

(2012) 01 BOM CK 0022

In the Bombay High Court

Case No : Criminal Application No. 349 of 2012

The State of Maharashtra

APPELLANT

Vs

Shaikh Izhar Ahmed and Others

RESPONDENT

Date of Decision : 25-01-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378(1)(3)
Penal Code, 1860 (IPC) — Section 34, 363, 364A

Citation : (2012) BomCR(Cri) 8

Hon'ble Judges : S.B. Deshmukh, J;A.M. Thipsay, J

Bench : Division Bench

Advocate : S.D. Kaldate, app, for the Appellant;

Final Decision : Dismissed

Judgement

S.B. Deshmukh, J.—Heard learned A.P.P. Mr. S.D. Kaldate, for the applicant. He has placed on record compilation of notes of evidence of nine witnesses. The said compilation marked by letter "X" for identification, is taken on record.

2. Facts in brief, of the prosecution case can be summarized as follows :-

Dr.Shaikh Mohammad Ehsan Habib, was running hospital, " Meghraj General Hospital " in Chelipura area at Aurangabad. He lodged a report at Exh.18, at Chhawani Police Station. It was oral report made by P.W.1 Dr.Shaikh Mohammad Ehsan Habib. It was reduced into writing by P.W.9 Mr.Kishor Sonyabapu Nawale, Police Inspector, M.I.D.C. Police Station, Waluj. This report, registered by P.W.9 Mr.Kishor Nawale, Police Inspector, was pertaining to kidnapping of son of P.W.1 Dr.Shaikh Mohammad namely Mohammad Rehman aged about 7 years, was lodged on 5th of January 2011. Based on this report, offences under Sections 363, 364-A read with Section 34 of Indian Penal Code were registered by P.W.9 against the respondents (original accused persons). P.W.9 after registration of the crime No. 6 of 2011, ordered Nakabandi from control room. He had received information that Sillod Police had arrested the respondents (original accused).

Therefore, he alongwith other police staff went at Sillod Police Station. Accused Shaikh Izhar Ahmed and Salim s/o Noor Mohammad i.e. accused No. 1 and accused No. 4, were arrested by the Sillod Police and they also found Kidnapped boy Mehboob Rahman, aged about 7 years. P.W.9 Mr.Kishor Nawale, Police Inspector, took the custody of accused No. 1 Shaikh Izhar Ahmed and accused No. 4 Salim s/o Noor Mohammad. He also seized brown colour Maruti Omni Car allegedly used by the accused persons while committing the crime in question. P.W.9 Kishor Nawale, Police Inspector also recorded the statements of witnesses. He prepared seizure panchanama of the car in the presence of panch witnesses. He found tie of kidnapped boy Mehboob Rehman in the Maruti Car. This tie was also seized under seizure panchanama (Exh.34). He also effected arrest of other three persons i.e. accused No. 2 Mahmood Shah, accused No. 3 Shaikh Kamil Shaikh Raheem and accused No. 5 Syed Shugur, vide arrest panchanamas at Exh.41 to 45 respectively. During the course of investigation, it was transpired that accused had kidnapped the boy Mohboob Rehman for ransom. On completion of investigation, he filed chargesheet in the Court of Judicial Magistrate (First Class) at Aurangabad, against accused.

According to prosecution, Mehboob Rehman s/o complainant P.W.1 Dr.Shaikh Mohammad Ehsan Habib was taking education in Little Flower School at Aurangabad at the relevant time. It is also alleged by the prosecution that Mehboob Rehman son of complainant and daughter of complainant used to attend the school i. e. Little Flower School. Shaikh Ali Hasan, possessed auto-rickshaw No. MH-20-BT-5247 and used to take children to Little Flower School. Children of P.W.1 Dr.Shaikh i.e. Mehoob Rehman and his sister were also being regularly reached to the school and brought home back by Shaikh Ali Hasan, P.W.3. The prosecution, however, claims that on 5th of January 2011, P.W.3 Shaikh Ali Hasan auto rickshaw driver, took Mehboob Rehman, and girl of P.W.1 Mahvish Tarannum from their residence to the school and as per usual practice, parked the auto-rickshaw in the parking of said school at about 1.00 p.m. According to P.W.3 Shaikh Ali Hasan on 5th January 2011, he parked his auto-rickshaw in a parking of Little Flower School. Two-three children, daily commutes, came and sat in his auto-rickshaw as usual. He had gone to bring small children from their class room. He found that bag of Mehoob Rehman s/o P.W.1 Dr. Shaikh was kept in the rickshaw, however, Mehboob Rehman was not in the auto-rickshaw. He asked sister of Mehboob Rehman. He was informed that Mehboob Rehman had been to the school along with her. She had searched him near Bhel Stall and washroom, however could not found. On inquiry, one student, namely, Sushant of Xth standard told him that Mehboob Rehman was taken in brown Maruti Omni Car and that car went towards Panchakki, Aurangabad. P.W.3 Shaikh Ali immediately informed this fact to P.W.1 Dr.Shaikh that Mehboob Rehman had been kidnapped by unknown persons in red colour Omni Maruti Car. This fact was informed by P.W.3 to P.W.1 on mobile PW.1 Dr.Shaikh Mohammad Ehsan reached the school and made inquiry regarding his son Mehboob Rehman with other students. Thereafter P.W.1 Dr.Shaikh Mohammad Ehsan and P.W.3

Shaikh Ali Hasan went Chhawani Police Station and P.W.1 Dr.Shaikh Mohammad Ehsan lodged a report at Exh.18. P.W.3, was aware that kidnapped boy Mehboob Rehman was found at police station Sillod.

3. After filing of the chargesheet, Learned Judicial Magistrate First Class has committed the case to the Court of Sessions, since the offences under Sections 363, 364-A were exclusively triable by Court of Sessions. It was registered as Sessions Case No. 191 of 2011. The learned trial Court after considering the evidence brought on record, acquitted the accused of the offences with which they were charged and tried. It is this judgment of acquittal of the accused persons for the offences punishable under Sections 363, 364-A read with 34 of Indian Penal Code, is questioned by filing application u/s 378(1)(3) of Cr.P.C.

4. The learned trial Court acquitted the accused of the offences with which they were charged and tried, for the following reasons:

(i) The evidence of P.W.1 Ehsan Habib is here-say evidence. There is no dispute that at the relevant time P.W.1 Dr.Ehsan was not at or near the school He received telephone call from P.W.3 Ehsan Ali, autorickshaw driver. The status of P.W.No. 1 Ehsan Habib, even is not claimed to be of eye witness by the prosecution.

(ii) Evidence of P.W.2 Mehmood shah Rehman, alleged kidnapped boy, has been appreciated by the learned trial Court. Learned trial Court arrived at a conclusion that there was no identification parade held by investigation officer. The accused persons, were seen by P.W.No. 2 Mehmoodshah Rehman for the first time in the corridor of Court and they were pointed out by his father and an advocate. This admission has been given by P.W. No. 2 Shaikh Mehboob Rehman. One more reason recorded by learned trial Judge while disbelieving the evidence of P.W.No. 2 Shaikh Mehboob Rehman is tutoring of P.W.2. Un-natural conduct of P.W.2 Mehboob Rehman has also been noticed by learned trial Court, especially, when he was taken by unknown accused persons in the van, no hue and cry was made by him.

(iii) The learned trial Judge found that evidence of P.W.No. 4 Police Inspector Parasram Khedkar and P.W.8 Police Constable Subhash Pawar is contradictory. According to P.W.2 at 1.00 p.m. on the day of incident after school was over, he kept his school bag in auto-rickshaw of P.W.3 Shaikh Ali Hasan. He was called by accused, near the van and was made to sit in brown colour Maruti Van. In the van, he was instructed by the accused that in case of payment of money only, they would release him. He testified that accused were drinking liquor in the van and van was stopped near one temple on account of some mechanical fault. Police came and apprehended two accused persons and three accused persons fled. He, however, identified all accused persons present in the Court. Contrary to this evidence of P.W.2 learned trial Court found that evidence of P.W.4 and P.W.8 shows that alleged omni van was chased up to Anwa Phata and there the van went of the road. They could apprehend two persons (accused) on the spot.

(iv) Learned trial Court recorded finding that the evidence of P.W.3 Shaikh Ali Hasan, auto-rickshaw driver is inadmissible since it is hearsay evidence. It is not a case of prosecution itself, that P.W.3 Shaikh Ali Hasan is an eye witness of alleged kidnapping of P.W.2 Shaikh Mahboob Rehman by accused persons.

(v) No arrest panchanama was prepared by I.O. at the time of arrest of accused. There is no seizure panchanama brought on record and established regarding seizure of Maruti Omni allegedly used in commission of offence. The arrest panchanama of two accused persons and seizure of the Maruti Van has not been effected at Sillod Police Station, even though two accused persons and Maruti Van were taken to Sillod Police Station, according to case of prosecution.

(vi) There was no evidence brought on record to show that Sillod Police had handed over the accused and the van to Chhawani Police Aurangabad.

(vii) The learned Judge also found inconsistent evidence of Chhawani Police Station, Aurangabad and Sillod Police Station. According to learned trial Court, P.W.9 Kishor Nawale, Police Inspector admitted that brown colour Maruti Omni Van was seized by Chhawani Police Station, Aurangabad. According to learned trial Judge, P.W.4 Police Constable Khedkar and P.W.8 Police Constable Subhash Pawar claimed in their evidence that they noticed one Maruti Omni Van coming from Aurangabad and was proceeding towards Jalgaon. Despite their signaling to stop the vehicle, said vehicle went ahead in high speed. It was chased by Police Constable Khedkar with Subhash Pawar on motorcycle. Said Maruti Van met with accident near Anwa Phata and occupants ran away from the van. They caught two accused persons i.e. accused nos.2 and 3.

(viii) The Learned trial Judge, has also considered evidence of P.W.7 Vilas Kale, a panch witness. According to this witness Maruti Van bearing registration number MH-04-Y-7758 was seized by Chhawani Police Station, Aurangabad. This witness is disbelieved by the trial Court since this witness at the relevant time, was employee of P.W.1 Dr.Ehsan Habib.

(ix) The trial Court recorded finding that there was no inquiry or investigation regarding ownership of red colour Maruti Omni van by the police. According to learned trial Judge, it is also not explained by the prosecution as to how this red colour Maruti Omni van came in possession of accused persons. Trial Court has also noticed that the said red colour Maruti Omni van had been returned on bond to the owner Syed Shakil Syed Chand, resident of Jamner, District Jalgaon.

(x) The trial Judge recorded a finding that the prosecution did not examine owner of said red colour Maruti Omni van Mr.Syed Shakil Syed Chand.

(xi) Learned trial Judge disbelieved the evidence of P.W.5 Shreyas Kale, a 10th standard student on the ground that no identification parade of accused was held or conducted by the police to verify and confirm that the accused persons were the same persons, who had taken away victim Shaikh Mehboob Rehman in the Maruti van.

5. Learned trial Judge reached a conclusion that on account of contradictory evidence of prosecution witnesses it cannot be held that accused persons have committed offence of kidnapping of P.W.2 victim Shaikh Mehboob Rehman for ransom, beyond reasonable doubt.

6. The learned trial Judge in para 23 recorded a finding that alleged kidnapping is not proved therefore charge of 364-A of Indian Penal Code fails.

7. With the assistance of learned A.P.P. and we ourselves, have independently re-appreciated the evidence of witnesses examined on behalf of the prosecution. In our considered opinion, the judgment and order of acquittal recorded by the trial Court is legal and proper. There is no infirmity or perversity in appreciation of material brought on record. It is not possible to take a different view based on the same evidence, since the view taken by the trial Court is legal and proper. We, therefore, are inclined to dismiss the application, refusing leave sought for.

8. Criminal application stands dismissed. Leave to file appeal is refused.