
(2015) 09 DEL CK 0031

In the Delhi High Court

Case No : Criminal Appeal 855 and 1181 of 2011

Jiyaul and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 16-09-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 317, 34, 362, 363

Citation : (2015) 10 AD 236

Hon'ble Judges : Ashutosh Kumar, J

Bench : Single Bench

Advocate : Anu Narula, for the Appellant; Alpana Pandey, APP and Shyam Sunder, ASI, Advocates for the Respondent

Judgement

Ashutosh Kumar, J—The appellants have been convicted under Sections 363/364 and 34 of the IPC and have been sentenced to undergo Rigorous Imprisonment for seven years and fine of Rs. 2000/- for offence under Section 363 and in case of default of payment Simple Imprisonment for one week; for the offence under Section 364 of the IPC, Rigorous Imprisonment for ten years fine of Rs. 5000/- and in default of payment of such fine Simple Imprisonment for a period of one month by judgment dated 13th April, 2011 passed by ASJ-II (North-West), Rohini Courts, Delhi in S.C No. 1205/2010 arising out of FIR No. 375/2009 (P.S. Mukherjee Nagar). The sentences, however, has been ordered to run concurrently with the benefit of Section 428 to which the appellants are entitled.

2. The appellants have been charged with kidnapping Atul, aged about 1 1/2 months, out of the lawful guardianship of her mother Smt. Anita (PW-2). The reason for kidnapping and abducting aforesaid Atul was that he may be murdered or may be so disposed of as to be put in danger of being murdered and in furtherance of common intention both the appellants, having custody of the aforesaid child, left the child at a place with the intention of abandoning him and thereby committing an offence under Section 363/34, 364/34 and 317/34 of the IPC.

3. Be it noted that no conviction has been recorded under Section 317 of the Indian Penal Code.

4. The case of the prosecution is that on 13.9.2009 an information was received at Mukherjee Nagar police station vide DD No. 16A regarding a toddler having been taken away by someone from jhuggi No. 571, Nand Lal Jhuggi Camp, Mukherjee Nagar. On such information, the police reached the place of occurrence and found that Anita (PW-2) was searching for her 11/2 months old male child namely Atul. Statement of aforesaid Anita was recorded in which she alleged that on the same day at about 2 PM while she was at her house, a lady aged about 50 years came and introduced herself as an Anganwadi worker and inquired about the health of her child. Anita's eight year old daughter Seema (PW-7) was also present at that time in the house. Since the toddler Atul had bed wetted, Anita went to some distance for drying the clothes. When she came back in a couple of minutes she did not find her son and on inquiry from Seema, she was told that the lady who had introduced herself as an Anganwadi worker had taken away the child with her. The physical description of the lady referred to above was also given by aforesaid Anita. On the basis of such statement (Ex.PW-2/A) FIR No. 375/2009 (P.S. Mukherjee Nagar) was instituted under Sections 363/364/317 and 34 of the IPC.

5. After about sometime, the appellants were arrested in connection with FIR No. 319/2009 (P.S. Hari Nagar) which was instituted under Sections 363 and 302 IPC. In the aforesaid case, the appellants allegedly disclosed about their involvement in the present case. Thus the appellants were arrested in the present case and upon investigation, they were charge sheeted and sent up for trial.

6. The Trial Court after examining 13 witnesses, convicted and sentenced the appellants as aforesaid.

7. The prosecution has relied upon the deposition of Anita (PW-2) who is the mother of the boy, Atul, who allegedly was abducted; Bimla (PW-3) who is a neighbour of PW-2; Umesh (PW-4), a person who owns a rickshaw garage; Seema (PW-7), the eight year old daughter of PW-2; Dr.Jagjeet Singh (PW-5) and Deepak, compounder of PW-5 and the official witnesses namely the police officers involved with investigation.

8. The appellants have taken the defence that there was no material before the Trial Court to have convicted them for offences under Sections 363 and 364 of the IPC; the deposition of the witnesses are full of inconsistencies which are so glaring that it demolishes the entire prosecution edifice; improbability attached with the statements of PW-2 and PW-4; chain of circumstances leading to the conclusion that the appellants were responsible for abducting/kidnapping of the son of PW-2 is not complete and the testimony of the doctor namely PW-5, who deposed that appellant Ritu Kapoor had come with a child for treatment, being most untrustworthy. It has also been argued that Seema (PW-7) is a non compos

mentis and her statement could not have been relied upon for convicting the appellants. On behalf of appellant Mohd.Jiyaul, apart from the aforesaid grounds, it has been argued that neither PW-2 nor PW-4 had any occasion to see him at any point of time; there was positive reason for him to refuse his participation in the TIP and though he is said to have accompanied Ritu Kapoor and facilitated the kidnapping of the boy by providing services of his TSR, no effort has been made to seize the TSR (a form of a vehicle) nor any details of the same like registration number etc. have been collected during the course of investigation or materials adduced before the Trial Court. The appellants, in unison, have stated that only because the appellants were arrested in another case with somewhat similar allegations, they were made accused in the present case also by the investigating agency, adopting a short cut approach in attempting to bust the present kidnapping case.

9. In order to appreciate the contention of the parties it would be necessary to first examine the deposition of Anita (PW-2) who is the mother of the kidnapped boy and on whose statement, the FIR was registered.

10. Anita (PW-2) has deposed that her family comprises her husband and three children. In the month of November, 2009, one lady came to her and asked for a glass of water and she continued to sit outside her jhuggi. Anita had to go out of her house for drying wet clothes and in the meantime her son was taken away. Anita came back in about 3-4 minutes only to find that Seema, another daughter of PW-2, crying and uttering that the lady who was sitting outside had taken away the boy. Anita immediately called the PCR on which police officials came. Finding no clue of the boy, her statement was recorded (Ex.PW-2/A) bearing her thumb impression. She gave details of the physical attributes of the lady (Ritu Kapoor), on the basis of which a sketch was prepared (Ex.PW-2/C). She has further stated that after about 5-6 days appellant Ritu Kapoor was apprehended by police and she was brought to her house when she identified her as the same person who had, on the fateful day, come to her house and had asked for water and had thereafter taken away her child. Anita has further confirmed the fact that Ritu Kapoor was interrogated in her presence and she admitted that she had lifted the child for she had taken a fancy for him and wanted to raise him up. Only because the child took ill that the appellant, according to PW-2, left the child on road near her house. Anita has also confirmed that Ritu Kapoor pointed out the place from where she had lifted the child as also the place where she had abandoned him after sometime.

11. It was stated by PW-2 that appellant Mohd.Jiyaul was an auto rickshaw driver and PW-2 was not sure of his relationship with appellant Ritu Kapoor as Ritu Kapoor sometimes claimed Jiyaul to be her brother and sometimes her husband.

12. However, PW-2 categorically stated that she saw appellant Jiyaul for the first time in the Court when the appellants were remanded to judicial custody in another case. Ritu Kapoor and Mohd.Jiyaul are also said to have pointed at the hospital where her son was taken when he had fallen ill. The aforesaid witness,

however, later, on being questioned by the APP, who had sought permission for putting leading questions, deposed that she had seen appellant Jiyaul for the first time when she had gone to dry the clothes of her child. She had seen Jiyaul standing next to an auto rickshaw talking to appellant Ritu Kapoor but she did not hear the conversation between them.

13. On being cross examined, PW-2 admitted that she had not told the police that appellant Ritu Kapoor was accompanied by any male person. Of her own, she tried to explain the difference in her statement by stating that when she first made her statement before the police, she was not in a fit state of mind because of her child having been taken away. No suspicion at that time was raised on appellant Jiyaul as he was only assumed to be a person roaming around in the area. She has also denied the statement given in her examination in chief that she had seen Jiyaul for the first time in Court but admitted of having seen Jiyaul around her jhuggi on the date of incident and only thereafter in the Court when he was produced before another Court. She has denied the suggestion that appellant Ritu Kapoor was picked up from Hari Nagar and was shown to her by the police before she identified her in the Court of the Metropolitan Magistrate.

14. Bimla (PW-3) stated before the Court that she works in a factory and on 13.11.2009 she had returned from her work at around 1 PM. She spotted appellant Ritu Kapoor sitting outside the jhuggi of PW-2. Only later, did she come to know that the child of PW-2 was lifted. She was also cross examined by the APP after seeking permission from the Court. She has denied the suggestion that she saw the appellant running away with the child of Anita and going away in an auto. She has not supported the fact that she had seen another person standing near the auto or that person was the appellant Jiyaul. What is important to note in her deposition is that she has pointedly stated that the jhuggi of PW-2 is situated on the road whereas her jhuggi is opposite to the jhuggi of PW-2. On the date of incident, many persons were crossing through that road because of Nirankari Mela.

15. Umesh (PW-4) who owns rickshaw garage near the jhuggi of PW- 2 has testified that appellant Ritu Kapoor was found roaming in the area on the day of occurrence since 8 AM. A doctor, residing in the same area raised some suspicion on appellant Ritu Kapoor but PW-4 did not take any notice of such suspicion. He has deposed that he saw appellant Ritu Kapoor arguing with another lady. Thereafter PW-4 is stated to have offered Ritu Kapoor water and she sat in front of Anita's house. PW-4 also spotted a TSR parked on the road near the jhuggi of Anita where one boy was sitting. In the Court, at the trial, the boy was identified as the appellant Jiyaul. PW-4 thereafter heard cries of the daughter of PW-2. Many persons, according to PW-4 had assembled and appellant Ritu Kapoor was chased but she could escape by sitting in a TSR which sped away. Appellant Ritu Kapoor was spotted as having wrapped a shawl upon her body and perhaps she had hidden the child under the shawl.

16. What is important in the statement of PW-4 is that he has deposed that on

the next day of lodging of the first information report, he visited the police station and got the sketch of appellant Ritu Kapoor prepared which sketch is Ex.PW-2/C. Ritu Kapoor had prominent marks under her eyes and, therefore, it was very easy for her to be identified.

17. PW-4 has further contended that appellant Ritu Kapoor was brought to the jhuggi where everybody who had seen her on the date of the occurrence, identified her. Mohd.Jiyaul also was identified. PW-4 has hastened to add that appellant Jiyaul had put a cloth on his face but he was identified only through his eyes. Both the appellants disclosed before people at large that they had left the child of Anita on the road after 10 days as the boy had fallen ill. The place from where the boy was lifted and the place where he was abandoned were pointed by appellant Ritu Kapoor. The place where the boy was left is a road with lot of traffic. PW-4 has volunteered to inform the Trial Court that if the boy would have been left near the house of PW-2, that being a busy road, anybody would have noticed the child.

18. Dr.Jagjit Singh (PW-5) identified appellant Ritu Kapoor in the Court and deposed that she had come with a boy claiming him to be her son, to him for his treatment. PW-5 has stated that she had come to her on earlier occasions also and every time she brought a different child for treatment and referred to such child as Ishant and disclosed that such child was her son. Some objection was raised by his compounder Deepak Kumar (PW-6) who suspected that appellant Ritu Kapoor was not the mother of the child which she had brought. This was met with an angry response by appellant Ritu Kapoor who told his compounder to mind his own business. The records of his clinic disclosed that appellant Ritu Kapoor had visited the hospital on 29.10.2009, 31.10.2009 and 06.11.2009 with a different child on all occasions and gave their name as Ishant on all the three occasions. The photocopies of the records of his clinic (Ex.PW-5/B) Colly was proved by him. He has stated that on 19.11.2009 appellant Ritu Kapoor had come to his clinic with a small child aged about 2-3 months who was suffering from Upper Respiratory Infection. He examined the boy and drew up a medical sheet (Ex.PW- 5/A). When subsequently questioned, PW-5 could not say whether the appellant, on all occasions brought child of the same age group to his clinic.

19. Similar is the statement of Deepak (PW-6) who has been working with PW-5 for the last three years and stated that he would not remember whether child of the age group of 1, 2 or 3 months was brought by the appellant. He was also not in a position to state as to whether on every date as suggested by PW-5 same or different child was brought by appellant Ritu Kapoor. He, however, admits of not informing the IO of the present case regarding the visits of Ritu Kapoor at the clinic except on 19.11.2009 when he had signed the document namely Ex.PW-2/ F (seizure memo of medical sheet and the copy).

20. Seema (PW-7), daughter of PW-2 aged eight years at the time of her deposition before the Court (but to the Trial Court she appeared to be of around 4-5 years) was put to initial questions as voir dire to test her mental and

cognitive faculties. She has stated that a lady took away her brother. She remembered the name of the lady namely Ritu Kapoor. When she was asked as to how did she come to know about the name of the appellant, she answered that the lady herself told her name. When she was asked whether she ever visited the Court before, PW-7 confirmed that she had earlier gone to another Court along with her mother.

21. From the deposition of the aforesaid witnesses, what transpires is that the appellants were arrested in another case namely FIR No. 319/2009 (P.S. Hari Nagar) whereafter they were brought to the jhuggi of PW-2 for their identification. The case of the prosecution is that when the aforesaid appellants were arrested and disclosed about their participation in the present case, they were brought to the jhuggi of PW-2 where PW-2 and PW-4 identified appellant Ritu Kapoor as the person who had visited the jhuggi of PW-2. In such an event, the story of the prosecution that the appellants disclosed and pointed out the place from where the boy was lifted and where the boy was later dumped loses all its significance.

22. Such statements could not have been taken into account as there was no recovery pursuant to such statement. Moreover, it has been argued that such statements were confirmed by PW-2 and PW-4.

23. So far as identification of appellant Jiyaul is concerned, it has been argued that PW-2 in her statement before the police did not speak about any person waiting outside with an auto rickshaw. Only on being specially asked by the prosecutor, did PW-2 state that she saw appellant Jiyaul standing near an auto and talking to appellant Ritu Kapoor. In the earlier part of her statement, PW-2 has categorically stated that she saw appellant Jiyaul for the first time in the Court when he was being remanded in another case. Immediately thereafter, on being questioned, PW-2 changed her statement and said that it was the second time that she saw the appellant in Court. For the first time, she had seen appellant Jiyaul on the day of occurrence standing on the road near an auto rickshaw. Similarly, PW-4 only claims before the Trial Court that he had observed a TSR parked near the jhuggi of PW-2 and had spotted a boy sitting there. However, in Court he identified the boy as appellant Jiyaul but frankly admitted that the boy whom he had spotted near the TSR did not have any moustache, meaning thereby that the person who was spotted by PW-4 was a person of very young age.

24. From the deposition of witnesses namely PWs.2, 4 and 7, it appears that they all were made to know that the appellants were accused of child lifting for which another case was lodged and they had the occasion to see the appellants when they were brought by police to their area for identification.

25. With respect to the identification of appellant Jiyaul, the evidence of the aforesaid witnesses are very shaky and do not appear to be plausible or acceptable. It has been submitted on behalf of the appellant Jiyaul that if Jiyaul

would have been spotted on the day of occurrence by PW-2, the police would have asked for the physical description of appellant Jiyaul as well. The records reveal that description of physical traits of only Ritu Kapoor was given by PW-2, on the basis of which a sketch was prepared. Had Jiyaul been present, his sketch also would have been prepared. There is nothing in the deposition of PW-5 & PW-6 namely Dr.Jagjeet Singh and his compounder Deepak respectively to show that appellant Jiyaul had come along with appellant Ritu Kapoor to the clinic of PW-5 for getting the boy medically examined.

26. On a closer scrutiny of the deposition of PW-5 and PW-6, it would appear that their statements suffer from serious incongruities, making them completely unreliable. PW-5 who claims himself to be a doctor and who runs a hospital, allegedly found appellant Ritu Kapoor coming to his clinic on a number of occasions with a different child and on all such occasions appellant Ritu Kapoor disclosed that she was the mother of the child and surprisingly on all such occasions appellant Ritu Kapoor gave only one name to the child namely Ishant. This ought to have rung alarm bells in the mind of the doctor who should have informed the local police or should have taken care to find out as to who was Ritu Kapoor.

27. Assuming for the sake of argument that what PW-5 spoke before the Court was true, in that case also, this Court is left with no material to ascertain whether the boy who was brought to him for treatment by Ritu Kapoor on 19.11.2009 was the son of PW-2. The evidence of PW-6, the compounder of PW-5, is also not worth acceptance as he could not speak with certainty whether he saw different child at different times with appellant Ritu Kapoor. Their not informing the police on the second occasion at least, makes them highly unreliable.

28. There is another aspect to the story. If the deposition of PW-5 is to be believed that the appellant Ritu Kapoor came to his clinic for seeking treatment of an ailing child who was suffering from Upper Respiratory Infection, it cannot then be said that the child was kidnapped for the purposes of being murdered or other purposes, attracting the mischief of Section 364 of the IPC. Section 364 of the IPC reads as hereunder:-

"364. Kidnapping or abducting in order to murder." Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with [imprisonment for life] or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

29. The word kidnapping has not been defined in the Code. Section 362 of the IPC defines abduction. Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person. Section 363 of the IPC provides for punishment for kidnapping which inter-alia reads that whoever kidnaps any person from India or from lawful guardianship, shall be

punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine. Section 363A of the IPC prescribes kidnapping or maiming a minor for the purposes of begging. Section 364 of the IPC deals with kidnapping or abducting in order to murder. Thus if the story of appellant Ritu Kapoor abducting the child is accepted to be true, the very fact that she brought the child to the clinic of a doctor for treatment takes the case away from the pale of Section 364 of the IPC.

30. To establish the offence punishable under Section 364 of the IPC, it must be proved that the person charged with the offence had the requisite intention at the time of abduction, that the person so abducted would be murdered or would be disposed of as to be put in danger of being murdered. Even if after the abduction, the accused person placed the abducted person in danger of being murdered, that would also not establish the charge of abduction punishable under Section 364 of the IPC. The intention at the time of abduction is relevant.

31. In a case under Section 364 of the IPC, the motive is of great importance and if there is absence of any motive, it would be difficult to maintain the conviction under Section 364 of the IPC.

32. The deposition of the official witnesses are of no help but for bringing home the offence under Section 363 of the IPC against appellant Ritu Kapoor.

33. Constable Devender (PW-8) has deposed that he joined the investigation with SI Pradeep Kumar (PW-13). He has stated that the appellants were produced before the Metropolitan Magistrate from judicial custody in muffled faces. Only after seeking permission from the Metropolitan Magistrate, PW-13 interrogated the appellants and ultimately arrested them. The arrest memos namely Ex.PW-8/A and Ex.PW-8/B respectively of the aforesaid appellants (Ex.PW-8/C and 8/D) also bears the signature of PW-8.

34. Lady Constable Sunita (PW-9) has deposed the fact that on 5.1.2010 while appellant Ritu Kapoor was on police remand, she was in her custody. She has testified to the fact that during the course of interrogation appellant Ritu Kapoor disclosed that on 13.11.2009 she had abducted a three month male child from one of the jhuggis of Nand Lal Camp. On 19.11.2009, the child became sick and was then taken to the clinic of PW-5. Constable Samay Singh (PW-10) and Head Constable Naresh Pal (PW-11) have confirmed the fact that DD No. 16A regarding missing of a child from the Nand Lal Camp Jhuggi camp was received and pursuant to such information the aforesaid witnesses came to the place of occurrence. Head Constable Naresh Pal (PW-11) has clearly stated that the sketch of one suspect i.e. Ritu Kapoor was prepared and no sketch of any other person was prepared as the eye witnesses were not at all clear about the identity of other male person. Aforesaid PW-11 has also stated that the eye witnesses did not disclose the details of TSR driver or the number of TSR in which child was taken away by the kidnapper.

35. SI Pradeep Kumar (PW-13) confirms the fact that the appellants were taken

on police remand and were brought to Nand Lal Jhuggi camp where PW-2 identified appellant Ritu Kapoor as the same lady who had lifted her child. The appellants had also taken the police party to the clinic of PW-5, Dr.Jagjeet Singh where the child was treated. PW-13, however, has admitted that he recorded the disclosure statement of Ritu Kapoor but did not request any public person or Court staff to join the investigation. He did not even give any kind of notice regarding the aforesaid proceedings. He admits that till 27.11.2009 there was no clue of involvement of appellant Jiyaul in the present case and he was only orally informed by the first IO that there was one person along with the TSR who had accompanied appellant Ritu Kapoor. He also has admitted that he has not seized any TSR in the present case as the number of TSR was not known. Even the license of appellant Jiyaul, during the whole investigation, was not seized. The investigating officer was not even aware whether appellant Jiyaul was the TSR driver.

36. Thus from the deposition of the aforesaid witnesses what comes to the fore is that appellant Ritu Kapoor visited the jhuggi of Anita (PW-2). She has been identified by Anita (PW-2), Bimla (PW-3: though she has not supported the major part of the prosecution version), Umesh (PW-4) and Seema (PW-7). All of them but PW-3 have spoken about appellant Ritu Kapoor having taken away the child with her.

37. It appears rather curious that appellant Ritu Kapoor fled from the scene without her getting caught. However, the story of Ritu Kapoor having escaped on the TSR driven by appellant Jiyaul has not been established.

38. The evidence regarding the appellant Jiyaul having assisted appellant Ritu Kapoor in taking away the child on his vehicle is weak and no categorical statement has been made nor any evidence has been adduced. PW-13, the IO of the case has also specifically stated that neither any effort was made to know whether appellant Jiyaul had the driving license or not nor the number of the TSR was ascertained and logically, therefore, the TSR was not seized. Thus this part of the story of the prosecution that Ritu Kapoor escaped with the child on the TSR which was driven by Jiyaul is completely demolished. There is thus no evidence with regard to the participation of the appellant Jiyaul in the aforementioned occurrence.

39. What cannot be doubted is that Ritu Kapoor visited the jhuggi and for some reason or the other took away the child from the jhuggi. Since Seema (PW-7) was herself a child, she could not offer any resistance. The purpose, albeit, of such abduction remains unknown. The evidence of Dr.Jagjeet Singh (PW-5) further confirms the issue. Had the purpose been to murder the child, Ritu Kapoor would not have undertaken the risk of visiting a doctor for the treatment of the child when on earlier occasions also she had visited the clinic along with different child on different occasions. Perhaps Ritu Kapoor had taken a fancy for the boy and had taken him temporarily for her amusement. We do not know as to what was the reason for the abduction of the child. The fact remains that Atul,

the son of PW-2 was removed from the guardianship of PW-2 and this brings Ritu Kapoor within the mischief of Section 363 of the IPC.

40. The Trial Court has rightly acquitted the appellants for the offence under Section 317 of the IPC for want of any evidence in that regard.

41. Thus on the basis of the discussions made, the conviction of appellant Ritu Kapoor under Section 364 of the IPC does not appear to be sustainable, and is therefore set aside. The appellant Ritu Kapoor stands convicted only for the offence under Section 363 of the IPC.

42. For paucity of any clear, cogent and unshakeable evidence against appellant Jiyaul, his conviction and sentence is absolutely unwarranted. As a result, appellant Jiyaul is acquitted of all offences and is directed to be released from jail if not wanted in any other case.

43. The conviction of appellant Ritu Kapoor under Section 363 of the IPC is sustained, but, for the facts and circumstances of the case, the sentence awarded to her is modified. She had been sentenced to Rigorous Imprisonment for seven years and a fine of Rs. 2000/- for the offence under Section 363 IPC. It has been stated at the bar that the appellant Ritu Kapoor has remained in custody for about six years by now. In the facts and circumstances of the case, interest of justice would be met if the appellant Ritu Kapoor is sentenced for the period which she has already undergone in custody.

44. Thus the Appeal No. 855/2011 (Mohd.Jiyaul) is allowed.

45. The Appeal No. 1181/2011 (Ritu Kapoor) is partly allowed and appellant Ritu Kapoor is only convicted under Section 363 of the IPC and sentenced to the period which she has already undergone.

46. The Trial Court records be sent back.

47. Two copies of this judgment be transmitted to the Trial Court for record and compliance.

Crl.M.B No. 171/2014 in Crl.A No. 1181/2011

1. In view of the appeal having been partly allowed, no order is required to be passed in the instant application.

2. Dismissed as infructuous.