
(2015) 11 AHC CK 0082

In the Allahabad High Court

Case No : Criminal Appeal Nos. 1737, 2535 and 1850 of 2007

Jhagalley and Others

APPELLANT

Vs

The State of U.P.

RESPONDENT

Date of Decision : 17-11-2015

Acts Referred:

Citation : (2015) 11 AHC CK 0082

Hon'ble Judges : Surendra Vikram Singh Rathore and Pratyush Kumar, JJ.

Bench : Division Bench

Advocate : Rajiva Dubey, Manju Gupta, Rajeev Mishra, Ram Bux Rawat, Sanpam Lal Pandey and Soniya Mishra, for the Appellant

Final Decision : Allowed

Judgement

Surendra Vikram Singh Rathore, J.—Since all the aforesaid criminal appeals arise out of a common judgement, hence these are being disposed of together.

2. Under challenge in the aforesaid criminal appeals is the judgment and order dated 20.07.2007 passed by Additional Sessions Judge/Special Judge (E.C. Act), Hardoi, in Sessions Trial Nos. 887 of 2004 (State v. Amar Singh and Dinesh) and 409 of 2006 (State v. Jhagalley), arising out of Case Crime No. 204 of 2004, Police Station Kotwali Shahar, District Hardoi, whereby all the appellants were convicted and sentenced as under:

"302/34 IPC - Imprisonment for life and fine of Rs. 5,000/- with default stipulation of one year"s rigorous imprisonment.

364 A IPC Imprisonment for life and fine of Rs. 5,000/- with default stipulation of one year"s rigorous imprisonment.

201 IPC 3 years" rigorous imprisonment with fine of Rs. 2,000/- with default stipulation of 6 months" additional imprisonment."

All the sentences were directed to run concurrently.

3. In this case, charge sheet was also filed against one Kamal @ Kamallu but during pendency of the trial, he claimed himself to be a juvenile and therefore vide order dated 27.10.2006, his case was separated.

4. The case of the prosecution was that on 16.02.2004, complainant Raees Ahmad informed through a typed application addressed to Superintendent of Police, Hardoi, that his son Anas Ahmad, aged about 10 years, had gone to Exhibition/Ram Leela Maidan on 15.02.2004 at about 06:00 PM. When he did not come back for a long time then the complainant, his father and other neighbours tried to search him out but whereabouts of his son could not be traced out. Then on 16.02.2004, at about 08:00 AM, he gave an information at police out post Sadar regarding missing of his son. Thereafter, on the same day in between 01:30-02:00 PM the complainant received a phone call whereby the caller said that he is calling from Sikandara, Kanpur and his name is Nirbhaya Gurjar. He has purchased his son and there is no need to search him and made a demand of Rs. 5,00,000/- as ransom within six days and he also asked to call again after six days to tell the date, time and place where the ransom amount was to be delivered. He also asked him not to inform the police. After receiving this phone call, the complainant got an application typed on 16.02.2004, addressed to Superintendent of Police, Hardoi. On the basis thereof, an order was passed to inquire and to take necessary action. Thereafter on 17.03.2004, the SHO, on the basis of the material collected during inquiry, directed to register a case and on the basis of his direction, the first information report of this case was registered on 18.03.2004 at 09:20 AM. As per the Chik Report, the distance of police station from Ram Leela Maidan was about two furlong. This first information report was registered at Crime No. 204 of 2004 against Nirbhaya Gurjar. It transpires from the perusal of the record that during investigation, the complainant met DIG and IG Police at Lucknow and on their directions, the STF was informed that the son of the complainant has been kidnapped and ransom is being demanded through phone call. So the STF came into action and on the information received by secret informer that abductee from Hardoi is present with accused Amar Singh and his other companions in the house of sister of the father of appellant Amar Singh in Gram Lalpur, Police Station Bilhaur, District Kanpur Nagar. On this information, the SO, Bilhaur along with STF team went to the said place where only appellant Amar Singh was arrested and from his Pant, a receipt of PCO whereby a phone call was made on 20.03.2004 at 10:56:02 hours at Phone No. 0585232509 was recovered. A diary was also recovered in which aforesaid number was mentioned. He also informed that abductee has been killed and his dead body has been thrown into a bore well. Arrest of accused Amar Singh was made on 22.03.2004. On the said date, the dead body could not be seen in the bore well but the SO, Bilhaur, experienced foul smell coming out from the said bore well. The Investigating Officer of this case was accordingly informed who also inspected the place of occurrence on 22.03.2004 and thereafter he went back and on 29.03.2004, the dead body is alleged to have been recovered in the presence of the complainant with the help of

Supervisor of Jal Nigam named Udai Narain. Accused Amar Singh, while in police custody also disclosed that on 01.03.2004, they had received Rs. 75,000/- from the complainant at Makanpur bridge. He also disclosed that some letters demanding ransom were also got written by them through the abductee. The complainant also supported that he had paid ransom of Rs. 75,000/- but he was demanded additional Rs. 1,00,000/-, which he could not manage. He has stated that at the time of delivery of ransom amount one person took him below the bridge wherefrom he was followed by another accused and taken to a place at some distance where two accused were also present. They counted the money in the light of torch. He had recognized the culprits. During investigation, it also came into light that one Shakeel Ahmad had seen the abductee going in the company of Kamal @ Kamallu in the evening of 15.02.2004. The police after investigation, filed charge sheet against all four persons, out of which three were arrested and charge sheet against accused Jhagalley was filed in absconding. Since Jhagalley was not arrested by that time so his case was separated and the case against three accused persons namely Amar Singh, Dinesh and Kamal @ Kamallu was committed for trial. During pendency of the trial, accused Kamal @ Kamallu claimed himself to be a juvenile and therefore vide order dated 27.10.2006, his case was separated. Accused Jhagalley was subsequently arrested and his case was committed subsequently. Both the cases were tried together and by the impugned judgment, all the three appellants were convicted.

5. The case of the defence was that they have been falsely implicated in this case.

6. In order to prove its case, the prosecution has examined PW-1 Raees Ahmad - the complainant, PW-2 Shakeel Ahmad, who has not supported the case of the prosecution and has been declared hostile, PW-3 SI Ghan Shyam Tiwari is the subsequent Investigating Officer of this case, who received investigation from SI Ved Nath, PW-4 Head Constable Mukul Prasad Verma is a formal witness, who has prepared the Chik Report and GD of this case. PW-5 is Udai Narain Katiyar. As per the case of the prosecution, with the help of this witness the dead body was recovered from the bore well. However, he has turned hostile. PW-6 is SI Tej Bahadur Singh, who was a member of STF, Lucknow and had arrested appellant Amar Singh. PW-7 SHO Ral Lal is the third Investigating Officer of this case, who took investigation from 25.05.2004 and filed charge sheet against the appellants and Kamal @ Kamallu.

7. No evidence in defence was adduced on behalf of the appellants.

8. After appreciating the evidence on record, the trial court convicted the appellants, as above, hence these appeals.

9. Submission of learned counsel for appellants was that virtually it was a case of no evidence. The appellants were not seen in the company of the deceased nor they were seen near the place wherefrom the dead body was recovered. The evidence of PW-1 was not reliable regarding the payment of ransom amount and the learned trial court has given undue importance to the recovery of receipt of

the PCO whereby a phone call was made on the land line phone number of the complainant. No test identification parade of any of the appellant was conducted by the Investigating Officer during investigation. It was only during trial for the first time the appellants were identified by the complainant in court.

10. Per contra, learned AGA, addressing the State, has submitted that learned trial court has rightly convicted the appellants as there was sufficient evidence against them to connect them with this offence. Learned trial court has rightly appreciated the prosecution evidence and has rightly convicted the appellants. The judgment of the learned trial court is well reasoned and needs no interference by this appellant court.

11. PW-1 the complainant has supported the case of the prosecution but PW-2 Shakeel Ahmad, who was examined by the prosecution on the point of last seen, has not supported the case of the prosecution and has turned hostile. PW-1 Raees Ahmad in his examination in chief has stated that PW-2 Shakeel Ahmad is of his Mohalla. After the arrest of accused Amar Singh, he had told him that he had seen his son going with Kamal @ Kamallu but Shakeel Ahmad, who was examined as PW-2, has not supported this part of the prosecution case and has turned hostile. In his examination in chief he has stated that he had not seen the son of Raees Ahmad going in the company of the accused persons.

12. Now, the evidence regarding recovery of the dead body has to be considered. As per the postmortem report, on the dead body of the deceased, the following injuries were found:-

"Fracture mark present over left temporal bone. At fracture surface bone marrow present. The body was disfigured and decomposed. Head and face disfigured. Skin all over body was peeled off. All the joints were separated. Foul smell was coming out. Bones exposed at places. Mud was also present at places over body and the duration was reported to be more than one week."

13. The postmortem was conducted on 30.03.2004 while the arrest of the appellant Amar Singh was made on 22.03.2004. So, according to the medical evidence, the death was caused probably on the date on which appellant Amar Singh was arrested. So in that condition, there was no question of foul smell coming out from the bore well. The complainant had recognized the dead body on the basis of the Pant which was found on the dead body. As stated earlier, the head and face were disfigured and decomposed. So, the submission of learned counsel for the appellants has also force that there is no definite evidence that it was the dead body of the son of the complainant. It has come in the evidence of the Investigating Officer that on 22.03.2004 after inspecting the place of occurrence, he came back and thereafter, he went to the place of occurrence on 29.03.2004 and recovered the dead body with the help of Supervisor of Jal Nigam but as stated earlier the said Supervisor of Jal Nigam, who was examined as PW-5, has not supported the case of the prosecution and has turned hostile. He has stated that the dead body was not recovered in his presence. In his cross

examination, nothing could be elicited to lend support to the case of the prosecution. So, there remains the evidence of the complainant and the evidence of recovery of receipt of PCO. The complainant in his evidence has supported the case of the prosecution and has stated that he along with his father had gone to make payment of ransom amount on 25.02.2004. He reached the instructed place at about 07:30-08:00 PM. He met there with one person, who told his name as Rajjan. They were asked to go under the bridge where one more person joined them. Thereafter, they were taken to a place at some distance, where two persons were also present. He was searched and thereafter, he made payment of Rs. 75,000/-, which were counted by the accused persons. At the time of arrest, according to the statement of accused, which was given in the police custody, the payment of ransom amount was made on 01.03.2004. It is true that this part of the statement is not an admissible evidence because the same was given in the police custody. On this point, the sole evidence of PW-1 Raees Ahmad is available on record. Even the father of the complainant has not been examined in support of the case of the prosecution. It is really surprising that the place where the amount of ransom is alleged to have been paid was not even inspected by the Investigating Officer of this case and no site plan of the said place was prepared.

14. Perusal of the impugned judgment shows that learned trial court has given great importance to the receipt of PCO whereby a phone call was made on 20.03.2004. But the learned trial court failed to take note of the fact that the complainant, in his evidence, has nowhere stated that he had received any phone call on 20.03.2004. It was also mentioned in the arrest and recovery memo of the accused Amar Singh that they got written several letters by the abductee but the complainant has nowhere stated that any such letter demanding ransom amount was received by him nor any such letter has been proved during trial.

15. As per the evidence of PW-1, he had given the information of missing of his son at police out post Sadar in the morning but no such information was proved before the Court during trial. The details of the clothes of the deceased which he was putting on when he left his house were not disclosed in the first information report and the initial information of missing has been withheld by the prosecution. So, it gives rise to an adverse inference against the prosecution. The said initial information was very important in the facts of this case because the same might have contained the details of the clothes which the deceased was putting on because the dead body of the deceased was totally disfigured and decomposed and it was identified only on the basis of Pant which was recovered on the body of the deceased. So, in this perspective, a doubt is created on the point whether the recovered dead body was of the deceased Anas Ahmad or was of some other person.

16. The evidence of recovery of dead body does not find support from the evidence of the Supervisor of Jal Nigam. As per the case of the prosecution, the dead body was recovered from the bore well with the help of this witness but he

has not supported this fact. The fact that the dead body was lying into the bore well came to the notice of the police on 22.03.2004 but the dead body was ultimately recovered on 29.03.2004. This time gap has been explained by the Investigating Officer by saying that efforts were made to take out the dead body from the bore well but the Investigating Officer himself has admitted that he left the place of recovery on 22.03.2004 and thereafter he went to that place on 29.03.2004. So, it is absolutely unbelievable that in the meanwhile any effort would have been made by the Investigating Officer to recover the dead body and as per the case of the prosecution ultimately it was recovered with the help of the Supervisor of the Jal Nigam, who did not support the case of the prosecution. Thus, the factum of recovery itself comes under the shadow of doubt. As stated earlier the identity of the deceased was also not established to the hilt. Now, the only evidence that remains against the appellants to connect them with the offence is the evidence of PW-1 regarding the payment of ransom amount to the appellants. As per the statement of appellant Amar Singh, the ransom amount was paid on 01.03.2004 but the complainant has stated that the ransom amount was paid on 25.02.2004. It is pertinent to mention here that there is absolutely no other evidence except the evidence of PW-1, the complainant, that the ransom amount was paid and at that time he recognized the appellants by face. Learned counsel for the appellants has drawn our attention towards the statement of the complainant wherein he has stated that the said amount was collected by him by taking loan from other persons. He had taken Rs. 8,000/- from the owner of his shop. He himself had Rs. 2,000-4,000/- and the balance amount was taken on loan from some other persons. On this strength, it is submitted that this statement of the witness does not find support from any other evidence. Neither the owner of the shop nor any other person was produced by the prosecution to support the fact that the complainant had borrowed money to pay ransom amount at the relevant time. So, this statement of the witness also creates doubt regarding payment of ransom amount of Rs. 75,000/- because the complainant could not explain as to from where he managed such a huge amount while he himself had only Rs. 2,000-4,000. The evidence on this point also becomes suspicious because no test identification parade of the appellants was conducted by the police during investigation. It is true that the purpose of test identification parade during investigation is to ensure that the investigation is proceeding in the right direction but the appellants Dinesh and Amar Singh were recognized by PW-1 Raees Ahmad on 04.01.2005 i.e. after about ten months of the occurrence and appellant Jhagalley was identified by him on 26.09.2006 i.e. with a further delay of about one year and eight months. The trial court has observed that the complainant got sufficient opportunity to see the appellants in the torch light and recognized them. So this delay was not considered to be material. But we are not in agreement with the reasoning given by the trial court.

17. Keeping in view the over all view of the matter, we are of the considered view that the absence of test identification parade, in the peculiar facts of this case,

and in the absence of inspection of the place where the ransom amount is alleged to have been paid and also the fact as to how the amount was managed by the complainant, create doubt regarding the correctness of the prosecution version but these facts were not properly considered by the learned trial court. As stated earlier, learned trial court has placed great reliance on the point of recovery of receipt of PCO which relates to date 20.03.2004. It is highly unbelievable that any accused of such an offence would take a receipt and would also carry the same with him to create evidence against himself. Apart from it, PW-1 has nowhere stated that any phone call was received by him from any of the appellants on 20.03.2004. So, in absence of evidence on this point in the statement of the complainant, recovery of said receipt of PCO loses all its value.

18. In view of discussions made above, these appeals deserve to be allowed and are hereby allowed. Appellants Jhagalley, Amar Singh and Dinesh are hereby acquitted of all the charges levelled against them. They be set at liberty. They are in jail. They shall be released forthwith if not wanted in any other case.

19. Office is directed to communicate this order to the court concerned for immediate compliance and also to send back lower court record.