. The aforesaid facts unerringly establish that the appellants had abducted P.W.8 and P.W.19 in order that they may be murdered or may be so disposed of as to be put in danger of being murdered.

22. Another argument raised on behalf of the appellants is that demand of ransom has not been proved. Referring to the testimony of P.W.8 and P.W.19, much has been argued by the learned counsels appearing for the appellants that no demand of ransom was made to the abducted persons or their family members.

23. The offence under section 364-A of the Indian Penal Code is attracted when it is proved that: (i) the accused has kidnapped or abducted a person, (ii) keeps him under detention and, (iii) the kidnapping and abduction was for ransom.

24. In our opinion, to complete the offence under section 364-A IPC it is not necessary that demand of ransom should be made from the abducted persons. The offence under section 364-A of the Indian Penal Code refers to not only the actual threat but also a reasonable apprehension that such person may be put to death or hurt. The victims were found under detention of the appellants in a room with their hands and legs tied. Not only till the time they were examined in the court they were fearful, when they were rescued they were looking very frightened. In the court the learned Additional Sessions Judge has noticed their physical condition. The evidence on demand of ransom has come through the evidence of P.W.19 which is corroborated by the evidence of an official witness. A fact except the content of a document or electronic record may be proved by oral evidence. Section 60 of the Indian Evidence Act, 1872 provides that oral evidence must be direct. It says that if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it. One of the victims namely, Vishwanath Garg-P.W.19 has deposed that his family members have informed him that he was abducted for ransom. He has also stated that the abductors used to tell him that talk with his family members was going on. The officer-in-charge, Chandil Police Station, namely, Dhananjay Singh who has been examined as P.W.18 has stated that Vishwanath Garg after his rescue told him that he was abducted for ransom. The testimony of Vishwanath Garg and Dhananjay Singh on demand of ransom is not entirely inadmissible evidence, but it is also not simply hearsay. True, the evidence of Vishwanath Garg on demand of ransom is not corroborated by the evidence of the informant or other related witnesses and the evidence of Dhananjay Singh is not entirely corroborated by the testimony of Vishwanath Garg, but then, there are other evidences which can be relied upon to hold that P.W.8 and P.W.19 were abducted for ransom. The

statement of Vishwanath Garg and Dhananjay Singh regarding demand of ransom is admissible evidence insofar as it is used to establish the fact that such statements were made, however, the statement of Vishwanath Garg would be hearsay and inadmissible if it is proposed to establish truth of the statement made by the other.

25. In the crime scene which has been described by the prosecution witnesses, a positive statement by the informant or any other family member of the abducted persons regarding the demand is not necessary to prove the demand for ransom. May be, the informant or any other related witness has not stated about demand of ransom by the abductors from them but there are other evidences which would sufficiently prove that the victims were abducted for ransom, such as; (i) evidence of P.W.9 and P.W.18 through whom the prosecution has led evidence on the mobile phones used by the abductors, the mobile towers and information about keeping the abducted persons at Patna, (ii) except Dilip Singh @ Dilip Kushwaha arrest of all the appellants, (iii) exchange of fire between the appellants and the police personnel, (iv) recovery of huge cache of arms and ammunitions, (v) rescue of the abducted persons, (vi) physical condition of the abducted persons, (vii) the appellants not coming forward with any plausible explanation on their presence at the place of occurrence in the night of 30.07.2007 and, (viii) the appellants not disputing the encounter and their arrest with arms and ammunitions in the night of 30.07.2007.

26. In the above state of affairs, we find no force in the contention raised on behalf of the appellants that the offence under section 364-A IPC has not been proved. On non-examination of Dr. Chandra Bhushan Mishra during the trial and failure of the investigating officer to seize the vehicle of the victim and the vehicle used in the crime, suffice it would be to record that non-examination of Dr. Chandra Bhushan Mishra during the trial has not caused any prejudice to the present appellants. This plea at best can be raised by the appellant, namely, Dilip Singh @ Dilip Kushwaha but the criminal appeal on his behalf has been dismissed in default. The learned Additional Sessions Judge has rightly referred to the decision in "Allarakha K. Mansuri Vs. State of Gujarat" reported in (2002) 3 SCC 57, to brush aside these contentions by observing that defective investigation by itself cannot be a ground for acquitting an accused. On the plea raised by the appellants that in the absence of their identification by the victims and they not being put on Test Identification Parade they cannot be held guilty for the offence under section 364 IPC and under section 364-A IPC, it needs to be recorded that the victim, namely, Vishwanath Garg in his testimony has stated not on one place but on several places that he had no occasion to see his abductors. It was a dark evening on 17.07.2007, the abductors put band on his eyes, he was kept in a room where he was served food from outside and on 30.07.2007 he was so frightened that he could not see the face of the accused persons. In the above scenario, arrest of the appellants in the night of 30.07.2007 with arms and ammunitions and the other circumstances narrated in the paragraph no.18 above clearly establish complicity of the appellants in the incidents and, not to forget,

there is a charge under section 120-B IPC which has been proved by the prosecution. We further find that failure of the investigating officer to conduct Test Identification Parade would not shake the foundation of the prosecution's case. After all, evidence of Test Identification Parade is not a substantive evidence rather it is only a corroborative evidence. In the face of unimpeachable and trustworthy evidence led by the prosecution against the present appellants, failure of the victims to identify them in the court would not lead to their acquittal in the present case. In our opinion, the prosecution has firmly proved the charges under section 364 IPC and section 364-A read with section 120-B IPC.

27. In the end, after examining the evidences led during the trial of S.T Case No. 43 of 2008, we find no error in the judgment dated 17.04.2009 passed by the learned Additional Sessions Judge (Fast Tract Court-II), at Seraikella against the appellants, namely, Md. Jaffar Ali @ Jafar Ali, Rajeev Ranjan Sah @ Chhotu Gupta, Virendra Singh @ Virendra Kushwaha and Virendra Paswan and, accordingly, Criminal Appeal (DB) No. 422 of 2009, Criminal Appeal (DB) No.449 of 2009 and Criminal Appeal (DB) No.523 of 2009 are dismissed.

28. The bail-bonds furnished by the appellants are hereby cancelled.

29. The appellants who were granted bail by this Court are directed to surrender before the court below to serve the remaining sentence.

30. Let a copy of the Judgment be transmitted to the court concerned through FAX.

31. Let the lower-court records be sent to the court concerned forthwith.