
(2012) 05 UK CK 0056

In the Uttarakhand High Court

Case No : Criminal Reference No. 03 of 2011 and Criminal Jail Appeal No. 41 of 2011

State of Uttarakhand

APPELLANT

Vs

Ganesh Sahu
 Ganesh Sahu Vs State of Uttarakhand

RESPONDENT

Date of Decision : 08-05-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 366, 368(a), 368(c)
Penal Code, 1860 (IPC) — Section 201, 302, 364A, 364A

Citation : (2012) 3 UC 2320

Hon'ble Judges : Barin Ghosh, C.J; Umesh Chandra Dhyani, J

Bench : Division Bench

Judgement

Umesh Chandra Dhyani, J.—This reference was made u/s 366 of the Code of Criminal Procedure, 1973 by the Additional Sessions Judge/IV FTC. Dehradun for confirmation of the sentence of death awarded by said court against the convict/appellant Ganesh Sahu for the offences punishable under Sections 364-A IPC and 302 of the Indian Penal Code, 1860. The convict was also directed to pay a fine of Rs. 50,000/-, for each of the above offences and in default of payment of fine, he was directed to further undergo three years" rigorous imprisonment for each of the above offences. Aforesaid convict/appellant Ganesh Sahu was also convicted for the offence punishable u/s 201 IPC and was sentenced to rigorous imprisonment for seven years. He was also directed to pay fine of Rs. 10,000/-, in default of payment of which, he was required to further undergo one year"s rigorous imprisonment vide impugned judgment and order dated 30th July, 2011. Learned Additional Sessions Judge/IV FTC, Dehradun passed aforesaid orders in Sessions Trial No. 120 of 2008. Criminal Jail Appeal was also filed by the convict Ganesh Sahu against the said Judgment and Order. Prosecution story in nutshell is that Ram Ratan Shah, the father of kidnapped child moved a complaint to Inspector incharge Kotwali on 28.05.2008 alleging that his son Nitesh Kumar aged about 12 years was missing since 27.05.2008 from 3:00-4:00 pm. When he did not reach his home, a frantic search was made for

him everywhere including the houses of relatives, but to no avail. On 28.05.2008 victim's father received a telephonic call from phone No. 0135-2711125 on his mobile No. 9897036780 whereby a ransom of Rs. 5 lacs were demanded. In the event of failure to meet such a demand, it was threatened that informant's son would be killed.

2. PW 1 Ram Ratan Shah was informant/father of missing child aged about 12 years. He said that on 27.05.2008 in between 3:30-4:00 p.m. his son Nitesh disappeared from his shop. He made a frantic search for his missing son but to no avail. Next day in the morning, he gave a complaint to the Police. He proved his complaint (Ext. Ka-1) which was scribbled by some one on his dictation. He mentioned telephone number of the sender of call whereby a ransom of Rs. five lacs was demanded. The caller asked him to pay Rs. five lacs or else, his son would be killed. When he approached Police for filing complaint, he again received a call from mobile No. 9758774686 on his mobile No. 9897036780 that if the Police was informed then his son would be killed. The caller asked that the informant would be informed again at 5:00 pm regarding the place where the money was required to be sent. The Police prepared a sketch (Ext. 1) showing the identity of accused Ganesh Sahu. Ganesh Sahu worked with the informant as a domestic help two years ago. When the informant settled his accounts with the domestic help, he used to obtain his signatures.

3. PW 1 Ram Ratan Shah also said that on 30.05.2008 at 11:00 am a Police-man came to him and asked him to accompany police to Survey Chowk. On reaching Survey Chowk, he found that Ganesh Sahu was sitting in Police jeep. Then informant Ram Ratan Shah, accused Ganesh Sahu accompanied by police personnel went to Gopal Bhatta at Shahastradhara Road. Ganesh Sahu took them to bushes and pointed towards the child. Child was dead. There was mark of injury on his neck. That dead child was no one but informant's son Nitesh. Police prepared recovery memo (Ext. Ka-2) of the dead body of the child. Informant identified photographs (Ext. 2 to 6) of his dead child taken over there. Accused wanted a ransom of Rs. five lacs and therefore he killed Nitesh. Informant also identified the photograph (Ext.-7) of his son. In cross-examination, PW 1 Ram Ratan Shah said that child was kidnapped on 27.05.2008 at around 3:00-3:30 p.m. He made a search for the missing son everywhere including the houses of his relatives. On 28.05.2008 at 8:00 p.m. somebody rang him up from PCO. Police was informed of the same (Ext. Ka-1). Informant owned a general merchant shop which used to open at 7:00 am and closed at 10:00 p.m. Accused was labourer. Informant knew accused since the date accused worked with the informant as a domestic servant. He did not remember whether the Police called public witnesses or not when the dead body of his son was recovered. There was no habitat near the place of occurrence but there was forest. The feet of kidnapped person (Nitesh) were tied with ropes.

4. Dr. N.S. Jangpangi conducted postmortem on the dead body of Nitesh on 30.05.2008 at 4:00-5:00 p.m. He proved his report (Ext. Ka-3) and said that

death of Nitesh was possible on 27.05.2008 at 3:00-4:00 p.m. or at a subsequent time. There was a ligature mark on the neck of the child. He found various ante-mortem injuries on the dead body of Nitesh. The cause of death of victim was asphyxia as a result of strangulation.

5. PW 3 Umesh Shah was brother of Ram Ratan Shah. He said that they were four brothers namely, Leeladhar Shah, Deonarayan Shah, Ram Ratan Shah and Umesh Shah (he himself). He used to sit in the shop of his brother Ram Ratan Shah. When the occurrence took place Nitesh Shah was aged about 12 years. On 27th May, 2008 Nitesh was present with him at his shop. Around 3:00-3:30 p.m. on the said day a few people came to his shop. He did not pay attention to Nitesh Shah. After about an hour or so, his sister-in-law Kaushalya Devi (bhabhi, Nitesh's mother) came to the shop and enquired about Nitesh. PW 3 Umesh Shah replied that Nitesh was with him. Nitesh could not be found there. He could not tell where the boy had gone. His elder brother Ram Ratan Shah had gone for marketing then. When he returned, he also enquired about Nitesh. Then they searched for Nitesh, but to no avail. The very next day Ram Ratan received a phone call at 8:30 a.m. whereby he was informed by somebody that the child was with him. He demanded a ransom of Rs. five lacs or else the child would be killed. After two or three days a police-man came to him and desired him to come to Survey Chowk. When they reached Survey Chowk, he found Ganesh Sahu there, who worked with his brother Ram Ratan Shah two years ago. Ganesh Sahu took policemen to Nalapani Jungle. Thereafter on the pointing of accused Ganesh Sahu dead body of Nitesh was found. His hands and feet were tied with ropes. This witness proved memo (Ext. Ka-2) of dead body of child. He also proved material exhibits-1 to 6 and material exhibit-7 (photographs of deceased). This witness ascribed the motive on the part of accused to commit crime thus - accused could not reconcile with the progress made by Ram Ratan Shah (in business). He (accused) therefore harboured grudge against informant on this account.

6. PW 4 Ajay Sonkar was also a witness to recovery of dead body. He also identified the photographs of deceased.

7. PW 5 Baldev Raj Bhatia had a shop in Saral Complex. He dealt with SIM, cell phones, recharge coupons etc. He said that on 27.05.2008 around 11:00 am a person aged 25-26 years came to his shop and demanded a SIM of Vodaphone. PW 5 Baldev Raj gave him a SIM and obtained his signatures. He identified SIM No. which was in his handwriting. SIM No. was 8991660000632490356 and mobile No. was 9758774686. He obtained signatures of accused Ganesh Sahu on the form. Although identification and photographs are required for obtaining a SIM connection, yet accused did not provide his ID proof or photograph to PW 5 Baldev Raj. Accused told him that ID proof and Photograph would be supplied in a short while. This witness waited for the accused. But when he did not supply ID proof, PW 5 Baldev Raj Bhatia rang him up from his mobile number 9837917308 which was not responded by accused. Accused had earlier supplied voter ID of

another person which was kept as a security by PW 5 Baldev Raj Bhatia. This Voter ID was of Sattan Ram, who was not produced. After sometime, Police came to his shop and enquired about the telephone connections. PW 5 Baldev Raj admitted having given the telephone connection. Police also enquired about the identity of accused. He was taken to an expert to prepare sketch of accused.

8. PW 6 Dheeraj Agarwal was a photographer. He prepared sketch (Ext. Ka-4) of accused.

9. PW 7 Manoj Kumar said that on 28.05.2008 Ram Ratan Shah's son was kidnapped. It was revealed on 30.05.2008 that his son was killed. PW 7 Manoj Kumar was witness of inquest report (Ext. Ka-5).

10. PW 8 Shankar Prasad Churasia was also a signatory to inquest report (Ext. Ka-5).

11. PW 9 Deepak Kumar was posted as Constable Clerk in PS Kotwali on 28.05.2008. He proved chik FIR (Ext. Ka-6) and copy of report (Ext. Ka-7 & Ka-8). He also proved copy of GD (Ext. Ka-8).

12. PW 10 Constable Anil was asked by Inspector Kotwali on 30.05.2008 at around 11:00-12:00 noon to bring Zild Panchnama at Shashtradhara Road.

13. PW 11 Navin Chandra Pant, Scientific Officer, Forensic Science Laboratory, Dehradun proved his report (Ext. Ka-9) duly countersigned by Incharge Director of Forensic Science Laboratory, which pertained to signatures of accused on Vodafone prepaid application form. He found the signatures of accused Ganesh Sahu on said document.

14. PW 12 Inspector R.S. Hayanki arrested accused Ganesh Sahu on 23.05.2008 at 10:25 am. A Nokia Mobile with SIM and an extra Airtel SIM was found from his possession. Accused confessed his guilt that he made a telephone call to father of victim and kidnapped his son who was hidden in a jungle near Gopal Chuna Bhatia. Recovery memo of mobile and SIM was prepared as Ext. Ka-10. Nokia mobile 1100 along with a Vodaphone SIM and an extra Airtel SIM were also proved as material Exhibits 9, 10 & 11 respectively. On the disclosure and pointing of accused dead body of victim was found recovery memo (Ext. Ka-2) whereof was prepared.

15. PW 13 SI Nitin Chauhan said that mobile No. 9758774686 was of Vodaphone company and was issued to one Baldev Raj Bhatia. He was also a witness to the recovery of dead body on the pointing and disclosure of accused Ganesh Sahu. He also proved that a Nokia 1100 mobile phone No. 9758774686 was found in his possession.

16. PW 14 SI Girish Chandra Sharma was also a witness to recovery memo. (Ext. Ka-2), inquest report (Ext. Ka-5 and papers related thereto (Exts. Ka-11 to Ka-14).

17. PW 15 Constable Harish Chandra handed over the dead body of victim to the

family members of victim after postmortem.

18. PW 16 SI Sanjay Pathak was Investigating Officer of the case who proved site plan (Ext. ka-15), sketch of accused (Ext. Ka-4), took into possession the application form of Ganesh Sahu given to Baldev Raj Bhatia for obtaining mobile connection, effected arrest of accused and prepared recovery memo of mobile etc. (Ext. Ka-10). He was also a witness to recovery of dead body (Ext. Ka-16) and recovery of rope (Ext. Ka-18). He also proved taking of sample of blood stained soil and simple soil (Ext. Ka-19, site plan of the place of recovery of mobile (Ext. Ka-23) and finally submitted charge-sheet (Ext. Ka-24) against the accused appellant in relation to the offences punishable under Sections 364A, 302 and 201 IPC.

19. In order to obtain SIM card, proof of identity, residence, etc. is required to be given. In the instant case, no proof of identity or residence was given. An application for obtaining SIM card was moved by accused but the same was not proved. How can a prudent person believe that the appellant used this mobile? How can the Court implicate him? Vodafone prepaid application form has not been exhibited. There has to be material on record that has to be tendered in evidence. There was no material evidence to prove that the call was made from telephone number 0135-2711125 to the mobile number of victim's father Ratan Shah on telephone number 9897036780. It was said that accused/appellant demanded a ransom of 5,00,000/- from mobile number 9758774686. There was an oral assertion only that the call was generated. There was also no material evidence to show that second call was made from newly acquired Vodafone number 9758774686 to the mobile number 9897036780 which belonged to victim's father.

20. Even the bill of Vodafone connection of victim's father was not submitted in evidence. Vodafone prepaid application form was not proved. Only oral evidence has it that PW 5 Baldev Raj, dealer of phone gave SIM to accused/appellant. There was oral evidence to the effect that PW 5 Baldev Raj, shop keeper of Vodafone gave connection to applicant and the SIM card given to him was 9758774686. Before obtaining SIM card, appellant was said to have signed the documents but unfortunately the same was not exhibited. There was nothing to link mobile number 9758774686 (accused) to 9897036780 (father of victim).

21. Important documents have not been tendered in evidence. Even if anyone of these documents was filed, the same was not proved. How can an oral evidence be accepted in the absence of vital documentary evidence?

22. It was said that the opinion was given by Scientific Officer of Forensic Science Laboratory, Dehradun. It was argued that the expert examined the signatures of accused on Vodafone prepaid application form and found that such signatures were of accused-appellant Ganesh Sahu. Since Vodafone prepaid application form was not exhibited, God only knows what was sent to FSL. There was no evidence on record to prove what was sent to Forensic Science Laboratory.

Without the material being placed on record, how can we accept the same?

23. It was not proved that the SIM which he purchased was used in the alleged crime. Accused was arrested because a sketch of him was prepared on the clue given by PW 5 Baldev Raj Bhatia who sold SIM to him. But there was lacuna in prosecution evidence in not providing the link between the telephones of sender and receiver. Three years ago appellant was the domestic servant of father of victim. Appellant harboured grudge against informant and that is why informant's child was done away with for ransom but the story is not proved by the prosecution.

24. There was recovery of dead body on disclosure and pointing of accused/appellant. A recovery memo was exhibited. The same indicated the presence of accused appellant. The same was having the signatures of accused/appellant but the accused denied everything in his statement u/s 313 Cr.P.C. Dead body was lying in the open and was not buried. The same must be emitting foul smell. Passers-by must have noticed the foul smell but no one came forward to inform or depose.

25. Even if recovery on the disclosure and pointing of accused is accepted, there was no evidence that accused/appellant kidnapped victim. At the most it can be inferred that the appellant had the knowledge where the dead body was kept. The Court is inclined to accept that the same was recovered on disclosure and pointing of accused but that fact alone is not sufficient to bring home guilt to the accused. He is entitled to be given benefit of doubt.

26. The lacunae in the prosecution story are highlighted thus:

- i. The application form of accused applying for SIM was not proved.
- ii. The SIM of Mobile No. 9897036780 or 9758774686 was not produced.
- iii. Service provider Company was not produced in evidence.
- iv. Who had telephone No. 0135-2711125?
- v. How did the informant suspect involvement of accused in kidnapping? If informant suspected involvement of accused in the crime on the basis of identification of his voice, why there was no word about the same in FIR?
- vi. Appellant was arrested only because a sketch of him was prepared as said by PW 5 Baldev Raj Bhatia who sold SIM to him. Sattan Ram, whose voter ID Card was supplied by accused was not produced in evidence.
- vii. Accused purchased SIM three days before. He did not owe a duty to speak. But it was not proved that SIM was used in the alleged crime.
- viii. Vodafone prepaid application form was not exhibited.
- ix. No material evidence was produced to show that call was made from mobile 9758774686 to 9897036780 or telephone No. 0135-2711125 to mobile No.

9897036780.

x. There is oral assertion only that the call was generated. Even telephone bill of father of victim was not submitted.

xi. There was nothing to link telephone of sender (accused) to telephone of receiver (father of victim).

xii. We accept that it was appellant who pointed out dead body. It was lying in open and not buried. At least he had the knowledge where the dead body was. But, it seems improbable that the dead body did not smell foul after three days to the passersby.

xiii. Even if recovery of dead body on the pointing of accused was admitted, that alone was not sufficient to make home the guilt against accused.

27. Although the prosecution story is not proved by prosecution but even if it was otherwise, it was not a case attracting death penalty. If a child is killed by a kidnapper, is it rarest of the rare case? A balance sheet of aggravating and mitigating circumstances suggests that it was not a case of awarding death penalty but a case worth awarding life imprisonment only, had the prosecution story been proved.

28. Learned Additional Government Advocate cited the cases of Henry Westmuller Roberts Vs. State of Assam, and Vikram Singh and Others Vs. State of Punjab, to show that on drawing balance sheet of aggravating and mitigating circumstances imposition of death sentence was proper. The facts of these cases are distinguishable from the present case. In the first case Henry became a monster and still demanded money making father to believe that the boy was alive. We need not enter into the details of second case because we have held that the prosecution has not been able to prove the case against appellant beyond reasonable doubt and therefore, the Reference made u/s 366 of the Code of Criminal Procedure, 1973 also stands answered in the negative.

29. The evidence thus brought on record on behalf of the prosecution is not sufficient to bring home guilt to the accused appellant Ganesh Sahu. Interference is thus called for in the Judgment and Order passed by the Court below. Not only we refuse to confirm the death sentence as prescribed u/s 368(a) of the Code of Criminal Procedure, 1973, we also allow the Criminal Jail Appeal of the convict and acquit him u/s 368(c) of the Code giving him benefit of doubt. Order accordingly. Criminal Jail Appeal No. 41 of 2011 filed on behalf of accused appellant Ganesh Sahu is thus allowed. The judgment and order dated 30.07.2011 rendered by learned trial court is accordingly set aside. The conviction and sentence awarded to the appellant Ganesh Sahu is also set aside. The appellant Ganesh Sahu is in jail. He be set at liberty forthwith, if not required to be detained in any other case. Let a copy of this order be sent to the Superintendent of Jail concerned where the accused appellant is currently serving out the sentence.

Lower court record be also sent back immediately for ensuring compliance of this order.