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Court : Delhi

Decided On : Aug-19-2015

Judge : Sanjiv Khanna &Amp; R.K. Gauba

Appeal No. : CRL.A. Nos. 1648 of 2013, 194, 244 of 2014 & 261 of 2015

Appellant : Ashok alias Bobby and Others

Respondent : State and Others

Judgement :

R.K. Gauba, J.

1. The three appellants viz. Bhajan Singh @ Gulla (Accused No.1), Joginder Singh @ Jagga (Accused No.2) and Ashok @ Bobby (Accused No.3) stand convicted by judgment dated 19.08.2013 of the Additional Sessions Judge for the offences punishable under Section 302 read with Section 120-B of Indian Penal Code (IPC) and 201 read with Section 120-B IPC on the charge of having entered into criminal conspiracy and, pursuant to it, having committed the murder of child Wasim (son of PW-16 Mohd. Yunis), aged 8 years, and destroying the evidence thereafter on or about 11.7.2004 and 12.7.2004 in House No.B-7/144, Sector-17, Rohini.

2. By order dated 21.8.2013, the convicts were sentenced to imprisonment for life with fine of Rs.5,000/- for the offence under Section 302 read with Section 120-B IPC and imprisonment for seven years with fine of Rs.5,000/- for the offence under Section 201 read with Section 120-B IPC. The trial court directed that in case of

default in the payment of fine, the three convicted appellants could further undergo simple imprisonment for six months on each count. It also directed each convicted persons to pay compensation of Rs.30,000/- to the parents of the deceased child (hereinafter referred to variously as the victim or the deceased ?).

3. The three convicts have preferred criminal appeals No. 194/2014, 244/2014 and 1648/2013 respectively) assailing the judgment and order on sentence as above.

4. The appellants were also charged by the trial court for offences punishable under Sections 364 and 364-A read with Section 120-B IPC on the allegations that in furtherance of the criminal conspiracy they had kidnapped the victim child at about 3.30 pm on 11.7.2004 from in front of house nos. B-209 and 203, Sector-17, Rohini, in order to commit murder and having kept him in detention after such kidnapping extending threats of causing harm to him so as to compel his father (PW-16 Mohd. Yunis) to pay ransom. By the impugned judgment dated 19.8.2013, the trial judge held that the prosecution had not been able to prove the requisite facts constituting the said offences and, thus, acquitted the three afore-mentioned appellants of the said charge.

5. The State, feeling aggrieved, has come up in Crl.A.261/2015, questioning the correctness of the order of acquittal, praying for reversal of the judgment of the trial court to that extent.

6. It may be mentioned here that PW-16 (Mohd. Yunis), father of the victim child, had also preferred Crl.A.No.1355/2013 assailing the acquittal on the aforementioned charges. The said appeal was disposed of by order dated 26.2.2015 with liberty given to the said appellant to address arguments at the time of hearing on the appeals at hand.

7. Certain basic facts borne out from the record are beyond dispute and may be noted at the outset.

8. PW-16 Mohd. Yunis was a resident of B-2/42, Sector-17, Rohini. He had a shop in Samaipur Badli where he was engaged in the business of metal trading. His family included his son Wasim Ahmad, then aged 8 years, a student of Sachdeva

Public School, Sector-13, Rohini. He (PW-16) was in possession and use of mobile telephone No.9810119204 (hereinafter referred to as the mobile phone of father of the victim ?).

9. The victim child was found untraceable some time around 3.30/3.45 pm on 11.7.2004. After return from school, he had statedly gone out for a ride on his bicycle. His father (PW-16), having made unsuccessful efforts to locate him (and having learnt about the kidnapping for ransom on receiving a ransom call, to which facts we shall revert later) lodged report with the police some time after 7.30 pm on 11.7.2004 by making a statement (Ex.PW-16/A) before SI (later Inspector) Jai Prakash (PW-30), who was posted at that time as in-charge of the police post, Sector-16, Rohini of Police Station Prashant Vihar (hereinafter referred to as the police station ?).

10. The victim child, after becoming untraceable, was never found alive. His dead body was recovered (statedly at the instance of the accused persons, the evidence in which regard would need to be discussed later) on 15.7.2004 from a drain in the area of Village Jagatpur. PW-32 Inspector (later ACP) Tilak Raj Mongia, the Station House Officer (SHO) of the police station, accompanied, amongst others, by PW-30 Inspector Jai Prakash, PW-16 Mohd. Yunis and constable Manbir Singh (PW-20) have together proved that the dead body was found inside a gunny bag (bori) floating in the drain around 15 feet away from its northern end and 100 ft. distance from the west side of the overhead bridge (flyover). The undisputed evidence of these witnesses, to which Abdul Sattar (PW-7) provides further corroboration, proves that the services of the latter (PW-7) were availed as he worked as a private diver in the area.

11. The unchallenged evidence shows that with the help of PW-7 Abdul Sattar, the gunny bag, the upper portion whereof was visible above the water level was taken out from the drain. On being opened, it was found to contain another gunny bag which, in turn, was found to contain the dead body of the victim child along with two full bricks and one broken brick (collectively Ex.P-5).

12. The body was identified at the place of recovery by PW-16 Mohd. Yunis as that of his missing child Wasim. The proceedings relating to recovery of the gunny

bag from the water and of the dead body from inside it were photographed by constable Dalbir Singh (PW-24) a member of the mobile crime team of North-West district. The SHO prepared site plan (Ex.PW-32/B) depicting the place of recovery of the dead body. On its basis, SI Manoharlal (PW-18) later prepared a scaled site plan (Ex.PW-18/A) showing the layout of the area.

13. The photographs (Ex.PW-24/A-1 to A-13) prepared with the help of negatives (Ex.PW-24/B-1 to B-13), exposed by PW-24, on the request by SI Satya Prakash Vashisht (PW-11) in-charge of the crime team, along with report (Ex.PW-11/A) of the latter (PW-11) stand testimony to the afore-stated circumstances of recovery of the dead body from the drain and it being identified on the spot by PW-16 (Mohd. Yunis). The photographs reveal that the dead body of the child had been put partially in foetal position and its limbs tied together with a string. The recovery of the dead body is subject matter of the police proceedings recorded in memo (Ex.PW-16/B) to which the above mentioned witnesses are signatory. The circumstances leading to the recovery of the dead body are in dispute. For the present, it only needs to be noted that the document evidences that the victim's body had been found in the aforementioned state from a public drain.

14. The fact that the body was tied in the manner stated, and thrown into the drain, after being put inside two gunny bags, one after the other, along with bricks, leaves no room for doubt that the person(s) who would have thrown it at the place intended its disposal in secrecy.

15. The SHO (PW-32) prepared the inquest papers (Ex.PW-32/A) and made a request (Ex.PW-32/A) for post-mortem examination in mortuary of Babu Jagjivan Ram Memorial Hospital. The post-mortem examination was conducted by Dr. N C Gupta (PW-3) and Dr. Anil Shandilya , after the dead body identified formally by PW-16 (vide Ex. PW-16/C) and by Zulfikar Ali (PW-1), a cousin of the former (vide Ex. PW-1/A). The autopsy proceedings were also subjected to photography with the assistance of private photographer Anil Sharma (PW-5). The result of this exercise in the form of 13 photographs (Ex. PW-5/A-1 to A-13) have also been proved beyond any dispute.

16. The photographs taken during autopsy and the autopsy report (Ex.PW-3/A) collectively show that the dead body was in highly decomposed state when recovered. Maggots were found crawling and there was loosening of hair with de-gloving. Both eye balls were protruding outside with eyes and mouth open. The tongue was peeping out through the open mouth. Because of the putrefaction, the post-mortem staining could not be ascertained. Scrosanguiavius discharge with reddish tinge blood was present at both side nostril. Both lips, nose and both sides of face was found contused. Exudation of blood in subcutaneous tissues was present underneath the muscles. It was reddish blackish in colour with greenish tinge. Contusion of both side arm pits was present of size 2 x 3 cm and 1 x 1 cm. The underneath tissues were deeply effused with blood, reddish grey in colour.

17. In the opinion of the autopsy doctors, the cause of death was asphyxia, resulting from forceful closure of extraneous air passage (manual smothering), it being sufficient to cause death in ordinary course of nature. The autopsy doctors opined that it was a case of homicidal death and that, after the killing, the dead body had been tied with ropes, packed in the two gunny bags one over the other and then dumped into the drain. The autopsy was carried out from 4.30 pm to 7 pm in the mortuary of the hospital on 15.7.2004. The autopsy doctors assessed the death to have occurred 3-4 days prior to the said exercise. This would broadly coincide with the time at which the prosecution has alleged the death to have been caused.

18. With unimpeachable evidence to above effect available, there is no doubt in our mind that the death of Wasim Ahmad, son of PW-16 Mohd. Yunis was a case of murder. The eight year old child had been strangulated to death intentionally and the assailant(s) had thereafter disposed of the dead body in the drain clearly with the intent of destroying evidence.

19. The moot question, however, is as to who was responsible for the murder of Wasim Ahmad. Further, the issues as to whether the child had been kidnapped with the intention of murder and to compel his father to pay ransom is also required to be addressed alongside the question of culpability for such kidnapping.

20. The evidence of PW-16 Mohd. Yunis, by itself, is sufficient to bring home the fact that his son Wasim Ahmad was kidnapped some time after 3.30 pm on 11.7.2004 from a place near his house in Sector-17, Rohini. There is no reason to doubt the word of this witness when he testified that the child had gone out with his cycle at about 3.30 pm, when the witness was home for lunch. The child, according to him, had taken away the keys of his motorcycle. Since PW-16 had to go back to his shop, he had come out and started searching for Wasim Ahmad, who along with his cycle could not be found.

21. The prosecution case has been that while PW-16 was moving in the area of public park, Sector-10, Rohini located close-by, searching for Wasim, he received a call on his mobile phone around 7.30 pm demanding ransom money against the child. The call received by him had come from mobile phone No.9899122565. This mobile phone number would be the number from which calls were incessantly made to PW-16. For the sake of convenience, therefore, the mobile phone number 9899122565 shall hereafter be referred to as the mobile phone of the ransom caller ?.

22. PW-16 was told by the ransom caller in the first call received at 7.30 pm on 11.7.2004, in Hindi Aap dhoondo mat, chakkar mat kaato. Aapka ladka hamaare paas hai. Hum khud pareshani mein hain. Hamein aur pareshaan mat karnaa. Hum kal phone karenge. Pachchees laakh rupaye ka intezaam rakhna va police ko mat bataana meaning thereby that he need not search for his son since the child was with the caller(s) and that he should make arrangement for , 25 lakhs and not inform the police, assuring there would be another call on the next day.

23. PW-16 contacted PW-30 SI Jai Prakash, who along with constable Harjit Singh (PW-19) was present in the area on patrolling duty and reported the matter. PW-30 recorded the statement (Ex. PW-16/A) of PW-16 setting out the background facts, made his own endorsement (Ex. PW-30/A) finding it a case of kidnapping for ransom (under Section 364-A IPC) and requested for registration of FIR. The rukka was taken to the police station by PW-19 on the basis of which head constable Bharat Lal (PW-6), the duty officer in the police station, registered the FIR (Ex.PW-6/A) at 10 pm on the same night. Since the child was never found

alive, thereafter, and since his dead body was recovered in a state and in circumstances that leave no room for doubt that it was intentionally killed, it is apparent that the child was spirited away surreptitiously and, thus, had been kidnapped.

24. The police initially did not have a clue to the case except for the mobile phone number of the ransom caller. The first informant (PW-16) had passed on to the Investigating Officer (IO) photograph (Ex.P-1) of the missing child along with description of his clothes and of the cycle at the time of going missing. The prosecution case is that the ransom caller telephonically contacted the father of the victim child using the same mobile phone number for the second time at about 5.50 pm on 12.7.2004. It may be mentioned here that the evidence of this witness (PW-16) shows that he received at least five more such calls from the mobile phone of the ransom caller thereafter. The Investigating Officer (PW-30) moved an application on 12.7.2004 before the Joint Commissioner of Police (Northern Range) seeking permission for putting the mobile phone numbers of the father of the victim and of the ransom caller under observation/surveillance.

25. The unchallenged testimony of Anil Yadav (PW-17), an official of the Home Ministry of Govt. of NCT Delhi (GNCTD), deposing on the basis of official record (file No.F-5/735/2004/HG), shows that the approval for monitoring of the two above mentioned mobile phone numbers had been granted by Mr. Narayan Swami, Principal Secretary (Home) GNCTD on the request made through Joint Commissioner of Police vide letter No.3484 dated 14.7.2004. The formal order (PW-17/A), conveying the approval, was issued on 26.7.2004. The authorisation was given by the competent authority in pursuance of the provisions of sub-rule (1) of rule 419-A of the Indian Telegraph Rules, 1951, as amended by the Indian Telegraph (First Amendment) Rules, 1999 and in exercise of the powers conferred by sub-section (2) of section 5 of the Indian Telegraph Act, 1885 (13 of 1885) read with the order No.PA/DSH(G)/86/Part II/6161-64 dated the 10th December, 1997 of GNCTD permitting the interception of messages or calls on the aforementioned two mobile phones and the disclosure thereof to the Joint Commissioner of Police (Northern Range), Delhi.

26. It is stated that the IO had also collected the call detail reports (CDRs) of the two mobile phone numbers and subjected the same to scrutiny. The ransom caller, in the meanwhile, had called PW-16 Mohd. Yunis several times. According to the evidence, the second call had come at 5.30 pm on 12.7.2004 enquiring if the money had been arranged. When PW-16 replied that he had arranged Rs.2.5 lakhs and would try to make further arrangements requesting for his son Wasim Ahmad to be allowed to talk on the phone, the same was declined from the other end. PW-16 has deposed on oath that he had arranged Rs.3.5 lakhs by borrowing some amount from one of his acquaintances also named Waseem. When the third call from the ransom caller came, upon PW-16 expressing his inability to pay the sum demanded, the demand was reduced to Rs.5 lakhs and finally when PW-16 expressed that he could arrange only Rs.3.5 lakhs, the ransom caller asked him to come to Rithala Metro Station at 6 pm on the next day i.e. 13.7.2004 with the money. The request for the kidnapped child to be brought on line was again refused and the call ended with PW-16 begging for his son to be spared any harm.

27. As per the prosecution case, the fourth call from the ransom caller came some time after 5.30 pm on 13.7.2004 questioning as to why PW-16 had not reached Rithala Metro Station. PW-16 explained he was about to leave his house and was told by the caller to reach the place of rendezvous immediately. The ransom caller questioned him about the mode of transportation and instructed that the money be carried in a white bag (Thaila ?). PW-16 was asked to board the metro train from Rithala Metro Station and to get down at Pratap Nagar Metro Station.

28. PW-16 complied with the above instructions and, during the metro journey when he had reached Pitampura, he received the next call from the ransom caller asking him of his position and suggesting that he should hurry up. The ransom caller further instructed him to proceed to Sonepat by catching the train at 7.40 pm from Subzi Mandi Railway Station, located nearby adding that he should sit in the last compartment. PW-16 missed the train for Sonepat leaving Subzi Mandi Station at 7.45 pm. While he was still at the said place, he received the next call. He explained to the ransom caller his difficulty and was then told that he should wait for the next train for Sonepat expected to come later in the night.

29. PW-16 Mohd. Yunis statedly boarded the next train leaving Subzi Mandi Railway Station for Sonepat around 9/9.30 pm. During the said train journey, he received another call from the ransom caller, when the train was at Azadpur. The instructions from the ransom caller were that the money bag had to be thrown out of the train near Sonepat. The police officials were travelling with PW-16 during the entire journey. The police was unable to pin down any person involved in the kidnapping during this exercise. On advice from the police, the bag containing the money was not thrown out. PW-16 with the police officials returned from Sonepat.

30. In the meanwhile, the investigating agency had received the permission for the calls to be intercepted. It is the case of the prosecution that PW-16 Mohd. Yunis, on advice from the investigating police had engaged the ransom caller in prolonged conversation so that the calls could be intercepted and recorded. The Investigating Officer had availed the services of head constable Manbir Singh (PW-20) for recording the telephonic conversations between the mobile phone of the father of the victim and that of ransom caller from 12.07.2004 to 14.07.2004. PW-20 prepared a cassette of the said recording (Ex.P-12), which was handed over by him to the Investigating Officer (PW-30) against formal seizure memo (Ex. PW-20/A), after it had been put in a cloth parcel and appropriately sealed.

31. It is the case of the prosecution that the service provider of the mobile phone number of the ransom caller was Hutch. The analysis of the CDRs revealed to the IO that the ransom caller was using mobile phone instrument having IMEI No.3506043021848039 (hereinafter referred to as the IMEI number of the handset of ransom caller ?). It is stated that the investigation revealed that the handset of the ransom caller (bearing the aforementioned IMEI number) was active and in use of mobile telephone No.9871155519 of Airtel company. The investigation also statedly brought out that Airtel mobile No.9871155519 (hereinafter referred to as the Airtel mobile number ?) was in regular telephonic contact with mobile telephone No.20089749 of MTNL (Garuda) (hereinafter referred to as Garuda mobile number ?).

32. The prosecution claims that the Investigating Officer (PW-32) had found by 15.7.2004 that the Garuda mobile number was in use of accused No.1 Bhajan

Singh @ Gulla (A-1), a resident of B-6/320, Sector-17, Rohini. It is stated that the Investigating Officer, accompanied by PW-30 SI Jai Prakash and PW-20 Manbir Singh, raided the house of A-1 Bhajan Singh in premises No.B-6/320, Sector 17, Rohini in the morning hours and found him present. It is stated that, upon interrogation, A-1 Bhajan Singh made certain disclosures (Ex. PW-20/B) which led to discovery of crucial evidence in their wake. A-1 Bhajan Singh was arrested on the basis of the said revelations by formal arrest memo (Ex. PW-20/C), after personal search (vide Ex. PW-20/D), at 10.25 AM at 15.7.2004 from his said residence. It may be mentioned here that A-1 concedes that the said house is his residence and would not dispute his arrest on the said date.

33. It is the prosecution case that the disclosures made by accused No.1 (A-1) Bhajan Singh had brought out the involvement of accused No.2 (A-2) Joginder - Singh @ Jagga and accused No.3 (A-3) Ashok @ Bobby. It is Bhajan Singh (A-1) who is stated to have led the Investigating Officer and other police official witnesses to House No.B-7/144 Sector-17, Rohini, statedly the residence of A-2 Joginder Singh where the latter (A-2) and A-3 (Ashok @ Bobby) together were found present.

34. It is the case of the prosecution that A-2 Joginder Singh and A-3 Ashok, upon interrogation, made certain disclosures (Ex.PW-20/E and Ex.PW-20/F respectively), which were similar to the disclosures earlier made by A-1 (vide Ex. PW-20/B). They were also arrested formally vide separate arrest memos (Ex. PW-20/G and Ex.PW-20/H) after personal search (vide Memos Ex. PW-/I and Ex.PW-20/J respectively) at 12.30 pm on 15.7.2004 from House No.B-7/144, Sector 17, Rohini, Delhi.

35. Both A-2 Joginder Singh and A-3 Ashok deny their arrest from the aforesaid house in Rohini. While A-2 claimed in his statement under Section 313 Cr.P.C. to be a resident of C-1154, Jahangirpuri, Delhi, A-3 (Ashok) mentioned House No.114/89, Pratap Nagar, Sanganer, Jaipur, Rajasthan as his residential address. Both admitted that they were arrested, though claiming on false charges, A-2 claimed he was picked up from his house (presumably referring to Jahangirpuri residence) while A-3 would not clarify his position in such regard.

36. According to the prosecution case, it was A-1, Bhajan Singh, who had initially disclosed (vide Ex. PW-20/B) the place where the dead body of the victim child had been disposed of and this information was confirmed in their respective disclosures by A-2 (Ex. PW-20/E) and by A-3 (Ex. PW-20/F). It is stated that the three accused led the Investigating Officer (PW-32) and the other police witnesses to the place near a drain at village Jagatpur and at their instance, in the presence, amongst others, of PW-16 Mohd. Yunis, who had also been called, with the help of diver (PW-7) Abdul Sattar, the dead body was recovered from the gunny bags in which it was found floating in the water, the proceedings in such regard being reduced into a memorandum (Ex. PW-16/B). The two jute bags, the rope (sutli), the two bricks and one piece of brick collectively (Ex. P-5) were also seized vide the same memo.

37. The prosecution alleges that the dead body having been recovered pursuant to the disclosures and at the instance, of the accused persons, the three of them led the IO and the witnesses to house No.B-7/144, Sector-17, Rohini (the same house as from where A-2 and A-3 had been arrested earlier on the same date) and pointed out the kitchen as the place where the victim child had been kept and killed and from where his dead body was later removed for disposal. The prosecution referred to memo (Ex. PW-20/C) in this behalf. Similarly, it is alleged, A-2 Joginder Singh led the IO and the police witnesses and pointed out the gate of the public park opposite house nos. B-2/209 and B/203, Sector-17, Rohini as the place from where the victim child had been kidnapped, referring in this context to memo of pointing out (Ex. PW-12/A). It must be observed here that this part of the evidence of prosecution must be excluded from consideration for the simple reason that it constitutes statements of suspect(s) in custody to a police officer, which is inadmissible and no fact or further evidence has been discovered on such basis. For this very reason, the scaled site plan (Ex. PW-18/B) depicting the lay out of the House No.B-7/144, First Floor, Sector-17, Rohini also is inconsequential.

38. It is the case of the prosecution that, on 15.7.2004, A-1 Bhajan Singh led the IO (PW-32) and the other witnesses to his house B-6/320, Sector-17, Rohini (at 3rd Floor) from where he got recovered a mobile telephone instrument make

Motorola, which was in use with the Garuda SIM card number (20089749). The said handset, with Garuda SIM, was seized in the presence of PW-30 SI Jai Prakash vide formal memo (Ex. PW-20/M).

39. It may be mentioned here that, for purposes of investigation, the IO (PW-32) had requested, on 17.7.2004, a public witness, Navneet (PW-14), a local resident living in A-870, Sector-16, Rohini, who had voluntarily joined in the proceedings. It is the case of the prosecution that on 17.7.2004, during investigation, under police remand (granted on 16.7.2004 by the Metropolitan Magistrate), A-2 Joginder led the IO and the witnesses, including PW-16 Mohd. Yunis and PW-20 head constable Manbir Singh, to a place close to drain, opposite flat No.A-8/40, Sector-17, Rohini where a small bicycle, make Avon, was found kept concealed behind bushes and dry twigs. The cycle (Ex.P-4) was identified by PW-16 Mohd. Yunis to be that of his son Wasim Ahmad, who had been gone out with it on 11.7.2004. The cycle was seized vide formal memo (Ex. PW-14/A). PW-14, the independent public witness is also an attesting witness to the seizure memo of the cycle (Ex.PW-14/A) and certain further proceedings which may be noted hereinafter.

40. The prosecution further stated that after the recovery of the cycle, A-2 Joginder led the Investigating Officer and the other witnesses PW-14 Navneet, PW-16 Mohd. Yunis and PW-20 Manbir Singh to his house No.B-7/144, Sector-17, Rohini and got recovered mobile phone instrument make Nokia, with Airtel mobile SIM number 9871155519 (Ex.P-1), along with another mobile handset also make Nokia, with Airtel SIM number 9871204450 (Ex.P-2). Both handsets were found kept concealed under a quilt beneath the bed of a room. The said two mobile handsets with their respective SIM cards were seized vide formal seizure memo (PW-14/B) in the presence of the witnesses.

41. It may be added here that the second above-mentioned mobile handset (P-2) has no relevance to the case. The first aforesaid mobile handset (Ex.P-1) is, however, crucial to the case of the prosecution since it is the Airtel SIM number in use therein, which was found by the Investigating Officer to be in regular touch with the user of the Garuda phone, and thus, led the investigating team to A-1 (Bhajan Singh). The handset of the said Airtel number (Ex.P-1) is statedly the

same as had been used by the ransom caller.

42. It is stated in the prosecution case that A-1 Bhajan Singh led the IO (PW-32) and the witnesses PW-16 Mohd. Yunis and PW-20 constable Manbir Singh to his house No.B-320, sector-17, Rohini on 18.7.2004 and got recovered Hutch SIM card bearing No.H2-2000 7805673 of the mobile phone number 9899122565 (Ex.P-9) i.e. the SIM card used by the ransom caller. It was found concealed, wrapped in a piece of paper, kept beneath a concrete slab behind water tank on the top terrace of the property. The SIM card (Ex.P-9) was seized vide formal memo (PW-16/F).

43. The prosecution also alleged that during investigation, on 15.7.2004, the three accused had led the Investigating Officer to house No.B-6/210, Sector-17, Rohini and pointed out Maruti van with registration No.DL 2CK 0823 of V. Rishi (PW-10) whereupon the said van was seized (vide Ex.PW-10/A) along with its documents vide memorandum PW-10/B. In the same context, it may also be mentioned that prosecution further alleges that, on 18.7.2004, A-4 Bhajan Singh and A-2 Joginder had led the investigating team to house No.B-6, 412, sector-17, Rohini and pointed out scooter make Bajaj bearing registration No.DL 8SK 5582 of Vivek Manchanda (PW-9) which was also seized vide Memo (Ex.PW-9/A). It is stated that (according to the disclosures of the accused persons) both these vehicles had been borrowed by accused from their respective owners on 11.7.2004, 12.7.2004 and 13.7.2004 respectively, on some pretext PW-10 and PW-9 confirmed during their respective deposition the temporary use of the said vehicles by A-1 and A-2. But, in absence of any further corroborative material, particularly in the context of acts of commission/omission constituting the crime, this part of the evidence is not of much importance.

44. The prosecution further claimed in the case that, on 17.7.2004, A-3 Ashok had led the Investigating Officer and the witnesses (PW-14 Navneet, PW-16 Mohd. Yunis, PW-20 head constable Manvir Singh) to house No.B-7, Sector-17, Rohini (from where he had been arrested with co-accused A-2 Joginder Singh on 15.7.2004) and got recovered a pair of hawai chappals (Ex.P-3) which were identified by PW-16 Mohd. Yunis to be that of his deceased child, and were seized

(vide memo Ex.14/C). It is further claimed that, on 18.7.2014, A-1 Bhajan Singh led the IO (PW-32), accompanied by witnesses PW-16 Mohd. Yunis and Sudama Sharma (PW-27), and got recovered taviz (charm) (Ex.P-8), a key ring containing two keys (Ex.P-7) and a broken cycle basket (Ex.P-6) which had been kept concealed near water tank on the top third floor terrace of the property. It is stated that PW-16 Mohd. Yunis identified the taviz (Ex.P-8) and the broken cycle basket (P-6) to be that of his deceased son and the key ring (P-and) to be his property, which was in possession of the deceased child. The same were seized vide formal seizure memo (Ex.PW-16/E).

45. The learned trial court declined to act on the evidence concerning the Maruti van, the scooter and the recoveries in the nature of footwear (Ex.P-3), broken cycle basket (Ex.P-6), key chain (Ex.P-7) and taviz (Ex.P-8) and, in our opinion, rightly so. As observed earlier, no further evidence confirming the use of the Maruti van or the scooter by anyone connected with the crime has come up. The footwear, key chain and the broken cycle basket are items of ordinary use. There is nothing special about the ones recovered so as to be safely taken as corroborative of their connection with the deceased child. The taviz (Ex.P-8) was not mentioned by PW-16 at any earlier stage to be in use, or possession, of his child at the time of he going missing.

46. The prosecution had claimed that Anis Khan (PW-2), an acquaintance of PW-16 Mohd. Yunis had seen the victim child going away in the company of A-2 Joginder from near the public park in Sector-17, Rohini around 3.30/3.45 pm on 11.7.2004, after which he went missing, never again to be seen alive. It was claimed that PW-2 has been a local resident of the area, living on rent in house No.B-6/150, Sector-17, Rohini till 12.7.2004 and being acquainted with PW-16 Mohd. Yunis (and his son Wasim) on account of both being in the business of iron scrap as also with A-2 Joginder, on account of he also being a local resident. PW-2 claimed that had shifted residence on 12.7.2004 since his landlord had asked him to vacate. He was in the area in search of another house. He claimed that on 15.7.2004, he had learnt telephonically from PW-16 about the kidnapping and recovery of the dead body and it was then that he shared the information with the police, in the nature of last seen evidence. The learned trial court declined to

accept this evidence and, in our opinion, justifiably so. The testimony of PW-2 is of poor credibility. He claimed to have noticed the face of A-2 Joginder in the coverage of the case in media, newspaper and T.V. on 15.7.2004. Sector-17, Rohini is a large locality and it is difficult to believe that he would be in a position to identify A-2 Joginder only on account of the fact that both were living around the same place. There was no attempt by the IO to arrange test identification of A-2 qua the claim of Anis Khan.

47. The CDRs of the mobile phone numbers referred to earlier (Ex.PW-15/A, Ex.PW-13/A to C, Ex.PW-26/A and Ex.PW-22/A) were also presented as evidence at the trial. The said evidence was not acceptable to the learned trial judge in absence of supportive certification as to its admissibility in terms of Section 65-B of the Evidence Act. The learned counsel for the State fairly submitted in the course of arguments that, in these circumstances, he is not able to press home the said material for consideration.

48. The investigating agency made a formal request (Ex.PW-29/A) before the Metropolitan Magistrate seeking permission to collect voice samples of the three accused for the purpose of comparison with the recording of the voices in the telephonic conversation involving ransom caller(s). The request made on 6.9.2004 by Inspector K G Tyagi (PW-29), who had since taken over as the SHO of police station Mayapuri and to whom the investigation had been assigned was allowed by the Metropolitan Magistrate vide order endorsed thereupon. The three accused person were in judicial custody at that stage. It is stated that, under instructions from PW-29, head constable Omender Kumar (PW-25) collected the voice samples of A-1 Bhajan Singh,A-2 Joginder and A-3 Ashok, who had joined the proceedings voluntarily. PW-25 subjected the said exercise to recording in two separate audio cassettes. The voice sample of A-1 was recorded in one cassette (Ex.P-1), which was assigned serial No.1-A. The voice sample of A-2 Joginder was recorded in the other audio cassette (P-2) on one side which was assigned serial No.2-A. The voice sample of A-3 Ashok was recorded on the other side of the same cassette (P-2) and assigned serial No.2-B. The two cassettes were then seized by PW-29 (Inspector K G Tyagi) vide seizure memo (Ex.PW-23/A) after they had been put in cloth parcel and appropriately sealed. This exercise was

undertaken joining S I R. Srinivasan (PW-23) as an attesting witness.

49. It is stated that the audio recording (Ex.P-12) of the ransom callers and the voice samples taken by (PW-25) in two audio cassettes (Ex.P-1 and P-2) were sent for comparison to Central Forensic Science Laboratory (CFSL), Chandigarh where they were subjected to examination, leading to report being issued on 31.1.2005 (Ex.PW-21/A). The result of this examination in CFSL would be taken note of in detail later. Suffice it to note here that two of the voices from the end of mobile phone of the ransom caller have been identified as that of A-1 Bhajan Singh and A-3 Ashok.

50. In the above facts and circumstances, the prosecution rests its case against the three appellants on circumstantial evidence. It has been submitted that the recovery of the dead body at the instance of the three accused is the most crucial evidence indicative of their complicity. Against A-1 Bhajan Singh, the prosecution relies on the recovery of the Garuda phone on account of its nexus with the mobile phone number of the ransom caller, as indeed the recovery of the SIM of the said number. As against A-3, the recovery of the handset used for the purpose of the SIM card of the ransom caller, and of the cycle of the victim child are presented as clinching circumstances. It is urged that the voice identification of A-1 Bhajan Singh and A-3 Ashok positively connected them with the ransom calls. Finally, the factum of A-2 and A-3 being found together is submitted as a factor in corroboration. The learned counsel for State argued that these circumstances have been proved and collectively form a complete chain unerringly pointing towards guilt of the two accused.

51. The learned trial judge rejected the evidence about recovery of the SIM card of the ransom caller basically on the ground that this recovery shown to be effected on 18.7.2004 could not be believed since the house had been visited by the police earlier also. The learned trial judge declined to act on the evidence about the voice identification on the reasoning that the recording of the intercepted telephonic conversation with the ransom callers was unauthorised and illegal. The learned counsel for the State submitted that the view taken by the trial court on both these aspects is erroneous and misdirected.

52. Per contra, it has been argued by the defence that the case for the prosecution ought not be believed since the appellants were arrested and implicated falsely merely on the basis of suspicion.

53. The defence argued that since proper certification under Section 65-B of the Evidence Act has not been submitted, the CDRs of the mobile phones in question are bound to be excluded from the consideration and, if that approach were taken, there is nothing to show that the ransom calls were received by PW-16 from the mobile phone number the SIM card of which was recovered from A-1 Bhajan Singh, or, the hand set whereof was found in possession of A-3 Joginder Singh. The counsel further submitted that, in absence of the CDRs, the prosecution cannot show clearly as to how the investigating officer had zeroed in on A-1 Bhajan Singh. This, in the submission of the appellants, breaks the chain of circumstances which, in turn, should give rise to doubts as to their complicity.

54. It was urged that the recovery of the dead body from the drain cannot be used as a circumstance because the evidence would not show that the place was within the exclusive knowledge of any of three appellants. Further, it was submitted that mere knowledge about the location of dead body cannot lead to inference that the accused who led to the recovery was the killer.

55. It was argued that A-2 Ashok and A-3 Joginder Singh have been falsely shown arrested from H. No.B-7/144, Sector-17, Rohini. The submission is that both of them were picked up from their respective residences elsewhere and a false case foisted on them.

56. It was also urged by the defence that the evidence as to recoveries of other incriminating material, particularly the bicycle of the deceased child, the SIM card of the mobile phone of the ransom caller and handset connected thereto must be viewed with suspicion. The counsel argued that there has been effort to plant the said other evidence, recoveries whereof were not found to be trustworthy by the trial court.

57. The defence further submitted that evidence as to the voice identification has been rightly rejected by the trial court since the recording of the ransom calls was

a product of unauthorised and illegal interception.

58. Undoubtedly, as a result of the exclusion of the CDRs from consideration on account of the absence of certificate under Section 65-B of the Evidence Act, the documentary proof as to how the investigating officer had started probing the involvement of A-1 Bhajan Singh is rendered unavailable. But this, by itself, cannot mean that the evidence which came to be gathered after A-1 Bhajan Singh had been apprehended would have to be trashed. We have on record the word of the investigating officer (PW-32) and that of Inspector Jai Prakash (PW-30) to show that the perusal and analysis of the CDRs of the two mobile phone numbers (one of the father of the victim and other of the ransom caller) had led them to A-1 Bhajan Singh residing in house no.B-6/320, Sector-17, Rohini.

59. In the face of the highly incriminating evidence that came to light as a result of the follow-up on the lead about the role of A-1 Bhajan Singh, the rejection of CDRs from the admissible evidence only means that such material as could provide additional corroboration may not be availed of.

60. As regards of the identity of the mobile number of the ransom caller (i.e.9899122565), the evidence of PW-16 Mohd. Yunis proves the fact beyond doubt. There is no effort made to impeach his testimony that he was in use of mobile phone number 9810119204 and that he had received several ransom calls from mobile phone number 9899122565. The phone number of the ransom caller would have flashed on his own mobile handset and thus the number of the phone from which the ransom calls came could be ascertained by him on his own. PW-16 Mohd. Yunis had mentioned the phone number of the ransom caller even in his first statement (Ex.PW16/A). His son was missing. He had no reason to give wrong information to the police. Instead, he would be too eager to share with the police all possible clues available with him. The mobile phone number of ransom caller was most crucial lead - the only lead - at the stage. Thus, he would have mentioned this in the FIR, this correctly on basis of call logs in his own phone. The non-availability of CDRs, therefore, would not come in the way of believing the testimony of PW-16 Mohd. Yunis as to the identity of the mobile phone of the ranson caller.

61. We find no reasons to doubt the prosecution evidence as to the fact that A-2 Ashok and A-3 Joginder Singh were found together arrested from House No.B-7/144, Sector-17, Rohini. As noted earlier, it is A-1 Bhajan Singh, who led the investigating officer and the witnesses to the said house. The evidence clearly shows that A-3 Joginder Singh is real nephew (Bhanja) of A-1 Bhajan Singh. He would undoubtedly know the place where his relative was living. At any rate, no evidence has been adduced either by A-2 Ashok or by A-3 Joginder Singh to prove that they had been picked from a place other than the said house in Sector-17, Rohini. We are, thus, satisfied that the prosecution has proved the arrest of both these appellants found living together in the same house.

62. The argument of the defence that discovery of the dead body from the drain cannot be connected to any of the three appellants is devoid of substance. It is true that the drain in question is a place where public would have unrestricted access. It is also true that the gunny bag in which the dead body was found floating in the water of the drain could be partially seen above the water level. This, however, cannot detract us from the fact that, but for some lead, it was well nigh impossible for the police to reach the said spot, get the gunny bag brought out from the water and to recover the dead body there-from. The lead was given, per the evidence which deserves to be believed, during interrogation of A-1 Bhajan Singh. The disclosure statement (Ex.PW-20/B) would not be admissible in entirety for the simple reason it was a statement made by the suspect to the police officer and thus hit by the provisions contained in Sections 24 -26 of Evidence Act. But, so much of the said disclosure as constituted information regarding the place where the dead body could be found is admissible and evidence in such regard can be lawfully received and acted upon in terms of Section 27 of the Evidence Act. In the facts and circumstances, the location of the dead body in the gunny bag dumped in the public drain at the specific place was a fact discovered only on account of special knowledge of A-1 Bhajan Singh in such regard. This circumstance, thus, must be found duly proved and can be legitimately used as an incriminating circumstance against A-1 Bhajan Singh.

63. We, however, agree with the submissions on behalf of A-2 Joginder Singh and A-3 Ashok that since the location of the dead body in the gunny bag in the public

drain was a fact that had already come to the knowledge of the Investigating Police Officer from A-1 Bhajan Singh, the disclosures (Ex.PW-20/E and Ex.PW-20/F) to such effect attributed to A-2 Joginder Singh and A-3 Ashok, concededly not made simultaneously, cannot be described as information received from the accused leading to discovery of a new fact within the meaning of the exception under Section 27 of the Evidence Act.

64. We do not agree with the argument that the evidence in the nature of chappals, taviz, broken cycle basket etc. have been planted. There is sufficiently cogent evidence adduced about the said recoveries. The said material, however, as set out in paragraph 45 above is found to be not properly connected with the victim child and, therefore, of low evidentiary value. In this view of the matter, the submission that the other recoveries of clinching nature, viz., the bicycle of the deceased child, the SIM card of the ransom caller and the handset in which it was used be discarded as suspicious, does not appeal to us. We have carefully gone through the evidence regarding the recoveries of the said three exhibits and find no reason to disbelieve the same.

65. The evidence of PW-16 Mohd. Yunis is consistent since beginning that the child had gone out for ride on bicycle when he went missing. Neither the child nor the bicycle could be immediately found. While the dead body of the child was recovered from the public drain, pursuant to disclosure and on the pointing of Bhajan Singh on 15.7.2004, the cycle was recovered on 17.7.2004 in the wake of disclosure by A-2 Joginder Singh and upon he leading the Investigating Officer (Pw-32) accompanied by PW-16 Mohd. Yunis and independent public witness PW-14 Navneet to the place close to the drain in Sector-17, Rohini where, as mentioned in detail earlier, it was found concealed behind bushes and dry twigs away from the public gaze. The cycle was properly identified by PW-16 Mohd. Yunis as the one on which his deceased child had gone out in the afternoon he was kidnapped. The witnesses to the recovery have withstood the cross-examination well and we find no reasons to disbelieve this part of the evidence.

66. Similarly, in our view, the mobile handset of the ransom caller with SIM card of 9871155519 is also proved recovered from the possession of A-2 Joginder Singh,

on 15.7.2004. The testimony of PW-30 SI Jai Prakash and of PW-32 ACP Tilak Raj Mongia are consistent on the subject and deserve to be believed. This recovery was crucial and is connected with recovery of the SIM card of the mobile phone (9899122565) of ransom caller from the possession of A-1 Bhajan Singh vide Ex.PW-16/F on 18.7.2004 in the presence of PW-16 Mohd. Yunis and PW-20 Head Constable Manbir Singh.

67. The learned trial court declined to believe the above noted evidence about recovery of SIM card for the reason the house of A-1 Bhajan Singh had been raided by the police earlier on 15.7.2004.

68. While it is indeed a cause for concern as to why the Investigating Officer had not been able to collect complete evidence from the house of the then prime suspect A-1 Bhajan Singh at the time of first visit to the place, it must be borne in mind that after the initial interrogation, upon revelation about the location where the dead body would be discovered, the immediate priorities of the investigating team on 15.7.2004 had changed. The dead body was found and two other accused (A-2 and A-3) had come to be arrested. The follow up action on disclosures made by them is also shown to have been carried out. The investigation continued on these lines for the next two days. Thus, the revisit to the house of A-1 Bhajan Singh took place on 18.7.2004. The SIM card of the mobile phone of the ransom caller was found kept concealed. It being a very tiny article must have escaped notice earlier. In the facts and circumstances, its recovery from the place of its hiding is also a matter connected with special knowledge of A-1 Bhajan Singh.

69. The SIM card of a mobile phone is not such an article as could have been fabricated by the Investigating Officer. The evidence respecting its recovery pursuant to disclosure and at the instance of A-1 Bhajan Singh coming through the mouthpiece of PW-16 Mohd. Yunis, PW-20 Head Constable Manbir Singh, both attesting witnesses to the seizure memo (Ex.PW-16/F) providing corroboration to the evidence of PW-32 ACP Tilak Raj Mongia, inspires confidence. Therefore, the fact of recovery of SIM card of the mobile phone of the ransom caller must be held brought home.

70. The learned trial judge excluded from consideration the evidence regarding voice identification connecting A-1 Bhajan Singh and A-3 Joginder Singh with the ransom calls primarily for two reasons - one, there was no valid authorisation for interception of the telephonic conversations and, two, the permission of the Metropolitan Magistrate for taking voice samples and the voluntariness of giving of such samples by the appellants has not been proved. In our view, the approach of the learned trial judge on both these counts was misdirected.

71. The trial court has quoted, in extenso, the notification dated 01.03.2007 issued under Section 7 of Indian Telegraph Act by the Department of Communications of the Ministry of Communications and Information Technology of the Government of India. It may be reproduced as under :

G.S.R. 193 (E).-In exercise of the powers conferred by Section 7 of the Indian Telegraph Act, 1885 (13 of 1885), the Central Government hereby makes the following rules further to amend the Indian Telegraph Rules, 1951, namely:-

1.

(1) These rules may be called the Indian Telegraph (Amendment) Rules, 2007.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Indian Telegraph Rules, 1951, after rule 419, the following rule shall be substituted, namely:- 419-A.

(1) Directions for interception of any message or class of messages under sub-section

(2) of Section 5 of the Indian Telegraph Act, 1885 (hereinafter referred to as the said (Act) shall not be issued except by an order made by the Secretary to the Government of India in the Ministry of Home Affairs in the case of Government of India and by the Secretary to the State Government in-charge of the Home Department in the case of a State Government. In unavoidable circumstances, such order may be made by an officer, not below the rank of a Joint Secretary to

the Government of India, who has been duly authorized by the Union Home Secretary or the State Home Secretary, as the case may be: Provided that in emergent cases- (i) in remote areas, where obtaining of prior directions for interception of messages or class of messages is not feasible; or (ii) for operational reasons, where obtaining of prior directions for interception of message or class of messages is not feasible; the required interception of any message or class of messages shall be carried out with the prior approval of the Head or the second senior most officer of the authorized security i.e. Law Enforcement Agency at the Central Level and the officers authorised in this behalf, not below the rank of Inspector General of Police at the state level but the concerned competent authority shall be informed of such interceptions by the approving authority within three working days and that such interceptions shall be got confirmed by the concerned competent authority within a period of seven working days. If the confirmation from the competent authority is not received within the stipulated seven days, such interception shall cease and the same message or class of messages shall not be intercepted thereafter without the prior approval of the Union Home Secretary or the State Home Secretary, as the case may be. ?

72. The interception of the calls received by PW-16 Mohd. Yunis on his mobile phone from that of the ransom callers and the recording thereof by PW-20 Head Constable Manbir Singh was held to be illegal by the trial Judge for the reason that the permission vide Ex.PW-17/A came only on 26.7.2004 and there was no authorisation secured under the clause applicable for emergent cases from the Joint Commissioner of Police.

73. Clearly, crucial evidence on record has escaped notice of the trial court resulting in an erroneous impression. The investigation at the relevant point of time was in the hand of PW-30 Inspector Jai Prakash. He deposed, without contest from the defence, about the permission of Joint Commissioner of Police (Northern Range) on 12.7.2004 resulting in the two mobile phones being put under observation/surveillance. A case of kidnapping of a child followed by ransom calls is undoubtedly an emergent case within the meaning of the proviso to amended Rule 419-A(1) quoted above. The Joint Commissioner of Police (Northern Range)

was an officer of the appropriate rank to grant the authorisation for operational reasons in such an emergent case. True, the formal authorisation of Joint Commissioner of Police (Northern Range) in writing has not been proved. But, that cannot inhibit the prosecution from claiming that the recording of the ransom calls was authorised and lawful. The formal authorisation did come in the shape of order dated 26.7.2004 (Ex.PW-17/A) granted by the competent authority. Even if this formal order was issued later, it would provide legitimacy, to the request made, on emergent basis, by the investigating police on 12.7.2004.

74. The fact that the request made by the Investigating Officer PW-30 Inspector Jai Prakash, had been endorsed by the Joint Commissioner of Police (Northern Range) only strengthens the case of the prosecution for availing the evidence resultantly gathered, in as much as the said police officer himself had the authority, in law, to grant the permission for such purposes. As can be noticed, the competent officer under the proviso to Rule 419A(1) quoted above, having granted the authorisation on emergent basis, is required to get the same confirmed by the competent authority. Thus, the Joint Commissioner of Police (Northern Range) by referring the matter to Principal Secretary (Home) of GNCTD had taken the requisite steps for approval of the action already undertaken under his authorisation.

75. Even if, for the sake of argument, the plea of the defence as to unauthorised interception/recording of the ransom calls were to be accepted, it would not mean the evidence as to the recording of such calls collected in the due course of investigation would stand rejected. It is settled law and has been consistently followed over the years that even illegally obtained evidence may be admissible.

76. In Barindra Kumar Ghose V. Emperor 1910 ILR 37 Cal 467, Lawrence H. Jenkins, CJ observed thus :

... has attacked the searches and has urged that, even if there was jurisdiction to direct the issue of search warrants, as I hold there was, still the provisions of the Criminal Procedure Code have been completely disregarded. On this assumption he has contended that the evidence discovered by the searches is not admissible, but to this view I cannot accede. For, without in any way countenancing disregard

of the provisions prescribed by the Code, I hold that what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which those provisions were disregarded. ... "

(emphasis supplied)

77. Interestingly, in the context of argument as to admissibility of tape recording of the conversation obtained by illegal means under the Indian Telegraph Act, in R.M.Malkani V. State of Maharashtra 1973 (1) SCC 471, the Supreme Court, affirming the proposition that even if evidence is illegally obtained, it is admissible ?, observed as under :

24. It was said by counsel for the appellant that the tape recorded conversation was obtained by illegal means. The illegality was said to be contravention of Section 25 of the Indian Telegraph Act. There is no violation of Section 25 of the Telegraph Act in the facts and circumstances of the present case. There is warrant for proposition that even if evidence is illegally obtained it is admissible. The Judicial Committee in Kuruma, Son of Kanju v. R. [1955 AC 197] dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence.

30. It was said that the admissibility of the tape recorded evidence offended Articles 20(3) and 21 of the Constitution. The submission was that the manner of acquiring the tape-recorded conversation was not procedure established by law and the appellant was incriminated. The appellant's conversation was voluntary. There was no compulsion. The attaching of the tape-recording instrument was unknown to the appellant. That fact does not render the evidence of conversation inadmissible. The appellant's conversation was not extracted under duress or compulsion. If the conversation was recorded on the tape it was a mechanical

contrivance to play the role of an eavesdropper. In R. v. Leatham [(1861) 8 Cox CC 198] it was said "it matters not how you get it if you steal it even, it would be admissible in evidence. ... ?

(emphasis supplied)

78. The Constitution Bench of the Supreme Court in Pooran Mal v. Director of Inspection (Investigation) 1974 (1) SCC 345, reiterating the view taken, inter alia, in Barindra Kumar Ghose (supra) ruled thus :

... It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out. ?

(emphasis supplied)

79. The above law was followed and the contemporaneous tape record of a relevant conversation accepted as relevant fact and held to be admissible under Section 7 of Evidence Act, regardless of the deficiencies or inadequacies in compliance with the provisions of the Telegraph Act, in the case of State (NCT of Delhi) v. Navjot Sandhu 2005 (11) SCC 600, holding as under :

...these deficiencies or inadequacies do not, in our view, preclude the admission of intercepted telephonic communication in evidence. It is to be noted that unlike the proviso to Section 45 of POTA, Section 5(2) of the Telegraph Act or Rule 419-A does not deal with any rule of evidence. The non-compliance or inadequate compliance with the provisions of the Telegraph Act does not per se affect the admissibility. ?

(emphasis supplied)

80. In our view, there is no illegality attached to the recording of the ransom calls. It was an emergent case and since there was authorisation granted by the Joint Commissioner of Police (Northern Range) to the Investigating Officer, the tape-recording of the conversation was lawful and within the four corners of Rule 419(A)

referred to earlier. The delay in formal confirmation by the competent authority under the general rule, even if treated as deficiency, would not result in the crucial evidence to be disregarded.

81. The plea that the opinion of CFSL with regard to the voices in the intercepted telephonic conversations not be acted upon since the prosecution has not formally proved the permission taken from the Metropolitan Magistrate for collecting voice samples overlooks the evidence of Inspector K.G. Tyagi (PW-29) and Head Constable Omender Kumar (PW-25). The statement of these witnesses has proved, inter alia through document Ex.PW-29/A, that Inspector K.G.Tyagi, the then SHO of P.S. Mangolpuri to whom the investigation had been entrusted, had moved an application before the Metropolitan Magistrate on 06.09.2004 seeking permission to obtain, by recording, the sample of voices of the three accused who were then in judicial custody. The document shows the Magistrate allowed the said request and in the wake of such permission, under instructions of PW-29, Head Constable Omender Kumar (PW-25) took the voice samples in the manner indicated earlier, the result of which exercise in the form of two cassettes (Ex.A-1 and A-2) were seized by the Investigating Officer vide memo Ex.PW-23/A. Noticeably, when confronted with this part of the incriminating evidence, at the stage of their respective statements under Section 313 Cr.P.C. each of three accused took the position that the voice samples were taken later on to be shown as ransom intercepts and get it matched with the other voice sample. The appellants, thus, would not deny that the voice samples were taken. Their plea is that the samples of their respective voices taken have been misapplied. We find this plea to be groundless and devoid of substance.

82. In the above facts and circumstances, the opinion given by Dr. C.P. Singh (PW-21), the then Junior Scientific Officer (Physics) in CFSL, Chandigarh is of crucial importance. From the recorded ransom calls, the CFSL expert had picked up four particular sentences uttered from the end of the ransom caller(s). Three of the said utterances ghar se nikal pade ke nahi appearing in the first call (Ex.Q-1), metro station me pahuch gaya in the third call, han ponch gaya.....metro me....hai.... are in the fourth call and han ponch gaya station pe.... han... nikal gaya in fifth call (Ex.Q-3), and Kahan pe hai, train kahan pe hai in sixth call (Ex. Q-

4) were found in voice similar to the sample voice of A-1 Bhajan Singh (Ex.S-3). Similarly, the utterance Are haan sun kal samko aisa kariyo tum in the second call (Ex.Q-2) was found to be similar to be the sample voice of A-3 Ashok Kumar (Ex. S-2). The CFSL expert has explained in the report that his opinion about similarity in the said voices was based on acoustic analysis of speech samples by using Compurterized Speech Lab (CSL) revealing similarity in the acoustic cues and other linguistic or phonetic features.

83. The opinion given by PW-21 in his detailed report Ex.PW21/A was not challenged except for bald suggestions that it was a false report and the cassettes had been tempered with while in the custody of the CFSL. In absence of any material in support, there is no reason why such vague theory of the defence should be even considered.

84. The learned counsel for the appellants have relied upon Savita alias Babbal vs. State of Delhi 2011 (3) JCC 1687, to request that the opinion on voices be not acted upon. In our view, the circumstances in which the evidence in the nature of tape-recording in the said case was discarded were distinguishable. That was a case where the prosecution relied heavily on the transcripts of the conversation subjected to recording. The Court found the authenticity of the tapes to be questionable since the MTNL officials, who had been involved in the exercise, were not called upon to depose on the subject. Further, there was no evidence made available to identify the voice of the person at the receiving end in the endeavour at extortion.

85. In the case in hand, Mohd. Yunis (PW-16) had received the ransom calls from persons who were not known to him. He would, thus, be not familiar with the voices. He has confirmed the steps taken by the Investigating Officer leading to the tape-recording of the ransom calls. In the overall facts and circumstances, we find no reasons as to why the opinion of CFSL confirming the voices at the other end of the telephone calls being that of A-1 Bhajan Singh and A-3 Ashok Kumar should be discarded. The said opinion lends credence to the facts emerging that the mobile phone of the ransom caller was in the hands of A-1 Bhajan Singh and A-3 Ashok Kumar.

86. The prosecution case rests on circumstantial evidence. Ld. Counsel for appellants submitted that in criminal jurisprudence, each person accused of a crime is entitled to presumption of innocence and at the stage of final analysis mere suspicion, even a grave suspicion, cannot suffice. They submitted that graver the nature of the offence, greater the duty on the part of the court to scrutinize each fact and circumstance more carefully. There can be no quarrel with these propositions.

87. Undoubtedly, this case is based on circumstantial evidence. It is settled law that in a case where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilty is to be drawn should, in the first instance, be fully, cogently and firmly established. All the facts so established should be of a conclusive and definite nature and tendency, unerringly pointing towards the guilt of the accused. They should be consistent only with the hypothesis of the guilt of the accused and exclude every other hypothesis but the one proposed to be proved. Even more importantly, the circumstances, taken cumulatively, should form a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that, in all human probability, the act must have been done by the accused. [Hanumat Govit Nagacunda vs. State of M.P. AIR 1952 SC 343; Kali Ram vs. State of Rajasthan 1977 SCC (Cri.) 250; Sharda B. Sarda vs. State of Maharashtra AIR 1984 SC 1622; Padala Veera Reddy vs. State of AP AIR 1990 SC 79; Balvinder Singh vs. State of Punjab 1996 (1) SCC 5 SC; C. Channy Reddy vs. State of AP (1996) 10 SCC 193; and Ramreddy Rajesh Khanna Reddy vs. State of AP (2006) 10 SCC 172]

88. In our considered view, the prosecution has brought home the following facts and circumstances beyond the pale of doubts:-

(i) Waseem Ahmed son of Mohd. Yunis (PW-16), aged about 8 years, went out for a ride on his bicycle sometime around 3:30/3:45 PM on 11.07.2004 from his house No.B-2/42 Sector-17, Rohini. His father Mohd. Yunis (PW-16) tried to locate him in the area around but with no success;

(ii) While Mohd. Yunis (PW-16) was trying to search for his missing son, he received a telephone call sometime before 7:30 PM on his mobile phone number 9810119204, from mobile phone number 9899122565, the caller informing him that the search by him was futile as the child was in the custody of the persons at the other end and that he should arrange Rs.25 lakhs, advising not to inform the police and that he would receive another call on the next date;

(iii) Mohd. Yunis (PW-16) lodged a report with the police sometime before 9:30 PM on 11.07.2004 on which FIR No. 621/2004 was registered for the offence under Section 364-A IPC;

(iv) Mohd. Yunis (PW-16) received at least six more calls from the ransom caller, calling each time from the same mobile number (9899122565) on his mobile number, wherein the ransom demands were repeated, the person(s) at the other end eventually settling to receive from him an amount of Rs.3.5 lakhs as had been arranged and calling him for handing over the money firstly on a route of metro network and then by train from Subzi Mandi railway station to Sonipat;

(v) Mohd. Yunis (PW-16), having reported the matter to police, shared the facts of further ransom calls with the Investigating Officer, who having secured an authorisation for interception subjected the same to tape-recording;

(vi) Mohd. Yunis (PW-16) during the journey by metro, and train, for the purposes of handing over the ransom money to the kidnappers, was accompanied by the police personnel, but the money was not handed over, nor dropped as instructed, on advice from police while the suspects could not be spotted or traced;

(vii) On the basis of the leads available about the ransom calls coming from the aforesaid mobile phone number (9899122565), the investigating police found that the mobile handset which had been used by the ransom callers was in use with another number (9871155519) which, in turn, was in regular touch with Garuda number (20089749), the last said mobile number being in use of A-1 Bhajan Singh, resident of B-6/320, Sector -17, Rohini;

(viii) A-1 Bhajan Singh was arrested from his aforesaid residence on 15.07.2004 and, upon interrogation, made a disclosure which led to discovery of the dead body of the kidnapped child Waseem Ahmed, found dumped in a public train in the area of Jagatpur, kept concealed in two gunny-bags (one into other) alongwith brick pieces, apparently with the objective of ensuring that it would drown and not be found;

(ix) When the dead body was subjected to autopsy, it was found that death had occurred sometime around the night of kidnapping (i.e. 11.07.2004), due to manual smothering;

(x) A-1 Bhajan Singh made disclosures about his nephew A-2 Joginder Singh and A-3 Ashok Kumar, who were arrested at 12:30 PM on 15.07.2004 from house No. B-7/144, Sector-17, Rohini, where they were found together;

(xi) Pursuant to disclosure made by A-2 Joginder Singh, the Investigating Officer found the bicycle (Ex.P-4) on which the deceased child had gone out on 11.7.2004, it having been kept concealed close to drain in the area of Sector-17, Rohini;

(xii) The mobile phone instrument (Ex.P-1) which had been used by the ransom caller(s) was recovered from the possession of A-2 Joginder Singh, though now used with SIM card of another mobile phone number (9871155519);

(xiii) The SIM card of mobile phone number 9899122565 (Ex.P-9) used by the ransom callers was recovered from the possession of A-1 Bhajan Singh, kept concealed on the top terrace of the property where he was living; and

(xiv) During investigation, the voice samples of the appellants were collected and when compared with the voices in the tape-recordings of the ransom calls, it was found that two voices from the end of the ransom callers matched with the samples of the voices of A-1 Bhajan Singh and A-3 Ashok Kumar.

89. The appellants rely on the view taken in Chhotu Singh V. State of Rajasthan 1999 SCC (Cri) 461, Bakhshish Singh V. State of Punjab 1971 (3) Supreme Court Cases 182 and the judgment dated 14.08.2007 of a Division Bench of this Court in

Crl.A.No.672/2006 Radhey Shyam V. the State (NCT) of Delhi to argue that mere recovery of the dead body at the instance of the appellants cannot prove the charge of murder.

90. The decision in the aforementioned cases cited at bar proceeded on the peculiar facts and circumstances of the said cases. In our view, the following observations of the Supreme Court in State of Maharashtra V. Suresh (2000) 1 SCC 471 are the complete answer to the argument urged:

We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was conceded by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act. ?

91. In our considered opinion, the aforementioned facts and circumstances establish a complete chain leaving no room for doubt as to the involvement of each of the three appellants in the crime. The manner in which the dead body of the child was disposed of clearly shows it to be a case of murder and further that the intention was to destroy evidence. The place of disposal of the dead body is proved to be within the special knowledge of A-1 Bhajan Singh. In the present case A-1 Bhajan Singh has not offered any explanation as to how he was aware of the specific location where the dead body had been disposed of in secrecy, in a manner clearly indicative of the intention of precluding the possibility of it coming to light. In these circumstances, it must be inferred that he is the perpetrator of the

offence of murder and party to the effort at destruction of evidence.

92. The fact that the bicycle of the deceased child was found similarly disposed of, concealed from the public view and that it could be discovered only upon the disclosure made in such regard by A-2 Joginder Singh, the onus shifts on to him. Since A-2 Joginder Singh also has been in denial mode and would not explain the said incriminating circumstance and since he was also found in possession of the mobile handset which was used for the purpose of ransom calls, his complicity stands brought home.

93. The fact that the SIM card used by the ransom callers was found in the possession of A-1 Bhajan Singh and further since the opinion of CFSL expert confirms that he (A-1) and A-3 Ashok Kumar were the ransom callers, the involvement of all the three appellants stands proved.

94. We are satisfied that the facts and circumstances established bring home that the three appellants were acting in close co-ordination and concert with each other with the objective of extracting ransom money from PW-16 Mohd. Yunis. Clearly, the victim child was kidnapped pursuant to a criminal conspiracy in furtherance of the ultimate object of which each of the three appellants played an active part. As shown by the evidence, the ransom calls were made and followed up by A-1 Bhajan Singh and A-3 Ashok Kumar. The recovery of the dead body at the instance of A-1 Bhajan Singh, recovery of the bicycle of the victim child at the instance of A-2 Joginder Singh, the recovery of the SIM card of the ransom callers from A-1 Bhajan Singh and of the mobile handset in which the said SIM card was used from the possession of A-2 Joginder Singh, as indeed the facts that A-2 is nephew of A-1 Bhajan Singh and was living under the same roof with A-3 Ashok Kumar, leave no room for doubt that they were party to the agreement to commit the illegal acts, constituting the offences with which they have been charged.

95. The facts and circumstances, thus proved, are conclusive and definite in nature and unerringly point towards the guilt of the appellants, there being no possibility of any hypothesis of their innocence. In our opinion, the guilt of each appellant is writ large on the record.

96. We, thus, find that the learned trial Judge correctly appreciated the prosecution evidence to hold the three appellants guilty for offences punishable under section 302 r/w section 120B IPC and section 201 r/w section 120B IPC. We also find that the learned trial Judge fell into error by acquitting the three appellants on the charge for offences punishable under Sections 364 and 364-A r/w section 120B IPC. Since the ransom calls have been proved, there is no escape from the conclusion that the objective of the criminal conspiracy was to indulge in extortion. Thus, the kidnapping of the victim child was to extract ransom money within the mischief of the penal clauses contained in Section 364-A IPC. In the facts and circumstances wherein the victim child was killed on the very night of kidnapping, and the ransom calls had continued thereafter, there is no doubt that the kidnapping was brought about in order also to commit the murder. Thus, the guilt of the three appellants for offence under Section 364 IPC has also been proved.

97. For the aforesaid reasons, we dismiss the appeals of the three convicts. We allow the State appeal. The conviction, and order on sentence, for offences under Section 302 r/w Section 120B IPC and Section 201 r/w Section 120B IPC are confirmed. We hold the three appellants guilty, and convict them also for offences punishable under Section 364 r/w Section 120B IPC and Section 364-A r/w Section 120B IPC. The impugned judgment to the extent it ordered acquittal for the said offences is resultantly set aside.

98. In the given facts and circumstances, we award sentence of imprisonment for life with fine of Rs.5000/- each for offences under Section 364-A r/w Section 120B IPC and Section 364 r/w Section 120B IPC respectively. We further direct that the amount of fine, as additionally imposed by us on the aforesaid two counts, shall also be paid as compensation on the same lines as directed by the learned trial judge to the parents of the deceased child.

99. The appeals are disposed of in the above terms.

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