
(2012) 03 CHH CK 0011
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 1348 of 1995

Mohd Ismail

APPELLANT

Vs

The State of MP Now State of CG

RESPONDENT

Date of Decision : 14-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 293
Penal Code, 1860 (IPC) — Section 363, 364

Citation : (2012) 03 CHH CK 0011

Hon'ble Judges : Rajeev Gupta, C.J.; Sunil Kumar Sinha, J

Bench : Full Bench

Advocate : Abhay Tiwari, for the Appellant; J.A. Lohani Panel Lawyer for the State, for the Respondent

Final Decision : Dismissed

Judgement

Shri Sunil Kumar Sinha, J.—This appeal is directed against the judgment dated 28th of August, 1995 passed in Session Trial No. 55/93 by the Fourth Additional Session Judge, Durg. By the impugned judgment, the appellant has been convicted u/ss 363 & 364 IPC and sentenced to undergo R.I. for 7 years and imprisonment for life with a direction to run the sentences concurrently. The facts, briefly stated, are as under:

The kidnapped boy namely- Mohd. Ismail (aged about 13 years) was residing with his father Mohd. Sharif. Originally they were residents of Tamil Nadu. Mohd. Sharif had a small kirana-shop in Camp No. 2, Bhilai. The appellant/accused Mohd. Ismail was also a resident of Tamil Nadu. He was also residing in Camp No.2, Bhilai. His father had a kirana-shop. The case of the prosecution is that on 20.7.1992 at about 8.00 p.m., appellant- Mohd. Ismail kidnapped Mohd. Ismail and took him to Tamil Nadu. Thereafter the appellant wrote letters to the father of the kidnapped boy demanding Rs.50,000/-. In one of the letters, he directed them to come to Bombay VT Station along with the money. Many other instructions were also given in that letter. Mohd. Sharif went to Bombay, but he

could not find the abducted boy (Mohd. Ismail). The 3 inland letters, written by the appellant to the father of the abducted boy are Ex.-P/16, P/17 & P/18. Another letter in this regard is Ex.-P/15. These letters were written in Tamil, therefore, hindi translated copies (Ex.-P/5, P/6, P/7 & P/9) were prepared. The 2 accused persons i.e. Mohd. Ismail (appellant herein) and R. Das (acquitted accused) were arrested at Bombay. Specimen hand-writing of appellant- Mohd. Ismail was taken vide Ex.-P/23 to P/61. The specimen hand-writing and the questioned documents were sent for expert examination to Central Forensic Institutes (CFI), Calcutta. The documents were examined by Government Examiner of Questioned Document who gave his opinion Ex.-P/62. According to CFI report (opinion), the hand-writing of the questioned documents and specimen hand-writing were one and the same. He opined that the person who wrote the documents S1 to S46 also wrote the documents Q1, Q2, Q3, Q4, Q5, Q6, Q8, Q9, Q10, Q11, Q12, Q13 and Q14. In further investigation, statements of P. Sadashiv (PW-9) and John Suresh (PW-10) were recorded. P. Sadashiv (PW-9) stated that the appellant and the kidnapped boy were residing on rent in his house in village Gopalpuram, Madras. The police also collected evidence that in the fateful night, the appellant had managed to call the kidnapped boy from his house and he was taken to Madras and the above ransom was demanded by the appellant. Though the accused persons were arrested, but the kidnapped boy could not be traced. We have been informed at Bar that even till today whereabouts of the boy are not known and he could not be traced at all.

The learned Session Judge, on a close scrutiny of the entire evidence, held that offences u/ss 363 & 364 IPC were proved against the appellant, therefore, the appellant was convicted and sentenced as aforementioned. However, the second accused namely- R. Das was acquitted of the charges framed against him.

2. Admittedly there were no eye-witnesses to the incident and the case of the prosecution was based on circumstantial evidence. Following are the circumstances, on which, the learned Session Judge relied for conviction of the appellant :

i. At the relevant time in the fateful night the appellant was seen in the locality by Sukhbanti Bai (PW-6) and Anusuiya Bai (PW- 7);

(ii) In the fateful night the kidnapped boy was called by the appellant through Gudda @ Santosh Kumar (PW-5);

(iii) The appellant was residing with the kidnapped boy in village Gopalpuram, Tamil Nadu which was witnessed by P. Sadashiv (PW-9) and John Suresh (PW-10);

(iv) The appellant wrote various letters to the father of the kidnapped boy and called them to Bombay VT Station along with ransom of Rs.50,000/- &

(v) A diary of the year 1992 was seized from the possession of the appellant vide seizure memo Ex.-P/19 and 2 pages of the diary i.e. of the dates of 12th/13th &

14th/15th August 1992 were torned and missing and the page of 12th & 13th August was used in writing one of the letters (Ex.-P/15) by the appellant.

3. Mr. Abhay Tiwari, learned counsel appearing on behalf of the appellant, argued that the hand writing expert was not examined, therefore, it was not proved that the letters were written by the appellant. He also argued that the other circumstances were also not proved and the chain of circumstantial evidence was not complete, therefore, the conviction based on the above set of circumstantial evidence cannot be sustained.

4. On the other hand, Mr. J.A. Lohani, learned Panel Lawyer appearing on behalf of the State, opposed these arguments and supported the judgment passed by the Session Court.

5. We have heard learned counsel for the parties at length and have also perused the records of the sessions case.

6. In *Dhananjay Chhatterjee -Vs- State of W.B.*, (1994) 2 SCC 22 the Supreme Court held "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof.

7. In *Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir*, the Apex Court laid down that there is no doubt that conviction can be based solely on circumstantial evidence but the conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are:

1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established;

2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

3) the circumstances should be of a conclusive nature and tendency;

4) they should exclude every possible hypothesis except the one to be proved; and

5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must

show that in all human probability the act must have been done by the accused.

8. Almost similar view was taken by the Supreme Court in State of Goa -Vs- Sanjay Thakran & anr., 2007 (4) SBR 321 by taking note of the decision of Bodh Raj (supra).

9. On the above principles, now we shall examine the sufficiency of the circumstantial evidence held to be proved against the appellant.

10. The learned Session Judge has held that it was proved that the impugned letters were written by the appellant. In fact reliance was placed on the contents of the impugned letters and the opinion of the expert-Ex.-P/62. Admittedly no expert was examined by the prosecution to prove the opinion given through Ex.-P/62. From the description in Ex.-P/62 it could not be gathered whether the office of the Government Examiner of Questioned Document would fall within the purview of Section 293 Cr.P.C. We would like to quote the relevant contents of Section 293 Cr. P.C.:

293. Reports of certain Government scientific experts.- (1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) xxx xxx xxx.

(3) xxx xxx xxx.

(4) This section applies to the following Government scientific experts, namely:

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief Controller of Explosives; (c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government.

(g) any other Government scientific expert specified, by notification, by the Central Government for this purpose."

11. The perusal of Section 293 would show that the Government Examiner of Questioned Document does not fall within the category of the experts described in sub-section (4) of Section 293. Therefore, reliance on the expert report (Ex.-P/62) in absence of its independent proof by calling the expert was not proper. We are of the view that the above hand writing expert report (Ex.-P/62) was not admissible in evidence and the learned Session Judge erred in relying on the said

report.

12. The conviction is not solely based on the expert report. We shall now, therefore, examine the other circumstantial evidence.

13. Gudda @ Santosh Kumar (PW-5) deposed that on the fateful night, at about 8.00 p.m., the appellant called him and said him that he is brother of Mohd. Sharif. Since Mohd. Sharif use to beat him, therefore, he is not going to the house of Mohd. Sharif and Gudda (PW-5) should call his nephew Mohd. Ismail (kidnapped boy). On this Gudda (PW-5) replied him that Mohd. Sharif is his brother, he should go to his house. After the said conversation, the appellant again said him to call Mohd. Ismail, on which, Gudda said that he is going to the house of Mohd. Ismail and if Mohd. Ismail is present in his house, he will call him. Thereafter Gudda (PW-5) went to the house of Mohd. Ismail (kidnapped boy) and brought him saying that his uncle is calling him. He took him to the appellant. The appellant started talking with Mohd. Ismail (kidnapped boy). Thereafter Gudda (PW-5) went to see television. Gudda identified the photograph (Ex.-P/14) of Mohd. Ismail (kidnapped boy). He further deposed that thereafter at about 11.00 p.m., the persons started searching Mohd. Ismail (kidnapped boy). Gudda (PW-5) was not stranger to the appellant and the family of the kidnapped boy. He had identified the appellant in the court. He had also identified the photograph of kidnapped boy. Therefore, it was proved by his evidence that in the fateful night the kidnapped boy was called by the appellant through Gudda (PW- 5) on the false pretext that he is uncle of the kidnapped boy and Gudda (PW-5) left the kidnapped boy in the company of the appellant at about 8.00 p.m.

14. Sukhbanti Bai (PW-6) and Anusuiya Bai (PW-7) deposed that in the fateful night, they had seen the appellant in the locality of the house of the kidnapped boy. The appellant was standing near kishan-chowk. They have identified the photograph of the kidnapped boy. They deposed that the kidnapped boy is missing since the said date.

15. The most important circumstance is that P. Sadashiv (PW-9) and John Suresh (PW-10) had seen the kidnapped boy in the rented premises of the appellant in village Gopalpuram (Tamil Nadu). P. Sadashiv (PW-9) is the landlord of the premises in which the appellant was residing. He deposed that the appellant had taken aforesaid premises on the rent of Rs.300/- per month. The appellant was paying its monthly rent. The appellant had told him that he use to sell the wooden-boxes for keeping golden ornaments. John Suresh (PW-10) was his other tenant. After one and half months of taking his premises on rent, the appellant brought a boy aged about 12-13 years. When he asked about the boy, the appellant stated that the boy is the son of appellant's sister. The boy stayed with the appellant for 3 days. P. Sadashiv (PW-9) was shown the photograph of the kidnapped boy. He identified the photograph and admitted that the same boy had stayed with the appellant for 3 days in the premises which he had given on rent to the appellant. John Suresh (PW-10) was another tenant of P. Sadashiv

(PW-9). He also deposed that the kidnapped boy had resided along with the appellant in his rented premises. He also identified the photograph of the kidnapped boy.

16. Vijay Seth (PW-11) is the Investigation Officer. He has proved the seizure of various letters and has also proved the seizure of a diary of the year 1992 from the possession of the appellant. The seizure memo of the diary is Ex.-P/19. 2 pages of the diary i.e. the pages of dates 12th & 13th and 14th & 15th of August 1992 were missing from the diary. On comparison it was found that the page of the dates 12th & 13th of August were used for writing the letter Ex.-P/15.

17 On appreciation of the evidence of above witnesses, it was proved that in the fateful night the appellant was seen in the locality of the house of the kidnapped boy; he called the kidnapped boy through Gudda @ Santosh Kumar (PW- 5) on the pretext that he is uncle of the kidnapped boy; Gudda (PW-5) went to the house of the kidnapped boy and called him and left him in the company of the appellant; since the said date the kidnapped boy was missing; the kidnapped boy was seen with the appellant in village Gopalpuram, Madras, where the appellant took a rented premises belonging to P. Sadashiv (PW-9); even John Suresh (PW-10) also saw the kidnapped boy in the company of the appellant; a diary was seized from the possession of the appellant from which the above 2 pages were missing and one page of the diary was used for writing a letter (Ex.-P/15) to the father of the kidnapped boy by the appellant. In the above facts and circumstances of the case, even if we keep the alleged letters of demand out of consideration for want of proof of the hand-writing expert report Ex.-P/62, the other evidence available on record were sufficient to hold that the boy was kidnapped by the appellant, he was living in the company of the appellant and ultimately he cannot be traced at all.

18. We are of the view that the above circumstances were fully established against the appellant and the chain of circumstantial evidence, as stated above, was also complete. For the foregoing reasons, we do not find any substance in the appeal. The appeal, therefore, is liable to be dismissed and is hereby dismissed.