
(2015) 07 JH CK 0036

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) Nos. 974, 819, 887 and 925 of 2007

Surendra Mahto and Others

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision : 09-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 313
Penal Code, 1860 (IPC) — Section 120B, 34, 363, 364A

Citation : (2015) 07 JH CK 0036

Hon'ble Judges : Rakesh Ranjan Prasad and Pramath Patnaik, JJ.

Bench : Division Bench

Advocate : Rashmi Kumar, Advocate, for the Appellant; S.K. Srivastava, A.P.P., for the Respondent

Judgement

1. These four criminal appeals, arising out of same Dhanwar P.S. Case No. 17/05 but from different judgments/orders passed in S.T. Nos. 87/2006 and 206/2005, were heard together and are being disposed of by the common judgment.

2. The appellants namely, Sunil Kumar Yadav, Laxman Yadav and Rajesh Yadav @ Mahto were put on trial in S.T. No. 206/2005 and were found guilty for kidnapping one Vickky Kumar, aged about 10 years, for ransom in furtherance of conspiracy hatched by them. Accordingly, they were convicted for the offences punishable under Sections 364A and 120B of the Indian Penal Code vide judgment dated 24.5.2007 and were sentenced to undergo rigorous imprisonment for life for the offence punishable under Section 364A of the Indian Penal Code and further they were sentenced to undergo rigorous imprisonment for ten years for the offence punishable under Section 120B of the Indian Penal Code vide order dated 30.5.2007 and to pay a fine of Rs. 5,000/- each with default clause. Both the sentences were ordered to run concurrently. On the other hand, the appellant-Surendra Mahto @ Pahalwan was put on trial in S.T. No. 87/2006 and was found guilty for kidnapping the same victim boy for ransom and accordingly, he was convicted for the offence punishable under Sections

364A and 120B of the Indian Penal Code vide judgment dated 24.5.2007 and was sentenced to undergo rigorous imprisonment for life for the offence punishable under Section 364A of the Indian Penal Code and further he was sentenced to undergo rigorous imprisonment for ten years for the offence punishable under Section 120B of the Indian Penal Code vide order dated 30.5.2007 and to pay a fine of Rs. 5,000/- with default clause. Both the sentences were ordered to run concurrently.

3. The case of the prosecution is that one Vickky Kumar, aged about ten years (examined as P.W. 4 and P.W. 15 respectively in S.T. Nos. 87/06 and 206/2005) was studying in St. Albert Residential School, Dhanwar, which was being run by Shyam Prasad Saha-Principal (examined as P.W. 3 and P.W. 14 respectively in S.T. Nos. 87/06 and 206/2005). On 10.2.2005 at about 6pm while the victim boy was playing in the field along with other children, two unknown persons came there, one of them was being addressed by the victim as "uncle", and took him away on the motorcycle. Thereupon, the Principal-Shyam Kumar Saha (informant) submitted a written report before the Dhanwar Police Station upon which a case was registered under Sections 363/364A/34 of the Indian Penal Code against unknown.

Said information when was given to Suresh Mandal-father of the victim (examined as P.W. 1 and P.W. 12 respectively in S.T. Nos. 87/06 and 206/2005), he came from Delhi and started searching his son along with the villagers including Kuldeep Pd. Yadav (examined as P.W. 2 and P.W. 13 respectively in S.T. Nos. 87/06 and 206/2005), Munna Mandal (examined as P.W. 8 and P.W. 3 respectively in S.T. Nos. 87/06 and 206/2005), Basudev Mandal (examined as P.W. 7 and P.W. 8 respectively in S.T. Nos. 87/06 and 206/2005). In course of search, they visited the house of the appellants-Surendra Mahto @ Pahalwan, Sunil Kumar Yadav, Laxman Yadav and Rajesh Yadav @ Mahto, as they suspected their hands in the said offence. They could meet the appellants-Sunil Kumar Yadav and Laxman Yadav only. There appellant-Sunil Kumar Yadav confessed that he along with appellants-Laxman Yadav and Rajesh Yadav @ Mahto had kidnapped the boy and brought him to Dhanwar from where appellant-Rajesh Yadav @ Mahto took away the victim boy along with unknown persons on his motorcycle. When they mounted pressure upon the appellant-Laxman Yadav to recover the boy, he promised them that he will get the boy recovered within 24 hours. Instead of doing that, appellant-Laxman Yadav absconded. Thereupon appellant-Sunil Kumar Yadav disclosed that the boy is in custody of accused-Arvind Rout and Ram Kumar Rout but the boy could not be recovered. On 19.2.2005, appellant-Sunil Kumar Yadav made a written confession (Ext.1) before the villagers disclosing therein the names of the persons who were involved in commission of the offence. However, on 20.2.2005 the victim boy was recovered.

4. Meanwhile, the I.O. upon registration of the case took up the investigation and succeeded in apprehending the appellants who confessed their guilt. The police

also seized the said written confession under Ext.2. The police also got the statement of appellant-Sunil Kumar Yadav recorded under Section 164 Cr.P.C. whereby he disclosed that it was the appellant-Surendra Mahto @ Pahalwan who had asked him to bring the boy and accordingly, he lifted the boy from the school and gave custody of the boy to the other accused persons.

Apart from appellant-Sunil Kumar Yadav, the police also arrested appellants-Laxman Yadav and Rajesh Yadav @ Mahto and one Dev Narayan (since acquitted). Against them, charge-sheet was submitted upon which cognizance of the offence as aforesaid was taken and the case was committed to the Court of Sessions where the appellants were put on trial in S.T. No. 206/2005.

5. During trial, P.W.1-Ranjeet Kumar, P.W.2-Manoj Kumar and P.W.3-Munna Mandal were examined who all did testify that upon coming to know that the victim boy has been kidnapped, his father was informed and when his father came from Delhi, he along with others including P.W.3-Munna Mandal, P.W.8-Basudev Mandal came to the house of the accused persons as named above. Of them, appellant-Laxman Yadav promised them that he will get the boy recovered but he did not do so. On the other hand, appellant-Sunil Kumar Yadav confessed his guilt before the villagers and made a written confession. P.W.4-Kailash Singh, P.W.5-Khublal Singh, P.W.6-Tuklal Singh did depose that the boy was recovered from Chanchal forest. P.W.7-Sonu Barnwal, a classmate of the victim boy, had disclosed to the Principal of the said school that two persons came to the school on the motorcycle, one of them, who was being called "uncle" by the victim, have taken away the victim boy. P.W.9-Pramod Kumar, P.W.10-Sujeet Kr. Rajak and P.W.11-Umesh Pd. Yadav have been declared hostile.

6. After 11 witnesses were examined, appellant-Surendra Mahto @ Pahalwan was also put on trial along with accused-Ram Kumar Rout in S.T. No. 87 of 2006 after the charge-sheet was submitted against them. Thereafter, both the sessions trial though were not amalgamated but were tried simultaneously.

7. Thereupon, Suresh Mandal-father of the victim boy was examined as P.W.12 in S.T. No. 206/05 who testified in the same manner as has been stated above. Kuldeep Pd. Yadav was examined as P.W.13 in S.T. No. 206/05 who testified that he along with Suresh Mandal including other villagers when apprehended appellants-Sunil Kumar Yadav and Laxman Yadav, they confessed before them that they will get the boy recovered within 24 hours and appellant-Sunil Kumar Yadav made the written confession. Shyam Pd. Saha-informant-Principal of the said School has been examined as P.W.14 in S.T. No. 206/05. Vickky Kumar-victim boy, who has been examined as P.W.15 in S.T. No. 206/05, did testify that while he was playing in the field of the school, two persons came over there; of them, one introduced himself as Rajesh Yadav @ Mahto who asked to come along with them to the S.T.D. booth as his father wanted to talk to him. Believing his version, he accompanied them but instead of bringing him to the Telephone Booth, they started taking him towards the forest and in the way three persons also joined. Upon reaching to the forest, one of them carried him on his shoulder

and kept him under the captivity of two persons who always remained present. He further testified that while he was being taken to Koderma, the miscreants saw the light of the vehicle which was coming to their direction. On seeing this, the miscreants by leaving motorcycle fled away and then he was brought before the Mukhiya of a village by a lady and then the Mukhiya brought him before the police. The victim boy in course of evidence did identify appellants-Laxman Yadav, Rajesh Yadav @ Mahto, Surendra Mahto @ Pahalwan and Dev Narayan whereas he failed to identify appellants-Sunil Kumar Yadav and Ram Kumar Rout. Ramesh Kumar Singh-I.O., who has been examined as P.W.16 in S.T. No. 206/05 and has also investigated the case to some extent, did testify that he had recorded the confessional statements of the appellants who had been apprehended. One Biresh Kumar, Judicial Magistrate, who has been examined as P.W.17 in S.T. No. 206/05, has proved the confessional statement of appellant-Rajesh Yadav @ Mahto made under Section 164 Cr.P.C. as Ext. 5. The I.O.-Birendra Kumar Singh has been examined as P.W.18 in S.T. No. 206/05.

8. It be stated that the photocopies of the testimonies of those witnesses, who were examined as P.W.12 and onwards, were taken on record of S.T. No. 87/06 and the witnesses were numbered as P.Ws. 1 to 9.

9. After closure of the prosecution case, when the incriminating materials appearing against the appellants were put to them under Section 313 of Cr.P.C., they denied it.

10. Thereupon, the trial court taking into account the evidence of the victim boy, examined as P.W.15 in S.T. No. 206/05 and P.W.4 in S.T. No. 87/06 and also the written extra judicial confession (Ext.1) made by appellant-Sunil Kumar Yadav as well as his confessional statement recorded under Section 164 Cr.P.C. (Ext.5) found the appellants-Sunil Kumar Yadav, Laxman Yadav, Rajesh Yadav @ Mahto and Surendra Mahto @ Pahalwan guilty, whereas accused-Dev Narayan and Ram Kumar Rout were not found guilty. Accordingly, the trial court vide different orders passed in S.T. No. 206/05 and S.T. No. 87/06 recorded the order of conviction and sentence against the appellants which is under challenge in different appeals.

11. Ms. Rashmi Kumar, learned counsel appearing for the appellant-Surendra Mahto @ Pahalwan, submits that though the victim boy has identified this appellant in course of evidence but that identification is not on account of the fact that the appellant had participated in the commission of the offence of kidnapping rather the victim boy did identify him as he was quite known to his family members which fact is evident from the evidence of Suresh Mandal, father of the victim boy, who has clearly testified that his family members and other persons were knowing him fully well.

Further, it was submitted that the appellant has been implicated falsely for the reasons that the Suresh Mandal, father of the victim boy, had given him some money on interest and when the appellant failed to return the money, Suresh

Mandal made him to execute a document which was taken by the appellant to be the document of agreement to sale but later on the appellant when came to know that it was a deed of transfer, the appellant wanted to pay back money so that the land be re-transferred but Suresh Mandal was not agreeable to it and hence to put pressure upon the appellant not to put forth that claim, Suresh Mandal got the appellant falsely implicated but no evidence is there even to show that the appellant did anything in the commission of offence of kidnapping except the fact that the victim boy did identify the appellant but that identification is on account of this appellant being known to victim boy. That apart, the name of this appellant also figures in the extra judicial confession (Ext.1) and also in the confession made under Section 164 Cr.P.C. (Ext.5) made by appellant-Sunil Kumar Yadav but those facts cannot be taken to be the substantive piece of evidence and, therefore, in absence of any substantive evidence relating to the appellants' participation in the said offence of kidnapping, the confessional statement made by the co-accused cannot be made basis for conviction as the confession made by the accused can be used only for the purpose of corroboration and under the circumstances, there appears to be nothing against this appellant and hence he deserves to be acquitted.

12. Mr. Ram Lakhan Yadav, learned counsel appearing for the appellant-Laxman Yadav, by adopting the said argument advanced on behalf of appellant-Surendra Mahto @ Pahalwan, submits that similar is the case with this appellant, as this appellant has simply been identified by the victim boy who in his evidence has never testified about any overt act being committed by this appellant and that the identification was on account of the fact that he was also known to the family members of the victim boy which even the victim boy has admitted in his evidence. Since no substantive evidence is there, this appellant cannot be convicted on the basis of the statement made by the co-accused in the written confession (Ext.1) and also in the confessional statement made under Section 164 Cr.P.C. and therefore, this appellant be acquitted.

13. Mr. Mahesh Kumar Sinha, learned counsel appearing for the appellant-Sunil Kumar Yadav, submits that this appellant though is said to have confessed his guilt in his extra judicial confession as well as under judicial confession made under Section 164 Cr.P.C. but that extra judicial confession can never be said to be voluntary one, as one Kuldeep Pd. Yadav, examined as P.W.2 in S.T. No. 87/06, has admitted that the villagers after apprehending this appellant had assaulted him and this fact has also been admitted by Munna Mandal-P.W.8 in S.T. No. 87/06 and thereby when it is apparent that the extra judicial confession was extracted under threat, it cannot be acted upon on account of confession being not voluntary.

Further, it was submitted that admittedly the victim boy has not identified this appellant as the person who had participated in the commission of kidnapping and under the circumstances, any confession made under Section 164 Cr.P.C. cannot be used as substantive evidence and thereby in absence of any

substantive evidence being there, this appellant cannot be held guilty but the trial court did not take into account this aspect of the matter and thereby it committed illegality in convicting this appellant.

14. Ms. Chaitali C. Sinha, learned counsel appearing for the appellant-Rajesh Yadav @ Mahto, submits that though the victim boy, examined as P.W.15 in S.T. No. 206/05, has testified that this appellant along with others kidnapped him but it has never been the case of the prosecution that the victim was kidnapped for the purpose of ransom.

Further, it was submitted that the father of the victim boy has never testified that any demand was made from him though the victim boy in his evidence has testified that the accused persons were telling him that he would be let off only his father will be making payment but the victim boy had never said so in his statement made under Section 161 of Cr.P.C. and thereby the testimony made by the victim boy will not have much bearing.

Further, it was pointed out that the testimony of the victim boy itself depicts that he was never put to fear of death or injury rather the evidence has come that when the victim got tired, he was carried even on the shoulder and was even paid Rs. 150/- for coming to Koderma and under the circumstances, this cannot be a case under Section 364A of the Indian Penal Code rather at best, if any case is made out, that is made out under Section 363 of the Indian Penal Code.

15. Having heard learned counsel for the parties and on perusal of the records, we do find that on the day of occurrence i.e. on 10.2.2005 while the victim-Vickky Kumar was playing along with others, he was called by two persons who had come there on the motorcycle. One of them was addressed by the victim boy as "uncle" who has been identified as appellant-Rajesh Yadav @ Mahto by the victim in course of his evidence. Both of them took the victim boy along with them on the pretext that his father-Suresh Mandal (P.W.1 of S.T. No. 87/06) want to talk to him. They instead of taking the victim boy to the telephone booth took him to the forest where the other persons joined and took custody of the boy. They kept the boy in captivity. Meanwhile, when information was received by Suresh Mandal (P.W.1)-father of the victim, about kidnapping of his son, he came to the village and visited the house of the appellants-Surendra Mahto @ Pahalwan, Sunil Kumar Yadav, Laxman Yadav and Rajesh Yadav @ Mahto along with other villagers but they could meet only appellants-Sunil Kumar Yadav and Laxman Yadav. The appellant-Sunil Kumar Yadav confessed his guilt before the villagers. That confession made before the villagers was reduced in writing (Ext.1). He subsequently made judicial confession (Ext.5). There also he did admit his guilt but the victim boy in course of his evidence did not identify him as the person who kidnapped him or kept in captivity. In spite of that, he has been convicted by the trial court taking into account the confession made by him by way of judicial confession and also in the extra judicial confession. So far as the extra judicial confession is concerned, that never seems to have been made voluntarily as Kuldeep Pd. Yadav (examined as P.W.2 in S.T. No. 87/06) in his

evidence did testify that when appellant-Sunil Kumar Yadav was subjected to assault by the villagers, he promised that he will recover the boy and thereby ample indication is there to hold that the extra judicial confession made in writing (Ext.1) never happened to be voluntary one. So far as the judicial confession is concerned, it appears from the evidence of Biresh Kumar-Judicial Magistrate (examined as P.W.6 in S.T. No. 87/06) that as soon as appellant-Sunil Kumar Yadav was brought to the court by the constable for getting his statement recorded, it was recorded without giving reflection time to the appellant-Sunil Kumar Yadav as a result of which he may not have come out with the influence or the pressure which would have been mounted upon him by the police and thereby judicial confession made by appellant-Sunil Kumar Yadav cannot be taken to be voluntary one. Thus, we do find that no evidence is there against appellant-Sunil Kumar Yadav regarding his involvement in the commission of the offence of kidnapping.

16. Coming to the case of appellant-Surendra Mahto @ Pahalwan, we do find that his name does find mention in the extra judicial confession made by co-convict-Sunil Kumar Yadav as the person who was also involved in the kidnapping of victim boy. Apart from that, this appellant has been identified by the victim boy in his evidence but this appellant is known to the family members of the victim boy which has been admitted not only by the victim but also by his father-Suresh Mandal.

Further, it was pointed out that appellant-Surendra Mahto @ Pahalwan had taken loan from Suresh Mandal (P.W.1), father of the victim boy, and on account of non-payment of the said amount, he at the instance of Suresh Mandal signed over a document taking it as agreement to sale but that was converted by Suresh Mandal as a deed of absolute sale and, therefore, this appellant approached P.W.1 for giving money so that sale deed be cancelled but it was never agreeable to P.W.1. However, P.W.1 in his cross-examination did not accept this fact but he has admitted that appellant-Surendra Mahto @ Pahalwan had sold the land to him. The victim boy has also admitted that appellant-Laxman Yadav was the frequent visitor to his house as he was the friend of his father. Thus, we do find that the victim boy (P.W.4 in S.T. No. 87/06) did identify the appellant-Laxman Yadav, as he was quite known. It would be significant to note that the victim boy has only identified but has not said anything about the overt act being committed by this appellant in the commission of the offence of kidnapping. In that event, it can safely be said that there has been absolutely no evidence against appellant-Surendra Mahto @ Pahalwan. So far extra judicial confession and judicial confession made by co-convict-Sunil Kumar Yadav is concerned, it can not be used as substantive evidence against the other accused rather it can be used for the purpose of corroboration. In absence of any substantive evidence against this appellant, extra judicial confession and judicial confession made by the co-convict cannot have any bearing on the culpability of this appellant.

17. Coming to the case of appellant-Laxman Yadav, we do find that his case also

appears to be almost similar to that of appellant-Surendra Mahto @ Pahalwan, as his name does also find mentioned in the judicial confession as well as extra judicial confession and that apart, he has also been identified by the victim boy, but he in his evidence has not said anything about any overt act being committed by him in the commission of the offence of kidnapping. Further, we do find that this appellant seems to be acquainted with the family members of the victim boy, as the victim boy has testified that he was also the frequent visitor and at one occasion he had taken him to Delhi before this father. Thus, the case of this appellant appears to be as that of appellant-Surendra Mahto @ Pahalwan and thereby it is recorded that no evidence is there against this appellant showing his culpability in the alleged offence.

18. Coming to the case of appellant-Rajesh Yadav @ Mahto, we have already noted that the victim boy has testified that it was appellant-Rajesh Yadav @ Mahto and one unknown person who had come to the school and had taken him on the motorcycle and brought him to the forest. He has also been identified by the victim boy in course of his evidence but the question does arise as to whether in the facts and circumstances, the prosecution has been able to establish the ingredients which should necessarily be there for constituting the offence under Section 364A of the Indian Penal Code? The said provision reads as follows:--

"364-A. 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."

On its perusal, we do find that essential ingredient to attract the provision under Section 364A of the Indian Penal Code is that there has to be demand by the kidnapper from the complainant or from any of his/her relatives asking for payment of ransom and that the victim after being abducted or kidnapped must be under threat of being killed or hurt. Both the ingredients are lacking in this case. None of the witnesses examined on behalf of the prosecution has come forward to say that this appellant had ever demanded money from the father of the victim (Suresh Mandal) or any other relatives nor any evidence is there to the effect that the victim boy was ever kept under threat of life or hurt.

19. In that view of the matter, the conviction of appellant-Rajesh Yadav @ Mahto under Section 364A of the Indian Penal Code is converted into an offence under Section 363 of the Indian Penal Code and is sentenced to the period already undergone by him.

20. So far as other appellants, namely, Surendra Mahto @ Pahalwan, Sunil

Kumar Yadav and Laxman Yadav, are concerned, they are acquitted of both the charges and the judgment of conviction and order of sentence passed against them is hereby set aside. Accordingly, they are discharged from the liabilities of their bail bonds.

21. Appellant-Surendra Mahto @ Pahalwan, who has been in custody, is directed to be released forthwith, if not wanted in any other case.

22. In the result, Cr. Appeal (D.B.) Nos. 974, 819 & 887 of 2007 stand allowed whereas Cr. Appeal (D.B.) No. 925 of 2007 stands allowed but in part.