

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.M.B. No.222/2008 in Crl. APPEAL No.110/2008**
% **Date of Decision: 19.12.2008**

Dalip Singh Appellant
Through Mr.R.N. Mittal, Sr. Advocate with
Mr.Manoj Kumar, Advocate.

Versus

The State Respondent
Through Mr.M.N. Dudeja, APP for the State
along with SI Satvinder Singh and ASI
Gopi Chand, P.S. Malviya Nagar.
Mr.Chandra Shekhar, Advocate for the
complainant.

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR
HON'BLE MR. JUSTICE V.K. SHALI

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

ANIL KUMAR, J.

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1. The appellant/applicant seeks suspension of his sentence during the pendency of the appeal and his release on bail on the ground that he has been in custody since 31st October, 2000 and he has a good prima facie case in his favour and the balance of convenience also lies in his favour and there is likelihood of his success in the appeal. It is also contended that according to the various pronouncements of the

Supreme Court and this Hon'ble Court, in cases of life convicts, if such a convict is in custody for a period of more than five years then he deserves to be released on bail.

2. The appellant is stated to be a permanent resident of Gurgaon, Haryana having roots in the society and, therefore, it is contended that there is no likelihood of his fleeing from justice.

3. The applicant had also filed an application for interim suspension of his sentence on the ground that the wife of the applicant is suffering from angina and she had to undergo angiography in Criminal M.B No.343/2008 which was allowed by order dated 7th March, 2008 and the applicant's sentence was suspended upto 24th March, 2008 and he was directed to be released on interim bail on furnishing personal bond for Rs.25,000/- with one surety of the like amount to the satisfaction of the trial Court. The interim bail granted to the applicant was somehow extended on same terms and conditions by order dated 24th March, 2008 upto 11th April, 2008. On 11th April, 2008 the matter was adjourned to 23rd April, 2008 and interim bail was extended on the same terms and conditions. On 23rd April, 2008 the matter was again adjourned to 7th May, 2008 and the interim bail was extended till 7th May, 2008. On 7th May, 2008 the regular bench did not assemble.

Therefore, the matter was adjourned to 13th May, 2008 and interim bail was also extended till 13th May, 2008. On 13th May, 2008 the matter was ordered to be listed before another bench as one of the Hon'ble Judge had recorded the evidence of prime witnesses as Additional Sessions Judge and, therefore, the matter was adjourned to 20th May, 2008 and the interim bail was extended. On 20th May, 2008 the matter was again adjourned to 4th August, 2008 and the interim bail was extended till 4th August, 2008. On 4th August, 2008 the counsel for the complainant appeared and pleaded that he has a right to be heard and oppose the bail application and at his request the matter was renotified for 5th November, 2008 and the interim bail was extended. On 5th November, 2008 adjournment was sought by the counsel for the State and, therefore, the matter was adjourned to 28th November, 2008 and the bail was extended. On 26th November, 2008 an application was filed before 28th November, 2008 for adjournment on account of bereavement in the family of the learned counsel for the applicant and, therefore, 28th November, 2008 date was cancelled and the matter was adjourned to 16th December, 2008 and the interim bail was extended. The matter has been heard on 16th December, 2008, 18th December, 2008 and 19th December, 2008 and interim bail was extended till today.

4. The learned counsel for the applicant has contended that the angiography had been completed. The interim suspension of the

sentence was granted on account of angioplasty which was to be done on the wife of the applicant which has already been done and, therefore, there are no grounds to further extend the interim suspension of sentence and interim bail of the applicant.

5. The learned counsel for the applicant has sought regular suspension of sentence during the pendency of the appeal and his release on bail primarily on the ground that the applicant has already undergone 7 years of sentence. The learned counsel has taken us through the evidence in detail and has pointed out certain alleged contradictions. He has contended that though the applicant was alleged to have driven the car no finger prints were picked up from the car. Great emphasis has been alleged by the learned counsel on the fact that though the mobile was used to convey the ransom calls, however, neither any mobile was recovered nor any record of service provider has been established to show that the calls were made nor it has been established that the phone was in the name of the applicant.

6. The learned counsel has also emphasized that seven persons namely PW.1 Sh.Rajinder, PW.2 Sh.Gajraj Singh, PW.5 Sh.Dharam Vir, PW.6 Sh.Ratti Pal, PW.7 Sh.Jagmal Singh and PW.10 Sh.Ramesh have not supported the version of the prosecution. The learned counsel has

also contended that non production of the driver who was abducted along with Subhash Batra is fatal to the case of the prosecution.

7. The learned counsel has also referred to the testimony of PW.8 Sh.Shyam Sunder brother of Sh.Subhash Batra who was allegedly kidnapped by the applicant and has stated that even he has not supported the prosecution version. The learned counsel has taken us through the testimony of PW.4 Sh.Subhash Batra who was allegedly kidnapped and has contended that his testimony is not in consonance with his statement under Section 161 of the Code of Civil Procedure and hence, he cannot be termed as reliable witness for conviction of the applicant.

8. Mr.Mittal, learned senior counsel has also contended that there was no test identification parade and an application filed on 16th November, 2008 few days after the alleged incident was not allowed by the Court and consequently adverse inference has to be taken. According to him nothing has been recovered.

9. The learned counsel has also emphasized that taking into consideration the testimonies of the some of the witnesses, which include pw4, pw9 and pw17 and the version stated in the FIR, no case

under Section 364A of the Indian Penal Code is made out as there were no threats for any bodily harm to Sh.Subhash Batra which is an essential ingredient of Section 364A and in absence of the same, if any case which could be made out against the applicant, it could only be of Section 363 of the Indian Penal Code and in the circumstances continuous incarceration of the applicant is contrary to law. The learned counsel has also asserted that at the time Sh.Subhash Batra was recovered from the Haveli the premises was not even bolted and in the circumstances it is not reasonable to infer any threat to such person. Difference in the ransom demands as in the FIR the amount of ransom is not stipulated whereas there are different versions regarding the amount of ransom being Rs.28 lakhs and Rs.35 lakhs have been given, which casts doubts about the veracity of the prosecution case and in the circumstances the applicant has a prima facie case. The learned counsel has also referred about the revolver which was recovered and which was deposited, however, the same has been missing.

10. The learned counsel for the appellant has also relied on 2003 Cr.Law Journal 1262, Bhagwan Singh and Ors Vs. State of M.P to contend that on account of failure to hold a test identification parade, the applicant cannot be saddled with the offence alleged to have been committed by him. Reliance has also been placed on 149(2008) DLT

306 (DB), Rafiq & Anr Vs. State to contend that in absence of evidence in regard to any threat to cause death or hurt to the kidnapped person and only simple ransom demands made, will not bring the offence under Section 364A of IPC and the case will only fall under Section 363 of the Indian Penal Code. The learned counsel for the appellant has also relied on 2007 (1) JCC 216, Lal Ram Vs. State (GNCT) of Delhi; Madan Gopal Vs. The State (Govt. of NCT of Delhi), 2006 (1) JCC 461; 133 (2006) DLT 315 (DB), Ajay & Anr. V. State of NCT of Delhi; 97(2002) DLT 776 (DB), Id.Mohd Vs. State; Sudhir Aggarwal & Anr. V. State of NCT of Delhi, 2005(2) JCC 1049; 2001 (2) JCC (Delhi) 181, Priya Swami v. The State (N.C.T of Delhi); 2000 CrI.L.J. 4619, Dadu alias Tulsidas v. State of Maharashtra and AIR 1977 SC 2147, Kashmira Singh v. State of Punjab to contend that the applicant is entitled for suspension of his sentence and his release on bail in the facts and circumstances.

11. Mr.Dudeja, learned APP for the State has refuted the pleas and contentions raised by Mr.Mittal, learned senior counsel for the applicant. Relying on AIR 2004 SC 4865, Malleshi Vs. State of Karnataka; Suman Sood alias Kamal Jeet Kaur Vs. State of Rajasthan, AIR 2007 SC 2774 para 57 and Vinod Vs. State of Haryana, (2008) 2 SCC 466, it is contended that in order to attract the provision of Section 364A what is required to be proved is that the accused kidnapped or abducted the person and kept him under detention after such

kidnapping and abduction and that the kidnapping or abduction was for ransom. He contended that if the evidence on record is analysed in this background of Section 364A of Indian Penal Code, the inevitable conclusion is that kidnapping was done with a threat to cause death or hurt to such person and such conduct gives rise to a reasonable apprehension that such person can be put to death or hurt. The learned counsel for the State, Mr.Dudeja has also relied on (2004) SCC 638, Kishori Lal v. Rupa and Ors to contend that only in exceptional cases suspension of sentence and grant of bail should be granted during the pendency of appeal in the High Court. He stated that in the said case direction by the High Court in respect of releasing the convict on bail merely on the ground that during the trial he had not misused the liberties was set aside and the order for suspension of sentence of the High Court was set aside.

12. The learned counsel has also contended that period undergone is not the criterion for suspending the sentence nor the regular suspension can be granted on the ground that the appellant/applicant was on interim bail and during the period of interim bail he has not exploited the liberty granted to him.

13. Regarding non lifting the finger prints, it is contended that the driver of the vehicle had given the statement that he had washed the vehicle and in the circumstances no finger prints could be lifted. Regarding non performing the TIP it has been pointed out that PW.4 Sh.Subhash Batra has categorically stated that the appellant is a dismissed constable from Delhi Police and he is a terror in the area and he runs a notorious group by the name of D.K and he knows the applicant and the other accused very well since past number of years. In the circumstances, it is contended that not performing TIP was not fatal.

14. Perusal of the testimony of PW.4 Sh.Subhash Batra reveals that he deposed categorically that the applicant with other accused had confined him and his driver in a farm house for 6-7 hours and then made him make telephonic calls on his residence at about 5.30 PM and he talked to his wife from the mobile phone given by the applicant. He deposed that he had told his wife that he was in problem and his son should be called and, therefore, the call was again made at about 6.45 PM by the applicant to find out if his son had arrived home or not. Since his son had arrived the call was again made and he spoke to his son and told that the applicant with other accused are demanding two crores and he would be let off only if the demand is met. It was also deposed by PW.4 that the applicant had told him that in case the

demand is acceptable they should display a white flag at the top of the house indicating that the ransom demand raised by the applicant another accused is acceptable to them. The victim has also deposed that he and his driver were removed to village Badshahpur in a maruti car in a haveli and they were lodged in a dingy and dark room of the haveli.

15. We have perused the entire testimony of PW.4. though there are certain portions of depositions of PW.4 which are not in consonance with his statement under Section 161 of the Criminal Procedure Code, however, on considering the entirety of facts and circumstances it cannot be held that the deposition of PW.4 is unreliable. Similarly, the deposition of his son and his wife cannot be held to be unreliable prima facie in the facts and circumstances.

16. The various alleged discrepancies relied on by the learned counsel, Mr.Mittal does not appear to be such so as to make the testimonies of the victim, his son and his wife untrustworthy and to be rejected in totality. They alleged discrepancies in the totality of facts and circumstances appears to be only embellishments and on account of imperfection of memory. The allegation that one witness stated that plain paper was put in the attaché case while the other called it raddi of

newspaper will not be such a discrepancy so as to disbelieve the entire prosecution case in the facts and circumstances or to hold that prima facie no case is made out against the appellant.

17. The driver Santosh could not be examined because the summons sent to him were received back as he was not traceable and had gone to Nepal. The victim had not only known the applicant for past couple of years but he had correctly identified them in the Court and his testimony about the time he was kidnapped and various other factors have also been corroborated from the testimonies of PW.9 and PW.17. The decision to put plain paper which can also be termed as raddi newspaper was taken by the police according to the testimony of the son of the victim PW.9.

18. It is no more res integra that a decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. It is well settled that a little difference in facts or additional facts may make a lot of difference

in the precedential value of a decision. In P.S.Rao Vs State, JT 2002 (3) SC 1, the Supreme Court had held as under:

". There is always a peril in treating the words of judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusion in two cases.

In Rafiq v. State, 1980 SCC (Cr1) 946 it was observed as under:

“The ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and circumstances obtaining in two cases.”

19. The judgments relied on by the applicant are clearly distinguishable. In the case of Rafiq (Supra) relied on by the applicant the testimony was of a child witness which was not very reliable and consequently insistence for corroborative evidence to child's testimony was sought as there was absence of any evidence in the child testimony regarding threat to the life or the body was sought. In contradistinction the testimony on the record categorically reflects the threats extended to the victim. PW.4 had told that threats were given to him by the applicant and other accused that if the amount of ransom is not paid he would be done to death. The son of the victim has also deposed that the accused had told “Apney Pitaji Se Pyar Hai to Paisa ka intjam kar lo aur apne ghar pe safed jhanda laga lo”. In considering the entirety of the

testimonies and even the testimonies of those witnesses who are alleged to have not supported the prosecution version, it cannot be held that no threats were given to the victim. The testimonies of the witnesses who have not supported the version of the prosecution cannot be rejected altogether.

20. In *Bhagwan Singh & Ors (Supra)* the child witness was vacillating in the course of his deposition. The child was six years of age and consistency in his deposition was not expected and therefore it was held that there was a possibility of the child witness being tutored. In such circumstances it was held that there should have been a TIP. Apparently the facts and circumstances of the present case are quite distinguishable. In *Lala Ram (Supra)* a Division Bench of this Court had suspended the sentence in a case under Section 376 of IPC where the prosecutrix had not even told her mother or anyone else in regard to the alleged rape committed by the convict and in the circumstances the sentence of the convict was suspended. In *Surender Singh (Supra)* a Single Judge of this Court had suspended the sentence as the conviction was only on the statement under Section 164 of the Criminal Procedure Code and the prosecutrix was not even examined in the Court. In *Madan Gopal (Supra)* a Division Bench had granted the suspension of sentence which was denied only on account of the convict committing an offence under Section 324 read with Section 34 IPC

while he was undergoing his sentence. In *Ajay & Anr (Supra)* a Division Bench had suspended the sentence in the facts and circumstances of the said case without commenting on the merits and consequently, the ratio of the said case cannot be of any assistance of the applicant. Similarly, on the basis of the precedents relied on by the applicant, *ID Mohd (Supra)*, *Sudhir Aggarwal & Ors (Supra)* and other cases it cannot be held that the applicant is entitled for regular suspension of his sentence and his release on bail.

21. At the time of consideration whether the applicant is entitled for suspension of sentence and his release on bail during the pendency of the appeal, it is not appropriate to go into meticulous examination of the evidence which the learned counsel for the appellant wants the Court to do and to deal in detail with the rival contentions and to embark on a final determination of the contentions raised against any such determination, as even tentative determination may influence the decision in the appeal of the applicant.

22. Mr. R.N.Mittal, learned senior counsel for the appellant, has contended that the applicant be allowed to withdraw the application for suspension of sentence and his release on bail, in case this Court is not inclined to grant the suspension of sentence and release him on bail

during the pendency of appeal. We do not accede to the plea of the counsel for the Appellant/Applicant. We have considered the rival contentions and have also gone through the record before us. After consideration of the contentions and the record and in the entirety of facts and circumstances of the case that the appellant has already been convicted of a serious offence under Section 364A IPC and was not on bail during the course of trial and we are not inclined to suspend the sentence of the applicant during the pendency of the present appeal.

23. In the circumstances, the application of the applicant for regular suspension of the sentence and his release on bail is, therefore, dismissed. We have also held that the applicant is not entitled for extension of his interim suspension of sentence and his interim bail which was on account of ill health of his wife. The interim suspension had been extended from time to time on account of adjournment of the case. There are no grounds to extend the interim suspension of sentence in the facts and circumstance. Consequently, the appellant/applicant who is present in person in Court be taken into custody and be sent to judicial lock up Patiala House Courts, New Delhi to be sent to Central Jail from where he was released on interim bail. With these directions the application is disposed of. It is, however, clarified that anything stated hereinabove shall not be an expression of final opinion on the final merits of the appeal.

Crl. M.A. Nos.13987/2008 & 13986/2008

The learned counsel for the applicants/complainant contends that the applications do not survive and he seeks to withdraw the applications. Dismissed as withdrawn.

Dasti under the signature of the Court Master.

ANIL KUMAR, J.

December 19, 2008
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V.K. SHALI, J.