
(2011) 06 BOM CK 0069

In the Bombay High Court

Case No : Criminal Appeal No. 266 of 2004 in Session Case No. 563 of 2002

Mohammad Murtuza and Mohammed Mosin Shaikh

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 07-06-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 120B, 363, 364A

Citation : (2011) 113 BOMLR 2427 : (2012) 1 RCR(Criminal) 428 : (2012) 1 RCR(Criminal) 428

Hon'ble Judges : Naresh H. Patil, J;Mridula Bhatkar, J

Bench : Division Bench

Advocate : Gajendra Jadhav, for the Appellant; P.S. Hingorani, APP, for the Respondent

Final Decision : Allowed

Judgement

Naresh H. Patil, J.—This appeal is directed against the judgment and order dated 10.12.2003 passed by the Additional Sessions Judge, Mumbai in Sessions Case No. 563 of 2002 convicting and sentencing the Appellant for the offences punishable under Sections 363, 364A read with 120-B of Indian Penal Code.

2. The prosecution case is that PW-1 Smt. Zubeda Khatun Gafur Raien and PW-2 Abdul Gaffar Mohd. Muslim Raien were residing together in room No. 15, 2nd floor, "B" block, Nagpada, Mumbai-400 008. PW-2 Abdul Gaffar Mohd. Muslim Raien was involved in manufacturing of school bags. His factory was situated at Shukla Street, Ded galli, Kamathipura. PW-2 Abdul Gaffar Raien normally used to leave the house at about 11.00 A.M. and returned home at about 6.00 P.M. There were about 10 to 15 labourers working in his factory.

3. It is the case of the prosecution that on 11.4.2002 after PW-2 left the house, the Appellant Mohammad Murtuza Shaikh came to the house of complainant and told PW-1 Zubeda that her husband was standing nearby the building and was calling son Abdul Rehman. It is alleged that the Appellant represented himself as

a worker in the factory of her husband. Some material of manufacturing of school bags was also seen by the prosecution witness PW-1 Zubeda with the Appellant. It is alleged that on the same day at about 11.15 A.M, the husband of PW-1 came to their house for getting his diary which he had forgotten. At that time, PW-1 inquired whether their son had reached the factory. PW-2 husband replied that son Abdul Rehman was not with him. At that time, PW-1 told her husband that one labourer from the factory had carried their son to the factory. The husband of PW-1 denied that he had sent any person for calling his son to the factory. They tried to trace their son in the building and around the vicinity.

4. The prosecution alleges that on the same day at about 1.15 P.M. in the afternoon, the husband of PW-1 received a call on his cell phone. The person who was calling on the mobile, demanded Rs. " 1 lakhs from him for handing over the son. The couple thereafter went to the police station on the same day and lodged a complaint.

5. It is the prosecution case that on the next day morning, the police called the couple in the police station. The police informed them that they had apprehended one person along with the child from Mira Datta Darga, Darukhana Shivri. The police also produced the child which was identified by the couple as their son. The police attached clothes of the son of the complainant. He was provided other clothes. They found the accused in the custody of the police.

6. On 9.5.2002 the police had called PW-1 Zubeda for identification of the accused. The accused was identified in identification parade which was held in a room where 15 persons were present. The accused was identified by PW-1. The police thereafter started investigation. During the process of investigation, the police recorded statements of witnesses, drew panchanamas, seized clothes of the accused and the son of the Complainant and after completion of investigation, filed a charge-sheet against two accused persons.

7. The trial Court framed charge against both the accused for offences punishable under Sections 120-B of IPC and under Sections 363 & 364A read with 120-B of IPC. The original accused denied the charge and came to be tried.

8. The prosecution examined 7 witnesses. Heavy reliance was placed on the evidence of parents of the child by the prosecution, apart from the evidence of other witnesses including evidence of Investigating officer. PW-1 Zubeda Abdul Gaffar Raien the mother of the child claimed to have seen the Appellant who had come to her house and had informed that father of Abdul Rehman called the child at factory. He represented himself to be worker in the said factory. In examination-in-chief, the witness narrated that the Appellant had taken away the child by representing himself as a worker in the factory. In the afternoon, father of the child came to the house and after having talk with her husband, she found that somebody had taken away the child by mis-representing. They tried to search the child but they could not find. The couple proceeded to the police station and accordingly, a complaint was lodged.

9. The evidence of PW-2 Abdul Gaffar Mohd. Muslim Raien, husband of PW-1 supports the evidence of PW-1 Zubeda Abdul Gaffar Raien, wife of PW-2. There is some variance in respect of the amount of ransom demanded by the Appellant. In the evidence of PW-1 the amount is stated to be Rs. " 2 lakhs. In the evidence PW-2 stated that there was a call on his Cell phone at about 1.30 P. M on the same day. The caller told him that his son was in his possession and he should make preparation for payment of Rs. " 1 lakhs.

10. While appreciating the evidence, the trial Court discarded the evidence of PW-3 Sayyed Jafarool Hasan. The observation to the said extent is in paragraph-10 of the judgment. PW-3 claims to be the resident of Pharas Road, Bachbhai Wadi, Nagpada. While going to the house, he heard talks between two persons that they would kidnap the child of 5 years for ransom. After 4 days of the said talk, the witness found that the Juice stall run by the Appellant was closed. He claims to have identified the Appellant in the identification parade. In his cross-examination, he stated that Appellant was running a juice stall at hand cart in the said area and he heard the communication as there was no rush at that time. Considering the quality of evidence of PW-3, we do not find that the observation made by the trial court in respect of reliability of evidence of PW-3 needs to be set aside.

11. PW-4 is Mohd. Nauashad Abdul Hafriz Shaikh who was working as Electrician. He is a resident of Meera Dattar Darga. According to witness, on every Thursday and Friday, there is heavy rush of devotees. On 11.4.2002 between 11.30 A.M to 12.30 P.M. he was present near the Darga premises. At that time, he saw Appellant moving along with a small child. He also saw that Appellant was going to STD booth for making a call. At that time, he saw that the child was crying. He asked the Appellant as to why the child was crying. Appellant told him that he had brought the said child to the Darga for prayers. Thereafter, he left the place. In the afternoon he saw that Appellant along with the said child was sleeping by the side of STD booth. On the next day i.e. 12.4.2002 the Appellant along with the said child was present there and on seeing them, the witness asked the Appellant as to who were the parents of the child, to which the Appellant informed that the mother of the said child was admitted in the Nagori hospital, Nagpada. These statements were made by the witness in the Examination-in-chief. He further proceeded to depose that thereafter, he went to the hospital to verify as to whether mother of the child was really admitted in the hospital but he was informed that no such lady was admitted. Thereafter he went to Nagpada police station and informed the police as to what had happened. According to the witness, one police officer and 2-3 constables came along with him to Darga and the Appellant and the child were still there. The child was pointed out by the witness and thereafter two persons who came along with him identified the child. Thereafter police arrested the Appellant. In his cross-examination, he deposed that his shop was next to the place of his residence. Meera Dattar Darga was 200 feet away from his house. The prosecution wanted to establish that the presence of this witness at the spot was natural.

12. PW-5 Santosh Prakash Chavan who was working as a Special Executive Officer conducted identification parade on 9.5.2002. He deposed before the Court that PW-1 Zubeda Abdul Gaffar Raien identified the accused. Identification parade was carried out according to the procedure. Parade panchanama was drawn. In the cross-examination, he stated that his father was in service of police department and they were staying in the police quarter .Before the identification proceedings began, the witness asked the complainant as to whether police had shown the accused prior to the parade, to which complainant immediately replied in negative.

13. PW-6 Taslim Khan Sabaz Khan Pathan is a panch of arrest of the accused and seizure of clothes of the accused. He had proved the contents of panchanama which was marked at Exhibit-17.

14. PW-7 Laxman Punjaji Gore is the investigating officer. He supported the prosecution case. He deposed that on 31.5.2002, second identification parade for both the accused was conducted by Special Executive Magistrate.

15. Learned Advocate for the Appellant submitted that both the accused were tried by the trial Court but for want of evidence accused No. 2 was acquitted. The acquittal of accused No. 2 has bearing on the case and shall be considered beneficial to the Appellant in considering the prosecution case. The learned Counsel submitted that the prosecution case does not inspire confidence. The entire prosecution case is based on the evidence of parents who no doubt deposed that the Appellant had come to the house and had taken away the child representing himself to be one of the workers but the prosecution failed to establish that the Appellant had demanded ransom money for handing over the child to the complainant.

16. Considering the conduct of the accused, quality of evidence of prosecution witnesses, learned Advocate for the Appellant submitted that it could be safely construed that the prosecution failed to establish its case beyond reasonable doubt. The evidence in respect of complainant identifying the Appellant in identification parade was doubtful in view of the fact that accused was shown to the complainant in the police station on 12.4.2002. It is submitted by the learned Advocate for the Appellant that the Appellant was carrying on business of running a juice centre in the nearby premises. Some of the prosecution witnesses were also residents of the same premises. It has come in the evidence that the Appellant was seen sleeping with the child by the side of STD booth. This evidence on record corroborates the evidence of parents that the Appellant kidnapped the child and demanded ransom attracting an offence punishable u/s 364A of IPC. It is submitted by the learned Advocate for the Appellant that the Appellant was of young age of 20 years at the time of commission of offence and considering the nature of offence and evidence, the plea of the Appellant be considered.

17. Learned APP submitted that the evidence of the parents is clinching and is

not shaken. The Appellant was identified by the complainant. The complaint was promptly lodged without deliberation. Learned APP vehemently submitted that there is no reason to disbelieve the evidence of the complainant Zubeda Abdul Gaffar Raien PW-1 and the evidence of Abdul Gaffar Mohd. Muslim Raien PW-2 father of the child. There was a call received on the Cell-phone of PW-2 father of the child and the caller was Appellant alone as nobody had come to the house of the complainant and had taken away the child by misrepresenting himself as a worker. Learned APP submitted that the objection raised in respect of identification parade was not proper. Identification parade was held properly. The Appellant was identified in the identification parade by the complainant. Efficacy of identification parade is not diluted.

18. We have perused the record, the evidence and considered the submissions of the learned Advocate for the Appellant as well as submissions of learned APP for the State. We find that there is good evidence on record to hold that the Appellant is guilty of the offence punishable u/s 363 of IPC i.e. punishment for kidnapping any person from the lawful guardianship. It has come on record in the evidence of PW-1 that the Appellant had come to the house and represented himself that he was working in the factory of her husband and child was called by him, saying so, he took away the child. In the afternoon, father of the child came to the house and thereafter he came to know that one person represented himself as a worker had taken away his child and after searching, they rushed to the police station. It is true that the complainant had filed complaint with the police station promptly. We do not find that there is any false involvement of the Appellant from the complainant's side. Nothing has come on record that parties have any previous enmity. The investigation conducted by the police shows that the accused was arrested and brought to the police station. The child was identified by the accused. There is no explanation by the Appellant during recording of his statement u/s 313 Code of Criminal Procedure. He merely stated that a false case has been filed against him. From the entire evidence, we find that charge for kidnapping the child was proved and the finding of the trial Court in respect of the offence committed by the Appellant u/s 363 of IPC deserve confirmation.

19. The question now is whether the Appellant could be held to be guilty u/s 364A of IPC. The provision of Section 364A is stringent. Section 364A reads thus:

364A. Kidnapping for ransom, etc.- Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person] to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.

Considering the object in framing of this provision, we have noticed that apart

from the evidence of PW-1 Zubeda Raien and PW-2 Abdul Gaffar Raien, the evidence brought on record through witnesses does not inspire full confidence so as to find Appellant guilty u/s 364A. On this aspect we find some discrepancies in the prosecution case. In the evidence of PW-1 Zubeda and PW-2 Abdul Gaffar Raien, we noticed the discrepancies in respect of amount claimed as ransom by the Appellant. PW-1 Zubeda deposed that there was a call for demand of Rs. " 2 lakhs, whereas PW-2 Abdul Gaffar Raien states that there was a call for demand of Rs. " 1 lakhs. The child was not kept in a secret place. The Appellant was moving around with the child in and around the area where the Appellant was running a juice centre. He was seen along with the child near the Darga. It demonstrates that Appellant was accessible. So many persons must have seen him including the witnesses. He was seen sleeping along with the child. None of the witnesses deposed that the conduct of the Appellant was suspicious and that he was assaulting the child or had behaved in a strange manner which would give rise to grave suspicion.

20. Considering the quality of evidence of PW-3 Sayyed Jafarool Hasan and PW4 Mohd. Naushad Abdul Hafiz Shaikh, we find it difficult to arrive at a conclusion that their evidence supports and corroborates the evidence of parents of the child that money was demanded by the Appellant alone and none else for handing over the custody of the child.

21. There is substance in the submission of the learned Advocate for the Appellant that the prosecution has failed to establish as to who gave call on the cell-phone of PW-2 Abdul Gaffar Raien. There is no evidence in respect of the call made on the cell-phone except mere statement of the witness. The learned Advocate appearing for the Appellant therefore, submitted that the prosecution ought to have produced more clinching evidence in respect of offence allegedly committed by the Appellant attracting penal provisions of Section 364A. We have noticed that the Appellant was available in and around the area where he was running a juice centre. In absence of the evidence in respect of the caller who had demanded ransom money, we find it difficult to hold the Appellant guilty for the offence punishable u/s 364A. The defence has raised doubt in the prosecution case on this aspect of the matter. The prosecution failed to discharge the burden to establish its case beyond reasonable doubt.

22. Apart from the fact that Appellant was seen moving with the child, there is no evidence that he had harmed the child. There is substance in the defence that there is nothing on record to show that the caller on the cell-phone demanded ransom amount and the mode of payment or the place of payment, was indicated by the caller.

23. Learned Advocate for the Appellant places reliance on the judgment in the case of Philips Fadrick D? souza and Anr. v. State of Maharashtra and Anr. reported in 2009 (1) Bom. C.r.(Cri) 38. In the said case the Division Bench of this Court observed in paragraph-18 of the judgment as under:

A statutory provision like section 364A must undoubtedly, like penal legislation, be construed strictly. But while construing a provision such as section 364A the Court must be careful not to interpret it in a manner which would denude it of its legislative efficacy. More so when the stated object of Parliament was to deal with an aggravated form of an offence, the effect of which is to seriously undermine the stability of civil society.

Learned Advocate for the Appellant also places reliance in the case of Ramcharan Bhudiram Gupta Vs. State of Maharashtra, and also in the case of Prashant Dnyanraj Thorat v. The State of Maharashtra decided by this Court in Criminal Appeal No. 420 of 1995 on 11.4.2005 and also on P. Liaquat Ali Khan v. State of Andhra Pradesh reported in (2010) 1 SCC (Cri) 700.

24. Learned APP places reliance in the case of Maqbool @ Zubir @ Shahnawaz and Anr. v. State of A.P reported in 2010 ALL MR (Cri) 2971 and also in the case of Vijay @ Chinee v. State of M.P reported in 2010 ALL MR (Cri) 3326 (S.C).

25. For the reasons stated above, following order is passed.

ORDER

26. The appeal is partly allowed.

27. The order of conviction and sentence recorded by the trial Court for offence punishable u/s 363 of Indian Penal Code, is confirmed.

28. The order of conviction and sentence recorded by the trial Court for an offence punishable u/s 364A of Indian Penal Code is quashed and set aside. The Appellant/accused Mohammad Murtuza Mohammed Mosin Shaikh is acquitted of the said charge. Fine amount if paid, be refunded to the Appellant.

29. The Appellant Mohammad Murtuza Mohammed Mosin Shaikh be set at liberty forthwith if not required in any other case.