

**The State of Bihar Vs. Manoj Kumar Singh and Yogendra Singh**

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**Court :** Patna

**Decided On :** Mar-04-2009

**Judge :** C.M. Prasad and V.N. Sinha, JJ.

**Acts :** Evidence Act-Sections 10, 24 to 26, 27, 63(2) and 65B; Code of Criminal Procedure (CrPC) -Sections 161, 162, 164 and 313; Indian Penal Code-Sections 34, 120B, 201, 302 and 364A

**Appeal No. :** Death Reference Case No. 4 of 2007 and Cr. Appeal No. 836 of 2007 (D.B.)

**Appellant :** The State of Biharyogendra Singh Son of Dawarika Singh

**Respondent :** Manoj Kumar Singh and Yogendra SinghThe State of Bihar

**Advocate for Def. :** Lala Kailash Bihari, Additional Public Prosecutor

**Advocate for Pet/Ap. :** Surendra Singh, Rana Pratap Singh, Rajendra Prasad Singh and Kamal Nayan Choubey, Sr. Adv., Asha Verma, Rajiv Kumar Singh, Nawal Kishor Singh, Rajani Kant Pandey, Akhileshwar Prasad Singh, Sumant Sing

**Disposition :** Reference allowed

**Judgement :**

**V.N. Sinha, J.**

1. Death Reference Case No. 4 of 2007 and Cr. Appeal Nos. 836, 887, 960 and 1006 of 2007 arise out of Judgment and Order dated 6/7.06.2007, passed by 1st Additional Sessions Judge, Aurangabad in Sessions Trial No. 302 of 2006/76 of 2006, whereunder each of the two appellants Manoj Kumar Singh and Yogendra Singh has been convicted for the offence under Sections 364A, 302, 201 and 120B of the Penal Code and sentenced under Section 364A and 302 of the Penal Code to death with direction to be hanged by neck till they are dead. No separate sentence, however, has been awarded under Section 120B and 201 of the Penal Code. Appellants Raju Kumar Gupta and Raghubir Singh have been convicted under Sections 364A/34, 302/34, 201/34 and 120B/34 of the Penal Code and each has been awarded imprisonment for life under Sections 364A/34, 302/34 of the Penal Code and seven year's rigorous imprisonment under Sections 201/34 and 120B/34 of the Penal Code respectively with direction that the sentences shall run concurrently. Death Reference Case No. 12 of 2008 and Cr. Appeal No. 782 of 2008 arise out of Judgment and Order dated 25/28.06.2008, passed by Additional Sessions Judge, Fast Track Court No. IV, Aurangabad in Sessions Trial Nos. (1). 319 of 2007/126 of 2007, (2). 351 of 2007/186 of 2007 and (3). 99 of 2007/194 of 2007, whereunder appellant Kameshwar Singh, Upendra Singh and Anuj Singh has been convicted under Sections 364A/34, 302/34, 201/34 and 120B/34 of the Penal Code and each sentenced under Section 364A and 302 read with Section 201/34 and 120B/34 to death with direction to be hanged by neck till he is dead. As the aforesaid two judgments dated 6/7.06.2007 and 25/28.06.2008 have been rendered in connection with Barun P.S. Case No. 165 of 2005, G.R. No. 2330 of 2005 and the witnesses examined in the two trials are common, the references and the appeals have been heard together and are being disposed of by this common judgment.

2. Prosecution case, as set out in the First Information Report of the aforesaid Barun P.S. Case No. 165 of 2005, Exhibit-5 is that, Uday Kumar Singh, the informant on 30.12.2005 at about 10.30 A.M. had gone to Barun Hydrel to attend his duty where he received a call on his mobile from his home that his elder son Tej Pratap, aged about six years had gone to the neighbouring shop to purchase snack and has not returned for over an hour. The informant came back home and enquired in the household and searched his son in the neighbourhood and the

nearby grocery shop. When the son could not be traced, Barun Police Station was also informed that his elder son has gone missing. Having informed Barun Police Station the informant also asked his men to search his son and also informed his relatives telephonically that his son has gone missing. When informant's son could not be traced until late in the evening, the informant apprehended that his son has been kidnapped by unknown miscreants and he lodged written report, Exhibit-3 dated 30.12.2005 at 22 hours giving description of victim's appearance and attire. On the basis of written report, First Information Report, Exhibit-5 alleging offence under Section 364 of the Penal Code was drawn against unknown accused. Sri Yogendra Paswan, Officer-in-Charge, Barun Police Station himself took up the investigation of the case and examined under Section 161 Cr.P.C. on 30.12.2005 itself the parents and other family member of the victim including the grocery shop owner Rekha Devi where Tej Pratap had gone to purchase snack and they all supported the fact that Tej Pratap had gone to the nearby grocery shop of Rekha Devi, known as Shubham Kirana Store, for purchasing snack (Takatak) on 30.12.2005 at about 10.30 A.M. and having purchased the snack while coming back he became traceless and could not be found. The Superintendent of Police Aurangabad, having learnt of the kidnapping of Tej Pratap, formed two special Task Force for recovery of the victim boy under his order bearing Memo No. 2767 dated 31.12.2005 with specific direction to Sub-Inspector of Police Sunil Kumar Singh to obtain print out of the concerned telephone numbers. Six days after the occurrence on 05.01.2006 a telephonic information was received by cousin of the informant Chandan Kumar on his telephone No. 244103 that Tej Pratap is with the caller and the caller is calling from Banaras. Another call was received on 09.01.2006 in which ransom amount of Rs. 60 lacs was demanded for releasing the victim boy. Information about the calls received was given to the Investigating Officer who made arrangement for installing Caller I.D. Another call was received on telephone No. 244103 of Chandan Kumar on 12.01.2006 at 10.25 A.M. from Mobile No. 9431615667 in which the caller asked the receiver of the call to call the father of the victim. Later, two more calls were received on the same telephone No. 244103 on 12.01.2006 at 10.48 and 11.37 A.M. from Mobile No. 9431135489 in which instructions were given to the father of the victim to arrange the ransom amount for securing the release of the victim boy. Further ransom calls were

received on 14.01.2006 at 12 P.M., 14.42 P.M. and 16.55 P.M. from Mobile No. 9430055575 on Mobile No. 9431223950. Thereafter, another ransom call was received on 15.01.2006 from Telephone No. 95184252696 and again on 20.01.2006 at 11.35 A.M. and 5.19 P.M. from Telephone Nos. 06184-252840 and 06184-252499. The Investigating Officer in order to identify the ransom callers obtained the print out of the telephone numbers through Sub-Inspector Sunil Kumar Singh under guidance of superior police officer. On the basis of the print outs subscriber of Mobile No. 9431615667 and 9431135489 were identified as Radhe Shyam Gupta and Arvind Kumar Singh, both of Pandu Bazar, Jharkhand. Having identified the subscribers, the Investigating Officer examined both Radhe Shyam Gupta and Arvind Kumar Singh for fixing the identity of the callers who had made the ransom call on 12.01.2006 at 10.25 A.M., 10.48 A.M. and 11.37 A.M. on telephone No. 244103. Arvind Kumar Singh stated before the Investigating Officer that he has exchanged his SIM Card with Raju Kumar Gupta of Pandu Bazar who is using the same for operating the telephone booth with number 9431135489 and the telephone booth is managed by his nephew Mukesh Kumar Gupta. He further stated that Raju Kumar Gupta and his nephew Mukesh Kumar Gupta may be in a position to identify the caller who made call on telephone No. 244103 from the booth on 12.01.2006 at 10.48 and 11.37 A.M. The Investigating Officer having identified the telephone booth requested A.S.I. Ram Baleshwar Ram, Officer-in-Charge of Kutumba Police Station and Dinesh Jha, A.S.I. Vishrampur Police Station to seize the SIM Card and router machine of the two telephone booths having number. 9431615667 and 9431135489, which was seized on 24.01.2006 at 14.30 P.M. and 15.30 P.M. in presence of two seizure-list witnesses, namely, Munna Kumar Singh and Sanjay Kumar Gupta, as is evident from the seizure-list dated 24.01.2006, Exhibits 6 and 6/1. The Investigating Officer thereafter interrogated both Radhe Shyam Gupta and Raju Kumar Gupta. Radhe Shyam Gupta stated that he is not in a position to identify the caller who made call from his booth on 12.01.2006 at 10.25 A.M. on telephone No. 244103. Raju Kumar Gupta, however, confirmed the fact that he has exchanged his SIM Card with Arvind Kumar Singh and his telephone booth with number 9431135489 is being managed by his nephew Mukesh Kumar Gupta who may be in a position to fix the identity of those who made call from the booth on telephone No. 244103 on

12.01.2006 at 10.48 and 11.37 A.M. On the basis of the statement of Raju Kumar Gupta, Mukesh Kumar Gupta was also examined by the Investigating Officer on 29.01.2006 who stated that on 12.01.2006 Upendra Singh, Manoj Singh and Yogendra Singh along with few others came to his booth looking for his uncle Raju Kumar Gupta and along with him went inside the residential house wherefrom they made the two calls on telephone No. 244103 at 10.48 and 11.37 A.M. While they were making calls from inside the house, they had snapped the telephone connection of the booth. On the basis of the statement of Mukesh Kumar Gupta, Raju Kumar Gupta, Upendra Singh and Manoj Singh were arrested on 30.01.2006 and Upendra Singh interrogated who recorded his confessional statement on 31.01.2006 at 14 hours at Barun Police Station. From the confessional statement of Upendra Singh it appears that Yogendra Singh and Kameshwar Singh had come to his house 20-21 days earlier along with two unknown persons and in presence of Manoj Singh had conveyed that they have kidnapped the son of a big man of Barun, Aurangabad, the boy is in custody of their men and if they (Upendra Singh and Manoj Kumar Singh) helped them in making the ransom call, they may earn 3-4 lacs. Next morning also Yogendra Singh and Kameshwar Singh came to him along with the two unknown persons, whereafter Upendra Singh, Manoj Singh, Yogendra Singh, Kameshwar Singh and the two unknown persons went to the booth of Raju Kumar Gupta and met his nephew Mukesh Kumar Gupta and asked him to call his uncle Raju Kumar Gupta and along with Raju Kumar Gupta went inside the house and made the ransom calls demanding Rs. 60 lacs but the father of the victim did not agree to pay more than 10 lac rupees as also insisted that he should be allowed to talk to his son. After about half an hour another call was made giving out the description of the victim together with his dress but his father insisted that he must first speak to the victim. Upendra Singh further clarified in his confessional statement that before making the two calls from the booth of Raju Kumar Gupta one call was made from the booth of Radhe Shyam Gupta asking the recipient of the call to make available the father of the victim within five minutes to receive another call. It further appears from the confessional statement that after the seizure of the telephone booth of Arvind Kumar Singh and Raju Kumar Gupta on 24.01.2006 Upendra Singh became apprehensive of his arrest and in order to avoid the same met Yogendra Singh along with Manoj Singh and

instructed him to kill the victim boy and dispose of his dead body. Two days earlier Yogendra Singh informed Upendra Singh that with the help of local liner the victim boy has been killed, his dead body confined in a gunny bag has been thrown in a dry well near a temple located in a field situate on the western side of the road in Village Barain. Having recorded the confessional statement of Upendra Singh the Investigating Officer proceeded to locate the dry well near a temple on the western side of the road in village Barain and recovered the dead body from the dry well of Ram Eqbal Singh on 31.01.2006 at 18.30 hours in presence of Chandan Kumar, cousin of informant and Jag Narayan Choudhary, as is evident from the Inquest Report, Exhibit-8 and Seizure-List- Exhibit-8/1. Having recovered the dead body of the victim boy the Investigating Officer sent the same for post mortem examination which was conducted by a Medical Board and the report of the Medical Board is dated 31.01.2006, Exhibit-3, wherefrom it appears that the boy was strangled to death as there was finger-tip pressure mark on left side of his wind pipe in front of neck leading to cardiac respiratory failure on account of asphyxia. Having obtained the post mortem report, the Investigating Officer requested the Chief Judicial Magistrate, Aurangabad to add Section 364A/302/34 and 120B of the Penal Code in the First Information Report, which request of the Investigating Officer was allowed by the learned Chief Judicial Magistrate, Aurangabad under order dated 02.02.2006. In order to confirm the 161 Cr.P.C. statement of M/s Arvind Kumar Singh and Mukesh Kumar Gupta the Investigating Officer also produced them for their examination under Section 164 Cr.P.C. before the learned Magistrate, who recorded their statement, Exhibits- 9 and 9/1 on 02.02.2006 in which both the witnesses confirmed their statement made under Section 161 Cr.P.C. that Arvind Kumar Singh had exchanged his SIM Card with Raju Kumar Gupta on the basis of which Raju Kumar Gupta established his telephone booth with Telephone No. 9431135489 which was managed by his nephew Mukesh Kumar Gupta. In his statement under Section 164 Cr.P.C. Mukesh Kumar Gupta also confirmed his statement recorded under Section 161 Cr.P.C. that on 12.01.2006 when he was at the booth, Upendra Singh, Kameshwar Singh, Manoj Singh and Yogendra Singh had come and had asked for his uncle Raju Kumar Gupta and with him Upendra Singh and Yogendra Singh went inside his residence and after snapping the connection with the booth made call for about one hour

from inside the house. In consideration of the materials collected during investigation as also the statement of Arvind Kumar Singh and Mukesh Kumar Gupta under Section 164 Cr.P.C. the Investigating Officer submitted charge-sheet against Upendra Singh, Manoj Singh, Raju Kumar Gupta and Raghubir Singh vide charge-sheet No. 32 of 2006 dated 15.04.2006. Yogendra Singh who was in jail custody in connection with some other case was taken on police remand in the instant case on 03.07.2006, whereafter he recorded his confessional statement in presence of the Investigating Officer on 05.07.2006 at Town Police Station, Aurangabad in which he gave a graphic description of the manner in which the victim boy was kidnapped by Upendra Singh and others and when he asked for his share in the ransom amount then Upendra Singh told him that money has not been paid and the victim is to be killed. Charge-sheet was submitted against Yogendra Singh vide charge-sheet No. 53 of 2006 dated 17.07.2006, against Anuj Singh vide charge-sheet No. 104 of 2006 dated 16.11.2006 and against Kameshwar Singh, vide charge-sheet No. 76 of 2007 dated 13.05.2007. After submission of charge-sheets, cognizance of the offence under Sections 364A, 302, 201 and 120B read with Section 34 of the Penal Code was taken and the case was committed to the court of Sessions and Sessions Trial No. 302 of 2006/76 of 2006 proceeded in regard to appellant Manoj Kumar Singh, Raju Kumar Gupta, Raghubir Singh and Yogendra Singh after charges were framed against them under orders dated 18.9.2006 and 9.10.2006. The trial of Kameshwar Singh, Upendra Singh, Anuj Singh was split up vide Sessions Trial No. (1). 319 of 2007/126 of 2007, (2). 351 of 2007/186 of 2007 and (3). 99 of 2007/194 of 2007 and charges framed under orders dated 10.7.2007 and 26.7.2007 and after amalgamation of the trials the trial proceeded.

3. During trial, prosecution examined as many as 13 witnesses. P.W. 1, Rekha Devi is the owner of the grocery shop- Shubham Kirana Store, where the victim had gone to purchase snack (Takatak) and while returning home he was kidnapped. The witness has confirmed the fact that the victim boy had come to her shop alone on 30.12.2005 in between 10-10.30 A.M. and after purchasing snack (Takatak) returned back. Near about the time when the boy had come to her shop, she had also seen Raghubir Singh, the guard of P.N.B., Barun Branch near the bank gate. The witness further claimed that on the date of occurrence the guard

was not on cash duty. She further stated that she learnt about the kidnapping on the same day around 11 A.M. She further claimed to have seen Kameshwar Singh Upendra Singh and one another (who was not present in dock) with the Bank guard on the date of occurrence in between 9-9.30 A.M. but no such claim about identifying the other accused persons with Bank guard was ever made by the witness before the Investigating Officer, as is evident from paragraph 11 of her deposition in Sessions Trial No. 319 of 2007/126 of 2007.

4. P.W.-2 is Sushil Kumar Singh, cousin of the informant and uncle of the victim. He also confirmed the fact that victim was kidnapped on 30.12.2005 and further went on to state that after five days of the occurrence information about the kidnapping was first received on telephone No. 244103 of Chandan Kumar in which the caller claimed that he is calling from Banaras and the victim boy is with him. Police was informed about such call, whereafter Caller I.D. was installed at the behest of the police. 3-4 days thereafter another call was received demanding Rs. 60 lacs as ransom amount with further instruction to arrange money in a bag and to board the evening train coming from Palamu and drop the bag containing money on the left side of Bhim Chulha Railway Station. The witness further states that when the informant did not agree to drop the money bag at Bhim Chulha Railway Station then threat of dire consequence was extended. According to this witness the ransom caller was identified on the basis of the print out of the concerned telephone numbers which led to the arrest of Upendra Singh and others. Upendra Singh made a confessional statement on the basis of which dead body was recovered from a dry well in village-Barain. The witness further claimed in paragraph 28 that on 30.12.2005 he had seen Upendra Singh, Kameshwar Singh and others talking to the Bank Guard Raghbir Singh in between 09-9.30 A.M., but no such statement appears to have been made before the Investigating Officer, as is evident from paragraphs 119 of the Investigating Officer, P.W.-10 at page 172 of the brief and paragraph 130 at page 175 and 176 of the brief.

5. P.W.-3 in Sessions Trial No. 302 of 2006/76 of 2006 is Narayan Singh who has been examined in the subsequent trial as P.W.-4. He is the father of the informant and grand father of the victim boy. The witness has deposed that his grand son Tej Pratap was kidnapped on 30.12.2005. Ransom calls were received. Caller I.D.

was installed, whereafter accused-persons were identified and arrested and dead body was recovered from a dry well in village-Barain. Witness further stated that there is enmity with the Bank Guard who is resident of the same village where the dead body was recovered. Witness further states that his son M.L.A. Bhim Kumar Singh was Punch in a dispute between Bank Guard Raghbir Singh and the Sao's (Gupta's) of village Barain. In paragraph 7 of the cross-examination the witness claimed that Raghbir became inimical as M.L.A. Bhim Singh decided against him in the Panchayati.

6. P.W.-4 Arjun Singh is the elder brother of the informant who has been examined as P.W.-5 in the subsequent trial. He also confirmed that his nephew Tej Pratap was kidnapped on 30.12.2005. He further stated that the first ransom call was received on telephone No. 244103 of Chandan Kumar on 05.01.2006, whereafter another ransom call was received on 09.01.2006 on the same number and the ransom demand of Rs. 60 lacs was made. Caller I.D. was installed thereafter. Further ransom calls were received on the mobile of informant Uday Kumar Singh from Telephone No. 95184252696 with instruction to arrange money. On 20.01.2006 ransom call was received asking Uday Kumar Singh, father of the victim to arrange the ransom amount in a black bag and to board Varanshi-Ranchi Intercity Train and drop the bag near Bhim Chulha Railway Station. The accused persons were identified on the basis of the print out of the concerned telephone numbers and arrested on 30.01.2006, whereafter on the basis of the confessional statement the dead body was recovered from a dry well in village Barain and Inquest-Report was prepared in presence of Chandan Kumar and Jay Narayan Choudhary. He further stated that Raghbir Singh suspected that Bhim Kumar Singh was helping his adversary Pramod Kumar Gupta in the land dispute.

7. P.W.-5 is Babita Sinha. She is the mother of the victim and has been examined as P.W.-6 in the other trial. She has confirmed that her son had gone to purchase snack from Shubham Kirana Store around 10-10.30 A.M. on 30.12.2005 but he never returned home and when she discovered Teju has disappeared, she informed her husband telephonically at his place of work that Teju has gone missing. She further confirmed that the ransom calls were received on 05, 09-01-2006 and information about those calls were given to the police, whereafter Caller

I.D. was installed. On the basis of the print out of the concerned telephone numbers ransom callers were identified and arrested whereafter dead body was recovered. Raghbir Singh, the Guard of P.N.B., Barun Branch is on inimical terms with the elder brother of her husband Bhim Kumar Singh, who had arbitrated a dispute between the Bank Guard and others of Village Barain.

8. P.W.-6 is Bhim Kumar Singh, the elder brother of the informant who has been examined as P.W.-3 in the subsequent trial. He confirmed the fact that he had arbitrated a dispute between the Bank Guard Raghbir Singh, Pramod, Jawahar and Manoj Gupta and Raghbir Singh became inimical as he had given his verdict in favour of Guptas whereafter Raghbir Singh threatened the family of dire consequences. He further stated that after the occurrence Raghbir was not available in the Bank. The witness also stated that the ransom call was received demanding ransom whereafter Caller I.D. was installed and the accused persons were identified through print out of the concerned telephone numbers on the basis of which Upendra Singh, Manoj Singh and the booth owner, from whose booth the ransom call was made, were arrested and on the basis of the statement of Upendra Singh dead body of Tej Pratap was recovered. Witness claimed that in between 9-9.30 A.M. on the date of occurrence he had seen the appellants talking to the Bank Guard Raghbir Singh. He also claimed that he had seen them two days prior to the date of occurrence taking meal in Akash Ganga Hotel along with Bank Guard Raghbir Singh. No such claim, however, was made by the witness before the Investigating Officer as is evident from Paragraph 115 of his evidence.

9. P.W. 7 in both the trial is Uday Kumar Singh, the informant and father of the victim, who submitted written report, Exhibit-1 on the basis of which formal F.I.R., Exhibit-5 was drawn. He reiterated the contents of the written report and further deposed that on 5.1.2006 a call was received on telephone No. 244103 of Chandan Kumar. The caller claimed that he was calling from Banaras and victim is in his custody. Another call on the same telephone number was received on 9.1.2006 by his wife Babita Sinha. Caller I.D. was installed thereafter. He further stated that on 12.1.2006 another call on the same telephone number was received at 10.45 A.M. in which instruction was given to arrange 60 lac rupees as ransom amount. Witness, however, requested the caller to arrange his telephonic talk with

the victim boy. Yet another call on the same number was received on the same day at 11.37 A.M. in which the caller gave description of the child as also about his dress. According to this witness further ransom calls were received on 14.1.2006 and 18.1.2006. On 20.1.2006 at 11 A.M. ransom caller instructed the witness to arrange ransom money in a black bag and at 5.15. P.M. further instructed him to board the train and come to Bhim Chulha railway station and drop the bag on the left side of the railway track. On the basis of the print out of the concerned telephone numbers the ransom callers were identified and 3-4 amongst them were arrested. One of the arrestee Upendra Singh led to the recovery of the dead body of his son from a dry well in village Barain. Witness, however, candidly admitted in paragraph-15 that none was suspect on the date of occurrence. Witness further confirmed in paragraph-19 that Caller I.D. was installed in the exchange at the behest of the police authorities. Witness claimed that on the date of occurrence when he was going to his place of duty he had seen the appellants in front of the P.N.B., Barun Branch talking to the Bank Guard, as is evident from his statement in Paragraphs 4, 5, and 34.

10. P.W. 8, Chandan Kumar is the cousin of the informant. He has also been examined in the subsequent trial as P.W. 9 and at his telephone number 244103 first call informing that Tej Pratap, the victim, is in possession of the caller, was received. Other ransom calls on 9.1.2006 and 12.1.2006 were also received at his aforesaid telephone number. He has further stated that on the basis of the print out, the ransom callers were identified and Upendra Singh and others were arrested and dead body recovered from a dry well in village Barain at the behest of Upendra Singh. Witness has further confirmed that he is a witness on the Inquest Report of the deceased.

11. P.W. 9 is Mukesh Kumar Gupta who has been examined in the subsequent trial as P.W.-11. He is the nephew of accused Raju Kumar Gupta and is said to be the manager of the telephone booth, which was operated with telephone No. 9431135489 from where two ransom calls were made on 12.1.2006 at 10.48 and 11.37 A.M. by Upendra Singh, Yogendra Singh and others after they went inside the residential portion of the house of Raju Kumar Gupta and made the two calls after snapping the telephone connection of the booth. Such statement was made

by the witness when he was examined before the Magistrate on 2.2.2006 but the witness resiled from his statement in court and stated that the statement made before the Magistrate under Section 164 Cr.P.C. was under police pressure and duress.

12. P.W. 10, Doctor Shyam Narayan Sahu and Dr. Devendra Kumar who has been examined as P.W. 8 in the subsequent trial are the members of the Medical Board and conducted autopsy on the person of the victim boy and confirmed that he was done to death by applying pressure on his wind pipe and the victim died due to asphyxia leading to cardio-respiratory failure.

13. P.W. 11, Yogendra Paswan is the Investigating Officer of the case. He has been examined in the subsequent trial as P.W. 10. On the date of occurrence he was the Officer-in-Charge of Barun Police Station but was on leave. He resumed duty on the same date at 9. P.M. and having perused the Station Diary learnt that Tej Pratap, son of Uday Kumar Singh was missing. He visited the house of the victim and received the written report and took charge of the investigation. Same night he visited the place of occurrence and recorded the statement of Rekha Devi, the proprietress of the grocery shop, Shubham Kirana Store, where the victim had gone to purchase snack (Takatak). He also recorded the statement of the father (informant), mother, grand-father and uncle(s) of the victim boy. Having learnt about the telephone call received on Telephone No. 244103 on 5.1.2006 and 9.1.2006, he informed the superior police officer about such calls and made arrangement to trace the caller. On 12.1.2006 at 10.28 A.M. a call was received on telephone number 244103 from Mobile No. 9431615667 in which instruction was given to call Uday Kumar Singh. Later at 10.48 A.M. another call on the same number came from Mobile No. 9431135489, which was received by the informant in which 40 lac rupees was demanded as ransom amount. Again at 11.36 A.M. another call from the same Mobile No. 9431135489 came in which description about the dress of the victim boy was given. On 14.1.2006 at 12 noon another call from Mobile No. 9430055575 came on the mobile of the informant, 9431223950. Again on the same day from the same mobile number ransom call came at 14.42 P.M. in which the ransom caller demanded 30 lac rupees as ransom amount. Again from the same mobile number a missed call came at 16.55 P.M. On

18.1.2008 ransom call was received from Mobile No. 95184252696. On 20.1.2006 another ransom call came at 11.35 A.M. from telephone No. 06184252840. Again on the same day at 16.19 hours ransom call came from telephone No. 06184252499 with instruction to come with the ransom money in a black bag at Bhim Chulha railway station. From the print outs obtained, it transpired that mobile telephone No. 9431615667 belongs to Radhe Shyam Gupta, who operates the telephone booth from Mehboob Studio, Pandu Bazar. From his booth ransom call was received on telephone No. 244103 on 12.1.2006 at 10.28 A.M. Another call on the same number was received on 12.1.2006 at 10.48 A.M. from Mobile No. 9431135489, which is in the name of Arvind Kumar Singh. Arvind Kumar Singh exchanged his SIM Card with Raju Kumar Gupta. Investigating Officer further claimed that both the booths were raided on 24.1.2006 and the SIM Cards of the two booths along with router machine and register were seized by Sub-Inspector Ram Baleshwar Ram vide seizure list dated 24.1.2006, Exhibits-6 and 6/1. Witness further confirmed that the aforesaid two booth owners, Radhe Shyam Gupta and Raju Kumar Gupta were interrogated and in their interrogation, Radhe Shyam Gupta stated that he is not aware about the whereabouts of the person who made the call from his booth on 12.1.2006 at 10.28 A.M. Raju Kumar Gupta, however, stated before the Investigating Officer that the details of the caller can only be provided by his nephew Mukesh Kumar Gupta, who manages the booth. The witness further stated that Mukesh Kumar Gupta when examined under Section 161 Cr.P.C. had confirmed that two calls were made from his booth on 12.1.2006 at 10.48 and 11.37 A.M. by Upendra Singh and others after they had gone inside the residential portion of the house of his uncle Raju Kumar Gupta and the callers, while making the call, had snapped the telephone connection of the booth. On the basis of the statement of Mukesh Kumar Gupta, Upendra Singh, Manoj Singh, Raju Kumar Gupta were arrested on 30.1.2006. Upendra Singh was thereafter subjected to further interrogation at 22.00 hours and he recorded his confession on 31.1.2006 at 2.00 P.M. Having recorded his confession Upendra Singh led the police team to village Barain and the dead body of the victim recovered from the dry well located in a field situate west of the road near a temple as foul smell was emanating therefrom. Having recovered the dead body, same was sent for post mortem, which was conducted by a team of doctors. Post

mortem report confirmed that the victim was done to death by applying pressure on his wind pipe. Mukesh Kumar Gupta recorded his 164 Cr.P.C. statement reiterating his earlier version recorded under Section 161 Cr. P.C. that two ransom calls were made from his booth on 12.1.2006 on telephone No. 244103 at 10.48 and 11.37 A.M. First charge-sheet bearing No. 32/2006 dated 15.4.2006 was submitted against Upendra Singh, Manoj Singh, Raju Kumar Gupta and Raghubir Singh. Yogendra Singh was arrested on 22.6.2006 whereafter he also recorded his confessional statement at Aurangabad Police Station and charge-sheet was submitted against him Vide charge-sheet No. 53 of 2006 dated 17.07.2006. Charge sheet against Anuj Singh was submitted on 16.11.2006 vide charge-sheet No. 106/2006 and against Kameshwar Singh charge-sheet was submitted on 13.5.2007 vide charge-sheet No. 76/2007.

14. P.W. 12 in both the trials is Ratan Kumar, the Judicial Magistrate, who recorded 164 Cr.P.C. statement of Mukesh Kumar Gupta and Arvind Kumar Singh.

15. P.W. 13 is Sunil Kumar Singh, member of the Task Force, who was instructed to collect the print out, Exhibit-7 from the B.S.N.L. office and he obtained the same and gave it to the Investigating Officer for use in the trial.

16. Besides the prosecution evidence, defense has also led evidence in Sessions Trial No. 302 of 2006/76 of 2006. D.W. 1, Suresh Ram is the Chowkidar of Vishrampur Police Station. D.W. 2, Doctor Arun Kumar is said to have treated the son of appellant Raju Kumar Gupta and his prescription is marked as Exhibit-E. D.W. 3, Pappu Kumar is a shop-keeper who has issued cash memo showing sale of Mobil oil. D.W. 4 Sanjay Kumar Gupta is the brother of Raju Kumar Gupta, who accompanied Raju Kumar Gupta when he had gone to attend his son at Tata Memorial Hospital, Jamshedpur. D.W. 5, Anand Kumar Singh is the Branch Manager of Punjab National Bank, Barun Branch. D.W. 6, Yogendra Singh is appellant in Cr. Appeal No. 836 of 2007 and has come forward to state that he never recorded any confessional statement and has further stated that he has no connection with Upendra Singh, appellant No. 1 of Cr. Appeal No. 782 of 2008.

17. Having read the prosecution evidence, counsel for the appellants submitted that the trial court convicted the appellants relying on the confessional statement of appellant Upendra Singh, 164 Cr.P.C. statement of Arvind Kumar Singh, Mukesh Kumar Gupta and the print out although there is no legal evidence to connect the appellants with the ransom call received by the prosecution party on 5.1.2006, 9.1.2006, 12.1.2006 and further calls received on subsequent dates as according to the learned Counsel, appellants are connected with the ransom calls only with reference to the confessional statement of Upendra Singh and Yogendra Singh and 161/164 Cr.P.C. statement of Arvind Kumar Singh and Mukesh Kumar Gupta. The two confessional statements of appellant Upendra Singh and Yogendra Singh were recorded by the Investigating Officer when they were in police custody, as such, cannot be proved against them as also against other accused in the light of the provisions contained in Sections 24 - 26 of the Indian Evidence Act and Section 162 of the Criminal Procedure Code. Reliance in this connection is placed on the dictum laid down by the Hon'ble Supreme Court in the case of Rao Shiv Bahadur Singh and Anr. v. State of Vindh-P reported in : 1954 CriLJ910 . Further reliance was place on the case of Hazari Lal v. The State (Delhi Admn.) reported in : 1980 CriLJ564 and on the case of Commissioner of Police, New Delhi v. Narender Singh reported in : AIR 2006 SC1800 and it was submitted that confessions made to the police officer or in custody of the police to any person whomsoever, unless made in the immediate presence of a Magistrate shall be presumed to have been obtained under the circumstances mentioned in Section 24 and inadmissible except so far as provided by Section 27 of the Evidence Act.

18. With reference to the judgment of the Hon'ble Supreme Court in the case of Aghnoo Nagesia v. State of Bihar reported in : 1966 CriLJ100 it was submitted that even recovery of the dead body at the instance of Upendra Singh is not admissible under Section 27 of the Evidence Act as from his extra judicial confession, Exhibit-7, it does not appear that Upendra Singh had concealed the dead body of the victim in the dry well at village Barain rather it only appears that he had knowledge of the fact that the body of the victim has been concealed in the well. Upendra Singh is said to have derived his knowledge about the concealment of the dead body in the well at village Barain from Yogendra Singh and it is submitted with

reference to the evidence of the Investigating Officer that he was led to village Barain by Upendra Singh but the dead body could be recovered only on the basis of the foul smell emanating therefrom, as such, according to the learned Counsel such recovery can not be said to be made at the instance of appellant Upendra Singh. Reliance in this connection may also be placed on the judgment of the Hon'ble Supreme Court in the case of Prabhoo v. State of Uttar Pradesh reported in : [1963]2SCR881 .

19. Learned Counsel further submitted that from the evidence of Mukesh Kumar Gupta, P.W. 9 in the first trial and P.W. 11 in the subsequent trial, it is evident that his statement under Section 161 and 164 Cr.P.C was recorded under threat and duress, which was subsequently resiled in court. In the circumstances, statements under Section 164 Cr.P.C. Exhibit-9/1 could not be used against the appellants. Reliance in this connection was placed on the judgment of the Privy Council in the case of Brij Bhushan Singh v. Emperor reported in and with reference to the said judgment it was submitted that the statement under Section 164 Cr.P.C. cannot be used as a substantive piece of evidence. The statement can only be used to cross examine the person who recorded the statement and the result may be to contradict the witness, nothing beyond that. If the statement of Arvind Kumar Singh and Mukesh Kumar Gupta under Section 164 Cr.P.C. is ignored then there is nothing on record to connect the appellants with the ransom call made from Mobile No. 9431135489 on 12.1.2006 at 10.48 and 11.37 A.M. Further reliance in this connection was placed on the judgment of Hon'ble Supreme Court in the case of State of Delhi v. Sri Ram Lohia reported in : AIR 1960 SC490 and in the case of Ram Kishan Singh v. Harmit Kaur and Anr. reported in : 1972 CriLJ267 .

20. It was further pointed out with reference to the evidence of Shri Ratan Kumar, the Judicial Magistrate who recorded the 164 Cr.P.C. statement of Arvind Kumar Singh and Mukesh Kumar Gupta that the recording Magistrate had not administered any oath to the two before recording their statement under Section 164 Cr.P.C. and in the circumstances, the statement cannot be treated as evidence adduced in court. It was also submitted that as the appellants had no opportunity to cross-examine Arvind Kumar Singh and Mukesh Kumar Gupta when they recorded their 164 Cr.P.C. statement, their statement cannot be relied

as evidence. Reliance in this connection was placed on the case of Neminath Appayya Hanamannanavar v. Jamboorao Satappa Kocheri reported in AIR 1966 Mys 154.

21. With reference to the seizure list, Exhibits-6 and 6/1, whereunder two SIM Cards of two telephone booths were seized, it was submitted that as neither the seizing officers nor the seizure list witnesses have been examined, the factum of seizure has not been proved. It is submitted that mere exhibiting the document does not prove its content. Reliance in this connection is placed on the case of Sait Tarajee Khimchand and Ors. v. Yelamarti Satyam and Ors. reported in : AIR 1971 SC1865 and on the case of Narbada Devi Gupta v. Birendra Kumar Jaiswal and Anr. reported in : AIR 2004 SC175 . It is submitted that the contents of the documents have to be proved by those who can vouchsafe for the truth of the fact in issue.

22. It is submitted with reference to the print outs that the Mobile No. 9431135489 is in the name of Arvind Kumar Singh who is said to have exchanged the SIM Card with Raju Kumar Gupta but Arvind Kumar Singh having not examined to state that he exchanged his SIM Card with Raju Kumar Gupta. The appellants cannot be connected with the calls originating from Mobile No. 9431135489 on 12.1.2006 at 10.48 and 11.37 A.M.

23. It is further submitted with reference to the evidence of Sunil Kumar Singh, P.W.-13 who obtained the print out, Exhibit-7 that print out has not been proved in the light of the provisions contained in Section 65B of the Evidence Act as neither the officer who was the incharge of the Exchange wherefrom the print outs have been taken has been examined to prove its correctness nor there is any certificate on the print out, as is required by law to certify its correctness. Reliance in this connection has been placed on the judgment of the Hon'ble Supreme Court in the case of State (N.C.T. of Delhi) v. Navjot Sandhu reported in : 2005 CriLJ3950 .

24. It is further submitted on behalf of the appellants that the evidence of P.Ws 1, 2, 3 and 7 that they had seen the appellants in front of the Punjab National Bank, Barun Branch on the date of occurrence near about 9-9.30 A.M. cannot be relied upon, as such, statement was not made by them before the Investigating Officer

vide paragraphs 101, 102, 109, 110, 119 and 120. According to the learned Counsel such omission amounts to contradiction, as such, vital information about the presence of the accused at the place of occurrence near about the time of occurrence has not been conveyed to the Investigating Officer. Reliance in this connection is placed on the judgment in the case of State of Maharashtra v. Bharat Chaganlal Raghani and Ors. reported in : 2002 CriLJ944 .

25. It is also submitted on behalf of the appellants that the identification made in the court room after passage of more than a year of the occurrence cannot be relied upon to hold the appellants guilty.

26. It is also submitted with reference to the judgment of Hon'ble Supreme Court in the case of Kashmira Singh v. The State of Madhya Pradesh reported in : 1952 CriLJ839 that in kidnapping/murder case of a six year old boy which is cruel and revolting, it is necessary to examine the evidence with more than ordinary care, lest the shocking nature of the crime induce and instinctive reaction against a dispassionate judicial scrutiny of the facts and law.

27. Shri Lala Kailash Bihari, learned Additional Public Prosecutor with reference to the answer given by appellant Kameshwar Singh while replying to question Nos. 4 and 5 put to him during his examination under Section 313 of the Code of Criminal Procedure submitted that he has admitted his guilt, as his answer to the question that he and other appellants made the ransom call on 12.1.2006 from the telephone booth, is in affirmative and the charge being under Sections 364A/34, 302/34, 201/34 and 120B/34 of the Penal Code, the affirmative answer given by appellant Kameshwar Singh shall bind the other appellants also. In this connection he relied upon the judgment of Hon'ble Supreme Court in the case of State of U.P. v. Lakhmi reported in : 1998 CriLJ1411 and in the case of Rattan Singh v. State of H.P. reported in : 1997 CriLJ833 .

28. Learned Counsel further submitted with reference to the evidence of P.W.-1 Rekha Devi, P.W.-2, Susil Singh, P.W.-3 Bhim Singh, P.W. - 6, Babita Sinha and P.W.-7, informant that those witnesses had seen the Bank Guard Raghubir Singh talking to the four appellants in front of the Branch gate on 30.12.2005 in between 9-9.30 A.M. P.W.-3, Bhim Singh had even seen the Bank Guard and the

appellants two days prior to the date of occurrence in Akash Ganga Hotel where they were taking meal and he had gone to take refreshment. Such statement is relied upon by the prosecution party to establish conspiracy hatched by Raghubir Singh with other appellants to feed fat his grudge against Bhim Singh and his other family member as he had given verdict in Panchayati against Raghubir Singh.

29. Sri Prasad, learned Additional Public Prosecutor further submitted with reference to the 164 Cr.P.C. statement of Mukesh Kumar Gupta, P.W.-11, (Exhibit-12), that the statement having been recorded by the Magistrate as also signed by the witness himself and admitted in evidence without objection should be relied upon ignoring the resiled statement of P.W.-11 recorded in court as the 164 Cr.P.C. statement of P.W. -11 is found corroborated from the print out, Exhibit - 7, which was obtained by the Sub-Inspector Sunil Kumar Singh, P.W.-13 from the B.S.N.L. Office.

30. Sri Prasad with reference to the evidence of the Investigating Officer recorded in paragraph 13 submitted that the seizure-memo dated 24.01.2006, Exhibits-6 and 6/1 was also admitted in evidence without objection and contents thereof need not be proved by examining the officer who made the seizure and the witnesses in whose presence the seizure was effected. Notwithstanding their non-examination the factum of seizure be taken as proved as the seizure list- Exhibit-6 and 6/1 was admitted in evidence without objection.

31. Sri Prasad, learned Additional Public Prosecutor, with reference to the evidence of Sub-Inspector Sunil Kumar Singh, P.W.-13 in the earlier trial submitted that the print outs were obtained by Sunil Kumar Singh, P.W.-13 in compliance of the instructions of the Superintendent of Police, contained in order bearing Letter No. 2767/Confidential dated 31.12.2005, Exhibit-X in discharge of official duty, photo copy of print out was marked exhibit as original was not available. He further submitted with reference to the contents of paragraph-14 of the Examination-in-Chief of the Investigating Officer, P.W.-10 in the subsequent trial that the print out in 19 pages was obtained by Sub-Inspector Ram Baleshwar Ram and Sub-Inspector Sunil Kumar Singh from Telecommunication Department,

Gaya and Patna, original whereof is presently available and marked Exhibit-7 and with reference to the aforesaid deposition he submitted that print outs may not have been certified, as is required under Section 65B of the Evidence Act but has been obtained by the police officers in official discharge of duty, as such, is admissible in evidence as secondary evidence in the light of the provisions contained in Sub-section (2) of Section 63 of the Evidence Act. In this connection, he relied on the observations of the Hon'ble Supreme Court in the case of State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru reported in (2005) 2 Scc (Cri) 1715 at page 1820, paragraphs 51 and 52.

32. Learned Counsel for the informant with reference to Section 10 of the Evidence Act submitted that the confessional statement of Upendra Singh and Yogendra Singh can be used even against the other conspirators and in support of evidence of conspiracy he relied on the statement of P.W. 3, Bhim Singh who had seen the appellants along with Raghubir Singh two days prior to the occurrence in Akash Ganga Hotel and on the date of occurrence P.Ws. 1, 2, 3, 5, 6 and 7 had seen Raghubir Singh talking to the other appellants in front of the Branch gate in between 9-9.30 A.M., just prior to the occurrence. In this connection further reliance is placed on the judgment of the Hon'ble Supreme Court in the case of State of Maharashtra v. Damu Gopinath Shinde and Ors. reported in AIR 2000 Sc 1691.

33. Learned Counsel for the informant further submitted that identification of the appellants by the witnesses in court room, may be after one year of the occurrence, should carry weight as prior thereto they had no occasion and opportunity to identify them and in support of such plea he relied on the judgment of the Hon'ble Supreme Court in the case of Malkhan Singh and Ors. v. State of M.P. reported in : 2003 CriLJ3535 .

34. Having considered the evidence of the prosecution/defence witnesses and the submissions made in the Court, it appears that Tej Pratap, elder son of the informant aged about six years, had gone to purchase snack from Shubham Kirana Store on 30.12.2005 around 10-10.30 A.M. While returning home, he became traceless. His mother, Babita Sinha searched for him, but he could not be

found, then she telephoned the informant on his mobile who was attending duty at Barun Hydel. The informant having received the telephonic message, returned home and searched for Tej Pratap in the neighbourhood as also in the grocery shop (Shubham Kirana Store). When Tej Pratap could not be found, informant telephonically informed Barun Police Station and his relatives that his elder son Tej Pratap has gone missing while returning from the grocery shop (Shubham Kirana Store). He also asked his men to search for him. Such information was recorded in the station diary. Sri Yogendra Paswan, Officer-in-charge, Barun Police Station was on leave on 30.12.2005. He joined duty during the evening hours on the same day at about 9.00 P.M. and having perused the station diary, learnt that son of the informant had gone missing. He, accordingly, came to the residence of the informant on 30.12.2005 late in the evening by which time those who were deputed by the informant to search/trace Tej Pratap had also informed the informant that Tej Pratap could not be traced, which led the informant to believe that Tej Pratap has been kidnapped and he, accordingly, submitted his written report dated 30.12.2005, Exhibit-3 to Sri Yogendra Paswan alleging kidnapping of his son by unknown miscreants on the basis of which formal First Information Report, Exhibit-5 was drawn. The Investigating Officer, having received the written report, examined the parent, uncle(s) and grandfather of Tej Pratap, including the proprietress of Shubham Kirana Store, Rekha Devi where Tej Pratap had gone to purchase snack (Takatak) on 30.12.2005 in between 10-10.30 A.M. and while returning therefrom become traceless, further late in the same evening, all the family members of Tej Pratap, including proprietress of Shubham Kirana Store, Rekha Devi confirmed the fact that Tej Pratap had gone to purchase snack (Takatak) in between 10-10.30 A.M. from Shubham Kirana Store and while returning home, he became traceless.

35. The Superintendent of Police, Aurangabad, having learnt of the kidnapping of Tej Pratap, formed two special Task Force for recovery of the victim boy under his order, bearing Memo No. 2767 dated 31.12.2005, Exhibit-X. On 5.1.2006, six days after the disappearance of Tej Pratap, a telephonic information was received by P.W.-8/9 Chandan Kumar, cousin of the informant on his telephone No. 244103 informing him that the caller was calling from Banaras and Tej Pratap was in his custody. Another call on the same telephone number of Chandan Kumar was

received on 9.1.2006, which was received by P.W. 5/6 Babita Sinha, mother of Tej Pratap in which caller demanded Rs. Sixty lacs as ransom money for releasing the victim. Information about the calls received was given to the Investigating Officer, P.W.-11/10 who made arrangement for installing Caller I.D. Another call was received from mobile number 9431615667 on the same telephone number of Chandan Kumar on 12.1.2006 at 10.25 A.M. and the caller asked the receiver of the call to call the father of the victim, informant, P.W.-7. Two more calls on the same day (12.1.2006) were received on the same telephone number 244103 from mobile number 9431135489 at 10.48 and 11.37 A.M. in which instructions were given to the father of the victim, informant, P.W.-7 to arrange the ransom amount in order to secure release of the victim boy. The Investigating Officer, Sri Yogendra Paswan, P.W.-11/10 in order to identify the ransom callers, obtained the print out of the concerned telephone numbers 9431615667 and 9431135489 through the Sub-Inspector of Police, Sri Sunil Kumar Singh, who was authorized to obtain the same from BSNL office by the Superintendent of Police, Aurangabad. From the print out, subscriber of mobile numbers 9431615667 and 9431135489 were identified as Radhe Shyam Gupta and Arvind Kumar Singh, both of Pandu Bazar, Jharkhand. Having identified the subscriber, the Investigating Officer examined both Radhe Shyam Gupta and Arvind Kumar Singh for fixing the identity of the caller, who had made ransom call on telephone number 244103 on 12.1.2006 at 10.25 A.M., 10.48 A.M. and 11.37 A.M. Arvind Kumar Singh stated before the Investigating Officer that he has exchanged his SIM Card with Appellant in Cr. Appeal No. 1006 of 2007, Raju Kumar Gupta of Pandu Bazar, who is using the SIM Card for operating telephone booth with mobile number 9431135489 and the booth is managed by his nephew Mukesh Kumar Gupta, P.W.-9/11. Arvind Kumar Singh further stated that Raju Kumar Gupta and Mukesh Kumar Gupta may be in a position to identify the caller who made call from the booth on 12.1.2006 at 10.48 and 11.37 A.M. The Investigating Officer, having identified the two telephone booths, requested the Assistant Sub-Inspector of Police, Sri Ram Baleshwar Ram, Officer-in-Charge of Kutumba Police Station and Dinesh Jha, A.S.I. of Vishrampur Police Station to seize the SIM Card and router machine of the two telephone booths of Radhey Shyam Gupta and Raju Kumar Gupta. The seizure of the SIM Card, router machine and the register maintained in the two

booths was made on 24.1.2006 at 14.30, 15.30 hours respectively in presence of two seizure list witnesses, namely, Munna Kumar Singh and Sanjay Kumar Gupta. The two seizure lists have been admitted in evidence as Exts. 6 and 6/1 without any objection, but the factum of seizure of the SIM Card, router machine and the register maintained in the two booths has not been proved by either examining the seizure list witnesses or the police officer who effected the seizure. Seizure list has been admitted in evidence on the basis of the evidence of the Investigating Officer, who identified the writing of Ram Baleshwar Ram, one of the police officers, who effected the seizure. The Investigating Officer, thereafter, interrogated Radhe Shyam Gupta and Raju Kumar Gupta. Radhe Shyam Gupta stated that he is not in a position to identify the caller who made call from his booth on 12.01.2006 on telephone number 244103 at 10.25 A.M. Raju Kumar Gupta, however, confirmed the fact that he has exchanged the SIM Card with Arvind Kumar Singh and his telephone booth with number 9431135489 is being managed by his nephew Mukesh Kumar Gupta, P.W.-9/11 who may be in a position to fix the identity of those who made call from the booth on 12.01.2006 on telephone number 244103 at 10.48 and 11.37 A.M. Having examined Raju Kumar Gupta, the Investigating Officer examined Mukesh Kumar Gupta on 29.1.2006 who stated that on 12.1.2006, appellant(s) Upendra Singh in Cr. Appeal No. 782 of 2008, Manoj Kumar Singh in Cr. Appeal No. 960 of 2007 and Yogendra Singh in Cr. Appeal No. 836 of 2007 had come to his booth looking for his uncle, Raju Kumar Gupta and along with him went inside his residential house wherefrom they made two calls on 12.01.2006 on telephone number 244103 at 10.48 and 11.37 A.M. While making the call, they had snapped the connection of the telephone booth. On the basis of the statement of Mukesh Kumar Gupta, Raju Kumar Gupta, Upendra Singh and Manoj Kumar Singh were arrested on 30.1.2006 and during interrogation, Upendra Singh recorded his confessional statement on 31.1.2006 at 14.00 hours at Barun Police Station.

36. In the confessional statement, Upendra Singh accepted that he along with other appellants and two unknown had gone to the booth of Radhe Shyam Gupta and Raju Kumar Gupta on 12.1.2006 and on the same day had made three ransom calls on telephone number 244103 at 10.25 A.M. from the booth of Radhey Shyam Gupta and at 10.48 and 11.37 A.M. from inside the residence of

Raju Kumar Gupta. It also appears from the confessional statement that after seizure of the telephone booth of Arvind Kumar Singh and Raju Kumar Gupta on 24.1.2006, Upendra Singh became apprehensive of his arrest and instructed Yogendra Singh to kill the victim boy and dispose of the dead body. It further appears from the confessional statement that two days prior to the recording of the confessional statement, Upendra Singh was informed by Yogendra Singh that with the help of local liner the victim boy has been killed and his dead body has been kept in a gunny bag and thrown in a dry well near a temple located in a field situate on the western side of the road in village Barain. Having recorded the confessional statement of Appellant Upendra Singh, the Investigating Officer, P.W.-11/10 along with Upendra Singh proceeded to Village Barain and located the dry well in a field near the temple on the western side of the road and recovered the dead body on 31.1.2006 at 18.30 hours in presence of P.W. 8/9, Chandan Kumar, cousin of the informant and Jag Narayan Choudhary, as foul smell was emanating therefrom. From the post-mortem report as also from the evidence of Dr. Shyam Narayan Sahu, P.W.-10 and Dr. Devendra Kumar, P.W.-8, who were the members of the team of doctors who conducted autopsy on the dead body of victim Tej Pratap, it is evident that he was strangulated to death as there was finger-tip pressure mark on left side of his wind pipe in front of neck leading to cardiac respiratory failure on account of asphyxia. Having recovered the dead body, the Investigating Officer produced both M/s Arvind Kumar Singh and Mukesh Kumar Gupta, P.W.-9/11 before Sri Ratan Kumar, P.W.-12, the Judicial Magistrate for recording their statement under Section 164 Cr.P.C., which was recorded on 2.2.2006 in which Arvind Kumar Singh confirmed the fact that he had exchanged his SIM Card with Raju Kumar Gupta on the basis of which Raju Kumar Gupta had established telephone booth with number 9431135489, which was managed by Mukesh Kumar Gupta. Mukesh Kumar Gupta in his statement under Section 164 Cr.P.C. also confirmed the fact that on 12.1.2006, appellants had come to his booth looking for his uncle and had gone inside the residence of his uncle wherefrom they made two calls on telephone number 244103 at 10.48 and 11.37 A.M. in presence of his uncle after snapping the connection of the telephone booth. The two 164 Cr.P.C. statements were admitted in evidence without any objection and were exhibits in both the trials. In Court Arvind Kumar

Singh has not been examined and Mukesh Kumar Gupta, who has been examined as P.W. 9 and 11 in the two trials, has resiled from statement recorded under Section 164 Cr.P.C. and has stated that he made the 164 Cr.P.C. statement on 2.2.2006 under police pressure and duress as he was under police custody and under threat of being made accused in the case. In this connection, during argument, reliance was also placed on petition dated 9.4.2006, Exhibit-A filed on behalf of Mukesh Kumar Gupta before the Chief Judicial Magistrate, Aurangabad.

37. The print out indicates that on 12.01.2006 two calls were made on telephone number 244103 from mobile number 9431135489 of Arvind Kumar Singh at 10.48 and 11.37 A.M. It, however, does not appear from the print out that the same has been proved as is required under Section 65-B of the Evidence Act. Further, it does not appear from the print out that the same bears any certificate of the competent officer of the Telephone Exchange wherefrom it has been obtained certifying the correctness of the data indicated in the print out. From the evidence of Investigating Officer as pointed out by learned Additional Public Prosecutor in paragraph 14 of the subsequent trial it appears that the print out was obtained in original but for reasons best known to the prosecution only photo copy thereof was produced during trial, as such, we have ourselves examined the print outs exhibited during the trial and have found that in the earlier trial the photo copy of the print out was marked as Exhibit-7 and in subsequent trial certified copy of the photo copy was marked as exhibit. In the circumstances, in absence of the original, that too without there being any material to establish the conditions mentioned in Sub-section (2) of Section 65-B of the Evidence Act that the computer wherefrom the print out has been obtained was normally functioning, it shall not be safe to rely on the print outs for connecting the appellants with the two calls made from mobile telephone number 9431135489 on 12.01.2006 on telephone number 244103 at 10.48 and 11.37 A.M. The evidence of the Investigating Officer and Sunil Kumar Singh only indicate that in compliance of the orders of the Superintendent of Police print out was obtained from the staff of the service provider, in the circumstances their evidence cannot be taken as secondary evidence in terms of Sub-section (2) of Section 63 of the Evidence Act to prove the correctness of the contents of the print out as evidence certifying the correctness of the contents of the print out can only be furnished by those who are

operating the computer and had knowledge about its functioning. Even assuming the contents of the print out to have been legally proved the same will connect Arvind Kumar Singh with the two ransom calls made from Mobile No. 9431135489 on 12.01.2006 on Telephone No. 244103 at 10.48 and 11.37 A.M. and not these appellants.

38. Reliance on the confessional statement of the appellant, Upendra Singh and Yogendra Singh recorded in police custody at Barun Police Station and Aurangabad Police Station on 31.01.2006 at 2 P.M. and 5.07.2006 at 16 hours respectively cannot be placed as the two statements do not stand to the test of the provisions of Sections 25 and 26 of the Evidence Act which mandate that statements recorded in police custody cannot be used and proved against those who have recorded such statement, as such, statements are presumed to have been made in the circumstances enumerated in Section 24 of the Evidence Act and cannot be relied against the maker or any other person. Further, even recovery of the dead body at the instance of Upendra Singh is not admissible in terms of Section 27 of the Evidence Act as from his confessional statement, it does not appear that he himself had concealed the dead body in the dry well. Upendra Singh derived knowledge about the concealment of the dead body in the well from Yogendra Singh. Even from the evidence of the Investigating Officer vide paragraph 24 in the subsequent trial, it is evident that he could reach near the well and recover the dead body as foul smell was emanating therefrom. The evidence of P.W.-2, Susil Singh (Paragraph-1), P.W.-3, Bhim Singh (Paragraph-2), P.W.-5, Arjun Singh (Paragraph-1), P.W.-7, informant (paragraph-3) that the dead body of Tej Pratap was recovered from the well at the instance of Upendra Singh is to be ignored in the light of the aforesaid evidence of Investigating Officer in paragraph-24.

39. The submission of learned Additional Public Prosecutor that the affirmative answer of appellant Kameshwar Singh while replying the question Nos. 4 and 5 put to him during his examination under Section 313 of the Code of Criminal Procedure shall bind the other appellants also, is misconceived as the questions which have been put to Kameshwar Singh are based on materials which are inadmissible in evidence, as has been discussed above. In the circumstances, the

answer given by Kameshwar Singh to those questions shall neither bind Kameshwar Singh nor the other appellants.

40. Other submission of the learned Additional Public Prosecutor that these appellants had hatched conspiracy to kidnap Tej Pratap as they were seen by P.W.-3, Bhim Singh in Akash Ganga Hotel two days prior to the occurrence and on the date of occurrence by P.Ws. 1, 2, 3, 6 and 7 in front of the Branch gate at around 9-9.30 A.M. also appears to be misconceived as there is no further legal admissible evidence to connect the appellants with the kidnapping of the victim boy.

41. Further reliance placed by learned Additional Public Prosecutor over the 164 Cr.P.C. statement of Arvind Kumar Singh and Mukesh Kumar Gupta is also misconceived as such statement cannot be relied upon as substantive piece of evidence to bring home the charge unless the person who has recorded his 164 Cr.P.C. statement again appears in Court and reiterates the same statement in his Examination-in-Chief and successfully undergoes the test of cross-examination. In the present case, Arvind Kumar Singh never appeared for his examination and cross-examination in court, Mukesh Kumar Gupta examined as P.W.-9 and 11 categorically deposed in court that he made his statement under Section 164 Cr.P.C. under police pressure and duress. In the circumstances, rightly it was submitted by the counsel for the appellants that no reliance can be placed over the 164 Cr.P.C. statement of Arvind Kumar Singh and Mukesh Kumar Gupta.

42. Seizure-memo dated 24.01.2006, Exhibits-6 and 6/1 can also not be relied upon to establish seizure of the SIM Card and router machine of the two telephone booths as neither the officers who effected the seizure nor the witnesses in whose presence seizure was made were examined as a witness in the court to vouchsafe about the factum of seizure. In the circumstances, no reliance whatsoever, can be placed over the two seizure-lists.

43. Reliance placed by the counsel for the informant over the evidence of P.Ws. 1, 2, 3, 6 and 7 to establish that these appellants had hatched conspiracy to kidnap Tej Pratap appears to be misconceived as no such case was ever made out by these witnesses before Investigating Officer and further there is no admissible

evidence to connect the appellants with the kidnapping of the victim boy. Reliance placed by learned Counsel for the informant over the judgment of the Hon'ble Supreme Court in the case of State of Maharashtra v. Damu Gopinath Shinde and Ors. (Supra) also appears to be misconceived as in the said judgment reliance was placed on a confessional statement which was recorded by a Judicial Magistrate and in support of the confession the Magistrate was examined as a witness but in the present case the two confessional statements having been recorded by the police is inadmissible in view of the provisions contained in Sections 24, 25 and 26 of the Evidence Act, as such, no reliance whatsoever can be placed on the two confessional statements.

44. Submission of the learned Counsel for the informant about the acceptance of identification of appellants other than Raghubir Singh made in court after more than one year of the occurrence also cannot be accepted as from the evidence of P.Ws. 2, 3, 5, 6 and 7 it is evident that they had opportunity to see them earlier but they never informed the police that they had seen the culprits and can identify them. In the circumstances, reliance on the identification made in court cannot be placed.

45. In the instant case, the Investigating Officer should have either examined the Incharge of the computer wherefrom the print out was obtained or should have obtained certificate over the print outs, as is required in terms of Section 65-B of the Evidence Act. He should also have included the two Officers who effected the seizure along with the two witnesses who were present at the time of seizure as charge-sheet witness. He should also have included Arvind Kumar Singh as a charge-sheet witness so as to establish in court that Arvind Kumar Singh exchanged his SIM Card with Raju Kumar Gupta. The Investigating Officer having not included and examined the aforesaid witnesses has allowed legally admissible evidence to disappear and has thereby massacred the prosecution case. Learned Additional Public Prosecutor with reference to the observations and directions of the Hon'ble Supreme Court in the case of Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat and Ors. reported in 2004 Scc(Cri) 999, paragraphs 22, 35, 54 and 56 orally submitted that if the State's machinery fails to protect citizen's life, liberties and property and the investigation is concluded in a manner to help the

accused persons, it is but appropriate that this Court should step in to prevent undue miscarriage of justice as it is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record and submitted that direction may be issued to examine the Incharge of the computer wherefrom print outs were taken as also to examine Arvind Kumar Singh and the officers and the witnesses who effected seizure of the telephone booth. Such oral prayer has been made after conclusion of the argument by the counsel for the appellants. In the circumstances, we are not inclined to allow such prayer.

46. In view of our discussion above it is evident that there is no legally admissible material available on record by which the appellants can be connected with the kidnapping of the victim boy Tej Pratap on 30.12.2005 and the ransom calls received on Telephone No. 244103 on 05.01.2006, 09.01.2006 and 12.01.2006 and subsequent thereto nor there is any legally admissible material to connect the appellants with the recovery of the dead body of Tej Pratap. In the circumstances, this Court has no option but to grant the appellants the benefit of doubt of the charges levelled against them.

47. In the result, the two references (Death Reference Case No. 4 of 2007 and Death Reference Case No. 12 of 2008) are answered in negative; both the judgment and order dated 6/7.06.2007, passed by 1st Additional Sessions Judge, Aurangabad in Sessions Trial No. 302 of 2006/76 of 2006 as also the Judgment and Order dated 25/28.06.2008, passed by Additional Sessions Judge, Fast Track Court No. IV, Aurangabad (Bihar) in Sessions Trial Nos. 319 of 2007/126 of 2007, (2). 351 of 2007/186 of 2007 and (3). 99 of 2007/194 of 2007 are set aside, Cr. Appeal Nos. 836 of 2007, 887 of 2007, 960 of 2007, 1006 of 2007 and 782 of 2008 are allowed, and the appellants are acquitted of the charges levelled against them and appellants, namely, Manoj Kumar Singh, Yogendra Singh, Raju Kumar Gupta, Kameshwar Singh, Upendra Singh and Anuj Singh are directed to be set free, if not required in any other case. Appellant Raghubir Singh is directed to be discharged from the liability of his bail bond.