

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 11 OF 2013

[Arising out of Special Leave Petition (Crl.) No.1636 of 2012]

MD. FAIZAN AHMAD @ KALU

...

Appellant

Versus

THE STATE OF BIHAR

...

Respondent

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. Leave granted.

2. This appeal, by special leave, arises out of judgment and order dated 7/9/2005 passed by the Additional Sessions Judge, FTCl, Begusarai in Sessions Trial No.304 of 2003. In the said Sessions Case, the appellant (A1) along with Mohd. Naushad Alam and Mohd. Sultan (A2 and A3 respectively) was tried for offences punishable under Section 364A read with Section 149 and Section 120B of the Indian Penal Code (for short, "**the IPC**"). Accused Mohd. Dawood, Sahini

Khatoon and Tabbasum Aara (A4, A5 and A6 respectively) were tried for offences punishable under Section 368 read with Section 149 and Section 120B of the IPC.

3. Learned Sessions Judge convicted the appellant and A2 and A3 under Section 364A read with Section 149 of the IPC and sentenced them to undergo rigorous imprisonment for life. They were also sentenced to pay fine of Rs.10,000/-. On failure to deposit the fine, they were directed to undergo simple imprisonment for one year. They were also convicted under Section 120B of the IPC and sentenced to undergo rigorous imprisonment for life. A4, A5 and A6 were convicted under Section 368 read with Section 149 of the IPC and under Section 120B of the IPC. They were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/-. On failure to deposit the fine, they were directed to undergo simple imprisonment for one year. They were also convicted for offence under Section 120B of the IPC and sentenced to undergo rigorous imprisonment for life. All the sentences were ordered to run concurrently. Being

aggrieved by the said judgment and order, the appellant and the other accused preferred appeals to the Patna High Court. The Patna High Court by judgment dated 14/09/2011 confirmed the order of conviction and sentence and dismissed the appeals. The said judgment is challenged in this appeal by the appellant (A1).

4. PW-5 Sazia, aged about 8 years, is the daughter of PW-11 Takki Imam and PW-6 Shirri, aged about 7 years, PW-7 Rehan, aged about 5 years and Arfa Jamal, aged about 3 years are the children of PW-4 Nusrat Bano. According to the prosecution, on 5/10/2002, these children returned from Masjid at about 4.00 p.m. after completing their studies. They went out to play. As the children did not return till 6.00 p.m. PW-11 Takki Imam and PW-4 Nusrat Bano started searching for them all over, but in vain. At about 9.00 p.m. on the same day, PW-11 Takki Imam went to Sahebpur Kaml Police Station and lodged his FIR. We shall deal with the evidence of PW-11 Takki Imam and the FIR lodged by him, a little later but suffice it to say, at this stage, that PW-11

Takki Imam, inter alia, stated in the FIR that he suspected that the appellant had played a role in the disappearance of the children. Investigation was started on the basis of PW-11 Takki Imam's complaint. Statements of PW-5 Sazia, PW-6 Shirri and PW-7 Rehan were recorded under Section 164 of the Code of Criminal Procedure, 1973 by PW-10 Nagendra Tripathi, the then Judicial Magistrate, Begusarai. Pursuant to the statement made by Dawood (A4), the children were recovered on 8/3/2003 i.e. after about 5 months from the tunnel (Surang) made in the house of Sultan (A3). At the trial, the prosecution placed heavy reliance on the evidence of PW-1 Ziauddin and PW-4 Nusrat Bano, who are the parents of PW-6 Shirri, PW-7 Rehan and Arfa Jamal. Reliance was also placed on the evidence of PW-11 Takki Imam. Evidence of PW-5 Sazia, PW-6 Shirri and PW-7 Rehan proved to be crucial. The appellant denied the prosecution case.

5. Learned Sessions Judge convicted and sentenced the appellant as aforesaid. As stated by us, the said order

having been confirmed by the High Court, the appellant is before us.

6. Mr. Manish Kumar Saran, counsel for the appellant contended that so far as the appellant is concerned, this is a case of no evidence. He has been involved in this case on the basis of hearsay evidence and, hence, he deserves to be acquitted. Mr. Samir Ali Khan, counsel for the State of Bihar, on the other hand, supported the impugned judgment.

7. Since learned counsel for the appellant has pitched his case very high and stated that there is no evidence against the appellant at all, we have carefully perused the evidence. In the complaint, PW-11 Takki Imam stated that the appellant was employed in the telephone booth of his cousin PW-4 Nusrat Bano. PW-4 Nusrat Bano removed him from service due to his bad conduct. He further added that he has no enmity with anyone else except the appellant and, therefore, he suspects that the appellant must be behind this abduction. Thus, the FIR is based only on suspicion. In his evidence in the court, PW-11 Takki Imam reiterated the

same story. He stated that PW-4 Nusrat Bano had removed the appellant from the job because of his activities. The appellant used to come to the village and threaten PW-1 Ziauddin, husband of PW-4 Nusrat Bano and, therefore, he was convinced that the appellant had a hand in the kidnapping. He stated that the appellant used to meet Naushad (A2) and Sultan (A3) but in the cross-examination, he stated that he could not tell the date on which the appellant met Naushad (A2) and Sultan (A3). His evidence does not connect the appellant to the abduction at all.

8. PW-1 Ziauddin supported PW-11 Takki Imam about the appellant being employed in the telephone booth of PW-4 Nusrat Bano. He also stated that the appellant was removed from job because of his bad behaviour. He described how the appellant used to get drunk and threaten them. He stated that on the day of incident, the appellant was seen riding a bicycle in the locality. After the abduction of children, a phone call was received in his house. Someone said on the phone that *"your child has been kidnapped,*

inform/talk to you later". He further stated that at 10.00 O' Clock, another call was received saying *"you all pester/disturb Kalu by sending police, has Master Saheb come?"* He then referred to the phone call received by him on 7/10/2002 at 12 O' Clock making a demand of Rs.50,000/-. After referring to the calls received by him, he referred to the search made by him for the children and stated that on 7/03/2003, the police arrested Dawood (A4) and pursuant to the statement made by him, the police visited Sultan (A3) and Tabbasum Aara (A6)'s house. The children were found tied with chains in the underground tunnel of the house of Tabbasum Aara (A6). In the cross-examination, he stated that the appellant worked in his booth from 2001 to 2/1/2002. He paid him a salary of Rs.700/- per month. He stated that the appellant fired at Iftikhar. But, he added that Iftikhar had not made any complaint. He stated that the appellant had got drunk, eight days prior to the date on which he had sent him out of employment. He added that he was not aware of any case registered against the appellant. He stated that he has not

made any complaint about the threats given by the appellant. He clarified that the telephone call was anonymous. He stated that he had seen Tabbasum Aara (A6) visiting the appellant's house, but he could tell the exact time and date. Thus, the evidence of this witness does not, in any way, involve the appellant in the abduction of the children. It appears that this witness also suspected that the appellant was behind the abduction.

9. PW-4 Nusrat Bano confirmed that the appellant was employed in her telephone booth and she had removed him from the job because he used to get drunk and his conduct was not good. According to her, Nushad (A2) and Sultan (A3) used to visit the booth. In the cross-examination, she reiterated the same story. She stated that they had not complained about the threats given by the appellant. It is difficult to connect the accused with the abduction on the basis of the evidence of this witness.

10. It is now necessary to go to the evidence of three children, who were abducted. All the three children stated

that Chanda, daughter of Tabbasum Aara (A6) had come to call them and that they were given laddoos to eat at her house. They described how Tabbasum Aara (A6) took them to the tunnel and how chains were put on their feet. They stated that they were beaten up and burnt with candle. They stated that they were given salt and bread to eat. PW-5 Sazia stated that during five months and three days, when they were in the tunnel, Tabbasum Aara (A6) used to beat them. She stated that Naushad (A2), Sultan (A3), Daud (A4) and Shahini (A5) used to come there. PW-6 Shirri also gave the gory details of the children's confinement in the tunnel. She stated that Dawood (A4) and an old woman used to come there. After narrating similar details, PW-7 Rehan stated that Tabbasum Aara (A6) and Sultan (A3) used to come to meet them. Thus, none of the children stated that the appellant used to visit them. It is pertinent to note that PW-1 Ziauddin stated that the appellant was working in his telephone booth and was familiar with his children. Since the appellant was known to PW-6 Shirri and PW-7 Rehan - the children of PW-1 Ziauddin, they would have referred to

him if he had visited them. PW-11 Takki Imam stated that he had seen the appellant riding a bicycle in the locality on the day of incident. None of the witnesses have claimed that they had seen the appellant on that day nearby the house of the prosecution witnesses. In any case, on the mere statement made by PW-11 Takki Imam that he had seen the appellant riding a bicycle, it cannot be concluded that he was involved in the abduction of children. PW-1 Ziauddin stated that the anonymous caller told him that they were harassing the appellant. The investigating agency has not traced the calls. The callers have not been identified. Therefore, merely on the basis of the said call, the appellant's involvement cannot be held proved. The material witnesses have expressed suspicion but there is not a single credible piece of evidence linking the appellant to the crime in question. We have no manner of doubt that the offence is grave; the children were abducted and kept in a tunnel for over five months and anonymous calls were made for ransom. Accused whose involvement in such crimes is proved must be dealt with with a firm hand, but the

seriousness or gravity of the crime must not influence the court to punish a person against whom there is no credible evidence. The trial court, therefore, erred in convicting the appellant.

11. We are distressed to note that by affirming the trial court's order, the High Court has compounded the error. The circumstances which the High Court has taken against the appellant are: (a) the fact that the appellant was employed in the telephone booth of PW-4 Nusrat Bano; (b) that he was removed from the service due to his misconduct; (c) that he used to give threats and claim his dues from PW-4 Nusrat Bano and her husband; (d) that on the day of incident he was seen in the locality; and (e) that after the incident telephone call was received by the prosecution witnesses warning them not to harass the appellant. According to the High Court all this indicates a well conceived plan with role assigned to everyone. We have already noted that except PW-11 Takki Imam nobody has said that the appellant was seen in the locality on the

day of incident. That he was employed in PW-4 Nusrat Bano's telephone booth and was removed from the service because of his bad conduct appears to be true. But, even if the story that he used to give threats to the prosecution witnesses and demand his dues is accepted, it does not further the prosecution case. There is no evidence on record to establish that infuriated by his removal from service and non-payment of dues, the appellant masterminded the plot to abduct the children or played any active role in abducting them. If a telephone call was received making ransom demand and making grievance about alleged ill-treatment of the appellant, the police should have traced the calls and identified the caller. The police have failed to do so. Criminal courts recognize only legally admissible evidence and not farfetched conjectures and surmises. The High Court's observation that there was a pre-conceived plan to abduct the children would not be applicable to the appellant because there is nothing on record to establish that the appellant met the co-accused and planned a strategy to abduct the children and demand ransom. His case stands on

a different footing from that of the other accused. The case of the other accused will have to be dealt with on its own merit. The High Court was carried away by the heinous nature of the crime and, in that, it lost sight of the basic principle underlying criminal jurisprudence that suspicion, however grave, cannot take the place of proof. If a criminal court allows its mind to be swayed by the gravity of the offence and proceeds to hand out punishment on that basis, in the absence of any credible evidence, it would be doing great violence to the basic tenets of criminal jurisprudence. We hope and trust that this is just an aberration.

12. In the result, we allow the appeal and set aside the impugned order. The appellant – Md. Faizan Ahmad @ Kalu is ordered to be released forthwith, if he is not required in any other case.

13. The appeal is disposed of in the afore-stated terms.

.....J.
(AFTAB ALAM)

.....J.
(RANJANA PRAKASH DESAI)

NEW DELHI
JANUARY 3, 2013

SUPREME COURT OF INDIA



JUDGMENT