

THE HIGH COURT OF MADHYA PRADESH BENCH GWALIOR

Division Bench:

(Sheel Nagu & Rajendra Mahajan, J.J.)

CRIMINAL APPEAL No.725 of 2008

Baiju @ Vijay S/o Badri Gaderiya
aged 30 years occupation
Agriculturist R/o village Nandpur
under Police Station Amola district
Shivpuri (M.P.)

Appellant

Versus

The State of Madhya Pradesh
through Police Station Subhashpura
district Shivpuri (M.P.)

Respondent

For appellant :- Shri Anoop Nigam, learned
counsel appointed by the
High Court Legal Services
Committee Bench Gwalior.
For respondent/State :- Ms. Sangita Pachori, learned
Public Prosecutor.

J U D G M E N T

(Pronounced on the 10th day of January 2018)

Per: RAJENDRA MAHAJAN, J.

Accused-appellant Baiju @ Vijay has preferred this
appeal from jail challenging the legality and correctness of

the impugned judgment and order dated 17/7/2008 passed by the First Additional Sessions Judge Shivpuri in Sessions Trial No. 155/2007, whereby he has been convicted and sentenced under the following Sections of the IPC:- 148- R.I for one year; 364-A r.w. 149- R.I for life with a fine of Rs.5,000/- (Five Thousand) in default thereof to further suffer R.I for three years; 365 r.w. 149- no separate sentence is awarded in view of the sentence awarded under Section 364-A r.w. 149; and 302 r.w. 149 (four counts)- R.I for life with a fine of Rs.5,000/- (Five Thousand) in default thereof to further suffer R.I for three years for each out of the four counts with the directions that the substantive jail sentences awarded in the aforesaid Sections of law shall run concurrently and the period of judicial custody he had undergone shall be adjusted in the substantive cumulative jail sentence as per the provisions of Section 428 of the CrPC.

2. The prosecution case as emerged out in the course of trial, in nutshell, is given below:-

(2.1) On 23/7/2001 at about 9:00 pm,
informant Madan Lal (PW-3)

accompanied by Brijesh Sharma (PW-1) made an oral FIR at Police Station Subhashpura district Shivpuri stating that in the morning of 23/7/2001 Permanand and Keshav (Both were later murdered), Banti (PW-7), Sahansah @ Sarle (PW-8), Vimal (not examined due to his death), Kanwar Lal (PW-2), residents of village Karsena, Narayan and Hazrat (Both were later murdered), residents of village Imaliya, had gone to the forest of village Narsinghpur for grazing their domestic animals. In the afternoon of the same day at about 4:00 pm Banti, Vimal and Sahansah came back to village Karsena and informed him that in the forest a gang of dacoits comprising namely Rambabu, Dayaram, Gopal, Pratap, Baiju @ Vijay, the accused-appellant herein, and one unknown dacoit came in the police uniforms with guns and they captured

them and asked their names and whereabouts. Thereafter, they released them by saying to go their villages and to inform the concerned that the gang of Rambabu dacoit has abducted Permanand, Hazrat, Kanwar Lal, Narayan and Keshav and the gang would free them from their custody taking ransom. Abductee Permanand is his brother. Upon the oral FIR, Head Constable Suresh (not examined) recorded F.I.R. Ex.P-4 and registered a case against the aforementioned dacoits at Crime No. 71/2001 for the offence punishable under Section 365 IPC.

(2.2) On 24/7/2001 informant Madan Lal handed over a letter Ex.P/1 to Head Constable Brijmohan Sharma (PW-5) stating that said Banti, Vimal and Sahansah gave it to him, saying that the gang of Rambabu dacoit gave it to them wherein it has been written that the gang

has demanded five lakh rupees in ransom. He seized letter Ex.P-1 from the possession of informant Madan Lal vide seizure memo Ex.P-6 in the presence of witnesses Narendra Singh and Lokendra Singh (not examined). He also prepared spot map at the instance of informant Madan Lal vide Ex.P-17.

(2.3) On 12/8/2001, abductee Kanwar Lal (PW-2) had been released by the gang of said dacoits. Thereafter, he reached Police Station Subhashpura, where Assistant Sub-Inspector Narendra Bhargava (PW-12) has made his recovery memo Ex.P-3.

(2.4) On 11/8/2001, at about 6:00 p.m. Vidyaram (not examined) informed the police at Police Station Mohna of Gwalior district that he saw four dead bodies of unknown persons lying nearby a culvert on the Mohna-Karahi road. Thereupon, J.P. Bhatt (PW-14), the SHO of the police

station, recorded merged intimation Ex.P-29 in each of the four merged cases being Nos. 16/01 to 19/01. Meanwhile, he got a message on wireless-set from Police Station Subhashpura that all the four deceased persons belong to villages Karsena and Imaliya and the police of Police Station Subhashpura with the villagers of Karsena and Imaliya were reaching the place where the dead bodies are lying. J.P. Bhatt with police force reached the place. There, he prepared spot map Ex.P-5 at the instance of Kanwar Lal. In the presence of informant Madan Lal and Mastram Rawat (not examined), he seized blood smeared and plain earth, seven empty cartridges and four scarfs from the place vide Seizure Memo Ex.-P/7. The witnesses present there identified the dead bodies. Thereupon, he held inquest proceedings on the dead bodies of

Permanand, Narayan, Hazrat and Keshav being Ex.P-12 to P-15 in the presence of informant Madan Lal and four other witnesses (not examined). Later, he sent their dead bodies for postmortems to J.A Hospital Gwalior, where Dr. Surendra Singh Jadon (PW-11) performed autopsies on their dead bodies. He opined that Narayan, Hazarat, Keshav and Permanand suffered homicidal deaths due to gunshot injuries on vital parts of their bodies. He gave their postmortem reports Ex.P-22 to Ex.P-25 respectively.

- (2.5) After merg inquiries, J.P. Bhatt lodged FIR Ex.P-35 at Police Station Mohna at Crime No. 0/2001 against dacoits/accused namely Dayaram, Rambabu, Pratap, Gopal, Baiju @ Vijay' the accused-appellant herein, and brother-in-law of dacoit Rambabu. Later, he sent the FIR with other papers

relating to the case to Police Station Subhashpura for their incorporation in the case registered at Crime No. 71/2001.

- (2.6) H.C. Brijmohan Sharma (PW-5) and S.I. Som Raghuvanshi (PW-10) had investigated the case. Brijmohan Sharma recorded the case-diary statements of informant Madan Lal, Banti, Vimal and Sahansah. Som Raghuvanshi recorded the case diary statements of Kaptan Singh, Meharban Singh, Takhat Singh and Brijesh Sharma.
- (2.7) Police Subhashpura sent all the articles collected during the investigation of the case for forensic examinations to FSL Gwalior vide Ex.P-36. As per the record, during the trial of the case the prosecution had not produced the FSL report.
- (2.8) On 1/1/2002, Police Subhashpura filed the charge-sheet against the six accused/

dacoits-namely Dayaram, Rambabu, Gopal, Pratap, Vijay S/o Nadariya and Baiju @ Vijay, the accused-appellant herein, under Sections 364, 365, 302, 147, 148 and 149 IPC and 25 and 27 of the Arms Act in the Court of CJM Shivpuri, declaring them absconding. Thereupon, Criminal Case No. 16/2002 came to be registered. On 22/1/2002, learned CJM issued permanent arrest warrants against them and consigned the case to the record room with the direction that it be kept safe.

(2.9) On 25/5/2007, Police Subhashpura filed an application stating that accused Baiju has been detained in Central Jail Gwalior in another criminal case, therefore, the police be permitted to arrest him in the present case. Thereupon, the learned CJM granted permission for his formal arrest in the present case.

(2.10) On 21/7/2007, Police Subhashpura filed

an application seeking permission for further investigation under the provisions of Section 173 (8) CrPC against accused Baiju on the ground that the investigation of the case was done when he had been in abscondance. The learned CJM granted permission. Thereafter, On 2/8/2007, Police Subhashpura filed additional charge-sheet against accused Baiju for being prosecuted for the aforesaid offences stating that the remaining abovenamed five accused persons had been died.

(2.11) On 17/8/2007, the learned CJM passed the committal order under Section 209 CrPC in respect of accused Baiju. Thereafter, Sessions Case No. 155/2007 came to be registered, which was made over by the Sessions Judge Shivpuri for trial to the First Additional Sessions Judge Shivpuri.

3. On 29/8/2007, the learned ASJ framed the charges

against accused Baiju for the offences punishable under Sections 148, 364-A r.w. 149 in alternative 365 r.w. 149 and 302 read with 149 (four counts) IPC. Accused Baiju pleaded not guilty to the charges and claimed for trial. Thereafter, he was put on trial. In the examination under Section 313 CrPC, accused Baiju had denied all the incriminating evidence and circumstances appearing against him in the prosecution evidence. His defence was, simpliciter, false implication. He did not adduce any oral or documentary evidence in support of his defence.

4. Having analyzed and appreciated the prosecution evidence in the impugned judgment, the learned ASJ has held accused Baiju guilty for the offences punishable under Sections 148, 364-A r.w. 149, 365 r.w. 149 and 302 r.w. 149 IPC and sentenced thereunder as stated in para 1 of this judgment. Feeling aggrieved by and dissatisfied with the impugned judgment, accused Baiju filed this appeal under Section 374 (2) CrPC from jail under the provisions of Section 383 CrPC.

5. We heard learned counsel for the parties at length.

6. Learned counsel for accused Baiju submitted that the learned ASJ has convicted accused Baiju upon the

dock identification and an eye-witness account of Kanwar Lal (PW-2), whereas Banti (PW-7) and Sahansah (PW-8) have not identified accused Baiju before the trial court and they have been declared hostile. He further submitted that Kanwar Lal has admitted in his cross-examination that the police had not got accused Baiju identified by him in the test identification parade after his arrest in the case. As per the evidence on record, the alleged incident occurred during the period between 23/7/2001 and 11/8/2001, and the trial court has recorded the statement of Kanwar Lal on 23/10/2007. Thus, the time gap between the incident and the recording of the statement of Kanwar Lal in the trial court is over six years. In the circumstance, the dock identification of accused Baiju by Kanwar Lal is wholly unreliable. Consequently, the learned ASJ has grossly erred in placing implicit reliance upon his evidence. He further submitted that informant Madan Lal has not stated in the FIR Ex.P-4 that Banti, Sahansah and deceased Vimal gave him jointly a letter Ex.P-1 in which the accused persons demanded five lakh rupees for the release of all the five abductees, whereas on the

following day of recording of the FIR i.e. 24/7/2001 Head Constable Brij Mohan Sharma (PW-5) had seized letter Ex.P-1 from the possession of informant Madan Lal vide seizure memo Ex.P-6. Thus, the letter of demand of ransom Ex.P-1 is forged one. He further submitted that there are discrepancies in the evidence of the prosecution witnesses, which have not been considered by the learned ASJ while appreciating the prosecution evidence. He further submitted that the prosecution case is that all the four deceased persons were murdered for non-payment of ransom by accused Baiju and the remaining accused persons. Thus, they committed only the offence punishable under Section 364-A IPC. But, the learned ASJ has also convicted and sentenced accused Baiju under Sections 148, 365 r.w. 149 and 302 r.w. 149 IPC. As such, the learned ASJ has committed the said legal error. Upon these submissions, he prayed to allow this appeal by setting aside the impugned judgment and acquitting accused Baiju from all the offences in which he has been convicted.

7. In reply, learned Public Prosecutor submitted that as per the evidence on record, Kanwar Lal remained in

the captivity of accused Baiju and the remaining accused persons for some 18 to 20 days, therefore, he came to know accused Baiju and the remaining accused persons by their names, physical features, appearances, the styles of walking and talking. In the circumstance, there was no need for holding the test identification parade for identification of accused Baiju by Kanwar Lal. She further submitted that as per the evidence of Banti (PW-7) and Sahansah (PW-8) they had been released by the accused persons on the same day i.e. 23/7/2001 after keeping them in captivity for a few hours. That is why, they have not identified accused Baiju while giving the evidence before the trial court after a gap of over six years. Therefore, their non-identification of accused Baiju before the trial court does not make any dent in the prosecution case. She further submitted that informant Madan Lal (PW-3) has stated that at the time of recording of FIR Ex.P-4, he gave a letter Ex.P-1 to the writer of the FIR Head Constable Suresh (not examined). His evidence is corroborated by the evidence of Brijesh (PW-1), who accompanied him at the time of lodgment of the FIR at Police Station Subhashpura. Thus, it is a

lapse on the part of Head Constable Suresh for not having seized letter Ex.P-1 in accordance with law at the time of recording the F.I.R. Moreover, letter Ex.P-1 is terribly illegible. She further submitted that there is overwhelming ocular evidence on record that all the four deceased persons and Kanwar Lal were abducted by accused Baiju and the remaining accused persons for getting ransom. Therefore, the seizure of letter Ex.P-1 on the following day of recording of the FIR Ex.P-4 does not affect the prosecution case even a bit. She further submitted that there are minor discrepancies in the evidence of the prosecution witnesses, which are having no material bearing upon the prosecution case. However, she fairly conceded that all the four deceased were murdered for non-payment of the ransom as demanded by accused Baiju and the remaining five deceased accused persons. Therefore, accused Baiju ought to have been convicted only under Section 364-A IPC. In this respect, she submitted that the learned ASJ has convicted accused Baiju under Section 364-A IPC with the aid of Section 149 IPC and sentenced thereunder, therefore, this appellate Court at the most set aside the

conviction and the sentence of accused Baiju under Sections 148, 365 r.w. 149 and 302 r.w. 149 IPC and convicted him simpliciter under Section 364-A IPC in place of 364 r.w. 149 IPC as the learned Sessions Judge sentenced him thereunder to suffer life imprisonment with a fine. Upon these submissions, she prayed that the appeal is devoid of merits and substance, therefore, it be dismissed.

8. We have earnestly considered the rival submissions made at the Bar and perused the entire evidence on record and the impugned judgment.

9. J.P. Bhatt (PW-14) has stated that on 12/8/2001, he reached the place where the dead bodies of four persons were lying. He issued safina forms Ex.P-8 to P-11 inviting the witnesses present there to identify them and to assist him in drawing the inquest proceedings. The Panch witnesses had identified the dead bodies as those of Permanand, Narayan, Hazrat and Keshavram. Thereupon, he prepared inquest reports Ex.P-12 to P-15 respectively. He has also deposed that in the opinion of Panch witnesses and that of him they were prima facie died of bullet injuries which they had found on their dead

bodies. He has also deposed that he had sent their dead bodies for postmortem examinations.

10. Dr. Surendra Singh Jadon (PW-11) has deposed that on 12/8/2001 in J.A. Hospital Gwalior, he conducted the postmortem examinations on the dead bodies of Narayan, Hazrat, Keshavram and Permanand and gave autopsy reports Ex.P-22 to P-25 respectively. According to his opinion, they suffered homicidal deaths due to gunshot injuries which were on the vital parts of their bodies. They had died within 6 to 36 hours before the commencement of postmortem examinations by him.

11. Upon the perusal of the cross-examinations of both the witnesses, we find that the defence has not impeached the credibility of their evidence and their opinion regarding the nature of the deaths of all the four deceased persons. Therefore, we hold that the learned ASJ has given a correct finding that they had suffered homicidal deaths.

12. Informant Madan Lal (PW-3) has testified that in the morning of the day of incident, all the four deceased namely Permanand, Narayan, Hazrat and Keshavram and Kanwar Lal, Banti, Sahansah and Vimal had gone to the

forest nearby village Narsinghpur for grazing their domestic animals. In the afternoon of the same day about 4:00 p.m., Banti, Sahansah and Vimal told him that accused Baiju and other accused persons named in the FIR had abducted Kanwar Lal, Permanand, Narayan, Hazrat and Keshavram and they had given a letter Ex.P-1 to them in which they have made a demand of five lakh rupees for their release. Thereupon, he lodged FIR Ex.P-4 in the night of the same day at Police Station Subhashpura having been accompanied by Brijesh (PW-1). The aforesaid evidence of informant Madan Lal is corroborated by the evidence of Brijesh (PW-1), Banti (PW-7) and Sahansah (PW-8). Upon the perusal of their cross-examinations, we find that there are minor discrepancies which had been occurred in our confirmed opinion due to lapse of memories. However, there is nothing in their cross-examinations to disbelieve their evidence. Kanwar Lal (PW-2) and Brijesh (PW-1) have stated in their examination-in-chief that at the time of lodgment of the FIR Ex.P-4, the writer of F.I.R. was given letter Ex.P-1. However, as per seizure memo Ex.P-6, letter Ex.P-1 was seized by Head Constable Brijmohan

Sharma (PW-5) on 24/7/2001 i.e. one day after the lodgment of FIR Ex.P-4. In our opinion, seizure of letter Ex.P-1 on the next date of lodgment of the FIR does not make it a forged letter because of the evidence of Banti (PW-7) who has stated that the said letter had been written in his presence. At the most, it may be a lapse on the part of the writer of the FIR Head Constable Suresh that he had not seized it at the time of recording of the F.I.R. From the analysis of the evidence of the aforesaid witnesses, we hold that all the four deceased persons and Kanwar Lal were abducted by accused Baiju together with the remaining five accused persons for an objective to seek ransom from their family members.

13. Kanwar Lal (PW-2) has testified that on the date of incident Permanand, Narayan, Hazrat, Keshavram, Banti, Sahansah and Vimal and he were grazing their domestic animals in the forest nearby village Narsinghpur with some distances from one another. One tribal man came to him and told him that the police have summoned him. Thereupon, he went with him. There, he saw accused persons namely Dayaram, Rambabu, Gopal, Pratap, Vijay and Baiju, the accused-appellant, in police uniforms and

with them Permanand, Narayan, Hazrat and Keshavram. They abducted them. They took them deep in the forest. They kept them for about 16 days in the forest. Later, they freed him in the forest nearby Aron village, saying that they had not so far received the ransom, therefore, they would murder Permanand, Narayan, Hazrat and Keshavram. Some time later, he heard that they had been shot down by accused Baiju and the remaining accused persons. He has also identified accused Baiju in the course of his evidence before the trial court, and he has also stated that accused Baiju used to poke him and all the four deceased persons with a stick. He has also proved that the police made a recovery panchanama of him being Ex.P-3. In his cross-examination in para 4, he has admitted that the police had not held test identification parade for identification of accused Baiju by him.

14. At this stage, we will first consider the impact of non-holding of test identification parade of accused Baiju preceded by his dock identification by Kanwar Lal over the reliability of his evidence. As per the evidence of Kanwar Lal, his recovery memo Ex.P-3 and F.I.R. Ex.P-4,

it appears that Kanwar Lal remained in the captivity of accused Baiju and the remaining five accused persons for about 20 days and during that period they took him to various places with them in the forest. Therefore, Kanwar Lal had got better acquainted with accused Baiju and the remaining accused persons by their names and physical features for having been in their company for about 20 days. Kanwar Lal has deposed that accused Baiju used to poke a stick in the body of him and all the four deceased persons. Thus, the physical features, the appearance and body language of accused Baiju have been deeply embedded in the memory of Kanwar Lal as his tormentor. In the circumstances, holding of test identification parade of accused Baiju was not necessary after his arrest in the case, and the dock identification of accused Baiju by Kanwar Lal cannot be doubted after the gap between the incident and his evidence before the trial court of over six years. It is well settled in law that the identification of an accused in the test identification parade is a primary evidence and the substantive evidence of identification of an accused by a witness is before the trial court, and the evidence of a witness on

the point of identification cannot be disbelieved because of non-holding of test identification parade if the evidence of an eyewitness on the point of identification is found to be trustworthy and without any ill motive. Our aforesaid views are fortified by the decisions rendered by the Supreme Court in the cases of Jadunath and Ors. Vs. State of U.P., AIR 1971 SCC 363, Daya Singh Vs. State of Haryana, (2001) 3 SCC 468, Dana Yadav Vs. State of Bihar, (2002) 7 SCC 295, State of Rajasthan Vs. Daud Khan (2016) 2 SCC 607 and Noor Mohammad and Ors. Vs. State of Karnataka, (2016) 3 SCC 325.

15. Upon the perusal of cross-examination of Kanwar Lal, we find that the defence has failed to undermine the credibility and truthfulness of his evidence. We also find that there is no material contradictions and inconsistencies between his case diary statement Ex.D-1 and his evidence before the court. Moreover, we do not find any motive on the part of Kanwar Lal to give false evidence against accused Baiju. Therefore, we hold that Kanwar Lal is a witness of truth and we place implicit reliance upon his evidence. From the aforesaid analysis of his evidence, we hold that accused Baiju and

the remaining accused persons had abducted him and all the four deceased persons for the purpose of getting ransom from their family members.

16. Kaptan Singh (PW-4) and Takhat Singh (PW-6) are the brothers of deceased Narayan and the father of deceased Keshavram respectively. They have stated in their examination-in-chief that Narayan and Keshavram with Hazrat and Permanand were abducted when they had gone to the forest nearby village Narsinghpur for grazing their domestic animals in order to get ransom from their family members. They had been murdered by the abductors because of non-payment of ransom to them. They have stated that Kanwar Lal had been released by the abductors. He told them that all the four deceased persons and he were abducted by accused Baiju and the remaining five accused persons. Upon the perusal of their cross-examination, we find some discrepancies in their evidence which are of minor nature and do not affect the reliability of their evidence. Thus, we hold their evidence is inspiring to the extent of abduction of all the four deceased persons and Kanwar Lal by a gang of dacoits of which accused Baiju is one of

the members for the purpose of getting ransom.

17. From the aforesaid critical analysis of evidence on record, we hold that all the four deceased persons and Kanwar Lal were abducted by accused Baiju and the remaining accused persons to extract ransom from their family members and on account of non-receiving the ransom, they gunned Permanand, Narayan, Hazrat and Keshavram down. Therefore, they had committed the offence punishable under Section 364-A IPC. Thus, the learned ASJ has rightly convicted accused Baiju for the offence punishable under Section 364-A IPC. Since accused Baiju and the remaining accused persons abducted all the four deceased persons and Kanwar Lal with an objective to get ransom, the learned ASJ has committed a legal mistake in convicting and sentencing accused Baiju for the offences punishable under Sections 148, 365 r.w. 149, 302 r.w. 149 and 364-A with the aid of 149 IPC instead of convicting and sentencing him under Section 364-A IPC simpliciter. Thus, the conviction and sentence awarded to accused Baiju under Sections 148, 365 r.w. 149 and 302 r.w. 149 IPC are liable to be set aside. We have noticed that learned ASJ has awarded

accused Baiju five thousand rupees as fine sentence under Section 364-A IPC and in default thereof to further undergo jail sentence for a period of three years. In our opinion, the default jail sentence is highly excessive. Therefore, we reduce the default jail sentence from a period of three years to a period of three months.

18. For the foregoing reasons and discussion, we allow this appeal in part upholding the conviction and jail sentence of accused Baiju under Section 364-A IPC simpliciter in place of 364-A r.w. 149 IPC and reducing the default jail sentence thereunder to a period of three months from a period of three years and setting aside his convictions and sentences under Sections 148, 365 r.w. 149 and 302 r.w. 149 IPC.

19. Accordingly, this appeal is finally disposed of in the terms mentioned in the preceding para.

(Sheel Nagu)
Judge

(Rajendra Mahajan)
Judge

AKS