

R-35 to 37

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 10th February, 2010

+ **CRL. APPEAL NO.793/2004**

DEVESH KUMAR Appellant
Through: Mr.Bhupesh Narula, Advocate.

versus

STATE Respondent
Through: Mr.M.N.Dudeja, A.P.P.

CRL. APPEAL NO.950/2004

FIROZ KHAN Appellant
Through: Ms.Charu Verma, Advocate and
Mr.Bhupesh Narula, Advocate.

versus

STATE Respondent
Through: Mr.M.N.Dudeja, A.P.P.

CRL. APPEAL NO.75/2008

JAIVEER Appellant
Through: Ms.Charu Verma, Advocate

versus

STATE Respondent
Through: Mr.M.N.Dudeja, A.P.P.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J. (Oral)

1. Four persons, Firoz Khan, Jaiveer, Devesh Kumar (the appellants) and Netrapal were charged for the offence punishable under Section 364-A/34 IPC. Case of the prosecution was that one Raju a juvenile (referred to before the Juvenile Justice Board) enticed Master Rahul aged about 7 years when Rahul was playing on the street outside his house and gave him a biscuit laced with a stupefying drug. Firoz Khan, Jaiveer and Devesh Kumar as also Netrapal were the architects. The child was taken to Agra and kept confined in the house of Udaiveer PW-2 and upon the arrest of Devesh, Firoz Khan and Jaiveer who came together to receive the ransom; pursuant to they making the disclosure statements Ex.PW-1/C, Ex.PW-1/D and Ex.PW-1/E led the raiding party consisting of Insp.Neeraj Kumar PW-12 and Ct.Jagdish Raj PW-7 as also Ct.Vijay PW-8 to the house of Udaiveer, from which house Master Rahul was recovered on 3.3.2002.

2. Vide impugned judgment and order dated 9.9.2004, the learned Trial Judge has held that the prosecution has successfully established the case against Firoz Khan, Jaiveer and Devesh Kumar. Holding that there was no evidence incriminating against Netrapal, he was acquitted.

3. The learned Trial Judge has returned a finding of

guilt against the appellants with reference to the testimony of Indrasen PW-1, the father of Rahul as also the testimony of Ct.Jagdish Raj PW-7 and Ct.Vijay PW-8 and lastly the testimony of Insp.Neeraj Kumar PW-12 (the IO of the case), all of whom deposed that on 3.3.2002 when the appellants came to receive the ransom amount at the pre-designated place they were apprehended and made disclosure statements informing that Master Rahul was in the house of Udaiveer PW-2 from whose house the child was recovered.

4. With reference to the testimony of Udaiveer PW-2, the learned Trial Judge has held that the same establishes that appellant Devesh was his brother-in-law and had brought Rahul to his house informing him that Firoz and Jaiveer were his friends and that Rahul was the nephew of Jaiveer. In a nutshell, qua the testimony of Udaiveer, the learned Trial Judge has held that the same establishes that the appellants brought Rahul to his house on 27.2.2002 and that the child was recovered from his house.

5. Rahul has been examined as PW-3 and with reference to his testimony the learned Trial Judge has held that the same establishes that Raju enticed Rahul from the road outside his house, the bate was a biscuit having a stupefying substance after consuming which Rahul became

unconscious and when he regained consciousness on the next day he found himself in the company of the appellants in the house of Udaiveer.

6. It is apparent that the fate of the instant appeal would be decided on the testimony of PW-1, PW-2, PW-3, PW-7, PW-8 and PW-12.

7. But before noting the same we note that the process of law pertaining to the instant case commenced when Indrasen went to the local police station Sangam Vihar on 22.1.2002 and made the statement Ex.PW-1/A informing that his son Rahul was missing since 3:00 PM on 21.1.2002 and inspite of making best efforts Rahul could not be found. After a few days he went to the investigating officer who had got registered the FIR relatable to the offence of kidnapping and handed over to him a letter Ex.PW-1/A which was seized by SI Sanjeev Kumar vide Ex.PW-1/B, as per which letter a written demand for ransom to release Rahul was made. The offence of kidnapping for ransom was added in the FIR.

8. As deposed to by SI Sanjeev Kumar PW-11, he had to hand over the investigation to another officer as he proceeded on leave.

9. The contours of the further investigation as claimed by the prosecution stand revealed in the testimony of

Insp.Neeraj Kumar PW-12. We would be soon noting the same. We now proceed to note the testimony of PW-1, PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8, PW-11 and PW-12.

10. Indrasen PW-1 deposed that the statement Ex.PW-1/A was made by him on the day next after Rahul went missing and that after 10 days he received the letter Ex.PW-1/A which he handed over to the police as recorded in the memo Ex.PW-1/B and that after about a week or 10 days thereafter he received a telephone call through a STD booth in front of his house and the caller Firoz Khan demanded Rs.3 lakhs for released of Rahul. He i.e. Indrasen took a mobile phone having No.9811106207 from his tenant and gave the same to the caller. **(It is important to note at this stage itself as to wherefrom Indrasen deposed that the caller was accused Firoz Khan has remained a mystery.)**. He further deposed that he received a call at the afore-noted mobile number informing that the ransom had to be paid at Agra on the 100 feet wide road at Kalindi Vihar. He gave said information to the police and went to Agra **“with pre-arranged money”**. He went to the place fixed by the caller and appellants came to collect the money. After he handed over the money to Firoz Khan and gave pre-fixed signal to the police, all appellants were apprehended and they made

disclosure statements Ex.PW-1/C, Ex.PW-1/D and Ex.PW-1/E. They led the police to a house near a STD booth where his son was recovered as noted in the memo Ex.PW-1/F. He deposed that the 5 packets each having two currency notes in sum of Rs.100/-, one each at the top and bottom which were seized vide memo Ex.PW-1/G were the ones which were shown to him in the Court being Ex.PW-7/1 to Ex.PW-7/5.

11. On being cross-examined, Indrasen stated that along with the police personnel he left for Agra on 28.2.2003 but did not remember as to where they first went on reaching Agra and that he did not remember how many days they stayed at Agra. He stated that he did not remember the distance between the STD booth near which the appellants were apprehended and the house wherefrom his son was recovered. He said he could not even remember whether the distance was 10 paces, 20 paces, 50 paces, 1/2 km or 1 km. He reiterated that the call received by him at the STD booth near his house 10 days after his son was missing was made by the accused Firoz Khan. On being questioned where did he and the police personnel stayed in Agra, he replied: ***“we use to remain in the vehicle itself”***.

12. Ct.Jagdish Raj PW-7 deposed that he joined investigation on 28.2.2002 and on that day left Delhi for Agra

and reached Agra in the night hours and remained in Agra for about 2 to 3 days and that when in Agra, Indrasen received a call on his mobile phone demanding ransom in sum of Rs.2,50,000/- and as directed by the caller they reached near STD booth on 100 feet road by Kalindi Vihar at Agra at 7:00 PM. 5 packets of currency notes i.e. the ransom amount payable were arranged having a genuine note each at the top and bottom of the packet in denomination of Rs.100/- and in between plain papers were kept. That the police personnel hid and when the complainant gave pre-fixed signal the police party apprehended appellants and on interrogation made the statements Ex.PW-1/C, Ex.PW-1/D and Ex.PW-1/E and thereafter led the police to the house of Udaiveer wherefrom Rahul was recovered as recorded in the memo Ex.PW-1/F and that the arrest memos Ex.PW-7/A, Ex.PW-7/B and Ex.PW-7/C of the accused were prepared.

13. On being cross-examined as to where they first reported on reaching Agra and where they stayed overnight in Agra, he stated that after leaving Delhi at around 4:00 PM they reached Agra at 10:00 PM and reported directly at the police station in Agra and during their stay in Agra they spent the night in the police station.

14. Ct.Vijay PW-8 deposed that even he joined the

investigation on 28.2.2002 and on 2.3.2002 Indrasen received a call on his telephone demanding ransom. As directed by the caller they reached the 100 feet road at Kalindi Vihar, Agra near the STD booth. He corrected himself that they went to Agra on 28.2.2002. That on 3.3.2002 the accused came to the telephone booth and demanded money. Bundles having genuine notes on both sides were handed over and at that point of time Indrasen gave the pre-designated signal and all the accused were apprehended. They were interrogated and made disclosure statements Ex.PW-1/C, Ex.PW-1/D and Ex.PW-1/E and led the investigating officer to the house of Udaiveer wherefrom the kidnapped child was recovered and that the packets Ex.PW-7/1 to Ex.PW-7/5 were the ones which were seized as recorded in the memo Ex.PW-1/G.

15. On being cross-examined he stated that as far as he remembers, no written proceedings were carried out after the accused were apprehended at the STD booth in Agra.

16. Insp.Neeraj Kumar PW-12 deposed that he took over the investigation on 20.2.2002 and Indrasen told him that he had received a telephone call at the STD booth in front of his house and the caller had instructed him to arrange a separate phone to listen to further calls which they would be making and hence through the tenant of Indrasen he arranged

mobile phone bearing No.9811106207, on which number a call was received from Agra on 28.2.2002 demanding ransom. He arranged the raiding party and left for Agra in a Tata Sumo. They reached Agra at about 11:00 PM and first of all went to the telephone exchange Agra to trace the address of the telephone booth from which the ransom call was received. It took about 2 days to trace the location of the STD booth from where ransom calls were being made, during which period Indrasen constantly received telephone calls from the kidnappers. On 3.3.2002 after preparing 5 packets containing Rs.100/- each on the top and bottom, they stationed themselves near STD booth on the 100 feet road at Kalindi Vihar, Agra. 3 persons came near the STD booth to collect ransom. Indrasen gave the pre-fixed signal. Appellants were apprehended. He interrogated them. They informed that the victim was in the house of Udaiveer. He went to the house of Udaiveer as pointed out by the accused and recovered Rahul as recorded in the memo Ex.PW-1/F. He recovered the ransom money as noted in the seizure memo Ex.PW-1/G. Accused were arrested as recorded in the memos Ex.PW-7/C, Ex.PW-7/D and Ex.PW-7/E. Pertaining to the place where the disclosure statements Ex.PW-1/C, Ex.PW-1/D and Ex.PW-1/E of the accused were recorded he deposed: *"On 3.3.2002 accused*

persons, namely, Jaiveer, Firoz and Devesh made disclosure statement Ex.PW-1/C, Ex.PW-1/D and Ex.PW-1/E at police post H-Block Sangam Vihar". He further deposed that he obtained the call details Ex.PW-12/B of the mobile No.9811106207 and moved an application for recording Udaiveer's statement under Section 164 Cr.P.C. before Shri Chandrashekhar, Metropolitan Magistrate. The statement Ex.PW-2/A was recorded by the learned Magistrate. He further deposed that the packets Ex.PW-7/1 to Ex.PW-7/5 being the ransom money was recovered by him and as recorded in memo Ex.PW-1/G.

17. On being cross-examined he admitted (1) that he did not record the statement of the owner of the STD booth from where ransom calls were made. (2) That he did not record the statement of the owner of the mobile phone who was the tenant of the complainant and who gave the same to the complainant. (3) That he did not attach any document to prove that they left Delhi. (4) That he did not inform the arrival of the police team from Delhi at the police station in Agra and during the entire duration of the stay at Agra, never informed the local police. (5) That he did not record the statement of any official of the telephone department at Agra pertaining to address of the STD booth wherefrom stated ransom calls were being made. (6) He did not associate the local police while

organizing the *naaka* (raid). (7) They did not stay in a hotel or a guest house in Agra and that everybody used to sleep in the vehicle itself during they stay of Agra. (8) That the STD booth adjoining where accused were arrested was open but he did not join the owner thereof as a witness (9) That the distance of the house of Udaiveer from the STD booth was 50 paces. (10) That he did not mention the place of arrest or the time of the arrest of the accused in the arrest memo. (11) That the wife of Udaiveer was present in the house from where Rahul was recovered but he did not record her statement. (12) That he did not put the date on the recovery memo Ex.PW-1/F.

18. Relevant would it be to note that the disclosure statements Ex.PW-1/C made by appellant Jaiveer, Ex.PW-1/D made by appellant Firoz Khan and Ex.PW-1/E made by appellant Devesh are complete confessional statements recording events in the past tense including the fact that when the statement was made the child had already been recovered.

19. Udaiveer PW-2 stated that he used to reside at Kalindi Vihar, Agra and Devesh was his brother-in-law, being the cousin of his wife and on 27.2.2002 the appellants brought Rahul to his house in the night and stayed in his house. Devesh told him that Rahul was the nephew of Jaiveer and that

on 3.3.2002, the three accused got recovered the child from his house whose custody was taken over by the police and that the recovery memo Ex.PW-1/F was drawn in his presence and thumb impression at point 'B' was his. On being cross-examined by the learned APP he stated that his wife told him that Netrapal used to come to his house.

20. Rahul PW-3 deposed that when he was playing '*gulli-danda*' outside his house. Raju gave him a biscuit to eat and he lost consciousness. Before eating biscuit he saw Netrapal sitting at a wall about 2/3 feet and he got consciousness the next day. He saw appellants Firoz and Jaiveer near him. They told him that his father had left him. He was taken to a house where Devesh was also present. Firoz used to beat him. Firoz and Devesh made him bald. Whenever he demanded to be left in the house of his parents he used to be beaten and at one point of time Jaiveer took him to a pond and threw him in the pond. He was rescued from Agra.

21. On being cross-examined whether the pond in which he had claimed to having been thrown had water, he said 'yes' but said that it was not a deep pond and he was drowned up to his neck.

22. Having perused the confessional statements, styled

by the prosecution as disclosure statements, of the appellants i.e. Ex.PW-1/C, Ex.PW-1/D and Ex.PW-1/E it is apparent, that as admitted by the scribe of the statement Insp.Neeraj Kumar PW-12, the said statements were recorded by him at the police post Sangam Vihar (in Delhi). That is, after the kidnapped child had already been recovered. As noted herein above, Ct.Vijay PW-8 had admitted that no written proceedings were carried out after the accused were apprehended, meaning thereby, their disclosure statements were never recorded immediately after the appellants were apprehended.

23. That apart, we translate the relevant extract from disclosure statement Ex.PW-1/D of appellant Firoz (noting that the relevant part of the disclosure statements of the other two appellants are near pari material). It stands recorded (translated): *"From the STD booth we all informed Indrasen that he should bring Rs.2.5 lakhs at 7:00 AM on 3.3.2002 should come near the STD booth adjoining 100 feet road Kalindi Vihar. Pursuant where to, accompanied by you Indrasen reached the STD booth on time and Indrasen handed over money to us and at that point of time you arrested us. Netrapal, Govind and Satish managed to flee the house due to it being dark and on the pointing out of myself, Jaiveer and Devesh from the house of the brother-in-law of Devesh*

recovered Rahul on being identified by Indrasen. I do not know the address of Govind and Satish”.

24. It is apparent that the learned Trial Judge has not read the disclosure statements Ex.PW-1/C, Ex.PW-1/D and Ex.PW-1/E which are narratives of past events. Obviously, no recovery has been made pursuant to any disclosure statement made by the appellant.

25. Thus, the most incriminating evidence sought to be proved by the prosecution as fallen. We have to hold that the prosecution miserably failed to prove that Rahul was recovered pursuant to the disclosure statements made by the appellants and upon the appellants leading the police to the house wherefrom the child was recovered. We also note that there are no pointing out memos drawn to show that the appellants pointed out the house of Udaiveer.

26. The testimony of PW-2 Udaiveer has thus lost its sting.

27. We shall be commenting upon the testimony of Udaiveer a little later.

28. From the admissions made by Insp.Neeraj Kumar as also the fact that PW-1 has stated that during their stay at Agra from 28.2.2002 to 3.3.2002 they slept in the vehicle in which they had left Delhi, it would be doubtful whether any

reasonable prudent person would accept the fact that apart from the driver of the vehicle, 3 police officers and the father of the child spent 3 nights and 3 days in the vehicle. Where did they go to answer the calls of nature or bath etc? Everything remains a mystery. That Insp.Neeraj Kumar had no proof of ever having left Delhi or reaching Agra suggests that nobody left to Agra. The fact that law requires police officers to make DD entries when they leave the police station disclosing therein the purpose of leaving the police station and make DD entries when they return to the police station as also the fact that there is just about nothing to show that anybody reached Agra are serious lapses wherefrom a doubt is cast whether at all the child was recovered from Agra. It would be difficult to accept that the police team from Delhi remained stationed at Agra for 3 days without informing their counterparts in Agra about their stay in Agra and the purpose thereof.

29. It assumes importance that neither the time nor the place wherefrom the accused were apprehended by Insp.Neeraj Kumar has been entered or recorded in the arrest memo.

30. In this connection it assumes significance that as per Insp.Neeraj Kumar the house of Udaiveer from where

Rahul was recovered was at a distance of about 50 paces from the STD booth near which the appellants were apprehended and Indrasen PW-1 could not even broadly state that distance between the two spots; he could not even say whether the distance varied between 10 paces to 1 km.

31. We find it strange that Insp.Neeraj Kumar claims to have obtained the call detail records Ex.PW-12/B from the service provider without recording the statement of the person who handed over the same to him. The fact that Insp.Neeraj Kumar did not record the statement of any person from the telephone exchange in Agra pertaining to the location of any particular STD booth suggests that location of no booth was obtained from anybody. The fact that Insp.Neeraj Kumar admits that the STD booth near which the accused were apprehended was open and his not associating the owner of the telephone booth further renders discreditable the actions and investigation of Insp.Neeraj Kumar.

32. At this stage, we would like to comment upon the lack of the knowledge of the investigating officer, the learned APP and even the learned Trial Judge as to how electronic record has to be proved. The decision reported as 2003 IV AD (Cr.) 205 State vs. Mohd.Afzal & Ors., which was delivered in the month of October 2003 clarified the law by explaining

Section 65-B of the Evidence Act as to how electronic record has to be proved.

33. In spite thereof, certain sheets of paper, styled as computer generated call detail printouts were permitted to be exhibited on the statement of Insp. Neeraj Kumar that he went to the company and obtained the same. Neither a certification from a responsible officer of the company having control over the computer or authorized to generate a print out from the computer was proved nor was anybody from the company examined to state that the computer generated sheets were generated through the computers storing the information and the information generated was stored in the ordinary course of business of the service provider.

34. We cannot look to the computer generated sheets Ex.PW-12/B for the reason the same have not been proved to be electronic record generated on sheets.

35. We are repeatedly noticing that learned Additional Sessions Judges are exhibiting computer generated printouts on mere statements of the investigating officer that he obtained the same from a particular source, without complying with the mandate of Section 65-B of the Evidence Act as explained in Mohd. Afzal's case (supra).

36. In view of the aforementioned deficiencies in the case of

the prosecution it becomes doubtful whether at all the appellants were apprehended near the telephone booth at Kalindi Vihar Agra as claimed by the prosecution.

37. We have reserved our comments on the testimony of Udaiveer and hence we pen down the same.

38. As deposed to by Udaiveer he used to ply a three-wheeler scooter. Persons in low place jobs and in the unorganized sector are most vulnerable and can be manipulated by the police. Udaiveer seems to have been manipulated.

39. We hasten to add that no cogent explanation has been given as to on what basis the investigating officer gave a clean chit to Udaiveer, the person from whose house the kidnapped child was recovered.

40. As per Udaiveer he kept Rahul in his house because Devesh told him that Rahul was the nephew of Jaiveer. Rahul claims that Firoz used to beat him. What business did Firoz have to beat Rahul? If he did so, why did the eyebrows of Udaiveer not rise to suspect that something was amiss? It is apparent that the testimony of Udaiveer and Rahul are not only not in sync but are contradicting each other on a material aspect i.e. the conduct of Udaiveer and the facts stated by Rahul.

41. If we analyze the testimony of Master Rahul there are traces of the child being tutored as also fantasizing. We have noted above that according to Rahul when he was in the house of Udaiveer accused Firoz used to beat him. According to Rahul a lady used to be in the house. Insp.Neeraj Kumar PW-12 has admitted on cross examination that Udaiveer's wife was present in the house. Rahul has stated that he was taken by Jaiveer and thrown in a pond.

42. That Rahul has deposed falsely is evident from the fact that he claims Jaiveer took him to a pond and threw him in the pond. Why would Jaiveer take Rahul and expose himself and the child in public, clearly to be spotted by someone when he would be throwing Rahul in a pond?

43. That Rahul is intelligent enough to clothe his lies is apparent when he stated that the pond was not deep and that he was drowned up to his neck.

44. It is settled law that where the case of the prosecution had substantially fallen, remnants of what is perceived to be not tainted is not sufficient to sustain a conviction, for the reason it may be difficult for the defence to demolish each and every piece of evidence led by the prosecution.

45. When the main pillars of the case of the prosecution

have fallen, it would be futile to look to the pillars which stand and try and ascertain whether the structure can be salvaged.

46. As noted hereinabove, the manner in which the disclosure statement of the accused have been recorded and the fact that as admitted by Insp. Neeraj Kumar he recorded the disclosure statements of the accused at the police picket Sangam Vihar, a place in Delhi it is apparent that the same were recorded much after everything was over.

47. As noted hereinabove, the script in the disclosure statement is not a pre-script but is a post-script of events which had already transpired. Thus, the question of a new fact not being in the knowledge of the police being discovered by the police for the first time after the disclosure statements were recorded does not arise. No part of the disclosure statements is admissible under Section 27 of the Evidence Act.

48. The appellants have earned their freedom.

49. Placing on record our sense of appreciation for the learned counsel for the accused who have, as Amicus Curiae at the asking of the Court, pointed out the afore-noted lacunas in the case of the prosecution we allow the appeals by setting aside the impugned judgment and order dated 9.9.2004. The appellants are acquitted of the charge punishable under Section 364-A IPC for having kidnapped Master Rahul for

ransom.

50. Noting that appellants Devesh and Jaiveer are in jail we direct their release if not required in any other case. Noting that appellant Firoz Khan had jumped interim bail in respect whereof steps are being taken to apprehend him and realize the surety amount furnished by the sureties, we direct that action as contemplated by law be taken against Firoz Khan in jumping interim bail but as far as his conviction is concerned in the instant case he shall be treated as having been acquitted.

51. A copy of this order is directed to be sent to the Superintendent Central Jail Tihar for implementation qua Devesh and Jaiveer who shall be set free if not required in any other case.

52. We also direct the Registry to send a copy of this order to the District and Sessions Judge Delhi with a covering letter that the same should be circulated to all the Additional Sessions Judges in Delhi drawing their attention to paras 32 to 35 of the present order cautioning them as to how electronic record has to be proved.

PRADEEP NANDRAJOG, J.

SURESH KAIT, J.

FEBRUARY 10, 2010
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