

**Tikam Vs. State of U.P.**

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**Court :** Allahabad

**Decided On :** Aug-29-1991

**Reported in :** 1992CriLJ1381

**Judge :** P. Basu, J.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 365 and 368

**Appeal No. :** Criminal Appeal No. 2069 of 1979

**Appellant :** Tikam

**Respondent :** State of U.P.

**Advocate for Def. :** A.G.A.

**Advocate for Pet/Ap. :** Keshav Sahai, Adv.

**Disposition :** Appeal allowed

**Judgement :**

ORDER

**P. Basu, J.**

1. This appeal has been filed by Tikam against his conviction under Section 368, I.P.C. and the sentence of 4 years' R.I. passed by the Vth Additional Sessions Judge, Agra, on 7-6-1979 in Sessions Trial No. 254 of 1973.

2. It appears that four accused were tried in the aforesaid trial, namely, Tikam appellant, Shyam Sunder, Jagdish and Smt. Bishun Kumari. It is alleged that Smt. Bishun Kumari is the own Bhabhi (elder brother's wife) of P. W. 1 Jagdish. Accused Shyam Sunder and accused Jagdish are own brothers of Smt. Bishun Kumari. Accused Appellant Tikam is a relative of the three other accused. It is further alleged that according to the will executed by the father of Jagdish Prasad, P.W. 1, some property went to Jagdish Prasad and his other two brothers whereas some property went exclusively to Jagdish Prasad's son Yogesh (written as Yogendra in the charge and the judgment). The case of the prosecution is that the said child Yogesh was kidnapped by the three other accused on 2-4-1973 sometime in the morning. After search the child could not be found. Consequently P.W. 1 Jagdish Prasad lodged a first information report on 2-4-1973 at 4-20 P.M. at Police Station Sadar Bazar. A case was duly registered at serial No. 35 of the General Diary and the matter was taken up for investigation. It is said that on 7-4-73 at about 2 P.M. the said child Yogesh was recovered from the custody of appellant Tikam near Chacha Hotel in the neighbourhood of the railway station Agra. Cantt and in front of the betel shop of one Mohan.

3. A recovery memo was prepared by the investigating Officer whereafter a case crime was registered under Section 365/368, I.P.C. against all the four accused mentioned above. It transpires that during investigation Jagdish Prasad, P.W. 1 had told about complicity of the other three persons in the alleged kidnapping of child.

4. The prosecution has examined. P.W. 1 Jagdish Prasad. He has said that one Ashok had told him on the day next to 2-4-1973 that Yogesh was seen playing on the chabutra in front of his maternal uncle Lala Kishan Lal's house P.W. 2 is Dr. Durga Prasad, father of P.W. 1 Jagdish Prasad. He testifies that he had executed a deed in favour of three shops to his three sons and the fourth shop was given to Yogesh through the will. He had said that Yogesh was missing from 2nd April, 1973, P.W. 3 Chhokhey Lal was examined to prove the alleged missing of the child and his consequent search but did not support the prosecution case and as such was declared hostile, P.W. 4 Har Prasad stated that he runs a cycle shop and on the day of occurrence he saw a person taking away a child from in front of

his shop. He knew the child as living in his mohalla but neither knew the name nor the parent's name of the child. Consequently this witness is of no help to the prosecution P.W. 5 Dwarka Prasad, P.W. 7 Ram Sewak and P.W. 8 Damodar did not support the prosecution case and have been declared hostile. P.W. 5 Mahabir Prasad and P.W. 11 Narendra Kumar Sharma, Station Officer, Sadar Bazar, Agra, and P.W. 9 Karan Singh have deposed that the child Yogesh was recovered while being in the company of Tikam on 7-4-1973. The police witnesses have deposed that a recovery memo was prepared. It was rightly pointed out by the learned counsel Sri Keshav Sahai on behalf of the appellant that in the recovery memo no crime number is mentioned and, therefore, this document does not corroborate the timing of recovery as given by the witnesses in Court. Sri Doodhnath Yadav, learned A.G.A. has stated that it may be a slip on the part of the police inspector recovering the child in having failed to mention the time of the recovery of the child while being in custody of Tikam appellant. He argues that the said fact should not be interpreted against the prosecution.

5. The main argument of the learned counsel for the appellant, however, is that once the other three accused have been acquitted on the ground that there was no evidence of kidnapping against them, the appellant Tikam, being a relative of the three acquitted accused, could be presumed to be in lawful custody of the child. It is further argued that kidnapping by the other acquitted accused, or for that matter, any one else having not been established, the charge should fail against the appellant, also. It is emphasised that for bringing home the charge under Section 365 and 368 I.P.C. the prosecution must prove that the person from whose custody the child was recovered had knowledge of the fact that the child was a kidnapped child.

6. It is correct that the trial Judge has recorded a finding that Tikam appellant was related to the other three accused who have been acquitted. Therefore, even if it is held that the child was recovered from Tikam, under the circumstances there was no reason for the appellant to think that the child had been kidnapped. He would normally not be expected to just keep the child with him even after having knowledge that the child was a kidnapped one. Just as the child could be present with the acquitted accused, it could be with their relative Tikam appellant also.

Thus, in the absence of evidence or circumstance attributing prior knowledge of kidnapping, the guilt under Sections 365 and 368, I.P.C. cannot be fastened on the appellant either. The charge fails against the appellant Tikam and he cannot be convicted under Section 368, I.P.C.

7. The appeal consequently succeeds and is allowed. The conviction and sentence of the appellant under Section 368, I.P.C. are set aside. He is on bail and need not surrender. His bail bonds are discharged.

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