

Suresh Vs. State

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Court : Delhi

Decided On : Jul-30-2013

Judge : G. S. Sistani

Appellant : Suresh

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of Decision : July 30, 2013 + CRL.A. 656/2010 SURESH Through : Appellant Ms.Charu Verma, Adv. versus STATE (NCT OF DELHI)Respondent Through : Ms.Richa Kapoor, APP. CORAM: HON'BLE MR. JUSTICE G.S.SISTANI HON'BLE MR. JUSTICE G.P. MITTAL G. S. SISTANI, J.

(Oral) 1. Present appeal, filed under Section 374(2) of the Code of Criminal Procedure, is directed against the judgment dated 29.10.2009 and the order on sentence dated 03.11.2009, whereby the appellant, Suresh, has been held guilty by the trial court for the offence punishable under Sections 363/302/201 IPC and directed to undergo rigorous imprisonment for life and pay a fine of Rs.50,000/- under Section 302 IPC and further sentenced to rigorous imprisonment for a period of seven years and pay a fine of Rs.5,000/- under Section 363 of IPC. Appellant was also sentenced to undergo rigorous imprisonment for a period of three years and pay a fine of Rs.3,000/- under Section 201 IPC. It was directed that all the sentences would run concurrently.

2. The case of the prosecution as noticed by the learned Additional Sessions Judge is as under:(i) Case of the prosecution as disclosed from the report under Section 173 Cr.P.C. is to the effect that on 23.11.2006 at 3:32 pm. Const. Ved Pal of PCR informed Police Station Kalyan Puri that one Balram Sharma S/o Nand Lal Sharma R/o 8/146, Kichri Pur, Delhi has informed that his son Dhananjay aged 3 years has been taken away by his neighbour Suresh. DD No.15A (Exhibited as Ex.PW-4/A) was recorded by Duty Officer at PS Kalyan Puri and was handed over to ASI Zile Singh for further action. ASI Zile Singh along with Const. Ajay Kumar proceeded for the spot. At about 4.30 pm, Sh.Balram Sharma got lodged DD No.20A (Exhibited as Ex.PW-4/DA). On 24.11.2006 Sh. Balram Sharma gave his statement to ASI Zile Singh to the effect that on 23.11.2006 he was sleeping and his wife had been away from his house in connection with some domestic work. That she came back around 12.50 noon and asked as to where Dhananjay was. Sh. Balram Sharma stated that he might have been to school. That when school bag of Dhananjay was found at the house itself then suspicion arose and search for Dhananjay was made by him and his wife. That Dhananjay is wearing a full sleeves shirt of white colour, a full pant of Maroon colour (Matmailla colour) and is 2.5 feet in height. (ii) A case under Section 363 IPC was registered and search for Dhananjay was made. Usual methods of search in the form of sending wireless messages, publication of pamphlets / ishtihar (shore goga) and their affixation at different public places, sending of the information to the Police Stations through CRO about missing of Dhananjay, sending of photograph of Dhananjay to Missing Persons Squad, making of enquiries in different probable places etc. etc. were employed. (iii) Supplementary statement of Balram Sharma was recorded on 25.11.2006 wherein he placed suspicion on accused Suresh, his neighbour. The reason due to which suspicion on Suresh was raised was that Dhananjay @ Monu was last seen in the company of accused Suresh by the other son of Balram Sharma namely Mrityunjay. Another reason of suspicion was that initially Suresh was helping in the search of Dhananjay but he suddenly disappeared. It was also stated that the accused Suresh had disappeared after inquiries were made by the Police from him. (iv) On 03.12.2006 police party consisting of Const. Prem Pal Singh and Tej Bahadur was formed. This party along with complainant went to different probable places of availability of accused Suresh but Suresh could not be

traced despite best efforts. (v) On 13.12.2006, investigation was handed over to Insp. Mohan Singh. He along with Const. Tej Bahadur went to the native village and other probable places of availability of Suresh but of no avail. He made various efforts to trace Dhananjay including intercepting of suspicious telephone numbers, publication of the information in the newspapers, issuance of hue and cry notice, declaration of award of Rs.25,000/-, publication of photographs of Dhananjay along with accused Suresh in newspapers, search of accused at Lucknow, Hardoi etc., making of enquiries from the accused persons involved in Nithari killings of children etc. etc. (vi) On 14.1.2007, in pursuance of a secret information, accused Suresh and Ram Prasad were apprehended from near Durga Puri Drain, Gali No.8 at the instance of Secret Informer and complainant Balram Sharma. Both the accused persons made disclosure about commission of the offence and after completion of requisite formalities, accused persons were arrested in the case. Disclosure statement of accused Suresh was reduced in writing. Accused Suresh disclosed about taking of the child to the house of Sunita at Noida. He also disclosed about the conversation which took place between him and Sunita. He also disclosed about the manner in which Dhananjay was murdered in the nearby jungle of NOIDA (Sector 32). He also disclosed that child was done to death by him and Ram Prasad and thereafter he was put on fire in order to destroy any proof. Accused Ram Prasad also made a disclosure statement on the similar lines. It was further disclosed that Dhananjay was kidnapped for the purpose of asking ransom from Sh.Balram Sharma. (vii) Insp. Mohan along with accused Suresh and Ram Prasad after obtainment of necessary permission went to the disclosed place at Noida and in pursuance to the disclosure statement got the case converted to a case under Section 364A/302/201/120B/34 IPC. Insp. Mohan Singh got the spot inspected and prepared site plan without scale. He summoned the crime team, got the spot photographed and videographed. Fingerprints could not be obtained. Insp. Mohan Singh seized 81 remains of the bones, burnt skull pieces, pouches of Ratna Khaini, 8 small and big stone pieces on which Dhananjay was burnt, burnt soil sample, earth control sample etc. CrI.Appeal No.656/2010 Parcel No.1 consisting of remains of Page 4 of 30 burnt bone pieces, skull bones and pouches of Ratna Khaini (partly burnt) lying near the dead body was kept in LBS Hospital Mortuary

whereas other parcels which were given Serial No.2 to 5 were deposited in the malkhana. (viii) On 15.1.2007, police remand of accused persons for one day was taken. (ix) On 16.1.2007 Post Mortem was got conducted on the remnants of the dead body vide report No.13/07. Spot of crime was got inspected by the Autopsy Doctor and the dead body was handed over to Balram Sharma. Statement of Smt. Sunita was got recorded under Section 164 Cr.P.C. On 19.1.2007, in pursuance to an application dated 16.1.2007, it was opined that possibility about homicidal manner of death cannot be ruled out. Insp. Mohan Singh deposited the case property in malkhana and got the scaled site plan prepared. Requirements for conduction of DNA test were fulfilled and accused persons were sent for trial. (x) After supply of copies to the accused persons, Ld. MM committed the case to the Court of Ld. Sessions Judge and case was assigned to my Ld. Predecessor.

3. In order to prove its case prosecution examined 24 witnesses.

4. Counsel for the appellant submits that the learned trial Court has failed to appreciate that mere mentioning of the appellants name in DD No.15A recorded PCR does not ipso facto make the appellant guilty. It is contended that the Court has grossly erred and over-looked the circumstances which are germane to decide the case. It is contended that in DD No.20A, the allegation of appellant carrying away deceased does not find any mention and the prosecution did not adduce any evidence in this regard. It is further contended that the appellant was not named by the father of the missing child in his statement recorded under Section 161 of the Cr.P.C. and thus the inclusion of the name of the appellant is an afterthought and is not based on sound tenets of law.

5. Counsel also submits that relevant witnesses have not been examined in this matter. The SHO concerned who was present during the investigation was not included in the list of witnesses. The local police was not associated nor any independent witness was associated at the time of recovery which took place in an open place, which is accessible to all. It is also submitted that the examination of Sunita, PW-2A was taken under duress to support the case of prosecution. The version of Sunita was vindictive in nature and was not corroborated with any other cogent evidence. She was an interested witness and her evidence is liable to be

discarded. It is also submitted that the testimony of PW-2A, Sunita cannot be relied upon as she was inimical to the appellant. No witness, not even the persons from the neighbourhood were taken into confidence in this case.

6. Counsel further submits that evidence of Mrityunjay PW-7, the brother of the deceased, who was six years of age, is unreliable. There is always a chance of tutoring a child of tender years and thus his testimony could not have been taken into consideration for conviction of the appellant. Whereas the entire conviction is based on the statement of Mrityunjay, which is impermissible in law. The child was below seven years of age, immature in understanding and his statement is liable to be rejected, as it is without any evidentiary value. Counsel further submits that the prosecution has failed to prove its case beyond any reasonable doubt. No cogent evidence was produced to implicate the appellant and thus, he deserves benefit of doubt.

7. It is next submitted that the case of the prosecution is based on circumstantial evidence and the circumstances relied upon by the prosecution do not prove the guilt of the appellant. It is submitted that there is a grave fallacy in the judgment of the trial court in arriving at a conclusion, as it is based on grounds which involve the appellant in the commission of offence, such as last seen evidence, absconding of the appellant and recovery at the instance of the appellant. The trial court has ignored the fact that the appellant had in fact helped in searching of the child who was missing and it is only an afterthought on the part of the prosecution witnesses that the appellant was named to have committed the crime. Counsel further submits that in this case neither the motive of the crime has been proved nor any ransom call was made to the father of the child by anyone. It is also contended that the theory of last seen will not be applicable in the facts and circumstances of the present case as there is no proximity between the deceased being last seen in the company of the appellant and the discovery of his dead body.

8. Counsel for the State to the contrary submits that the prosecution has been able to prove its case beyond any shadow of doubt. In the first DD entry which was made being DD No.15A to the PCR, the appellant has been named by the father

of the missing child. Attention of the court is drawn to Exhibit PW-11/A, police control room form no.1, to show that on 23rd November, 2006 at 15.27 hours, information was received that a three and a half year old child of PW-1 has been taken away by neighbour Suresh, as told to him by his elder son. This form stands duly proved in the evidence of PW-11, as to which there was no cross-examination. The first DD entry also stands duly proved, which would show that the finger of suspicion was on the neighbour Suresh the appellant herein and this information was given to the police at the first opportunity available.

9. Counsel submits that much cannot be read into the fact that name of Suresh does not find mention in the FIR. Strong reliance is also placed on the evidence of Sunita, PW-2A, who has deposed that the child was referring to the appellant as uncle and she had advised the appellant to return the child to his parents. Counsel further submits that merely because public witnesses were not joined, it cannot dent the case of the prosecution as evidence of police witnesses, if cogent and reliable can be relied upon by the Court. It is further submitted by counsel for the State that PW-5 was a witness to the recovery which was made and the recovery of the remains of the dead-body was made at the instance of the appellant.

10. We have heard the counsel for the parties, Ms.Charu Verma, counsel for the appellant and Ms.Richa Kapoor, counsel for the State, considered their rival submissions and also perused the record of the trial court. On 23rd November, 2006 at 3:32 p.m. constable Ved Pal of PCR informed Police Station Kalyanpuri that one Balram Sharma had informed that his three and a half year old son had been taken away by his neighbour, Suresh; DD No.15A (Ex.PW-4/A) was recorded by the duty officer and handed over to the ASI for further action. Statement of Balram Sharma was recorded on 24.11.2006 under Section 161 Cr.P.C. and search of the missing child was made. Supplementary statement of Balram Sharma was recorded on 25.11.2006 wherein he placed suspicion on appellant Suresh, his neighbour for the reason that his son was last seen in the company of the appellant by his elder son Mrityunjay. The second reason for the suspicion was that initially the appellant Suresh was helping in the search of Dhananjay, but he suddenly disappeared.

11. PW-1 Balram Sharma, father of the missing child; PW-2, Smt.Sharda, mother of the missing child and Smt.Sunita, second PW-2 referred to as PW-2A are the three material witnesses. We deem it appropriate to reproduce their evidence:

PW-1 Balram Sharma son of Sh. Nand Lal Sharma, 30 years, R/o H.No.8/146, Khichripur, Delhi. On S.A. I do welding works. I manufacture grill, gate etc. I do these works at site of the parties. I have three sons, namely, Atul Kumar, Mritunjay and Dhananjay. Sharda is my wife. On 23.11.2006, at about 11:00 am or 11:30 am, I was present at my house. At that time, I was sleeping. My wife reached home at about 11:40 or 12:00 noon. She had gone out about one hour ago. She made me to awake and inquired as to where our children were. I told her that they might have gone to school. When, she enquired from the school, she came to know that Dhananjay was not present in school. My son Dhananjay and Mrityunjay were studying in M.C. Primary School, Block No.7-8, Khichripur, Delhi. When we inquired from Mrityunjay then he told that Dhananjay was taken by uncle. We searched for Dhananjay, but he was not traceable. At about 3:00 or 3:30 pm, we gave a telephone call to police control room, informing that my son Dhananjay was missing and we were apprehensive that he was taken away by Sanjay, as told by my son Mrityunjay. At about 4:00 or 4:30 pm, I lodged a missing report at PS Kalyan Puri, Delhi. Thereafter, accused Suresh, present before the court met me at the place near our tenanted accommodation. Accused Suresh also resides in a room in the very house, where I reside as a tenant in a room. I inquired from him as to where he had left my son. He answered that my son had not gone with him. Suresh helped me in search of my son for about 1 hour. Thereafter, he went somewhere and met me again at about 9:00 or 9:30 pm. On 24.11.2006, I lodged a report against accused Suresh, which is Ex.PW-1/A. It bears my signature at point A. My son Dhananjay was aged about 4 years. My son Dhananjay was wearing full sleeve shirt and a full pant of brown colour. He was bared footed. Thereafter accused Suresh absconded, leaving his wife and children in his tenanted room. On 14.01.2007, I joined investigation with Inspector Mohan Singh, Addl. SHO, PS Kalyan Puri, Delhi. We went to Durga Puri. Accused Suresh along with his associate Ram Prasad, who is also present before the Court was apprehended from a road in Durga Puri, Delhi. Name of accused Ram Prasad was revealed to me later on. They were brought to PS. They were interrogated. Arrest

memos Ex.PW-1/B and Ex.PW-1/C, bear my signatures. Personal search memos Ex.PW-1/D and Ex.PW-1/E also bear my signatures. Accused Suresh made a disclosure statement disclosing therein that he can point out the place, where bones of Dhananjay were lying in Sector 32, Noida, U.P. His disclosure statement was recorded, which is Ex.PW-1/F, which bear my signature at point A. Thereafter, I went home. After two days, I was taken to LBS Hospital, Khichripur, there postmortem on bones of my son was got done. After postmortem examination, remains of my son were released in my favour. I buried bones of my son. My statement was recorded, when bones of my son were handed over to me, which statement is Ex.PW-1/G. After about four months, I along with my wife were taken to Rohini, where our blood samples were taken. I cannot tell anything about motive of abduction and murder of my son. xxxxxx by Sh.Dasa Ram, Adv. for accused Suresh. Accused suresh is a native of village Bari Nazirpur, District Hardoi, U.P. He was residing in a room adjacent to my room from last four months. Accused Suresh is a washer man, hence I was not having visiting terms at his tenanted accommodation. I am Sharma by caste. I had never been to native village of accused Suresh. Again said I had gone to his village, when my son went missing. I had gone to his native village along with police party after 15-20 days, when my son went missing. When we went in search of the accused to his native village, his wife and children were present at the tenanted accommodation. We had gone to Hardoi by train. Tej Bahadur and Ombir constables, besides one police officer had gone to native village of the accused. Police had gone to local PS, namely, Kotwali Malawa. Local police was also associated in the investigation. We reached Hardoi in one day. Local police was taken and thereafter we went to native village of the accused. We left for Hardoi at about 12:00 or 12:30 in the night. We reached Kotwali Malawa at about 8:00 or 9:00 am. There we came to know that accused Suresh was present at his native village, he absconded. We reached house of accused Suresh at about 8:00 or 9:00 pm. We went to Beni Ganj during day hours, in search of accused Suresh. In Beni Ganj in laws of his elder brother reside. Beni Ganj is in different direction than the native village of accused Suresh from Kotwali Malawa. Police had not received any information in my presence concerning whereabouts of accused Suresh. We Beni Ganj around 12:00 noon. Mother in law of brother of Suresh was interrogated, who told that Suresh had not visited their

house. Her statement was recorded. In my presence statement of any other person was not recorded there. Police had not searched her house. We had gone to Beni Ganj by a public transport bus. From there, we returned back to Kotwali Malawa. We had gone to native village of the accused by police jeep. I do not recollect the registration number of the said jeep. Two police officers from local PS were associated in the investigation. Police met Sarpanch of the village, who told that Suresh had visited his native village. I cannot tell name of the said Sarpanch. Police might have recorded his statement. Sarpanch had told that Suresh was present in the village from last one week. House of Sarpanch was at a distance of about 150 meters from the house of the accused. Sarpanch had not gone to the house of the accused along with we people. Suresh was searched in the village for about one hour. House of accused Suresh was dilapidated and not habitable. I cannot say as to whether statement of villagers were recorded by the police or not. We returned Kotwali Malawa during night. We returned Delhi after two days. We had gone to sisters house of accused at Miya Ganj. On 24.11.2006, I had stated before the police in my report that my son Mrityunjay had informed that Dhananjay was taken away by Suresh. Mrityunjay also used to visit the house of accused Suresh as usual. Accused Suresh used to visit my house as I used to supply him milk. Mrityunjay was student of 2nd class. Mrityunjay knew the name of accused Suresh. My son had named accused Suresh, when he informed that Dhananjay was taken by uncle ji. It is correct that I disclosed the name of accused Suresh in my report dt. 24.11.2006. Confronted with statement Ex.PW-1/A, where name of Suresh is not mentioned. My statement was not recorded by the police at any subsequent stage. On 24.11.2006, accused Suresh was present at his room. Police had apprehended accused Suresh on 24/25.11.2006, but thereafter he went missing. He was apprehended at about 4:00 pm. On that day, I had not visited PS. My son Mrityunjay had told before the police also that Dhananjay was taken away by Suresh uncle. Accused Suresh went missing from PS. On 14.01.2007, accused Suresh along with his associate was apprehended at Gali No.8, Durga Puri, at about 2:30 pm. He was apprehended from a road. I have no knowledge about the direction of place of apprehension. There was a drain in front the place, from where accused was apprehended. I cannot tell the width of the said drain. Several public persons were coming and going, when accused was

apprehended. We left the place of apprehension after about ten minutes. I cannot say about the exact place, where I signed arrest memos and personal search memos of accused persons. Nothing was recovered from the personal search of accused Suresh. It is incorrect that I falsely implicated the accused Suresh deliberately. It is incorrect that accused Suresh was not apprehended from Durga Puri and he was lifted from his house and falsely implicated in this case. It is incorrect that I am deposing falsely. xxxxxxxx by Sh. Abdul Sattar, Adv. for accused Ram Prasad. I do not know, who informed the police regarding presence of accused persons at Durga Puri. Volunteered, I was called by Addl. SHO telephonically to join the investigation. I do not remember where I was present when I received phone call of Addl. SHO. I received call of Addl. SHO at about 12:00 noon. Police joined me at Khichripur in the investigation. Two police officials were in civies (sic). I reached at Durga Puri along with three police officials including the Inspector at about 2:00 pm. I had not met the informer at Durga Puri. It is incorrect that accused Ram Prakash was not arrested from Durga Puri turning. It is incorrect that accused Ram Prakash was lifted from his house by the police, located at Lucknow and was framed in this case. It is incorrect that I am deposing false facts.

12. Statement of PW-2 recorded on 22.10.2007 :

PW-2 Smt. Sharda wife of Balram Sharma, 26 years, R/o H.No.8/146, Khichripur, Delhi on S.A. I am residing at H.No.8/146, Khichripur, Delhi with my husband and children, since three years. I had three sons, namely, Atul, Mrityunjay and Dhananjay. My son Atul resides at my native village. He is about ten years old. My two sons Dhananjay and Mrityunjay used to study at M.C. Primary School, Block No.7/8 Khichripur. On 23.11.2006, at about 9:45 pm (sic), I went away from my house for some job. I returned home at about 12:30 pm. My both the sons were present at home, when I left my home. On my return, I saw that my husband was sleeping. My children were not present in the house. I questioned my husband, regarding my children. He replied that they might have gone to school and requested me to see further. I went to school and found my son Mrityunjay there. Dhananjay was not in the school. I questioned Mrityunjay as to where Dhananjay was. Mrityunjay replied that Suresh uncle had taken away Dhananjay from the

room. I returned home and found that accused Suresh was not present at his home. Accused Suresh along with his wife and children used to reside in a room adjacent to my room. Me and my husband kept on searching Dhananjay hither and thither. At about 3:00 pm, accused Suresh, present before the court came at his home. We questioned Suresh, but he declined and told that he had not taken away Dhanjay with him. My husband informed police on 100 number, suspecting Suresh. Police reached the spot when police questioned Suresh then he joined police in search of my son. He remained with police for about 2-3 hours and thereafter disappeared. Again he returned home at about 10:00 pm. In the morning, he was taken away by the police. My husband visited police station at the juncture. From the PS again accused Suresh disappeared. My husband lodged FIR. Accused remained absent for about 1 month. He did not visit his house. However, his wife and children remained at their room. On 14.01.2007, my husband was called by the police. On that day, accused Suresh along with his associate were apprehended. My husband informed me regarding the arrest of accused Suresh and his associate. Prior to arrest of accused Suresh, police kept on calling my husband for search of accused Suresh. My husband informed me that Dhananjay was no more and he has been murdered. Some bone pieces given to us by the police stating that it was remains of Dhananjay. We performed burial ceremony of bones of Dhananjay. In the month of March 2007, me and my husband were called by the police. We were taken to Rohini. Our blood samples were taken there. xxxxxxxxx by Sh.Dasa Ram, Adv. for accused Suresh. I am illiterate. However, I am conversant with the date, month and year. I do not remember the date, on which Holi Festival of last year had fallen. Accused Suresh used to visit our house. My children were well known to accused Suresh. My son Mrityunjay had informed that Suresh uncle had taken away Dhananjay with him on the day of incident itself. Police had visited our house on that very day. Police had not recorded statement of Mrityunjay on that day. His statement was recorded on 24.11.2006 at about 4:00 pm. At evening time, Suresh had again came home and joined us in search of my child. Accused Suresh was again taken away by police on 24.11.2006 at about 4:00 pm. Statement of Mrityunjay was recorded in PS. My statement as well as statement of my husband was also recorded on that day. Suresh and our family were having in good visiting terms. We were having no

enmity to each other. I do not know as to when accused Suresh went out from the custody of the police as we were not there. My husband informed this fact to me. My husband had visited PS, where police officials informed him that accused Suresh had left their custody. Police had visited my house in search of accused Suresh. My child Mrityunjay was not taken to PS at that time. It is incorrect that I am deposing falsely at the instance of my husband. It is incorrect that accused Suresh did not take my son. It is incorrect that accused was falsely implicated in this case by my husband. xxxxxx by Sh. Abdul Sattar, Adv. for accused Ram Prasad. Accused Ram Prasad is not known to me. incorrect that I am deposing falsely. It is 13. Statement of PW-2A recorded on 27.10.2007. PW-2A Smt.Sunita wife of Sh.Lal Bahadur, 27 years, R/o.Jagat Singh ka makaan, Sector-31, Noida, U.P. On SA. I am residing at village Nithari in the house of Jagat, Noida, since 7-8 years. I have four children. My husband is employed in a company, Sector -60, Noida. My parents are resident of village Beria Nazirpur, District Hardoi. Accused Suresh, present before the court is known to me. He is son of my uncle Hori Lal. Accused Suresh was also residing at village Khichripur, Delhi. He was not in visiting term with me. About three years ago, once he had visited my house. Again he visited my house on 23rd day of Hindi Month Aghan. That day was Thursday. I was not present at my home. My children were present there. I had gone to the house of my landlord to wash his clothes. My son Rahul informed me that a maternal uncle had come. I directed him to go home with the assurance that I shall reach home soon. After about 15-20 minutes, my daughter Sushma contacted me. She also informed that one mamaji had come. I followed Sushma and reached home. I saw that accused Suresh, present before the court was present there along with a boy. Said child was about 4-5 years old. Suresh inquired about my husband. I informed him that he was on his duty. Suresh requested me to cook meat. I told him that I do not know as to whether meat would be available. On this my son Rahul uttered that he was knowing as to where meat shop was. Thereafter, Suresh along with my son Rahul went to purchase meat, leaving that boy at my home. My son Rahul reached home along with meat. However, Suresh did not return with him. I cooked meat. The said boy kept on playing with my children. I cooked vegetables also. I provided food to that boy also with my children. After taking food, said child kept on playing with my children. Accused

Suresh came to my house at about 6:30 or 7:00 pm. I am not sure about the time as I was not having watch. Said boy addressed Suresh as uncle. I questioned Suresh, who that boy was. Suresh informed that the said boy was son of his neighbor. I questioned Suresh as to why he had brought said boy and his parents might be puzzled. Suresh replied me that he had to take money from the parents of said boy. For that purpose he had brought the said boy with him. I advised Suresh that he should not indulge for money and he should return that boy to his parents. I prayed before him that my husband was not at home. We had come in Delhi for earning our livelihood. Again I requested him to return the boy to his parents. Suresh informed me that his associates was present at some distance away from my house and he will hand over the boy to him. Saying so he took said boy with him and left my house at about 7:00 p.m. When I resisted that I will inform other persons about the fact then Suresh assured me that there was no need to inform anybody and he would return the said boy to his parents. He immediately left my house with that boy. By that time, it was about 7:00 p.m. Suresh had not eaten the meat brought by him and cooked by. My husband returned home in the morning after completing the night duty. When my husband returned home, I narrated the entire facts before him. He scolded me that none should visit my home from my parental side. My husband felt perturbed and told that he was not having any contract number or address of Suresh and what he can do in the matter. After about more than 1 month of this incident, it was 14 day of Posh Month of Hindi Calendar. Police official along with accused Suresh and another person, who is present before the court in the dock with accused Suresh were brought at my home in handcuffs. Police inquired me about the fact. I narrated entire facts as above before the police. I was brought to PS Kalyan Puri. Again facts were inquired from me. I was set free after interrogation. Again facts were inquired from me. I was set free after interrogation. Again I was informed that I had to narrate facts before the court. th After two days of my first visit again I was summoned by the police, but I was told that my statement cannot be recorded by the court. Thereafter, again I was summoned by the police at the interval of two days. I was taken to court like the present court. My statement was recorded by the Magistrate. My thumb impression was obtained by the Magistrate, when my statement was over. I am illiterate. I cannot identify my thumb impression. I can

identify the photograph of said child, if shown to me. I can identify the photo of that child, which was brought at my home by accused Suresh, if shown to me. At this stage, photograph of victim is shown to the witness. I identify photograph Ex.P1 to be of the child, which was brought at my home by accused Suresh. XXXXXXXX by Sh.Dasa Ram, Adv. for accused Suresh. Accused Suresh is not of my clan. House of Suresh is located in that very mohalla, where my parental house is situated in village Beria Nazipur, District Hardoi. My family as well as the family of Suresh were not in visiting term at native village. I did not visit the native home of Suresh during my stay at village Nithari, Noida. Local address of accused at village Khichripur was not known to me. He had informed me that he was residing at Khichripur, when he had visited my house. Accused Suresh had not disclosed the house number and name of the locality, where he was residing. My husband never visited the house of Suresh. Brother of Suresh had never visited my house. I had visited village Beria Nazipur, District Hardoi at about 1 years. During my said visit, I had not gone to house of Suresh. I had not visited the house of his brother also. My brothers had not visited my home at village Nithari. Volunteered, occasionally about 2-3 years ago, my brother had visited my home at Nithari. I have two brothers. They are farmer. None of my brother met me after my marriage. Due to paucity of time, my brothers do not meet me. My parents are no more. My father died about 12 years ago. My mother died about 9 years ago. I do not know, date and month of English calendar month. Police officer had informed me today that I had to depose before the court. None had tutored me today from police file. Photograph Ex.P1 was not shown to me today by any person outside the court. I cannot tell the date, month and year of my marriage. My marriage was performed at village Tehrwa Kulli with Lal Bahadur. Prior to my marriage with Lal Bahadur, I was married to one Mahender. It is incorrect that I eloped with Lal Bahadur after my marriage with Mahender. It is correct that I had not taken divorce from Mahender. It is correct that I performed marriage with Lal Bahadur. It is correct that my brothers were not happy with my marriage with Lal Bahadur. I cannot say if persons from my cast as well as mohalla people were not happy with this marriage. It is incorrect that mohalla people brought me back from the house of Lal Bahadur. It is 4:00 pm, further cross-examination is deferred. XXXXXXXX by Sh.Dasa Ram, Advocate, for accused Suresh. I had not seen children of accused

Suresh. When he had brought a child at my house, I was not aware whether that child was of Suresh or not. Police came to my house after about one and half months of the date, when a child was brought by accused Suresh at my house. Accused Suresh and his associate, who is present before the Court, were with inspector and other three police officers who came to my house at about 4-5p.m. Police stayed at my house for about 5-10 minutes. It was 14 day of English Calendar month that day. I was taken to PS. I was kept there for two or three hours. I was asked by the police to depose in the case. Thereafter, I was allowed to leave the PS, when I answered in affirmative. My signatures were not obtained on any papers by the police. I was not tutored by the police to make a statement in particular line. Both accused persons, present before the Court were in the PS at that time. No other public person was present in the PS at that time. Accused persons were also interrogated in my presence. Their signatures were not obtained on any papers in my presence. Thereafter, I was called in PS and brought to Karkardooma Courts to make a statement before the Magistrate. Police had brought me from my home that day. Inspector met me in the PS that day. I was not tutored to make a statement that day. I do not know brother-in-law (jija) of accused Suresh. There are three real sisters of accused Suresh. I am his cousin sister. He does not belong to my Gotra. Sisters of accused Suresh are known as Nanhi, Sudha and Sonia. None of his sisters is married in Aliganj. Nanhi and Sonia are married in Miyaganj. Earlier I was married to Mahender, who was son of brother-in-law (jeth) of Nanhi and Sonia. It is incorrect that I left my previous husband and ran away along with Lal Bahadur. It is incorrect that Suresh and other members of his family came to my house and took me back to the village. It is incorrect that I again ran away with Lal Bahadur. I made a statement before the Id. Magistrate on 19th day of English calendar month. I recollect the aforesaid dates by my memory. I do not recollect the date of Holi Festival, which fell in the year, 2007. I do not recollect the date of Diwali Festival of year, 2006. I do not recollect date of births of my children. I cannot tell the date of Karva Chautha, which fell last year. Police inspector accompanied me to the Court. I had not talked to the inspector, when I was brought to the Court of Id. Magistrate. My husband Lal Bahadur and also accompanied to Court premises. I had not talked to him also, when I came to court premises. It is incorrect that accused Suresh had not brought

any child to my house. It is further incorrect that I had not cooked meal of Suresh. It is incorrect that I had not sent back Suresh along with child asking him to return that child to his (sic child to his) parents. It is incorrect that Suresh had not told me that said child was abducted by him. It is incorrect that Suresh had not told me that he would handover that child to his associate, who was present at some distance from my house. It is incorrect that Suresh never brought police to my house. It is incorrect that I was tutored by police to make a statement before the Magistrate or before this Court. It is incorrect that I am deposing falsely. It is incorrect on account of act of Suresh and his family members in taking away me from the village I was inimical to Suresh. XXXXXXXX by Sh.Abdul Sattar, Advocate, for accused Ram Prasad. Nil Opportunity given. I had visited PS on 14th day of English calendar month. Thereafter I never visited PS. My husband Lal Bahadur had also accompanied me, when I visited PS. No other person had accompanied me to PS. I was summoned by the police. I do not recollect the date, when I appeared before the Magistrate for my statement. At that time my husband had accompanied me to court. Police officials were also present. It is incorrect that I deposed before the Magistrate at the instance of Police and my husband. It is incorrect that I am deposing falsely. It is incorrect that I deposed false facts against the accused persons at the instance of the I.O.

14. The evidence of PW-7, brother of the deceased, is also reproduced below:

PW-7 Mrityunjay son of Sh.Balram, 6 years, R/o.Delhi. Que. Ans. Que. Ans. Que. Ans. Que. Ans. Que. Ans. Que. Ans. Que. Ans. Que. Ans. Que. Ans. Que. Ans. Que. Ans. Que. Ans. Crl.Appeal No.656/2010 What is your father?. He is an ironsmith. What is the name of your mother?. Her name is Sharda. What is your mother?. She is a house wife. In which standard do you read?. I was studying in a private school. Presently I am not going to that school. Whether you have learnt anything in your school?. I had learnt English alphabets. By what mode of transport you used to go to your school?. I used to go to school on foot. Who was your class teacher?. It was Sir, who was my class teacher. How many brothers and sisters do you have?. I have two brothers. Name of my brother is Dhananjay. Do you have any sister?. I have no sister. By what mode of transport you had reached here?. I had come here along with my father on a motorcycle. Whether

you had taken your breakfast today?. I had not taken my breakfast today. Are you feeling hungry?. No.I am not feeling any hunger. Whether you have been tutored by anyone to depose facts in a particular line?. Page 20 of 30 Ans. I have not been tutored by anyone. Que. Are you having any friend?. Ans. One boy named Atul is my friend, who lives in our native village. Que. Are you feeling fear from anyone?. Ans. No.From above rational answers given by the witness I am satisfied that Mrityunjay is intelligent enough, who understand the probable question, which would be put to him during the course of his testimony. He is competent to satisfy. Considering his tender age, no oath is administered to him. My brother Dhananjay went missing. He is missing from last many days. He had gone along with accused Suresh, who is present before the court (witness had pointed out towards accused Suresh by raising his finger on him). When my brother Dhananjay went along with accused Suresh, at that time my father was sleeping and my mother had gone some distance away from our house. Accused Suresh used to visit our house and used to stay there during night hours, hence he was known to me. Accused Suresh took away Dhananjay with him on the pretext giving toffee to him. I told my parents that I had seen accused Suresh taking away Dhananjay. Accused Suresh used to reside on rent in a room adjacent to our room. XXXXXXXXXX by Sh.Dasa Ram, Adv. for accused Suresh. Suresh have two children. One child is known as Sorabh and name of other child is not known to me. Me and my brother Dhananjay used to play along with children of Suresh. Prior to this incident Suresh never gave toffee to me or my brother. Volunteered, on the date of incident he took away Dhananjay along with him on the pretext of toffee giving to him. On night Suresh used to sleep in his house. He never came to our house during night hours. I do not know whether Suresh ever came to our house during day hours. At that time my father was sleeping and he was not coming out of slumbers when Dhananjay was missing. When my mother came, I told her that Dhananjay had gone along with Suresh. I had not seen the watch at that time. When my mother came home by that time my father had woke up. After coming out of his slumbers, my father remained at home that day. I had told only to my mother as to whether Dhananjay had gone and not to my father. I had not told any other person that Dhananjay had gone along with Suresh. It were noon hours, when I told these fact to my mother. On that day, I had gone to school and came back home at 5:00 p.m. I do not

recollect the time, when I had gone to school that day. Volunteered, my father had gone to school to bring me back, which facts were narrated by the witness after a small gap of time. I came home along with my father that day. I was aware prior to going to school that Dhananjay was not present at home that day. Dhananjay was student of that very school, where I was studying. Dhananjay used to go to school on foot. Police came to our home, when Dhananjay went missing. I was interrogated by police. I was interrogated by the police on that very day. I was interrogated by the police during morning hours. Suresh had caught hold of hand of Dhananjay and took him away on the pretext of a toffee. I had narrated before the investigating officer that Dhananjay had caught hold of hand of Suresh when he was taken away. I had not stated before the police that Dhananjay had followed Suresh. Confronted with portion A to A of statement Ex.PW-7/DA, where the facts are so recorded. I had not seen any other person walking in the street at that time. When Dhananjay was going along with accused Suresh, at that time I was going to my school. Other children were also going to school at that time. Those children were younger in age as well as older in aged than me. My mother had given me lunch, when I was going to school. My mother had not come upto street along with me at that time. My father had also not come upto street along with me at that time. Where I reside, there house of Suresh is in front of my house. On that day, Suresh uncle had came back to his home. He had come to our house also. He came to our house during evening hours. He had not come inside in our room and remained down stairs. He had talked to my mother and father that day. At that time I had not told my parents that Suresh had taken Dhananjay along with him. I had told my parents that Dhananjay was taken by Suresh prior to the time, when Suresh had not visited our house that day. I had gone to PS at the time of incident as well as today. I was not tutored by anyone today. I had not given any food by anyone today. I remained in the PS today for a while. My father was also with me at that time. Since defence is oppressing the witness, hence Sh.Dasa Ram is asking to give the questions in writing. He has not given any question, which is to be put to the witness now. XXXXXXXX by Sh.Abdul Sattar, Advocate for accused Ram Prasad. Nil. Opportunity given.

15. Counsel for the appellant has strongly urged before this court that the evidence of PW-7, who was six years of age at the time of the incident is not

trustworthy, as he was immature in understanding and it would be dangerous to rely on his testimony.

16. The submission made by counsel for the appellant is without any force. The law with regard to the evidence of a child witness has been discussed in detail by the Apex Court in the case of *Ratansinh Dalsukhbhai Nayak Vs. State of Gujarat*, reported at (2004) 1 SCC 64 wherein it has been held that a child witness if found competent to depose, his testimony can be the basis of conviction. Relevant portion of the judgment reads as under:

6. Pivotal submission of the appellant is regarding acceptability of PW11's evidence. The age of the witness during examination was taken to be about 10 years. The Indian Evidence Act, 1872 (in short the Evidence Act) does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J.

in *Wheeler v. United States*¹. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See *Suryanarayana v. State of Karnataka*)².

7. In *Dattu Ramrao Sakhare v. State of Maharashtra*³ it was held as follows: (SCC p. 343, para

5) A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational that such witness is able to understand the questions and able

to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. The precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and molded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

2 (2001) 9 SCC129 3 (1997) 5 SCC341 17. This question was also the subject matter of the judgment of the Supreme Court in Acharaparambath Pradeepan & Anr. Vs. State of Kerala, reported at 2007 [1]. JCC828 Relevant portion of the judgment reads as under:

48. Section 118 of the Indian Evidence Act seeks to exclude evidence of those who may suffer from intellectual weaknesses. It reads as under:

Who may testify.-.- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

49. In terms of the said provision therefore, all persons shall be competent to testify unless by reason of tender years, the court considers that they are incapable of understanding the questions put to them and of giving rational

answers. It is for the Judge to satisfy himself as regards fulfillment of the requirement of the said provision. The opinion of the learned Judge had been recorded and, thus, it satisfies the test laid down by this Court in *Rameshwar S/o. Kalyan Singh v. The State of Rajasthan* [AIR 1952 SC54].

50. It is not the case of the appellants that the court had failed to comply with the statutory obligations in this behalf. It is also not the case of the appellants that their testimonies otherwise should not have been accepted.

51. A child indisputably is competent to testify if he understands the question(s) put to him and gives rational answer thereto. None of the witnesses have been found to be suffering from any intellectual incapacity to understand the questions and give rational answers thereto.

53. Indisputably, certain factors are required to be considered as regards reliability of the testimony of the child witnesses but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of child witnesses.

18. Keeping in view the principles laid down by the Apex Court, the testimony of the Mrityunjay, PW-7, the brother of the deceased, is to be carefully scrutinised and cannot be rejected per se and once the court comes to the conclusion that the evidence is reliable and trustworthy, the same can form the basis of conviction. Merely because the witness is a child, his/her evidence cannot be treated as unreliable. In the case before us, the evidence of the child is not only trustworthy and reliable, but it has been consistent and remained unshaken even in the cross-examination.

19. PW-7, while identifying the appellant, has categorically testified that his deceased brother had gone along with the appellant on the pretext that the appellant would give him a toffee. He also described that at the relevant time his parents were sleeping. This part of evidence of PW-7 has remained unshaken even during the course of cross-examination. Based on this evidence, it is clear that the deceased was last seen in the company of the appellant. In fact during

cross-examination, PW-7 has clearly identified the appellant beyond any shadow of doubt. In our view any irregularity in the testimony of PW-7 is not material and does not touch the core issue.

20. The testimony of the father of deceased would also show that when he enquired from his son PW-7, with regard to the whereabouts of his deceased son, he was informed that Dhananjay was taken by Suresh uncle. In his testimony, PW-1 has also testified that at about 3.00 or 3.30 p.m. he gave a telephone call to Police Control Room informing them that his son Dhananjay, was missing and he was apprehensive that he was taken away by the appellant Suresh, as told to him by his son Mritunjay. The father of the deceased had named the appellant in the first DD Entry being No.15A to the PCR (Exhibit PW-11A).

21. PW-2, mother of the deceased, also testified on similar lines that she was informed by her son Mritunjay, that Dhananjay was taken away by Suresh uncle. Both PW-1 and PW-2, in our view, have stood the test of crossexamination with regard to the information of last seen received by them from their son PW-7, and the efforts made by them for tracing their missing child. Any irregularity or inconsistency in their cross-examination does not go to the root of the matter and can be of no help to the appellant.

22. Another important witness is PW-2A, Smt.Sunita, who is the cousin sister of the appellant Suresh. She has categorically identified the appellant, who is the son of her uncle Hori Lal. In her testimony, she deposed that the appellant had visited her house along with a boy, who was approximately four or five years of age. Appellant Suresh had informed her that the boy was the son of his neighbour and he had brought the boy as he had to take money from the boys parents. PW-2A had requested the appellant to return the boy to his parents which he had agreed to do. On being shown the photograph of the victim, PW-2A identified the same as the child who had been brought to her house by the appellant.

23. Testimony of PW-2A, Smt.Sunita, is categorical, reliable and trustworthy. She has identified the child on the basis of the photograph which was shown to her in Court, which is another relevant factor which establishes beyond any shadow of doubt that the victim was in the company of the appellant just before his death.

This witness also withstood the test of cross-examination. The argument raised by counsel for the appellant that PW-2A was an interested witness is without any force as she was related to the appellant.

24. It has been argued before us that merely because the appellant absconded, this factor cannot be held against him but in our view, abscondance of the appellant coupled with the evidence of last seen is a factor which would be of great importance in the facts of this case. Thus this submission of the counsel for the appellant is also without any merit.

25. In the case of *Matru v. State of U.P.*, (1971) 2 SCC75 Supreme Court observed:

19. The appellant's conduct in absconding was also relied upon. Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case the appellant was with Ram Chandra till the FIR was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence.

26. Similar observations were also made by Delhi High Court in *Kaloo Passi v. State*, CRL. A. No.413/2001 decided on 1st April, 2009:

16. It is settled law that mere absconding by itself does not necessarily lead to a conclusion of a guilty mind. The act of selfpreservation is such that even an innocent man may feel panicky and try to evade arrest when wrongly suspected of

a grave crime. The act of absconding is no doubt a relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. For instance, the circumstance of abscondence can be extremely fatal if the prosecution is able to prove that the victim was last seen in the company of the accused and that the accused is absconding after the death of the victim. Normally, the courts are disinclined to attach much importance to the act of absconding, treating as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused.

27. Another relevant factor is that the remains of the body of the deceased were recovered at the instance of the appellant. The appellant was apprehended on 14.1.2007. As per the testimony of PW-20, Inspector Mohan Singh, the appellant was identified by PW-1. The appellant made a disclosure statement, Exhibit PW-1/F, wherein he disclosed about cremation of the dead body in the forest of Noida, falling in Sectors 31 and 32. It may also be noticed that the appellant was last seen with the victim at the residence of his cousin, Smt.Sunita, PW-2A, who resides at Sector 31, Noida. The appellant had led the police to the place of cremation. Thus, recovery of bones of the victim at the instance of the appellant stood fully established by the prosecution from the testimony of PW-20. The recovery of bones was videographed and photographed by PW-5, Sh.Brij Mohan. PW-5 testified that accused persons led the police party to forest near a drain. Both accused persons pointed out towards the place where burnt bones of a child were lying. We find the testimony of this witness to be credible.

28. PW-10, Constable Shiv Om, was the photographer who had taken 23 photographs. He also proved the negatives in the court.

29. Another piece of evidence against the appellant is the FSL Report, Ex.PW-22/A, whereby PW-22, Sh.A.K. Srivastava, after testing the blood samples of PW-1 and PW-2 and the bones of the deceased has concluded that the deceased was the biological son of PW-1 and PW-2, thus proving that the bones found at the spot were of none other but deceased Dhananjay.

30. Taking into consideration the evidence of the witnesses of the prosecution, more particularly, the evidence of child witness PW-7, who has categorically testified that his brother was taken away by the appellant on the pretext of getting him a toffee, which fact was revealed by him to his parents and having regard to the fact that the father of the deceased had informed the police about the same in the first DD Entry; the strong evidence of PW-2A, Smt.Sunita, who was none other than the cousin sister of the appellant, who testified that the victim was brought to her house by the appellant; the fact that PW-2A identified the victim based on the photograph shown to her in Court; and further having regard to the disclosure statement, Exhibit PW-1/F, made by the appellant, which led to the discovery of the bones of the victim, which would clearly fall within the ambit of Section 27 of the Indian Evidence Act; the fact that the site where burnt bones of the child were recovered, was videographed and photographed; and the evidence of photographer, PW-5 and the videographer, PW-20, leaves no room for doubt that the appellant has been rightly convicted by the trial court. In view thereof, the present appeal is without any merit and the same is dismissed. G.S.SISTANI, J
G.P. MITTAL, J th JULY30, 2013 msr

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