

Jitender Kumar @ Jitu vs.state

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Court : Delhi

Decided On : May-09-2018

Appellant : Jitender Kumar @ Jitu

Respondent : State

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI RESERVED ON : NOVEMBER, 25, 2017 DECIDED ON : MAY09 2018 CRL.A. 1197/2016 + + + Appellant AJAY KUMAR @ AJAY TAKSHAK STATE (NCT OF DELHI) versus Through : Ms.Sima Gulati with Mr.Sumit Soni, Advocates. Through : Mr.Rajat Katyal, APP. Respondent CRL.A. 341/2017 JITENDER KUMAR @ JITU STATE Appellant Through : Mr.Akshya Kumar Sharma, Advocate. Through : Mr.Rajat Katyal, APP. versus Respondent CRL.A. 66/2017 VIJAY PHOGAT Appellant Through : Mr.Sumit Verma with Mr.Aman Choudhary, Mr.Akshya Kumar Sharma and Ms.Monika Sharma, Advocates. STATE versus Through : Mr.Rajat Katyal, APP. Respondent Crl.A.1197-2016 & connected matters Page 1 of 22 CORAM: HON'BLE MR. JUSTICE S.P.GARG HON'BLE MR. JUSTICE C.HARI SHANKAR S.P GARG, J.

1. The appellants Ajay Kumar (A-1), Jitender Kumar @ Jitu (A-2) and Vijay Phogat (A-3) are aggrieved by a judgment dated 31.08.2016 of learned Additional Sessions Judge in Sessions Case No.

arising out of FIR No.183/2009 registered at police station Tilak Marg whereby they all have been held guilty for committing offences punishable under Sections

120-B IPC; 364-A/365/394 IPC read with Section 120-B IPC. A-3 was further convicted for commission of offence under Section 25 Arms Act. By an order dated 04.10.2016, the appellants were awarded various prison terms with fine.

2. Briefly stated, the prosecution case as reflected in the charge- sheet was that on 20.07.2009 at around 1.30 p.m., A-1 took Abhay Garg, his friend/the victim in his car to Gurgaon on the pretext to show him some property. At Gurgaon, they met PW-17 (Satya Narain Jhangu). The victim did not return home that night. Victims father PW- 2 (Ajay Kumar) made futile attempts to contact him on mobile but it was switched off. On the next morning i.e. 21.07.2009 at around 6.00 a.m. Ajay Kumar received a telephone call from A-1s wife Nirmal Takshak informing him about the abduction of her husband. Ajay Kumar along with his relatives went to A-1s residence at Pushp Vihar, to ascertain more facts. On the way to Pushp Vihar at around 8.00 a.m. PW-2 (Ajay Kumar) on his mobile received a telephone call from A-1 Crl.A.1197-2016 & connected matters Page 2 of 22 informing that he had been released after some financial settlement and warning. He further informed that Abhay Garg was still in the custody of the abductors.

3. On 21.07.2009 on the basis of written complaint (Ex.PW-2/A) of victims father- Ajay Kumar, FIR was lodged. Efforts were made to find out the victim but in vain. The complainant suspected A-1s involvement in the kidnapping of his son.

4. Further case of the prosecution is that during investigation, it was found that Wagon-R in which the victim and A-1 had gone to Gurgaon belonged to A-1s wife. It was discovered that the assailants had withdrawn some cash from the SBI ATM at Rewari using victims cards. On the night intervening 22/ 23.07.2009, Sub-Inspector Shiv Karan and his team reached SBI ATM at Rewari. As per CCTV footage, an individual wearing a helmet was seen withdrawing money from the SBI ATM at Rewari during 1.05 a.m. till 1.26 a.m. The CCTV footage after converting into a CD was seized vide seizure memo (Ex.PW-7/C).

5. Further case of the prosecution is that on 23.07.2009 on getting information that vehicle No.DL-3C-AG-8139 was being stopped near Jharsa flyover on the highway, the police team reached there and found the said vehicle parked near the mini market. A-1 was found sitting on the drivers seat in a drowsy condition.

On A-1s search, a small spiral pocket dairy was found in his pocket; it recorded list of articles required for kidnapping a person. On interrogation, A-1 disclosed that he along with his associates Krishan Kumar (since Proclaimed Offender), A-2 and A-3 had kidnapped the victim and he was in CrI.A.1197-2016 & connected matters Page 3 of 22 confinement in a house at village Kosli, District Jhajjar, (Haryana). Necessary proceedings were conducted at the spot and A-1 was brought to the police station Chanakyapuri. A rescue team was constituted at the Police Station Chanakyapuri for recovery of the victim at Kosli. The police team along with commandos accompanied with A-1 went to Kosli and from a house therein pointed out by A-1, recovered the victim. A-3 was apprehended at the spot and a country made pistol and two live cartridges were recovered from his possession; these were seized vide seizure memo (Ex.PW-8/H).

6. The police team left to apprehend Krishan @ Mani at Naya Gaon but he could not be found there. The police team then visited A-2s village Shahdat Nagar; they were informed that he was residing at Laxman Vihar, Gurgaon. On reaching there, the police team came to know that A-2 had just left that place with the children. They also came to know that A-2 used to live at Sagarpur. A-2 finally surrendered in the court on 30.07.2009. He was arrested and his disclosure statement came to be recorded. He declined to participate in TIP proceedings; recoveries were effected at his instance.

7. During investigation, the victim was medically examined at RML hospital on 24.07.2009. The victims custody was handed over to his father that day.

8. During further investigation, exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Statements of witnesses conversant with the facts were recorded. The victim recorded his statement under Section 164 Cr.P.C. Call Detail Records were gathered. Upon completion of investigation, a charge- CrI.A.1197-2016 & connected matters Page 4 of 22 sheet was filed against the appellants along with their associate Krishan Kumar in the court for commission of offences mentioned previously.

9. To prove its case, the prosecution examined 36 witnesses in all and relied on various documents. In their 313 Cr.P.C. statements, the appellants denied their

complicity in the crime and pleaded false implication. They did not prefer to lead any evidence in defence. The trial resulted in their conviction, as aforesaid. Being aggrieved and dissatisfied, the instant appeals have been preferred by them.

10. Learned counsel for A-1 urged that A-1 has been falsely implicated; A-1 had no ulterior motive to kidnap the victim with whom he had cordial relations since long. A-1 had assisted the police in the search of the victim. When A-1 came to know that he has been falsely named by the victims father to be the suspect, he became annoyed and threatened the victims father for falsely naming him. A-1 threatened to take legal action against victims father and the police officers; he was mercilessly beaten. The victims father due to fear of legal action for A-1s false implication implicated him. It was further contended that the victim was in the habit of remaining away from the house on several nights and it did not matter to the complainant if he did not return that night. The complainant did not lodge the FIR promptly and informed the police about his sons disappearance on the next day. The complainant and victim have made vital improvements in their depositions before the court for which they have been duly confronted. PW-2 or PW-6s mobile phones were never kept under surveillance. Adverse inference is to be drawn against the prosecution for withholding the crucial witness Sant Lal who was associated in the CrI.A.1197-2016 & connected matters Page 5 of 22 victims search. The version given for the first time in the court without disclosing it in the FIR or 161 Cr.P.C. statement lacks credence and is liable to be rejected. The CDRs do not establish if ransom demand of `3 crores was ever made and if so by whom. It is unbelievable that the kidnapper would disclose his/her identity while demanding ransom. Delay in lodging the FIR has not been explained; FIR was ante-timed; complaint Ex.PW-2/A was manipulated. It was further urged that the victim had several property related disputes and had received money from various bona fide purchasers. A-1 had advised the victim to settle the disputes and not to annoy the property-owners and dealers; it had no impact upon him. Since A-1 had opposed the victims conduct and behavior, he had baseless suspicion on him.

11. Learned counsel for A-2 urged that there was no credible evidence against him and his false implication was under the influence of victims father and other relatives. It was urged that it was a case of fake and stage-managed kidnapping.

Since it was detected at an early stage, to avoid legal action, a false story was concocted. A-2 had surrendered himself before the court and some recoveries effected at his instance were planted. Various discrepancies and contradictions emerging in the statements of the prosecution witnesses were overlooked and ignored by the trial court without cogent reasons. The victim and the complainant have made huge improvements in their depositions for the first time before the court. Record reveals that the victim was medically examined on 23.07.2009; it falsified the prosecution case that after the recovery, the victim was medically examined on 24.07.2009 at RML Hospital. Various Call Detail Records Crl.A.1197-2016 & connected matters Page 6 of 22 demolish the prosecutions case that the complainant had received any ransom call, as alleged. No such call details find reflection in the CDR of the victim. It was further urged that A-2 was not capable to walk properly on or around 21.07.2009. Since A-2 was allegedly in muffled face at the time of the occurrence, his identification by the victim in the court is suspect.

12. Learned counsel for A-3 submitted that A-3 was not apprehended at the spot and was falsely implicated in this case. A-3 was not present at the spot and had nothing to do with the kidnapping; nothing was recovered from his possession.

13. Learned APP urged that no valid and sound reasons exist to disbelieve the testimony of the victim Abhay Garg who specifically implicated all the appellants in the crime. The evidence of PW-6 (Abhay Garg) has been corroborated in material particulars by his father PW-2 (Ajay Kumar) who received ransom calls for his release.

14. We have considered the submissions of the learned counsel for the parties and have examined the record minutely. It is not at issue that A-1 and the victim Abhay were acquainted with each other since long. Admitted case is that A-1 used to have visiting terms with the victim and his family and had even donated blood at the time of treatment of his mother for cancer. A-1 along with his family had participated in the marriage of victims sister before the incident.

15. Case of the prosecution is that on 20.07.2009, Abhay Garg, the victim, was taken by A-1 along with him in his WagonR No.DL-3C- AG8139to Gurgaon on the pretext to show him some property. A-1 in 313 Cr.P.C.statement admitted that on

20.07.2009 at around 2.30 p.m. CrI.A.1197-2016 & connected matters Page 7 of 22 he had taken Abhay Garg along with him to show the property. A-1, however, denied that the car in which he had taken the victim was Maruti WagonR DL-3C-AG8139 he claimed that it was victims own car Swift.

16. Victims case is that after he was taken by A-1 to Gurgaon, they met a property dealer PW-17 (Satya Narayan Jhangu) at Gurgaon. In his testimony before the court, PW-17 (Satya Narayan Jhangu) too admitted that on 20.07.2009 at around p.m., A-1 had come along with Abhay Garg by car to his office. He further disclosed that Abhay Garg wanted to purchase some property in the range of `1-1.25 crore. He had shown certain plots and had taken him for the site visit. Abhay Garg had told him that as and when he received money from the property sold by him, he would visit him again to purchase a residential plot.

17. A-1, in 313 Cr.P.C. statement, admitted that PW-17 (Satya Narain Jhangu) was known to him and on 20.07.2009 at around 4.00/05.00 p.m. he along with Abhay Garg had gone to his office by car as Abhay Garg wanted to purchase property in the range of `1-1.25 crore. Apparently, the victim was in the company of A-1 on 20.07.2009 when both had met PW-17 (Satya Narain Jhangu) at around 4.00/5.00 p.m. at Gurgaon. A-1 did not divulge as to when both of them parted company; he did not disclose if after visiting PW-17 (Satya Narain Jhangu), whether they returned to Delhi or went somewhere else. A-1 did not claim if after their visit to PW-17 (Satya Narain Jhangu), he and the victim were kidnapped by any individuals. He did not inform as to at what place/residence, he remained present after visiting the said CrI.A.1197-2016 & connected matters Page 8 of 22 property dealer. All these facts were in the special knowledge of A-1 which he deliberately avoided to disclose. Adverse inference is to be drawn under Section 106 Evidence Act against A-1 for suppressing the material information.

18. When Abhay Garg did not return home on 20.07.2009, the complainant, his father, attempted to contact him on his mobile which was switched off. Efforts were made by the complainant to search the victim on the night intervening 20/21.7.2009 but in vain. The complainants plea is that on the next morning at around 6.00 a.m., he received a telephone call from A-1s wife (Nirmal Takshak)

informing him about the kidnapping of her husband A-1 and that of Abhay Garg. When the complainant along with his close relations went to A-1s residence at Pushp Vihar to ascertain and verify the information, he was informed by A-1s wife that during the night intervening 20/21.07.2009, A-1 had visited the house and had taken `1,00,000/- and some jewellery from the house; A-1 had left the house along with his two children. A- 1 had informed his wife that the assailants had let him off. The complainant further claimed that in the morning at around 8.00 a.m. when they were on their way to Pushp Vihar, he received a call from A- 1 on his mobile and was informed about his release after some financial settlement and warning by the kidnappers.

19. In 313 Cr.P.C. statement, A-1 admitted that on 21.07.2009 at around 6.00 a.m. his wife had made a call from her Mobile No.9899851821 to PW-2 (Ajay Kumar) informing him that his son Abhay and her husband i.e. A-1 both had been kidnapped. He further admitted that thereafter the complainant along with his brother-in-law Crl.A.1197-2016 & connected matters Page 9 of 22 and victims would be father-in-law had gone to his house. He further admitted to have made a telephone call at 8.00 a.m. from his mobile No.9996812078 to the complainant on his mobile No.9810020946 informing that he had been let off after some financial settlement and warning and that the kidnappers were not letting off Abhay. He also admitted that his wife had informed the complainant about his visit to the house on the previous night and about collection of `1,00,000/- and jewellery and to have left the house along with children.

20. The facts admitted by A-1 in 313 statement lend corroboration to the prosecution case regarding Abheys kidnapping for ransom. It demolishes the defence raised by A-2 and A-3 that it was a case of fake kidnapping.

21. A-1s conduct throughout is unnatural and unreasonable. Nothing has been explained by him as to when he and Abhay Garg were kidnapped; if so by whom and where they were taken after kidnapping. He did not divulge as to how and in what manner he was released by the kidnappers at the first instance and how much ransom amount was allegedly paid to them for his release. Nothing has been explained as to from where A-1 had arranged cash of `1,00,000/- to be kept

at home. A-1 did not offer any explanation as to at which place he had gone after collecting the cash and jewellery from home; what was the purpose to take the children along with him and where they were kept. He also did not disclose his whereabouts after his departure from the house that night. Strange enough, at no stage, A-1 attempted to inform the police about the kidnapping; he did not disclose the complainant the name of the assailants and the place of victims confinement. During trial, Crl.A.1197-2016 & connected matters Page 10 of 22 conflicting and inconsistent defence was taken by A-1 to plead innocence. It was suggested to the complainant and other prosecution witnesses that A-1 had assisted the complainant to search the victim and when he was named as suspect, he threatened the complainant and the police officers to take legal action against them for his false implication. It prompted the complainant to rope him in this case. This defence deserves outright rejection. Nothing has emerged if A-1 ever assisted the complainant to find out the kidnapped boy or whether he took the police team to the place where the assailants had confined the victim. His complicity in the conspiracy to have kidnapped the victim Abhay Garg for ransom is writ large.

22. Material and crucial testimony is that of PW-6 (Abhay Garg), the victim. He categorically deposed that after their visit to PW-17 (Satya Narain Jhangu) at Gurgaon, A-1 took him to a secluded place. On the way, A-1 purchased liquor. When they reached at a plot having a boundary, A-1 consumed the liquor there. At that time, 3 or 4 assailants armed with weapons and who had covered their faces up to the tip of the nose came there. At that place, he was kidnapped by the said assailants forcibly by using arms in their possession. He identified A-2 and A-3 to be the individuals who were present at the spot and had taken him into custody. He also identified A-1 to be the individual to whom the other assailants had handed over his robbed jewellery articles. The other accused Krishan Kumar (since Proclaimed Offender) was also identified by the victim. Specific and definite role was assigned/ attributed to each of them in the kidnapping and also of inflicting various physical cruelties to him during confinement in the Crl.A.1197-2016 & connected matters Page 11 of 22 room. He also deposed as to how and in what manner, he was deprived of his ATM cards. On 24.07.2009 he was got released from the captivity by the police. He identified A-3 to be the assailant from

whom the police had recovered the country-made pistol at the spot. This witness was cross-examined at length by all the accused persons on various dates. This Court finds no sound reasons to disbelieve the testimony of the victim despite there being certain improvements made during his deposition before the court. The improvements are not substantial to throw the case of the prosecution overboard.

23. The victims recovery from the village at Kosli by the police with the assistance of commandos on the early morning of 24.07.2009 has been established beyond reasonable doubt. A conspiracy was hatched by A-1 along with his associates to kidnap the victim for ransom and as pre-planned, the victim was taken to an isolated place in the fields where he was kept in confinement in a room. The assailants were able to withdraw certain cash from the SBI ATM using the victims cards.

24. PW-19 (Sheela Yadav) is a star witness. In June, 2009, she was a teacher in Yaduvanshi School, Narnol. The house in village Kosli at Narnol, from where the victim was recovered, was owned by her. She is an independent witness having no familiarity with the victim to favour him and no animosity against the accused persons to falsely implicate them in the case. Her testimony inspires implicit and complete confidence. In her statement before the court, she disclosed that on 04.06.2009, the house in question was let out to A-2 on a monthly rent of `2,700/-. A-2 had informed her that he would stay in the said house along with his family. However, A-2 never brought his Crl.A.1197-2016 & connected matters Page 12 of 22 family in the said accommodation and after days, he vacated it. The testimony of this witness remained unchallenged; she was not cross-examined by A-2. No suggestion was put to her that A-2 had not taken the house on rent to stay with his family. A-2 did not offer any reason as to why the said accommodation was taken on rent on 4.6.2009 and why it was vacated after 8 or 10 days without utilizing it. It can well be inferred that the plan to kidnap the victim for ransom in June 2009 did not materialize due to certain reasons and A-2 vacated the said premises after days.

25. PW-19 (Sheela Yadav) further disclosed that on 26.06.2009, she had let out the said house to A-1 on a monthly rent of `3,000/-. A-1 too had assured to keep his family in the said house and also to open a computer centre at Kosli. A-1 did not produce his ID proof despite several requests; he also did not bring his family to the said house. When she apprised A-1 of her intention to visit the house to take keys, she was called by the police at the police station to enquire as to, to whom she had rented out the said house. She identified both A-1 and A-2 to be the individuals to whom she had let out the accommodation.

26. In the cross-examination, she elaborated that she used to visit the house at Kosli once in a month or two. She had personally met A-2 at the time of letting out the rented accommodation. She admitted that no rent receipts were issued and no rent agreement was executed at the time of creation of tenancy. She further disclosed that A-1 had stayed in the house initially for six days only and did not come back thereafter. A-1 had left the house in her absence without informing her. A-1 had contacted her to take the house on rent taking A-2s name. A-1 never Crl.A.1197-2016 & connected matters Page 13 of 22 stayed in the house in her presence or during her stay at Kosli. She denied the suggestion that some unknown persons had illegally used her house and she was one of the suspects. She admitted that the police had suspicion on her but she was never threatened by them. She denied that due to fear of being implicated in the case, she has given a false statement.

27. As observed above, this witness had no axe to grind to make a false statement. A-1 and A-2 did not give any reason as to why the said house which was used for confinement of the victim was taken on rent by them from PW-19 (Sheela Yadav) and what was its purpose. The only inference that can be drawn is that the accused persons had pre- planned to bring the victim for confinement in the said room and it was so done.

28. A-1s wife (Nirmal Takshak), registered owner of WagonR car No.DL-3C-AG8139 appeared as a prosecution witness (PW-16). She did not elaborate as to in whose possession the vehicle in question was at the relevant time. She did not deny if she had not made telephone call regarding abduction of her husband and

that of Abhay Garg to the complainant at 6.00 a.m. on 20.07.2009 on his mobile. She did not deny if A-1 had not visited the house on the night intervening 20/21.07.2009 and had not taken cash of `1,00,000/- and jewellery. She did not deny if A-1 had not taken her two children along with him that night. She did not disclose as to where A-1 was present during the period from 20.07.2009 till his arrest on 23.07.2009. She did not whisper a word if A-1 had assisted the prosecution in search of the victim after he went missing. She also did not disclose as to when and Crl.A.1197-2016 & connected matters Page 14 of 22 at what time A-1 returned home from Gurgaon where he had, admittedly, gone along with the victim on 20.07.2009. A-1s wife maintained complete silence on these crucial facts. She did not inform as to where she went after 20.07.2009 and when and where she joined the company of her sons. Despite appearing on behalf of the prosecution, she did not controvert the prosecution case at all for the alleged false implication of her husband (A-1).

29. Post-event conduct of A-2 is also unreasonable and unnatural. Soon after the victims recovery on the night intervening 23/24.07.2009, from the house at village Kosli, A-2s involvement in the conspiracy had emerged. The investigating agency made efforts to find him and went for his search to his village Naya Gaon/Shahdat Nagar situated

kilometers away from the spot; A-2 was not found there. The investigating officer came to know that A-2 was residing somewhere in Laxman Vihar. At Laxman Vihar, PW-8 (SI Shiv Karan) and his officials met the landlord where A-2 was having a rented accommodation on the first floor. The landlord disclosed that A-2 had gone on the motorcycle that morning to examine her wife from a doctor. The investigating agency came to know that A-2s in-laws were residing at Sagarpur. At Sagarpur, PW-8 (SI Shiv Karan) met A-2s wife and his father-in-law. They disclosed that A-2 had gone to Punjab in connection with some work. On 26.07.2009, the motorcycle was recovered at the pointing out of A-1 from the house of A-2s in-laws and it was seized by seizure memo (Ex.PW-8/K). Finally, A-2 surrendered in the court on 30.07.2009. The prosecution examined PW- 10 (Puran Singh), A-2s father-in-law, who disclosed that the Crl.A.1197-2016 & connected matters Page 15 of 22 motorcycle bearing No.DL3S SW-9031 belonged to A-2; on 24.07.2009 A-2 along with his daughter Neha had come to his

house at Sagarpur and had parked the motorcycle in question in front of his house. A-2 had left stating that he would go to Punjab for some work. On 26.07.2009 the said motorcycle was seized by police. A-2 did not claim if he had ever gone to Punjab during that period and if so, when and for what purpose. He did not inform as to when he had returned from Punjab. In 313 Cr.P.C. statement he rather denied if he had gone to Punjab. He claimed that his wife was in Sagarpur during those days and he had not gone Punjab or elsewhere; he was at his home. A-2, however, did not examine any witness from his family to substantiate his presence at home during that period. Apparently, A-2 had absconded after the crime and the circumstance of abscondance is an additional incriminating factor to connect him with the crime.

30. Another material witness is PW-11 (Mahesh Kumar), owner of the shop run under the name and style of Bharat Sweet and Bakers at Sheetla Mata Road, opposite Sector-5, Gurgaon. He identified A-2 to be the individual who had come along with the police to point out his shop where he had kept the helmet. He informed that on 23.07.2009, the helmet was kept by an individual at his shop. A-2 did not explain as to what had forced him to keep the helmet at PW-11s shop on 23.07.2009. He did not elaborate the purpose of his visit to PW-11 (Mahesh Kumar) on 23.07.2009.

31. A-1 had familiarity with the victim and his family since long. On 20.07.2009, he had taken the victim along with him on the pretext to show him some property at Gurgaon and had introduced him to PW-17 CrI.A.1197-2016 & connected matters Page 16 of 22 (Satya Narain Jhangu), a property dealer. Obviously, A-1 was aware about the financial position of the victim. The victim was unacquainted with A-2 and A-3 prior to the incident; he did not nurture any animosity against them. In the absence of prior ill-will, the complainant and the victim were not imagined to falsely implicate them in the horrible crime whereby the victim was not only kidnapped but was also tortured. The victim and the complainant specifically deposed that the kidnapping was for ransom. The complainant received four SMSs, print outs of which have been placed on record. The complainant also deposed about ransom call received by him on his mobile. This Court finds no sound reasons to disbelieve the testimony of the complainant and that of the victim

in this regard as there was no other plausible reason to kidnap the victim and to confine him at an isolated place. A-1 himself had claimed that their abduction was for ransom. A-1 further claimed that his release from the captivity was on his financial settlement and warning. There could be no other purpose in the kidnapping of the victim but ransom.

32. A-3 was apprehended and arrested at the spot where the victim was under confinement. Suggestions were put to the prosecution witnesses that he was lifted from his house in the village. A-3, however, did not produce any credible evidence from his family to support his version and to prove his presence at home during the relevant period.

33. On perusal of the record, this Court finds that the investigation carried out by the investigating agency is not up-to-mark. PW-8 (SI Shiv Karan) deposed that on 23.07.2009 after coming to know from the CrI.A.1197-2016 & connected matters Page 17 of 22 secret informer that some money was withdrawn from the victims account at SBI ATM situated at Station Road, Rewari, Haryana, they reached there on the night intervening 22/23.07.2009. On 23.07.2009, on the opening of the SBI Bank, they went to the branch and met Ramesh Kumar Jotriwal, Assistant Manager, who showed them CCTV footage regarding withdrawal of the money from SBI ATM during 1.05 a.m. to 1.26 a.m. by a boy wearing a helmet. The said CCTV footage was converted into a CD and seized vide seizure memo (Ex.PW-7/C). He also obtained the computerized copy of the said withdrawal transaction and seized it vide seizure memo (Ex.PW-8/A); transaction slip is Ex.PW-8/B and the other transaction enquiry is Ex.PW-8/C. He further deposed that the Inspector got developed four photographs from the CD which are Ex.PW-7/D. The prosecution examined PW-7 (Ramesh Kumar Jotriwal) who corroborated SI Shiv Karans testimony. He stated that he had handed over CD to Delhi Police on 23.07.2009 for the period intervening 20/21.07.2009 from 11.00 p.m. to 3.00 a.m. (night) on the application (Ex.PW-7/A) given by SI Shiv Karan (PW-8). The witness also brought the master copy of the CD and copy of the original CD (Ex.PW-7/B) which was seized by the police vide seizure memo (Ex.PW-7/C). CD print photographs were taken out. However, on perusal of the photographs (Ex.PW-7/D) on record, it reveals that the time reflected therein is 13:11:12; 13:37:06;

13:12:45 and 13:29:14 and the date is 20.07.2009. Apparently, these photographs do not pertain to the transaction whereby the money was withdrawn from the ATM vide CCTV footage produced on record; the printed photographs of which are Ex.PW-7/D. The prosecution has failed to reconcile this material CrI.A.1197-2016 & connected matters Page 18 of 22 inconsistency. Nevertheless, the CCTV footage is of no consequence as the identity of the individual wearing helmet withdrawing the money from the ATM is not known or recognizable. This part of the evidence is to be excluded from consideration.

34. It was vehemently urged by the learned counsel for A-2 that the victim was not recovered as claimed by the prosecution on the morning hours of 24.07.2009. He urged that the victim was medically examined at RML Hospital on 23.07.2009. He pointed out that the X-Ray plates on record prima facie show that the victim was actually examined on 23.07.2009 and subsequently, again on 24.07.2009 at RML hospital to show his recovery that day.

35. We have examined X-Ray plates (Ex.PW-14/B), the date reflected therein is 23.07.2009. It is, however, uncertain or unknown as to how this date 23.07.2009 appeared on the X-Ray form /report 16140 (Ex.PW-14/B). No explanation has been offered by the prosecution in this regard. The prosecution examined PW-14 (Dr.Durgesh) who proved the MLC No.902

pertaining to the victim Abhay Garg (Ex.PW-14/A) and deposed that the patient was examined by him on 24.07.2009. MLC records alleged history of abduction. Various injuries noted in the MLC were found on the victims body. After examination, he had referred the patient to orthopedic emergency for the needful and opinion. He further stated that at the time of preparation of MLC (Ex.PW-14/A) he had filled up X-Ray form /report 16140 (Ex.PW-14/B). In the cross-examination, various questions were put to him but it was not suggested at all if the patient was examined or was brought to RML hospital on 23.07.2009. Of course, Ex.PW-14/B CrI.A.1197-2016 & connected matters Page 19 of 22 (X-Ray report) is on record and in the X-Ray plate, the date 23.07.2009 is visible but the MLC (Ex.PW-14/A) and the yellow envelope containing X-Ray plates are all of dated 24.07.2009. The prosecution did not examine the radiologist who had examined the X-Ray plates. The record does not have any opinion of the radiologist regarding the fracture (if

any). It is, thus, unclear if after the form Ex.PW-14/B was filled by PW-14 (Dr.Durgesh), victim Abhay Garg was taken for X-Ray or any opinion from the radiologist was obtained. Anyhow, in view of the categorical assertion of the victim and the other police officials, it has been well established that the victim was recovered on the early hours of 24.07.2009. MLC (Ex.PW-14/A) is very categorical in this regard. No undue importance can be attached to the date visible in the X-Ray plate whose authenticity is doubtful. The accused has not divulged as to when the victim was recovered, and if so, from where. However, it was suggested in the cross-examination to PW-8 (SI Shiv Karan) that actually the victim was recovered / found before 24.07.2009.

36. Learned counsel for A-2 also urged that the ransom call reflected in the mobile of the victims father is not recorded in the mobile of the victim on the night intervening 21/22.07.2009 at 1:03.22 a.m. Again, this discrepancy is of no consequence as the call finds mention in the complainants mobile and it is so spoken by PW-6 (Abhay Garg). Merely because in the CDR of the victim this call does not find mention, PW-6s testimony cannot be discarded. The prosecution has relied upon four SMSs received by the victims father on his mobile at Crl.A.1197-2016 & connected matters Page 20 of 22 08.46, 8.57, 09.00 and 09.04 and they reflect that the purpose to kidnap was to receive ransom.

37. A-2s counsel would urge that PW-17 (Satya Narain Jhangu) has disclosed in his statement that on the next day i.e. 21.07.2009 the victim had visited him again at his office and it demolishes the case of the prosecution that the victim was kidnapped by the appellants. This Court finds no sound reasons to believe the testimony of PW-17 (Satya Narain Jhangu) regarding victims visit to his office on 21.07.2009. The victim had no occasion to go to the office of the PW-17 (Satya Narain Jhangu) on the next day when he had already visited the office on the previous day along with A-1. PW-17 (Satya Narain Jhangu) was acquainted with A-1 and seemingly to favour him he has introduced a new story of victims visit to his office on 21.07.2009 when it was neither the case of the prosecution nor the defence of the accused persons.

38. Certain discrepancies regarding the CDRs pointed out by the counsel create doubt about their authenticity. It is informed that the call details should have been either in ascending or descending order but it is not so. For these omissions or irregularities, the testimonies of PW-2 (Ajay Kumar) and PW-6 (Abhay Garg) cannot be discredited. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of the prosecution when it is otherwise proved.

39. In view of the above discussion, the conviction recorded by the Trial Court for the offences proved cannot be faulted and is affirmed.

40. The appellants have been sentenced by the learned Trial Court for various offences under Sections 364A/365 and 394 IPC separately. Crl.A.1197-2016 & connected matters Page 21 of 22 Since, Section 364A IPC incorporates the ingredients of Section 365 IPC, no separate sentence under that head is called for. It being a case of kidnapping for ransom, sentence under Section 394 IPC too is uncalled for.

41. The sentence order is accordingly modified. The appellants shall undergo imprisonment for life with fine `5,000/- each for the commission of the offence punishable under Section 364A IPC read with Section 120B IPC; default sentence for non-payment of fine would be simple imprisonment for one month.

42. A-3 shall further undergo RI for one year with fine `1,000/-; default sentence being SI for ten days under Section 25 Arms Act.

43. The sentences shall run concurrently. Benefit under Section 428 Cr.P.C. be given.

44. The appeals stand disposed of in the above terms.

45. Trial Court record be sent back forthwith with the copy of the order.

46. Intimation be sent to the Superintendent Jail. S.P.GARG, J.

C.HARI SHANKAR, J.

