
(2013) 11 AHC CK 0167
In the Allahabad High Court
Case No : Criminal Appeal No. 1211 of 2010

Vijay Malhotra @ Nagraj @ Naga @ Karan APPELLANT
Vs
State of U.P. RESPONDENT

Date of Decision : 13-11-2013

Acts Referred:

Citation : (2014) 1 ACR 219 : (2013) 10 ADJ 79 : (2014) 84 ALLCC 190

Hon'ble Judges : Sunita Agarwal, J; Amar Saran, J

Bench : Division Bench

Advocate : S.K. Tiwari, for the Appellant;

Final Decision : Allowed

Judgement

Sunita Agarwal, J.—The accused appellant Vijay Malhotra was put to trial by the Additional District and Sessions Judge, Fast Track Court No. 6, Ghaziabad in S.T. No. 535 of 2007 for committing offences under Sections 363 and 364A I.P.C. The appellant was heard on sentence on 8.2.2010 and was convicted by the Sessions Judge for a rigorous imprisonment for a period of five years alongwith Rs. 10,000/- as a fine u/s 363 I.P.C. In case of default, he had to undergo simple imprisonment for a period of ten months. The appellant was also convicted u/s 364A I.P.C. for life imprisonment alongwith Rs. 20,000/- as a fine. In case of default, the appellant had to undergo twenty months simple imprisonment. All the sentences were to run concurrently. A typed report (Ex.ka-1) dated 9.1.2007 was lodged by one Jamil Ahmad, informant (P.W.2) with the allegation that his two sons, namely, Khalil Ahmad aged about 16 years and Vakil Ahmad aged about 9 years were enticed away by the appellant, Vijay Malhotra under the pretext that he would take them to Chandigarh for outing and further asked them to bring money from their house. The kids were lured by Vijay Malhotra and they took Rs. 33,000/- kept in the money box at the shop of the informant. The appellant Vijay Malhotra ran away with two kids namely, Khalil Ahmad and Vakil Ahmad on 30.12.2007 without giving any information to anybody including the informant. It was further mentioned in the report that on 4.1.2007, between 6

p.m. to 9 p.m. a phone call was received on mobile number 9899252752 of one Abid. Abid told the informant about the phone call of Vijay Malhotra and the informant called back on the S.T.D. number 05944-241923 and 05942-241923 from the mobile of Abid. Vijay Malhotra received the call and demanded ransom of Rs. one lac and further threatened him to pay the amount within 3-4 days at Rampur station. He also threatened that if any report was lodged or information was given to the police he would kill both the kids. The informant was busy in arranging the ransom money. In the meantime on 8.1.2007 at around 6 p.m. one Dori Lal Kashyap came to the house of the informant and told him that the kids were at village Kira. He also told that in Kira, Vijay Malhotra was known as Nagraj alias Naga alias Karan son of Genda Lal (Kori.) As soon as the informant got information he went to the village Kira alongwith A.S. Khan son of M.A. Khan and Shafiq son of Abdul Aziz (P.W. 4) and found the information to be correct that his kids were detained by Vijay Malhotra alias Nagraj alias Naga alias Karan son of Genda Lal(Kori) in his house. The motive for the incident was attributed to the fact that the two kids, namely, Khalil Ahmad and Vakil Ahmad were close to Vijay Malhotra, who was working at the shop of Shafiq Halwai in front of the shop of the informant. Thus he succeeded in luring them with a view to extract money from their father, the informant.

2. Defendant alleged false implication and stated that the kids went alongwith him out of their own volition and he never enticed or lured them to leave their house. The kids were also of his age and they were friends and no ransom was ever demanded. Both the kids were smart enough to take away the money from the shop for their outing.

3. The prosecution in support of its case examined seven witnesses, P.W.1 is Krishna Pal Singh, who was deputed as clerk at P.S. Sahibabad where the report was lodged. P.W. 2 Jamil Ahmad(informant), P.W.3 Khalil Ahmad (victim) son of Jamil Ahmad, P.W.4 Shafiq son of Abdul Aziz, P.W.5 Shafiq son of Mohd. Shadiq, P.W.6 Ram Shanehi Lal, Sub-Inspector at P.S. Milak, District Rampur, P.W. 7 Malkhan Singh, Sub-Inspector, P.S. Sahibabad, District Ghaziabad, who was the Investigating Officer of the incident.

4. The medical examination of the two kids was done on 9.1.2007 itself and the report is that there is no evidence of any injury over the body of the victim. The charges framed were narrated to the accused-appellant, who denied the same.

5. P.W.1 was not examined as his statement was found of no relevance to prove the charges.

P.W. 2, Jamil Ahmad, informant was examined and in his examination-in-chief recorded on 22.4.2008 he narrated the same story as told in the typed report lodged by him on 9.1.2007. It may be noted that in the typed report dated 9.1.2007 as also in his examination-in-chief Jamil Ahamd (P.W.2) submitted that the accused appellant called from Rudrapur. He stated that the appellant asked him to arrange and handover Rs. one lac within a period of 2-3 days at Rampur

station. In his cross-examination on 23.5.2008 he supported his case and stated that he had not given any record of phone call but mentioned the phone number in the First Information Report. He reiterated that the phone call was made by Vijay from Rudrapur.

P.W.3 Khali Ahmad, one of the victim, who was alleged to have been kidnapped narrated the story in his examination-in-chief and cross-examination recorded on 2.6.2008. In his examination-in-chief he admitted to have taken away Rs. 33,000/- from his house and submitted that he alongwith his brother Vakil left the house with the accused Vijay Malhotra and they went to the bus stand. From there they boarded a bus to Rampur around 9 p.m. Vijay Malhotra told them that he would take them to his house first and then they will go to Chandigarh after 2-3 days. In his cross-examination, though he narrated the same story, however he submitted that he was not aware of the place from where the phone call was made by the appellant. Rather he was told by the appellant that the appellant had called Abid on his mobile and informed about them. He also submitted that his father used to scold and hit him for not studying.

P.W.4 Shafiq son of Abdul Ajij, who stated to have accompanied Jamil Ahmad to village Kira and was witness of recovery of two kids, stated in his examination-in-chief that Jamil Ahmad P.W.2 told him that Vijay Malhotra called from Rudrapur on the telephone of one of his acquaintance/friend, that the kids were with him.

P.W.5 is Shaifq son of Mohd. Sadiq, the owner of the sweet-mart shop in which accused Vijay Malhotra was working. P.W.6 Ram Sanehi was Sub-Inspector of P.S. Milak District Rampur, who proved the recovery memo.

P.W.7 Malkhan Singh was the Investigating Officer. P.W.7 Malkhan Singh in his cross-examination on 25.3.2009 stated that he had recorded the statements of the informant and all other witnesses mentioned above including Abid Mehmood son of Ahamd Hasan. On being asked about the mobile call S.T.D. Details, P.W.7 submitted that no evidence had been produced by him regarding mobile calls details of Abid as he did not find it relevant for the purpose of investigation. The telephone number had been given by the informant and it was told that the STD number is of Rudrapur. Two S.T.D Codes were mentioned in the First Information Report with the same telephone number and he did not know as to which S.T.D number was of Rudrapur. He also stated that accused Vijay Malhotra gave threat to the informant for ransom on those STD numbers.

No defence witness was produced and examined.

6. Shri Surendra Nath Tripathi, learned counsel for the appellant made two fold submissions. His first submission is that the two kids namely Khalil Ahmad and Vakil Ahmad were close to Vijay Malhotra and they willingly left their house with Rs. 33,000/- which they took from the shop of his father for their enjoyment.. Only one of the alleged victims, namely, Khalil Ahmad was examined. The other victim Vakil Ahmad, who was stated to be of 9 years, was not examined. As per the story narrated by Khalil Ahmad that he alongwith his brother left the house

with Vijay Malhotra. They went straight to Rampur by bus which they boarded from I.S.B.T., Ajmeri gate. They reached Rampur at around 6.30 a.m. and stayed at the house of Vijay Malhotra till they were recovered on 8.1.2007.

7. Learned counsel for the appellant further submitted that the informant stated in the First information Report lodged on 9.1.2007 and in his statement on oath recorded on 23.5.2008 that the phone number which appeared on the mobile of Abid and on which he had talked with Vijay Malhotra was of Rudrapur. Whereas both the kids went to Rampur and were recovered alongwith the appellant from his house at village Kira, District Rampur. Thus, there is no connecting link of Vijay Malhotra having called for ransom from Rudrapur which is in the State of Uttaranchal. Khalil Ahamd, who was aged about 17 years (when statement was recorded on 2.6.2008) had stated that he alongwith his brother went straight to Rampur by bus with Vijay Malhotra.

8. Learned counsel for the appellant submits that prosecution story of demand of ransom remained unfolded for the reason that the Investigating Officer did not investigate the phone call details which were mentioned in the First Information Report lodged by Jamil Ahmad. The Investigating Officer Malkhan Singh P.W.7 had submitted in his cross-examination that he did not find it necessary to investigate the phone number from which the alleged demand of ransom was made by Vijay Malhotra.

9. Further the statement of P.W.2 was that the STD number which appeared on the mobile of Abid and on which he called back was of Rudrapur, whereas Vijay Mehrotra went to village Kira, District Rampur alongwith the kids as per the statement of P.W. 3 Khalil Ahmad. He further submits that the chain of circumstances as culled out from the statement of P.W. 2 Jamil Ahmad, P.W.3 Khalil Ahmad and P.W 7 Malkhan Singh creates a reasonable doubt about the prosecution story of the kidnapping of two kids and demand for ransom. In view thereof, the entire prosecution story falls for lack of proper investigation into the alleged incident. Moreover, Abid son of Ahmad Hasan was not examined as a prosecution witness though his statement u/s 161 Cr.P.C. was recorded by the investigating officer.

10. His second submission is that the statement u/s 313 Cr.P.C. of the accused Vijay Malhotra recorded by the trial Court is such which caused serious prejudice to the accused. In fact, questions were not properly framed and were not put specifically, clearly and distinctly by the trial Court to the accused during his examination u/s 313 Cr.P.C. Thus a serious irregularity has been committed by the trial Court which has prejudiced the accused-appellant. The incriminating circumstances were not put to him nor he was given any opportunity to explain the same. In this view of the matter also, the conviction of the accused-appellant cannot be sustained.

11. Learned A.G.A. submits that the accused Vijay Malhotra was well acquainted and he had a good relationship with the kids namely Khalil Ahmad and Vakil

Ahmad sons of the informant is sufficient to establish that the kids were enticed away by the accused Vijay Malhotra. Further they were recovered from the house of Vijay Malhotra, which is an undisputed fact. Therefore, the appellant was rightly implicated in the crime committed by him. The fact that he asked the kids to take away money from their house/shop itself shows that he took the kids alongwith him for extracting money from their father. The ransom was demanded by him on the telephone of his friend Abid from Rudrapur so that he could not be traced and caught.

12. Dealing with the first submission of the learned counsel for the appellant regarding inconsistency in the statement of witnesses for implicating the appellant under Sections 363 and 364A I.P.C. It may be noted that though the recovery of kids from the house of the appellant has been proved by the two witnesses, namely, P.W.4 and P.W.6 who were present on the spot. However there is a lacuna in the investigation which goes to the extent of making prosecution story of kidnapping and demand of ransom a false one. The reason behind this is that to prove the kidnapping and demand of ransom, only the informant P.W.2, victim P.W. 3 and one Shafiq son of Abdul Ajij were examined. There is no explanation as to why the other victim namely Vakil and the witness Abid son of Ahamd Hasan were not examined. Of course non-examination of some of the witnesses would not matter if the witnesses examined unfold the prosecution carefully. But it is well established that witnesses essential to the unfolding of narrative on which the prosecution story is based must be examined.

13. The informant Jamil Ahmad's evidence is that on 4.1.2007 appellant called his friend Abid with whom he used to reside. He asked Abid to convey to Jamil Ahmad regarding his demand for ransom for releasing both kids. Jamil Ahmad called back from mobile of Abid on STD telephone number. The appellant picked the phone and told Jamil Ahmad that his kids were with him and demanded ransom of Rs. one lac for their release and further that he called from Rudrapur. So far as the statement of Khalil (P.W.3) victim is concerned, there is inconsistency in his statement regarding demand of ransom as in his cross-examination he stated that he was told by Vijay Malhotra that Vijay had called Abid and gave information about them. But he did not know the place from where the phone call was made.

14. Third witness namely Shafiq (P.W.4) son of Abdul Azij stated on oath that Jamil Ahmad informed him that ransom was demanded by the appellant on telephone of one of his friend/acquaintance from Rudrapur. Even the name of Abid has not been disclosed by Shafiq in his statement. Thus now the result is that the only witness examined by the prosecution is Jamil Ahmad, the informant to prove the story of kidnapping for ransom by the appellant.

15. Abid son of Ahamd Hasan was a key witness who could have unfolded the prosecution case as the alleged phone calls were received and made from his mobile only. Abid seems to be an independent witness and thus an important witness for unfolding of the prosecution case, but he has not been examined.

There is no explanation as to why he was withheld though his statement u/s 161 Cr.P.C. was recorded by the police.

Non-examination of this witness to support the prosecution story of kidnapping for ransom acquires a special significance in view of the material discrepancies with regard to phone calls which leads to conviction of the appellant u/s 364A I.P.C. for life imprisonment.

16. Another intriguing aspect of the prosecution case is the statement of P.W. 7 Malkhan Singh who was the investigating officer. In his cross-examination he very causally stated that he did not find it necessary to examine the details of phone calls for ransom and gave statement that he was not aware as to whether the STD number from which call for demand of ransom was made was of Rudrapur or not. When the phone numbers were given in the First Information Report itself it was incumbent upon the Investigating Officer to go into details of the phone calls and further to investigate as to whether any demand for ransom was made or not. The way the investigation was done shows the causal attitude of the police officer on whom there is an onerous duty to complete the investigation fairly to the best of his ability.

17. In the instant case, neither the Investigating Officer discharged his duty carefully nor the prosecution examined important witnesses. The manner in which investigation was done and further withholding of the independent witness, who could have unfolded the prosecution case creates a reasonable doubt in the mind of the Court about the entire prosecution story. The statement of the sole witness Jamil Ahmad, informant is not sufficient to implicate the appellant under Sections 363 and 364A I.P.C.

18. Careful reading of Section 364A shows that whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping for 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 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.

19. In the instant case the ingredients of Section 364A are found missing as kidnapping or threatening to pay ransom has not been proved by the prosecution with cogent and incriminating evidences. In so far as the Section 363 i.e. kidnapping is concerned it is not borne out from the evidence on record that the appellant had enticed the two kids and taken them away from lawful guardianship with the intention of kidnapping them. This is an admitted fact that the kids were friendly with the appellant Vijay Malhotra and the appellant was also nearly of the same age. It is also admitted that the two kids took away money from the shop of their father where they were also working to help him in the business.

From the circumstances it appears that both the kids went with Vijay Malhotra

alongwith the money to have fun for a few days as they were recovered within a period of eight days i.e. on 8.1.2007.

Moreover, there is one more fact which is bothering the Court that in case Vijay Malhotra had an intention to kidnap the kids for ransom, he would not have kept them with him in his own house at village Kira, District Rampur from where they were recovered. All theses factors show that kids had ran away with Vijay Malhotra and stayed at his house of their own will. Khalil Ahmad in his cross-examination stated that the appellant told that he informed Abid. This also supports the fact that Khalil Ahmad might have been told by Vijay Malhotra that he had informed Abid that the kids were with him at village Kira.

20. Now the second submission of the learned counsel for the appellant with regard to compliance of the provision as contained in Section 313 Cr.P.C. Before dealing with the same, it would be appropriate to go through the provision which reads as follows:

313. Power to examine the accused:

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court

(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under subsection (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may, tend to show he has committed.

(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.

Under the old code, Section 342 was there. Same is reproduced below:

342. Power to examine the accused.--(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the

Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused when he is examined under subsection (1).

21. Now looking to the examination of accused appellant u/s 313 Cr.P.C. It may be noted that five questions were put to him which are as under:

22. In the instant case, phone call for ransom was a vital circumstance appearing in the prosecution evidence. The trial Court did not put this circumstance clearly and distinctly to the accused during examination u/s 313 of the Code. The five questions put to the appellant are in telegraphic language and he denied the same. In fact, questions have not been specifically framed so as to put all the incriminating circumstances before the appellant. The failure to do so amounts to a grave irregularity. The gravity of this irregularity was accentuated by another lapse on the part of the prosecution and that was the failure of the prosecution to produce the most important and crucial witness Abid, having noted that this witness was examined by the police and his statement u/s 161 Cr.P.C. was recorded. He was in the list of prosecution witness and was required to appear to unfold the prosecution story of demand of ransom by the accused.

23. Thus, a serious irregularity has been caused by the trial Court which has prejudiced the accused-appellant. He was not in a position to explain as to why he made a call for ransom on the mobile of Abid that too from Rudrapur which is in the State of Uttaranchal.

24. Dealing with such a lapse by the trial Court, Apex Court in the case of Asraf Ali Vs. State of Assam, , observed in paragraph 21 that Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and the failure to do so amounts to a serious irregularity vitiating the trial, if it is shown that the accused

was prejudiced.

In paragraph 22 it was observed that the object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Recording of a statement of the accused u/s 313 is not a purposeless exercise.

25. The Apex Court relied upon its judgments in *Hate Singh Bhagat Singh Vs. State of Madhya Bharat*, ; *Zwinglee Ariel Vs. State of Madhya Pradesh*, ; *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*, and in *S. Harnam Singh Vs. The State (Delhi Admn.)*, , and held that the circumstances which were relied upon by the trial Court to find the accused guilty were not specifically brought to the notice of the accused. Therefore, in essence, his examination u/s 313 of the Code was rendered an empty formality.

26. In *Basavaraj R. Patil and Others Vs. State of Karnataka and Others*, , in paragraphs 18 and 19 it has been observed that provision is mainly intended to benefit the accused and as its corollary to benefit the Court in reaching the final conclusion.

Paragraph-19 of the said judgement is quoted as under:

At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim *audi alteram partem*. The word may in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the Court does not put any question under that clause the accused cannot raise any grievance of it. But if the Court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well-settled that a circumstance about which the accused was not asked to explain cannot be used against him.

27. The same view was expressed in paragraph 21 in *Vikramjit Singh @ Vicky Vs. State of Punjab*, ; in paragraph 13 in *Ajay Singh Vs. State of Maharashtra*, and in *Shaikh Maqsood Vs. State of Maharashtra*, . Reliance was placed on the judgement of *Hate Singh Bhagat Singh (Supra)* and it was observed that statements of the accused persons recorded "are among the most important matters to be considered at the trial"

28. In the latest judgement of the Apex Court in *Sujit Biswas Vs. State of Assam*, , relevant paragraphs 12 and 13 are quoted below:

12. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person u/s 313 Cr.P.C. is to meet the requirement of the principles of natural justice, i.e. *audi alteram partem*. This means that the accused may be asked to furnish some explanation as regards the incriminating

circumstances associated with him, and the Court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the Court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination u/s 313 Cr.P.C. cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.

13. In *Hate Singh Bhagat Singh Vs. State of Madhya Bharat*, , this Court held, that any circumstance in respect of which an accused has not been examined u/s 342 of the Code of Criminal Procedure, 1898 (corresponding to Section 313 Cr.P.C.), cannot be used against him. The said judgment has subsequently been followed in catena of judgments of this Court uniformly, taking the view that unless a circumstance against an accused is put to him in his examination, the same cannot be used against him. (See also: *Shamu Balu Chaugule Vs. State of Maharashtra*, ; *Harijan Magha Jesha Vs. State of Gujarat*, ; and *Sharad Birdhichand Sarda* (Supra).

29. Thus in view of the well-settled principle of law as indicated in the judgement of Apex Court, it is clear that the purpose of the statement of the accused recorded u/s 313 of the Code is to give him an opportunity to explain the circumstances appearing against him in evidence tendered by the prosecution, so that the said explanation can be weighed vis-?-vis the prosecution evidence before the Court reaches its conclusion in that behalf.

30. In some of the cases depending upon the circumstance, the Apex Court has even remitted the matter back to the trial Court. But the question of remittance in the instant case does not arise for the reason that from the entire circumstances i.e. investigation, non examination of crucial witnesses and lapses discussed above, we find it sufficient to hold that prosecution had failed to uncover its story and incriminating circumstance leading to guilt of the appellant.

31. The kids had willingly gone away with the appellant, and in the absence of any threat, coercion or inducement, we find that it is not possible to rely on the prosecution case to come to the conclusion that the appellant is guilty of the charges framed against him under Sections 363 and 364A I.P.C. The judgement of trial Court is set aside. Appellant Vijay Malhotra alias Nagraj alias Naga alias Karan son of Genda Lal is acquitted of the offences charged. It is found that appellant Vijay Malhotra is in custody. He shall be released forthwith, if he is not required in any other case.

The appeal is allowed.