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Vipin Kumar Saini vs.state

Vipin Kumar Saini vs.state

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Court : Delhi

Decided On : Feb-22-2019

Appellant : Vipin Kumar Saini

Respondent : State

Advocate for Pet/Ap. : Mr. R.N. Mittal, Ms. Aashaa Tiwari, Mr. Janender Kumar Chumbak, Ms. Radhika, Ms. Rishu, Mr. Madhav

Judgement :

* + IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 214/2004 IN THE MATTER OF: Reserved on:

11. 12.2018 Date of decision:

22. 2.2019 VIPIN KUMAR SAINI STATE GAURI SHANKAR SHARMA ..... Appellant Through: Mr. R.N. Mittal, Sr. Advocate with appellant in person. versus ..... Respondent Through: Ms. Aashaa Tiwari, APP for State. Inspector Ravi Shankar, SHO/Lodhi Colony Inspector Suhaib Ahmad, SHO/Badar Pur. ASI Tulli Ram, P.S. Badar Pur AND CRL.A. 643/2004 ..... Appellant Through: Mr. Janender Kumar Chumbak, Advocate with Ms. Radhika, Ms. Rishu and Mr. Madhav, Advocates. versus STATE OF GNCT OF DELHI ..... Respondent Through: Ms. Aashaa Tiwari, APP for State. Inspector Ravi Shankar, SHO/Lodhi Colony Inspector Suhaib Ahmad, SHO/Badar Pur. ASI Tulli Ram, P.S. Badar Pur CRL.A.214/2004, 643/2004 & 680/2004 Page 1 of 31 LILAWATI DEVI STATE

CRL.A. 680/2004 Through: Mr. Janender Kumar Chumbak, Advocate with Ms. Radhika, Ms. Rishu and Mr. Madhav, Advocates. versus ..... Appellant ..... Respondent Through: Ms. Aashaa Tiwari, APP for State. Inspector Ravi Shankar, SHO/Lodhi Colony Inspector Suhaib Ahmad, SHO/Badar Pur. ASI Tulli Ram, P.S. Badar Pur CORAM: HON'BLE MS. JUSTICE HIMA KOHLI HON'BLE MR. JUSTICE MANOJ KUMAR OHRI HIMA KOHLI, J.

1. A challenge has been laid in these three appeals to a common judgment dated 12.2.2004, passed by the learned Additional Sessions Judge in Sessions Case No.57/2002 arising out of FIR No.25/2002 registered under Sections 363/364-A/368 and 120-B of the Indian Penal Code, 1860 (in short IPC), whereunder all the three appellants have been held guilty of entering into a criminal conspiracy of kidnapping an
years old boy, Bharat Singh @ Bunty and demanding ransom from his father for his release. All the three appellants have been convicted under Section 120-B IPC and Sections 364-A/368 IPC read with Section 120-B IPC. Vide order on sentence dated 13.2.2004, the appellants were sentenced to undergo life imprisonment and to pay fine of Rs.10,000/- each, failing which they have been directed to undergo rigorous imprisonment for two years each. Pertinently, there were four co-

accused in the present case. Three accused persons, namely, accused No.2, Gauri Shankar Sharma (appellant in Criminal Appeal No.643/2018), his wife, accused No.3, Lilawati (appellant in Criminal Appeal No.680/2004) and accused No.4, Vipin Kumar Saini (appellant in Criminal Appeal No.214/2018) have faced trial, whereas the fourth co- accused, accused No.1, Dinanath Ray @ Umesh could not be arrested and was declared a Proclaimed Offender.

2. The prosecution case is that on 11.1.2002, Bharat Singh @ Bunty aged
years had left at 8.00AM from his residence, bearing House No.1162, Gali No.47, Molarband Extension, Badarpur Border to attend his school situated in the same locality, namely, Great Anubhav St. Thomas Public School. When Bharat did not return home by 11.00 A.M., his father, Jawahar Singh went to enquire about his whereabouts from his school and was informed by his class teacher that his son, Bharat had not attended school on that date. On learning this, Jawahar Singh went

about searching for his son throughout the day and at 5.00 P.M., he went to Police Station-Badarpur, to lodge a missing report. Based on the said report, FIR No.25/2002 (Ex.PW2/A) was initially registered under Section 363 IPC and the investigation was handed over to SI Ravi Shanker.

3. After two days, on 13.1.2002, Jawahar Singh received a phone call in the evening at a shop situated opposite his house, named Ajanta Sewak Band in Badarpur Market where telephone No.6949331 was installed. When Jawahar Singh attended the said call, the caller purportedly identified himself as Vijay Chaudhary and demanded a ransom of Rs.8,00,000/-, for releasing his son. He was told to reach with the ransom CRL.A.214/2004, 643/2004 & 680/2004 Page 3 of 31 money at Hanuman Mandir situated near Patna Railway Station. On receiving the said call, Jawahar Singh immediately purchased mobile phone with No.910352967 and gave a call to the caller at the number given by him i.e. 0612-434406. He was warned that if the ransom amount is not paid, his son would be beheaded.

4. Jawahar Singh informed the police about receiving the telephone call. The I.O., SI Ravi Shankar directed surveillance of the telephone number installed at Ajanta Sewak Band. On making inquiries, he discovered that the phone number given by the caller was installed at an STD booth located at Masori, District Patna. On 17/18.1.2002, Jawahar Singh accompanied by his brother-in-law, Jagbir Singh travelled to Patna by train. He sent Jagbir Singh to Hanuman Temple to look for the kidnapper, but none arrived. In the mean time, SI Ravi Shanker formed a team and proceeded from Delhi to Patna. Jawahar Singhs wife informed her husband that the kidnappers had called her at Delhi and told her that they would call her again on next morning. On 19.1.2002, Jawahar Singhs wife informed the kidnappers that her husband was staying at Hotel Royal Lodge at Patna. Jawahar Singh received a telephone call at the said hotel and the caller told him to bring the ransom money and reach Maner Dargah on an auto rickshaw. He was also warned that if he tried to play smart, his son would be killed. Jawahar Singh went to Maner Dargah with the ransom money kept in a bag and waited there, but no one came. He then went to the bigger Dargah situated close by, where a man aged 35-37 years approached him and after confirming his identity, asked him to

handover the bag containing the ransom money. Jawahar Singh asked him to show his son but the man demanded the CRL.A.214/2004, 643/2004 & 680/2004 Page 4 of 31 money first. When Jawahar Singh handed over the bag containing the ransom money to the man, he gave him a photocopy of his sons identity card whereon it was written that he should proceed to house No.301 of Royal Lodge to take the child. Jawahar Singh went back to Royal Lodge and proceeded to room No.301, but it was found locked.

5. In the meanwhile, on receiving information from a public person, the local police found the kidnapped child, Bharat weeping near Maner Dargah. On making enquiries, he informed the police that he had been kidnapped from Delhi. The kidnapped child was taken to the police station where his uncle, Jagbir Singh had also arrived and he identified his nephew. On the police inquiring from the child as to where was he confined, he took them to the locality of Kuhars (idol makers) from where he led them to a house where accused No.3, Lilawati was found and arrested. Lilawati disclosed to the police that her husband, accused No.2, Gauri Shankar, had gone with the accused No.1, Dinanath. In the meantime, SI Ravi Shanker also reached P.S. Maner where the kidnapped child and Lilawati were already present. In her disclosure statement, Lilawati stated that her husband had kidnapped the child along with the other co-accused and had received the ransom amount that was distributed amongst them. Prosecution Evidence:

6. As the case was cracked by the I.O., SI Ravi Shanker (PW-14) and the other police officers were a part of his team that was constituted to recover the victim, his deposition would cover the entire contours of the prosecution case. PW-14 deposed that after arresting Lilawati, he and his CRL.A.214/2004, 643/2004 & 680/2004 Page 5 of 31 team had proceeded with the local police to her house at village Maner where she had pointed out the premises where the kidnapped child was kept during his captivity for ransom. The pointing out memo in respect of the said house, adjoining Lilawatis house is marked as Ex.PW14/B. Efforts were made to search the other co-accused, but in vain. Thereafter, PW-14 returned with his team members to Delhi and so did the kidnapped child along with his father and uncle. On 20.1.2002, Lilawati was produced before the Metropolitan Magistrate, Danapur and on being granted three days transit remand, she was produced by

the police before the court in Delhi on 23.1.2002 and was remanded to police custody. At her pointing out, accused No.4, Vipin Kumar Saini was arrested from his house at Ali Gaon, Sarita Vihar, Delhi. The said accused was the one that the kidnapped child, Bharat had identified as the person who was on a motorcycle and when he was going to his school on 11.1.2002, he was taken by Gauri Shankar, made to sit on the motorcycle and head for the Railway Station. Accused No.2, Gauri Shankar, husband of Lilawati, was arrested from Chankyapuri on 11.2.2002 and PW-14 recorded his disclosure statement (Ex.PW14/E). At his instance, the police had proceeded to a timber shop in Mithapur Extension area where he was residing with his friend and a sum of Rs.45,000/- was recovered from there. The memo of recovery of the money is marked as Ex.PW8/A and the recovered money as Ex.P-9 (colly).

7. Accused No.2, Gauri Shankar was produced in court on 12.02.2002, and after his police remand was obtained, he took the police to his native village, Barkha Chanda at District Bhojpur, P.S. Koliber on CRL.A.214/2004, 643/2004 & 680/2004 Page 6 of 31 14.02.2002, where a search of his house was conducted. From his house, Gauri Shankar had got recovered the school bag and school identity card of the kidnapped child, some railway tickets, other papers and a cash amount of Rs.19,000/-, vide seizure memo marked as Ex.PW6/A. He also disclosed to the police that he had concealed a sum of Rs.80,000/- in the lawns of the house of his in-laws, situated in village Maner. But when the police took him to the said place, nothing could be recovered. Efforts were also made to search for the accused No.1, Dinanath Ray but he could not be traced. PW-14, SI Ravi Shanker proved the site plan of the place from where the child was recovered by the Maner police, marked as Ex.PW14/F.

8. On 19.7.2002, charges were framed against the accused persons under Sections 363, 364-A, 368 read with 120-B IPC. All the accused persons pleaded not guilty and claimed trial. The prosecution examined 14 witnesses in support of their case. The main witnesses are Bharat Singh @ Bunty (PW-1), the kidnapped boy, his father, Jawahar Singh (PW-2), his uncle, Jagbir Singh (PW-4) and the public witness, Kamlesh Yadav (PW-12).

9. SI R.P. Yadav (PW-5) and HC Chattar Singh (PW-8) were members of the team constituted by the IO, PW-14. PW-5 proved the recovery of the kidnapped child at Maner Dargah and the site plan of the spot where he was found sitting, marked as Ex.PW5/A. PW-8, HC Chattar Singh was a witness to the recovery of the sum of Rs.45,000/- [Ex.P9 (colly)]. from a timber shop in Delhi at the instance of the accused No.2, Gauri Shankar, vide seizure memo Ex.PW8/A. PW-8 was also a CRL.A.214/2004, 643/2004 & 680/2004 Page 7 of 31 witness to the recovery of the school bag and school identity card of Bhart, Rs.19,000/- in cash and other articles (Ex.P1 to P8) from the house of Gauri Shankar, vide recovery memo marked as Ex.PW6/A. The local police officers posted at District Bhojpur who were cited and produced by the prosecution include ASI Mukesh Kumar (PW-6) and SI Gorakh Manda (PW-7). PW-6 and PW-7 were also witnesses to the recovery of Rs.19,000/- and other articles from Gauri Shankars house.

10. PW-9, Mr. G.P. Singh was the Link Magistrate who was assigned the TIP of the accused No.4, Vipin Kumar Saini. He deposed that Vipin Kumar Saini was produced by the IO in a muffled face before him on 24.1.2002 and was asked whether he wanted to join the TIP or not, but he refused. The TIP proceedings were proved by PW-9 as Ex.PW9/B. PW- 10, Shashikant Pandey, the Chief Reservation Supervisor, Patna Railway Station proved that the railway reservation tickets, Ex.P3, P4 and P-6 had been issued from Patna Junction to Delhi, for a journey conducted on 28.12.2001 and 8.7.2001. He also proved the platform ticket, Ex.P5, sold on 19.4.2001.

11. Out of three public witnesses cited by the prosecution, namely, Krishan Murari Tiwari (PW-11), Kamlesh Yadav (PW-12) and Inder Bhushan (PW-13), two of them who had turned hostile were PW-11 and PW-13, both residents of village Maner, Patna. Initially, both the said witnesses had stated under Section 164 Cr.PC that in the month of January, they had seen the kidnapped child with the accused No.1, Dinanath, accused No.2, Gauri Shankar and the accused No.3, Lilawati. At that time, PW-11 had also stated that he had asked Gauri Shankar as CRL.A.214/2004, 643/2004 & 680/2004 Page 8 of 31 to who the boy with him was and he was told that the boy was a son of his friend in Delhi and his mother was being treated at Patna. But later on, he denied that he had learnt that the boy had

been kidnapped or that when he had seen him at PS Maner, he had identified the child to be the same who he had seen alongwith Gauri Shankar. However, both PW-11 and PW-13 did admit to their signatures appearing at point A and B, respectively on Ex.PW11/A, the seizure memo prepared by the police during the house search at the residence of Raj Nath Mistry, father-in- law of Gauri Shankar conducted on 19.2.2002. PW-12, Kamlesh Yadav, a resident of village Barkha Chanda, District Bhojpur, Bihar had deposed that he knew Gauri Shankar since he belongs to his village; that he had seen the police entering Gauri Shankars house with him, where a box was found containing a school bag, school identity card, a sum of Rs.19,000/- etc. that were seized. PW-12 had admitted to signing the seizure memo, Ex.PW6/A and had deposed that the said recoveries were made in his presence.

12. Coming to the star witness, namely, Bharat Singh @ Bunty (PW- 1), the child, who was kidnapped for ransom, he had correctly identified the accused No.2, Gauri Shankar, accused No.3, his wife Lilawati and accused No.4, Vipin Kumar Saini. PW-1 deposed that when he was on his way to his school at 8.00 A.M. on 11.1.2002, Gauri Shankar had met him and told him that his father had sent him to take him to meet Lilawati. As he knew both husband and wife from earlier days since they had stayed as tenants at his fathers house, he accompanied Gauri Shankar till some distance, when they met the accused No.4, Vipin Kumar Saini, who was on a motorcycle. Gauri Shankar made the child sit CRL.A.214/2004, 643/2004 & 680/2004 Page 9 of 31 on the motorcycle and Vipin Kumar Saini drove them around on the streets from some time. Thereafter, PW-1 was taken to the Railway Station. He correctly identified the registration number of Vipin Kumar Sainis motorcycle as DL5Q0421 He stated that both the accused persons gave him a packet of biscuits and they stood at a distance from him near the motorcycle. After some time, Vipin Kumar Saini left the Railway Station on his motorcycle and Gauri Shankar took him inside the train saying that he was taking him to meet Lilawati. When the child inquired about his parents, Gauri Shankar stated that they were with Lilawati.

13. PW-1 further deposed that after the train journey was over, Gauri Shankar took him in a three-wheeler scooter to his house where Lilawati was present. He

remained confined in that house for about 8-9 days. Gauri Shankar took away his school bag and identity card and left the house and Lilawati used to give him food etc. After some days, Gauri Shankar came back to the house and told PW-1 that he should accompany him to meet his father. Gauri Shankar took him to 2-3 places and from there, made him speak on the telephone to his father from STD booths. Accused No.3, Lilawati restrained PW-1 from speaking to anyone and also told him that if someone made inquiries from him, he should state that he is her sisters son. He further stated that one day, Gauri Shankar told him to accompany him to meet his father and he was left at an old fort/dargah, where the police ultimately found him. On making inquiries from him, PW-1 took the police to the house of Gauri Shankar and Lilawati, where he had been detained. The police apprehended Lilawati from there and took her to the police station, where CRL.A.214/2004, 643/2004 & 680/2004 Page 10 of 31 the kidnapped boy met his uncle, PW-4 and father, PW-2 and returned with them to Delhi.

14. PW-2, Jawahar Singh, father of the kidnapped child and PW-4, Jagbir Singh, brother-in-law of PW-2 and uncle of PW-1 corroborated the version of the IO, PW-14 with regard to the manner in which the incident unfolded which finally resulted in the recovery of the kidnapped child at PS-Maner. PW-2 identified his sons school bag and school identity card as Ex.P1 and Ex.P2. PW-4 identified accused No.3, Lilawati and stated that when he reached there, he found his nephew already present at PS-Maner. Defence Evidence:

15. On conclusion of the prosecution evidence, the accused were given liberty to lead evidence. Except for the accused No.2, who had produced one witness, namely, DW-1, Vikram Sharma, none of the other accused produced any defence witness. DW-1, a resident of village Manik Pur, PS Koliber, District Bhojpur, Bihar deposed that being a neighbour, he knew Gauri Shankar and when the Delhi Police had gone to his house, Gauri Shankar did not accompany them into his house and they did not recover anything from the said house, nor did they prepare any document there.

16. In his statement recorded under Section 313 Cr.PC, the accused No.4, Vipin Kumar Saini denied having any knowledge of the entire incident. He also denied

the fact that he was produced in a muffled face before the court on 24.1.2002, but he had refused to join the TIP CRL.A.214/2004, 643/2004 & 680/2004 Page 11 of 31 proceedings. Accused Nos.2 and 3 also denied the entire prosecution version and claimed that they were innocent. Conclusion of the Trial Court:

17. Based on the evidence brought on record, the learned ASJ observed that the testimony of the child witness had been adequately corroborated by the statements made by PW-2, PW-3, the police officers and an independent witness, Kamlesh Yadav (PW-12). The prosecution version also stood proved by the attending circumstance of the recoveries that were effected at the instance of the accused No.2, Gauri Shankar on the 11th and 14th February, 2002. Holding that the oversight on the part of the IO in not mentioning the number and denomination of the currency notes recovered on the disclosure of Gauri Shankar from his house was not enough to discredit the recovery when it had been duly corroborated by other witnesses. Thus, the trial court arrived at the conclusion that the recoveries made on 11th and 14th February, 2002 were a part of the ransom amount demanded by the accused persons for releasing the kidnapped child and there was ample evidence on record to prove that it was a case of kidnapping for ransom. As a result, the accused were convicted under Sections 364A and 368 read with 120-B IPC and were sentenced to undergo life imprisonment. Arguments:

18. The impugned judgment has been assailed by Mr. Janender Kumar Chumbak, learned counsel for the appellants, Gauri Shankar and Lilawati in Criminal Appeal Nos.643/2004 and 680/2004 respectively and by CRL.A.214/2004, 643/2004 & 680/2004 Page 12 of 31 Mr.R.N. Mittal, Sr. Advocate, who has appeared for Vipin Kumar Saini, the appellant in Criminal Appeal No.214/2018, but on different grounds.

19. Mr. R.N. Mittal, Sr. Advocate argued that the role assigned by the prosecution to Vipin Kumar Saini was very limited. He stated that the appellant had allegedly given a lift on his motorcycle to the accused No.2, Gauri Shankar, when he was with the kidnapped child in the morning of 11.1.2002 and he had dropped them at the Railway Station. He explained that Vipin Kumar Saini is an Ayurvedic doctor,

practicing in the same locality and he knew both, the kidnapped child as also Gauri Shankar; that Vipin Kumar Saini had got married only a month before the incident took place, on 11th December, 2001 and he had been gifted the motorcycle in question by his in-laws. It was argued that no evidence has been brought on record to suggest the involvement of Vipin Kumar Saini in the crime; that it was not proved that he was in touch with any of the co-accused after the incident of kidnapping on 11.1.2002 and nor was any recovery made from him, either of the ransom money or the other articles; that his innocent act of offering a lift to Gauri Shankar and the kidnapped child cannot be held against him when there is no other evidence to link him to the crime. Learned Senior Advocate also highlighted the ingredients of Section 364A IPC to urge that his client has been wrongly charged under the said provision when he had no role to play in the abduction of the child and nor was it proved that he had threatened to cause death or hurt him or had demanded any ransom amount. He added that by the date Vipin Kumar Saini was granted suspension of sentence in the present appeal, he had already undergone a sentence for a period of three years and 10 months, as on 17.11.2005. CRL.A.214/2004, 643/2004 & 680/2004 Page 13 of 31 20. Coming to the accused Nos.2 and 3 Gauri Shanker and Lilawati, their counsel, Mr. Janender Kumar Chumbak argued that the prosecution has miserably failed to prove that the boy had been kidnapped by his clients or they had extended him any threats and demanded ransom to release him; that the prosecution could not prove that there was any apprehension that any injury could be caused to the child and therefore, the provisions of Section 364A IPC had been wrongly invoked. It was next argued that there were a lot of discrepancies between the testimonies of the witnesses, as for example, PW-4 Jagbir Singh, uncle of the kidnapped child, had deposed that his nephew was recovered on 20.1.2002 whereas, the IO, SI Ravi Shankar (PW-14) had stated that the child had been recovered a day before, on 19.1.2002. It was argued that the prosecution has failed to prove that any ransom amount was demanded by the accused No.2 from PW-2, father of the kidnapped child; that no explanation has been offered as to the manner in which PW-2 arranged the ransom amount of Rs.8 lakhs and the denomination in which the said money had been arranged; that the police witnesses have not deposed about the denomination of the notes recovered alongwith their serial numbers, nor was any

witness produced who could identify that the notes recovered on the alleged disclosure statement made by accused No.2, were a part of the ransom money.

21. It was also argued on behalf of Gauri Shankar and Lilawati that during the court proceedings, the prosecution had failed to conduct their TIP and it was only when they were present in court that the child had CRL.A.214/2004, 643/2004 & 680/2004 Page 14 of 31 identified them for the first time, which from its very nature, is an evidence of a weak character; that the claim of the kidnapped child that he knew the accused Nos.2 and 3 from 6-7 years earlier as they were residing as tenants under his father, is highly improbable for the reason that even if it is assumed that he was 10 years of age at the time of his abduction, though the child had deposed that he was 8 years old, he would have been 3-4 years old when they were allegedly living as tenants at his fathers premises. Learned counsel also doubted the prosecution version that the kidnapped boy had led the police party to the residence of the accused No.3, Lilawati from the place where he was found sitting near the Dargah when the distance between the two places was about 1 km. He further submitted that the kidnapped child was a tutored witness and no reliance could have been placed on his deposition.

22. Learned counsel concluded by submitting that without prejudice to the stand of the accused Nos.2 and 3 that they had no role to play in the crime, even in the worst case scenario, the prosecution could only prove the case of kidnapping under Section 363 IPC, which entails a maximum punishment of imprisonment for seven years with fine and not Section 364A IPC, that provides life imprisonment for kidnapping for ransom on threat to cause hurt or death. It was thus argued that besides failing to prove the crime under Section 364A IPC, the prosecution had failed to prove that any conspiracy was hatched between co-accused, for invoking the provisions of Section 120-B IPC. To substantiate his submission that when there are lapses in the investigation due to ineffective prosecution, then the benefit of doubt arising out of the deficient investigation must CRL.A.214/2004, 643/2004 & 680/2004 Page 15 of 31 go to the accused, Uttar Pradesh vs. Wasif Haider & Ors., reported as 2018 SCC OnLine SC2740was cited.

23. In support of their submissions, learned counsel for the parties have walked us through the entire evidence produced before the trial court. We have carefully examined the testimonies of the witnesses and scrutinized the documentary evidence in the light of the arguments advanced by both sides and the case law cited. Analysis:

24. The conviction of the appellants on the charge of kidnapping for ransom is primarily based on the statement of Bharat Singh @ Bunty (PW-1), the kidnapped child, supported by the testimony of his father, Jawahar Singh (PW-2), his uncle, Jagbir Singh (PW-4), a public witness, Kamlesh Yadav (PW-12) and the police officials, who were members of the raiding party. Testimony of the child witness (PW-1):

25. Coming first to the claim of the counsel for the appellant about the child witness being tutored or his statement being contradictory, there is no doubt that the testimony of a child witness needs to be evaluated with care and caution before it is accepted. It is not considered prudent to act upon the sole testimony of a child witness without any corroborative evidence. As was recently observed by this Bench in Arshad @ Munna Khan vs. State of NCT Delhi, CRL.A. 576/2018 decided on 22.01.2019, judicial dicta is that the deposition of a child witness requires greater scrutiny before it is accepted or rejected but as long as the said statement CRL.A.214/2004, 643/2004 & 680/2004 Page 16 of 31 is found to be credible and it rings true, there is no good reason to reject the same [Refer: Rameshwar vs. State of Rajasthan reported as AIR 1952 SC54 Mangoo vs. State of M.P. reported as AIR 1995 SC959 Panchhi and Ors. vs. State of U.P. reported as AIR 1998 SC2726 Ratansinh Dalsukhai Nayak Vs. State of Gujarat reported as AIR 2004 SC23 Gagan Kanojia and Anr. vs. State of Punjab reported as (2006) 13 SCC516 Nivrutti Pandurang Kakote and Ors. vs. State of Maharashtra reported as AIR 2008 SC1460 State of Madhya Pradesh vs. Ramesh reported as (2011) 4 SCC786and Raj Kumar vs. State of Madhya Pradesh reported as (2014) 5 SCC353. However, in a case of kidnapping, where there is no witness to such an act, the court cannot insist on corroborative evidence regarding the identity of the kidnappers, if the statement of the kidnapped child is otherwise creditworthy and it is found that he is in a position to identify his kidnappers without committing any

mistake.

26. Having perused the deposition of PW-1, the child witness, no impression can be gathered that his statement suffers from the vice of tutoring or that it is full of contradictions so as to raise a doubt as to its correctness. There is no rule that in instances of a child testimony, there should invariably be corroborative evidence in all circumstances, irrespective of the facts of a given case. On a close scrutiny of his statement with regard to the identity of the accused Nos.2, 3 and 4, there was no reason for the trial court to have rejected the same. Moreover, the evidence of the child witness stands adequately corroborated on all material particulars by the testimony of his father and uncle (PW-2 and PW-3). Apart from the police witnesses, there is also a public witness, CRL.A.214/2004, 643/2004 & 680/2004 Page 17 of 31 Kamlesh Yadav (PW-12), who has testified that the police had accompanied accused No.2, Gauri Shankar to his house where one school bag, school Identity-Card, railway tickets, cash amount of Rs.19,000/- and other document were found in a box. PW-12 was a witness to the seizure memo Ex.PW6/A. In any event, the child, who had been abducted on 11.1.2002, had remained in confinement for about 9 days, upto 19.1.2002, when he was finally recovered near Maner Dargah. Having stayed in captivity for a sufficiently long time, it is not surprising that he was able to correctly identify the accused persons which he did before the court. Similarly, the child witness identified accused No.4, Vipin Kumar Saini and correctly mentioned the registration number of his motorcycle. Counsel for the said accused does not deny the fact that the motorcycle in question belonged to Vipin Kumar Saini. It has only been stated that the same was a gift from his in-laws on his marriage that was solemnized a month earlier. In the extensive cross-examination undergone by the child witness at the hands of the defence counsel, he remained firm and his testimony, unshaken. Therefore, the identity of all the accused persons stands proved beyond doubt.

27. It is also noteworthy that on the date when the kidnapped child was recovered near Maner Dargah and taken to PS Maner where accused No.3, Lilawati was present on being apprehended by the local police, the child had taken the police party to the house of Gauri Shankar and Lilawati, located quite close to the Dargah. The correct identification by the child of the house where he had been

kept in confinement by the accused Nos.2 and 3 from the date he was kidnapped, till he was recovered, is itself sufficient to accept his testimony as correct. The CRL.A.214/2004, 643/2004 & 680/2004 Page 18 of 31 argument advanced by learned defence counsel that such a small child could not have known the way to the place where he was confined, is found to be devoid of merits, as it has come in the evidence that the child had first taken the police to the locality of Kuhars (idol makers) and using the said spot as a landmark, he had proceeded directly to the house of the accused Nos. 2 and 3. Therefore, even if we accept the contention of the learned defence counsel for the accused Nos.2 and 3 that the child witness was of too tender an age to have recognized Gauri Shanker and Lilawati when they used to reside as tenants in his fathers house about
years ago, there is sufficient independent evidence on the record for this Court to accept the testimony of the child witness of having correctly identified the accused persons. Discrepancies in the testimony of prosecution witnesses:

28. Coming next to the argument advanced by learned counsel for the accused Nos.2 and 3 that there were several discrepancies between the statement of the prosecution witnesses and for this reason, their testimony ought to be discarded, it is a settled position of law that even if there are omissions, contradictions and discrepancies, the entire evidence cannot be discarded oughtright. In such an eventuality, it is the duty of the court to sift the evidence so as to separate the truth from falsehood, after exercising due care and caution so that all exaggerations, embellishment and improvements can be thrown out. On doing so, the Court is empowered to arrive at a conclusion that the remaining evidence would still be sufficient to convict the accused. As long as the irrelevant details do not corrode the credibility of the witness, CRL.A.214/2004, 643/2004 & 680/2004 Page 19 of 31 omissions/contradictions, if any, cannot be treated as sufficient to shake basic version of the prosecution witnesses. Further, material discrepancies must be treated on a different footing vis-a-vis normal errors of observation and errors of memory etc., that are minor in character and do not go to the very root of the prosecution story. The law on this aspect has been distilled in Sohrab and Anr. vs. The State of M.P. (1972) 3 SCC751 State of U.P. vs. M.K. Anthony (1985) 1 SCC505 Krishna Mochi & Ors. vs. State of Bihar Etc. (2002) 6 SCC81 State of Rajasthan vs Om Prakash (2007) 12 SCC381 Prithu & Ors. Vs. State of H.P.

(2009) 11 SCC588 Rameshbhai Mohanbhai Koli and Ors. vs. State of Gujarat 2010(11) Scale 120 and Essa & Ors. Vs. The State of Maharashtra, through STF, CBI Mumbai and Ors. (2013) 3 Scale 1. Given the legal position as discussed above, in our view, the discrepancies in the testimonies of the witnesses sought to be highlighted by the learned counsel for the accused No.2 and 3 are too trivial and do not go to the root of the matter for this Court to disregard the prosecution version. Test Identification Parade:

29. As for the plea of the learned counsel for the accused No.2 and 3 that the prosecution had failed to conduct their TIP and they had been identified by the kidnapped child for the first time in court, it may be emphasized that the underlying purpose of a prior test identification is to put to test, the trustworthiness of that evidence. In the case of Malkhan Singh and Ors. vs. State of Madhya Pradesh reported as (2003) 5 SCC CRL.A.214/2004, 643/2004 & 680/2004 Page 20 of 31 746, after examining the earlier decisions on the effect of not holding prior test identification parade, the Supreme Court held as under:-

"7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of section 9 of the Evidence Act the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification

parade. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. XXX XXX XXX10 It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason the the person concerned, to remember if CRL.A.214/2004, 643/2004 & 680/2004 Page 21 of 31 identification is made for the first time in court. (emphasis added) 30. As can be seen from the above, failure to hold a test identification parade cannot make the evidence of identification in the court, inadmissible. The TIP only corroborates the identification of the witness in court, if necessary. However, each case has to be examined on its own facts to see the extent of weightage that can be attached to such an identification. In the present case, we are of the opinion that failure to hold a test identification of the accused Nos.2 and 3 is not fatal to the prosecution case as the said accused persons were not complete strangers to the kidnapped child (PW-1). Nor is it anybodys case that PW-1 had such a fleeting glimpse of the accused that he was not in a position to recognize them. Even if we disregard his testimony to the effect that he knew the accused No.2 and 3 from earlier days since they had stayed as tenants in his fathers house, it has been proved that the child had remained in their custody for
days, which was sufficient time for him to have identified them from their memory imprinted in his mind, without a TIP having been conducted. Effect of failure to cross-examine PW-1, 2 and 4 on certain aspects:

31. It has further been canvassed that the prosecution version stands falsified as it has failed to prove the CDRs, the manner in which the childs father, PW-2 went about collecting the ransom money allegedly demanded for releasing his son, the person to whom he had given the ransom amount and the denomination in which it was given. Learned counsel for the accused Nos. 2 and 3 argued that no one had identified CRL.A.214/2004, 643/2004 & 680/2004 Page 22 of 31 the notes allegedly forming a part of the ransom money, recovered on the basis of the seizure memo, Ex.PW6/A. He has also disputed recovery of Rs.45,000/- from a timber shop at Mithapur Extn., vide seizure memo Ex.PW8/A.

32. It is relevant to note that though liberty was granted to the accused persons to cross examine PW-2, none of them cross-examined him on any of the points now sought to be raised for the first time by learned defence counsel. There are several judicial pronouncements that have held that wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in the cross- examination, it must follow that he believed that the testimony given, could not be disputed at all. To put it differently, if the opponent asks no question to the witness produced by the prosecution, then it must be taken that the version of the said witness has been accepted by him. [Refer: A.E.G. Carapiet vs. A.Y. Derderian AIR1961 Calcutta 359; Ashis Sen and Ors. Arun Kmar Bose and Ors. 2006 SC OnLine Cal. 131 and Ravinder Singh vs. State (NCT of Delhi) (2013) 197 DLT99(DB)].

33. In the instant case, the testimony of PW-1, PW-2 and PW-4 has remained unchallenged on the facet of demand for the ransom amount received by the father of the kidnapped child. Therefore, an adverse inference would have to be drawn against the accused Nos.2 and 3 insofar as the said aspect is concerned. The doubt sought to be cast by the defence counsel on the recovery of a part of the ransom amount, is also found to be devoid of merits. It was on the basis of the disclosure statement made by the accused No.2 who was arrested in Delhi on CRL.A.214/2004, 643/2004 & 680/2004 Page 23 of 31 11.2.2002, that a sum of Rs.45,000/- was recovered from a timber shop in Mithapur Extn. (Ex.PW8/A) to which HC Chattar Singh (PW-8) and the IO, SI Ravi Shankar (PW-14) were witnesses. It has also come on record that on 14.2.2002, the accused No.2 had taken the police to his house at village, Barka Chanda, District Bhojpur, where a school bag and school identity card of the kidnapped child, some railway tickets and a sum of Rs.19,000/- in cash, were recovered vide seizure memo Ex.PW6/A. Besides the police witnesses, the said recovery was also corroborated by a public witness, Kamlesh Yadav (PW-12). Therefore, the recovery of the child and the recovery of a part of the ransom amount seized at the instance of the accused No.2, stands adequately proved. Whether any offence is made out under Section 364-A IPC34 Lastly, learned counsel for the accused No.2 and 3 has pleaded that even if his clients are held guilty for kidnapping of the child, they are liable to be convicted and punished under the provisions of Section 363 IPC alone and not

under Section 364A IPC. The basis of taking such a plea is that the ingredients of Section 364A IPC have not been satisfactorily established by the prosecution as no evidence has come on record to connect the ransom calls allegedly received by the father of the kidnapped child, with the accused Nos.2 and 3.

35. The prosecution case was that the child was kidnapped for ransom. The provisions of Section 364A IPC are reproduced hereinbelow for ready reference:-

""364A. Kidnapping for ransom, etc.-Whoever kidnaps or abducts any person or keeps a person in detention after CRL.A.214/2004, 643/2004 & 680/2004 Page 24 of 31 such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

ransom, 36. The language used in Section 364A IPC itself suggest that when kidnapping is done alongwith a threat to cause death or hurt to the kidnapped person or gives a reasonable apprehension that such a person may be put to death or hurt or compel any Government or foreign State or international inter-governmental organisation or any person to pay a ransom, the offence is complete. The punishment prescribed under the said provision is death or imprisonment for life, besides fine. For attracting the provisions of Section 364A IPC and convicting a person thereunder, it is incumbent for the prosecution to prove the following ingredients:-

"(1) The accused must have kidnapped, abducted or detained any person; (2) He must have kept such person under custody or detention and (3) Such kidnapping, abduction or detention must have been for ransom. [Refer: Malleshi vs. State of Karnataka (2004) 8 SCC95and Suman Sood @ Kamal Jeet Kaur vs State Of Rajasthan (2007) 5 SCC634 37. In Suman Sood (supra), the Supreme Court took note of the fact that the term, "ransom" has not been defined in the IPC and went by the dictionary meaning of the said word that means "a sum of money

demanded or paid for the release of a captive". In other words, ransom is CRL.A.214/2004, 643/2004 & 680/2004 Page 25 of 31 a sum of money that is demanded for payment to release a captive, prisoner or detenu. The gravity of the said offence has been explained in Suman Sood (supra) in the following words:-

""60. Kidnapping for ransom is an offence of unlawfully seizing a person and then confining the person usually in a secrete place, while attempting to extort ransom. This grave crime is sometimes made a capital offence. In addition to the abductor, a person who acts as a go- between to collect the ransom is generally considered guilty of the crime."

38. There is no reason to disbelieve PW-2 in the instant case when he deposed that he had received threatening calls twice, first in Delhi on 13.01.2002 and a second time in Patna, on 19.01.2002 and the caller had warned him on both occasions that if the ransom amount is not paid, his son would be beheaded. Thus, it can be safely inferred that ransom calls with threats extended had been received by the father of the kidnapped child. A demand of ransom amount for the release of the kidnapped person is by itself not sufficient to attract the provisions of Section 364A IPC, unless and until it is satisfactorily proved that the kidnapped person was also threatened with death or hurt or the conduct of the kidnapper was such that it could raise a reasonable apprehension that the person abducted, could be put to death or hurt if the ransom amount is not paid. The latter aspect remains unproved as the smokescreen was not lifted by the prosecution from the identity of the person(s) who had made the said ransom calls.

39. The prosecution has failed to connect the ransom calls received by PW-2 with the accused No.2 to 4 by producing and proving the CDRs of CRL.A.214/2004, 643/2004 & 680/2004 Page 26 of 31 the mobile phone of PW-2, the phone installed at the shop opposite his house, and the number furnished to PW-2 by the caller, installed at a STD booth in Patna. In the absence thereof, PW-2's testimony to the effect that on 13.01.2002, he had received a call from the accused No.2, Gauri Shankar on his mobile phone and he had identified himself as Vijay Choudhary, remains unproved. Nor is this Court in a position to accept his statement to the effect that he had received a ransom call at the hotel at Patna on

19.01.2002, without any corroborative evidence. There is yet another prominent discrepancy which cannot be ignored. While the kidnapped child has stated that the accused No.1, Dinanath who has been declared a proclaimed offender and the accused No.2, Gauri Shankar used to take him to different STD booths for making calls to his father, PW-2, the father has nowhere stated that the kidnappers used to make his son speak to him on the phone. It is also a matter of record that the ransom money was not paid by PW-2 to any of the accused persons. He has deposed that the bag containing the money was handed over by him to some unidentified person. Nor has the kidnapped child deposed that the accused No.2 to 4 had at any point of time, threatened to cause his death or hurt him, for applying the provision of Section 364A IPC. In this context, we find force in the submission made by learned counsel for the accused No.2 and 3 that the decision of the Supreme Court in the case of Wasif Haider (supra) would apply and for the lapses in the investigation for connecting the ransom calls received by the father of the kidnapped child to the accused, benefit of doubt shall have to be conferred in their favour. CRL.A.214/2004, 643/2004 & 680/2004 Page 27 of 31 Role of each of the three accused and the offences made out:

40. Now coming to the role attributed to each of the three accused, we may start with accused No.4, Vipin Kumar Saini. The evidence brought on record reveals that his role was limited to giving a lift on his motorcycle to the accused No.2, Gauri Shankar Sharma alongwith the kidnapped child in the morning of 11.01.2002 and dropping them at the Railway Station. The prosecution has not been able to prove that the accused No.4 had hatched a conspiracy with the other co-accused to kidnap the minor child for ransom or had extended a threat to put him to death or cause him hurt. Neither the kidnapped child, nor his father or any other witness has attributed any other role to Vipin Kumar Saini that would suggest his involvement in the crime apart from giving a lift on his motorcycle to Gauri Shankar Sharma and PW-1 and dropping them at the Railway Station. We are therefore of the opinion that the impugned judgment to the extent that Vipin Kumar Saini has been held guilty for the offence under Section 120B and Sections 364A and 368 read with 120-B of the IPC, cannot be sustained. Accordingly, the impugned judgment of conviction and order on sentence qua the accused No.4, Vipin Kumar Saini is quashed and set aside and he is acquitted of all the charges

framed against him and set free unless he is required in some other case. Since the accused No.4 is on bail, his bail bond and surety bonds are discharged. This is however subject to the condition that he fulfills the requirements of 437(A) of the Cr.PC.

41. The role attributed to the accused No.2, Gauri Shankar is that he had kidnapped the child from Delhi, taken him by train to Bihar and CRL.A.214/2004, 643/2004 & 680/2004 Page 28 of 31 confined him in his house. Based on the evidence on record showing recovery of a part of the ransom amount of Rs.19,000/- from his residence and a sum of Rs.45,000/- that was recovered at his instance from a timber shop situated in Delhi, it is apparent that he was a beneficiary of at least a part of the ransom amount. However, the prosecution has miserably failed to connect the accused No.2 to the ransom calls received by PW-2. It is undisputed that the ransom money was paid by PW-2 to an unidentified person and not to the accused No.2. He is therefore acquitted of the charge framed under Section 364A IPC on account of failure on the part of the prosecution to satisfy the ingredients of the said provision. At the same time, it has been satisfactorily proved that the accused No.2 had hatched a criminal conspiracy to kidnap the minor child and wrongfully confine him. Thus, the charges under Section 120-B IPC and under Sections
read with Section 120-B of the IPC stand proved against him. Consequently, the impugned judgment and order of sentence is altered and modified to the above extent. Accused No.2, Gauri Shankar is convicted not only under Section 120-B IPC, but also Sections
read with Section 120-B IPC and he is sentenced to undergo rigorous imprisonment for a period of seven years with a fine of Rs.10,000/-. In default of payment of fine, he shall undergo simple imprisonment for one year.

42. This leaves the accused No.3, Lilawati, wife of the accused No.2. The evidence brought on record against her amply demonstrates that the accused No.3 was well aware of the fact that her husband had kidnapped the minor child and confined him at their house in village Maner. The minor child has deposed that both, accused No.2 and 3 had restrained CRL.A.214/2004, 643/2004 & 680/2004 Page 29 of 31 him from speaking to anyone and the accused No.3 had in

particular told him that if someone inquires, he should say that he is her sisters son. Thus an inference has to be drawn that the accused No.3 must be aware of the kidnapping of PW-1 and detaining him unlawfully. She was present in the house throughout, used to offer him food and in general, watch over him. The above circumstances show that she was aware that the victim had been kidnapped and kept in a secret place. However, no evidence has been brought on record by the prosecution to prove that any threat had been extended by the accused No.3 to the kidnapped child to cause him death or hurt him or to connect her with the recovery of any part of the ransom money. No witness has directly or indirectly deposed about the ransom on the part of the accused No.3. The learned APP has also not pointed out anything from which it can be inferred by this Court that she has committed an offence punishable under Section 364A.

43. We are therefore of the opinion that the accused No.3s conviction and sentence under Sections 364A is unwarranted and is accordingly set aside. Charges under Section 120-B IPC and under Sections
read with Section 120-B IPC are made out against the accused No.3. She is therefore convicted under Section 120-B IPC and under Sections
read with Section 120-B IPC and sentenced to undergo rigorous imprisonment for a period of seven years and pay a fine of Rs.10,000/- and in default of payment of fine, undergo simple imprisonment for one year.

44. As the accused No.2 and 3 are presently on bail, they shall surrender before the trial court within one week to suffer the remaining CRL.A.214/2004, 643/2004 & 680/2004 Page 30 of 31 sentence inflicted upon them. Benefit under Section 428 Cr.PC is extended to them.

45. As a result of the above discussion, Crl. Appeal No.214/2004, is allowed in toto. Crl. Appeals No.643/2004 and 680/2004 are partly allowed on the above terms. Trial court record be sent back forthwith alongwith a copy of this judgment. FEBRUARY22 2019 NA/ap/rkb/na (HIMA KOHLI) JUDGE (MANOJ KUMAR OHRI) JUDGE CRL.A.214/2004, 643/2004 & 680/2004 Page 31 of 31

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