

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

Reserved on: 09.05.2012

Decided on: 20.07.2012

+ **CRL.A. 690/2011**

DEVENDER KUMAR YADAV

..... Appellant

Through : Sh. Anubhav Dubey, Advocate.

+ **CRL.A. 1439/2011**

JAGBIR SINGH @ TONY

..... Appellant

Through : Sh. Varun Jamwal, for Sh. Mukesh Kalia, Advocate.

+ **CRL.A. 1530/2011, CRL.M.(BAIL) 2195/2011**

VIJAY @ VIJENDER

..... Appellant

Through : Sh. Avninder Singh and Sh. Ajay Verma, Advocates.

versus

STATE (NCT OF DELHI)

..... Respondent

Through : Ms. Richa Kapoor, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. This judgment will dispose of three connected appeals which challenge the judgment dated 13.04.2011 passed by Learned Additional Sessions Judge (Rohini) by which the appellants were convicted of the offence under section 363/364A, IPC read with section 120-B, IPC. By order

dated 26.04.2011, they were sentenced to undergo imprisonment for life, with fine.

2. The prosecution case was that on 14.01.2005, complainant Mohd. Irshad complained to the police that his son, Imran (aged 5) was missing and had been kidnapped. Imran had gone out to play the previous day but did not return. He stated that despite search, Imran could not be found. An FIR under Section 363, IPC was registered. On 31.01.2005, Mohd. Irshad informed the police that he had received ransom calls on his residential telephone as well as his cell phone demanding Rs. 3 lakhs for the release of his son. His statement was recorded and Section 364-A, IPC was added in the FIR. The investigation was entrusted to SI C.L. Meena. The IO obtained the call details. The police alleged that ransom calls were made from some STD booths in Bhadrauli and Jarar in Agra district of UP. On 05.02.2005, ransom calls were received again by Mohd. Irshad from different telephone numbers. These calls emanated from STD booths in Bhadrauli and Jarar in Agra district. A special team was formed under the supervision of SI Meena and ASI Azad Mohd. Call details of these were obtained from the BSNL office, Baha. On scrutiny of call details, it was noticed that the caller(s) who made the ransom call, used a particular contact mobile telephone number at Delhi. The negotiations took place between the complainant and the kidnappers for payment of ransom money and the release of Imran. The conversation was heard from a parallel line. From the conversation, it appeared that telephone calls were being made from the area near Shikohabad, District Ferozabad. Raj Kumar @ Puppy was the main suspect in the kidnapping. He and his brother-in-law Jagbir Singh were noticed near

the house of Mohd. Irshad on the day of the incident. A police team led by SI C.L. Meena were sent to district Firozabad. The assistance of local police was also taken. On 27/28.02.2005, local police of Shikohabad recovered the kidnapped child from the accused Vijay @ Vijender and Jagbir Singh. Separate cases bearing FIR No. 78/05 and FIR No. 79/05, 80/05 under section 307, IPC and under the section 25/27 of the Arms Act were respectively registered against Vijay and Jagbir for firing at the police party, and on account of recovery of arms and ammunition from them. The STD booths from where the calls were made by the kidnappers were located. One such STD booth owner Ajay Yadav (PW-12) stated that Jagbir @ Tony, Parikshit, Mukesh @ Chinuva, Raj Kumar @ Puppy, Shyam Singh were making calls from his booth since the last one and a half months to Delhi and other places. Ajay Yadav also disclosed that Shyam usually talked to his brother Devender using his STD booth phone, and Devender also used to call at his STD number for talking to Shyam. The child, who after recovery was with P.S. Shikohabad was released to the custody of his father Mohd Irshad. Statement of Imran was recorded where he mentioned that Puppy had taken him from the field and handed him over to Jagbir, who took him in a bus to Devender's helmet factory, from where Jagbir took him to Agra in a bus, and later to his village where he was held captive by Jagbir with the help of his associates Shyam, Parikshit, Mukesh and Vijay. Devender was arrested on 1.03.2005. Mobile bearing No. 9213129702 was recovered from him. Jagbir and Vijay, who had been arrested by the Shikohabad Police were arrested in this case too. Devender made a disclosure statement in which he pointed out the location of the STD booths at Bhadrauli, Farera and Jarar. All the STD booth attendants identified accused Devender and named two

others, i.e Raj Kumar @ Puppy and Parikshit. Jagbir pointed out the place where Raj Kumar handed over Imran to him. The call details of Mohd Irshad's phone, (landline and mobile), were procured for the period 01.01.2005 to 31.03.2001. Statement of Imran was recorded under section 164, CrPC.

3. Upon completion of investigation, final report was submitted to the Metropolitan Magistrate and the case was committed for trial to the Court of Sessions. Jagbir, Vijay and Devender were charged under section 363/364-A/120-B/34 IPC. Raj Kumar @ Puppy, Mukesh, Parikshit and Shyam Singh could not be arrested, and their names were put in Column 2 of the chargesheet. The accused pleaded not guilty and claimed trial. During trial, the prosecution examined 19 witnesses, and brought on record, among other things, documentary evidence giving call details of calls of the phone numbers at the STD booths and of complainant Mohd Irshad.

4. After considering the evidence before it, the Trial Court convicted all the three accused persons of the charged offences and sentenced them in the manner described above.

Trial Court findings

5. The Trial Court relied upon the testimonies of PW-3 Imran (victim) and PW-19 Inspector R.K. Singh, who, as per the prosecution story, led the police party which recovered the child from the custody of appellants Vijay and Jagbir, and PW-2 Mohd. Irshad, who testified as to the ransom calls. These primarily were the basis for conviction of Vijay and Jagbir. The appellant Devender's conviction was based mainly on PW-3 Imran's

deposition. For the offence of criminal conspiracy under section 120-B, IPC the Trial Court, while noting that the agreement between conspirators cannot generally be proved by direct evidence and can only be inferred, held that the circumstances proved against the accused unerringly pointed to their collaboration with each other for the various acts done in furtherance of the conspiracy.

6. The Trial Court refused to place any reliance on the call details that had been brought on record on the ground that it had not been proved in accordance to the conditions specified under Section 65B, Indian Evidence Act, 1872. The Trial Court also disbelieved the testimonies of the various STD booth (from where allegedly the ransom calls were made) operators/owners/ (PW-7 Rajbir Singh, PW-8 Rameshwar Singh, PW-9 Rajesh Dixit, PW-10 Manish Jain and PW-12 Ajay Yadav).

Arguments of parties

7. A common argument raised by Counsel for the appellants was that in the absence of any corroboration, placing heavy reliance on the testimony of the victim PW-3, the child witness, Imran was erroneous. It was further pointed out on behalf of all the appellants that PW-2 Mohd Irshad stated that he saw the appellants Jagbir and Vijay at P.S. Shikohabad 3-4 days before his son was recovered. This, it was argued, suggests that these appellants were already in police custody, and thus creates strong suspicion about the alleged recovery of the child from their custody. It was also urged by the appellants that even though certain ransom-related phone calls received by PW-2 Mohd. Irshad were recorded on CD and mobile phone by the police,

no such record was produced during the trial, which indicates that the appellants were falsely implicated. Moreover, it was contended on behalf of all the appellants that since appellant Vijay and Jagbir were acquitted by the Sessions Court of Shikohabad in all the three cases in which they were charged the recoveries were not proved beyond reasonable doubt. In the circumstances, the recovery of the child was also doubtful, and could not be used against them.

8. It was contended on behalf of Devender that the prosecution story was unbelievable in as much as during trial PW-2 Mohd. Irshad stated that the disclosure statement of appellant Devender was not recorded in his presence, whereas Ex.PW-2/H (Disclosure statement of accused Devender) shows PW-2's signature. Moreover, to discredit the testimony of PW-19 Inspector R.K. Singh, (who had led the police team which recovered the child from the custody of appellant Vijay and Jagbir), it was argued that while PW-19 said in his examination in chief that he had information about kidnapping of the child, during his cross-examination, he resiled from the earlier statement recorded during investigation, stating that he did not recall if he had any information. It was further urged that Devender's involvement in the alleged crime was added as an afterthought by the police. In this regard, it was stressed that Devender was nowhere named in the statement made by the child Imran to the Magistrate under Section 164, CrPC. It was also stressed that even during his examination, initially, nothing was mentioned about the role played by Devender in the crime; it was only upon the asking of the APP about his role that PW-3 Imran stated that Jagbir had taken him to Devender's helmet factory where he was given biscuits. Moreover, it was

pointed out that a discrepancy is revealed as to the place when PW-2's version is compared with that of PW-6. It was also emphasised that child Imran's statement under section 164, CrPC was recorded three months after his alleged recovery. It was also urged that surprisingly Imran, who was extremely young at the time of the incident, remembered, during the trial, the names of all the accused persons, and also disclosed the place where he had stayed and also knew that the factory where he had been taken belonged to Devender.

9. As regards the testimonies of the STD booth operators, it was urged on behalf of Devender that most of them turned hostile (PW-7 Rajbir Singh, PW-9, Rajesh Dixit, PW-10 Manish Jain), while the ones who did not (PW-8 Rameshwar Singh) brought about some discrepancy in their account rendering it unbelievable. PW-8, it was pointed out, stated during his cross examination that he would be unable to identify a person who makes a call from his booth two days before; that he further stated during his cross examination that Devender had made a call from his booth 3-4 days prior to when the police came with Devender to his booth; it was remarked that as per the prosecution story, the call was made from PW-8's STD booth on 05.2.05, which was not 3-4 days before police went to PW-8's booth with Devender. It was further argued on his behalf that the Trial Court failed to give due weight to the absence of any seizure memo for the recovery of Devender's SIM card which casts doubt on the prosecution story. It was also argued that the Trial Court failed to consider that the ransom calls had not been proved, as even though the calls had been made by landline numbers, the police merely sought to prove the mobile numbers of the appellants;

moreover, there was no proof that the alleged ransom calls were made by any of the appellants. Lastly for Devender, it was argued that there was absolutely no proof of any conspiracy, and the Trial Court based its conclusions on assumptions.

10. Other than the common grounds urged by counsels for all appellants, on behalf of Jagbir, it was argued that recovery of the child from his custody and Vijay's custody is dubious due to absence of public witnesses present even though allegedly at least two gun-shots had been fired. Learned counsel contended that it is highly improbable that no neighbour would come around to see the incident of police raid in which gum shots were allegedly fired; and that it is incredible that the child kept sleeping during the police raid. Through these reasons, a shadow of doubt was sought to be cast on the recovery of the child, and his and appellant Vijay's arrest by the police party led by PW-19 Inspector R.K. Singh. Moreover, it was urged on Jagbir's behalf that the necessary ingredients of the crimes charged were not proved.

11. Furthermore, for appellant Vijay it was also contended that the Trial Court failed to reckon that the recovery of the child, if at all held to be proved, was not from his custody. Moreover, there was no evidence that the house from which the child allegedly was recovered belonged to Vijay. It was also indicated that PW-19 Inspector R.K. Singh made contradictory statements in as much as he stated that no public persons gathered at the spot, while he also said that public persons were requested to join the raiding party, but they refused.

12. Learned APP for the State defended the Trial Court's judgement and contended that it should not be interfered with. Learned counsel urged that the testimony of PW-19 Inspector R.K. Singh clearly established that the child was recovered from the custody of appellants Vijay and Jagbir. PW-19's version was corroborated by the testimonies of PW-15 and PW-16. The testimony of the victim PW-3 Imran proved how he was kidnapped by one Pappi and handed over to Jagbir who took him to his house, and later on handed over his custody to Vijay in whose house he stayed for about two months. PW-3's testimony, it was argued, also highlighted the role Devender played. Moreover, it was contended that all the ingredients of the offences charged had been adequately proved. Even though the call records could not be proved in accordance with law, the ransom calls were proved by PW-2 Mohd Irshad's testimony, as were the other essentials required for the offence under section 364-A, IPC. From the established circumstances, the inference of conspiracy was justifiably drawn.

Analysis and appreciation of evidence

13. We have gone through the impugned judgement and have carefully considered the evidence placed on record. PW-2 Mohd Irshad, in his testimony, stated that at the time of the kidnapping (13.01.2005), his son was aged around 5 years. The FIR (Ex.PW-1/A) and the first intimation (*rukka*) also reveal that Imran's age was around 5 years. No birth certificate was brought on record during evidence. Moreover, his age was recorded as 5 years even on his testimonial record, and of his statement under section 164, CrPC which were recorded on 30.08.2006 and 28.6.2005 respectively. However, it must be noted that such recording in both instances was by the

judicial officer conducting the proceeding in which the testimony or statement, was recorded. The only evidence that has come on record is that of the father. Even though the proposition that Imran was aged about 5 years at the time of the kidnapping was challenged, it must be noted that no suggestion denying such a fact has been put to PW-2 Mohd Irshad who deposed about Imran's age. Thus, in the absence of any other evidence about his age, and also absence of any suggestion confronting such a proposition and based on the testimony of PW-2, we are inclined to suppose for the purposes of this case that the child was aged 5 years at the time of the kidnapping.

14. It was argued about the improbability of a child of such tender age having a sound memory of events dating back more than a year; and that in the absence of any corroboration it would be unsafe to base a conviction on it. The Court will firstly deal with the question of the competence of Imran to testify and further on whether it was safe to hold a fact proved based only on his testimony. During the trial, the Trial Court asked the child witness certain questions to determine his capacity to be a witness, and was thereafter satisfied about his competence. Section 118 of the Indian Evidence Act, 1872 does not proscribe a child from being a witness. All it provides is that those persons who cannot understand questions put to them, or cannot give rational answers to them shall not be competent to testify. The law is that the evidence of a child witness must be evaluated carefully and with circumspection because a child is susceptible to be swayed by what others tell them and an easy prey to tutoring. (Ref *Karnataka vs. Shantappa Madivalappa Galapuji* 2009 CrL LJ 2442 SC, *Nivrutti Pandurang Kokate and Ors. v. State of Maharashtra* 2008 (12) SCC 565, *Golla Yelugu Govindu*

v. State of Andhra Pradesh 2008 Cri LJ 2607, *Suryanarayana v. State of Karnataka* 2001 Cri LJ 705, *Dattu Ramrao Sakhara v. State of Maharashtra* (1997) 5 SCC 341. In the present case too, during the trial, the learned Additional Sessions Judge put preliminary questions to ascertain the competence of PW-3. Upon receiving answers to such questions, the learned Judge recorded his satisfaction about PW-3's competence to testify. Thus, we are satisfied that the child was competent to testify, though at the same time we are mindful about the need to exercise caution in considering his testimony. His testimony clearly implicated the appellant Vijay and Jagbir. He stated that he was kidnapped by one Pappi from the field, who handed him over to Jagbir near a temple; Jagbir took him to a helmet factory where he was given biscuits and was made to change his clothes; after that he was taken to a village and his custody was handed over to Vijay. In his cross examination, Imran admitted that his father told him outside the court the names of the accused persons. Based on this admission, it was argued by the appellants that Imran's deposition was tutored. In this regard, it must be noted that the child denied suggestions that he was deposing falsely or that he was deposing at the instance of his father. Imran identified all the appellants correctly in court. According to his testimony, he was in Vijay's custody for about two months, a period long enough for a five year old to remember someone's identity. Jagbir, who travelled with him from Delhi to Firozabad, came into substantial contact with the child. His statement recorded by the police as well as his statement under section 164, CrPC are to the same effect which implicates both Vijay and Jagbir. Thus, as far appellant Vijay and Jagbir are concerned, we are satisfied that PW-3 Imran's testimony can be relied upon.

15. As regards Devender, we note that other than Imran's identification of Devender, the only incriminating circumstance testified about by PW-3 is that the helmet factory he was taken to, belonged to Devender. Importantly, on his own, Imran did not reveal anything about the role played by Devender. He did not even state that Devender was present when he was taken to the helmet factory. In fact, initially he stated that the factory he was taken to belonged to none of the accused. It must also be mentioned that Imran's statement under Section 164, CrPC, which was recorded on 28.5.2005 and which implicates Jagbir and Vijay in the same manner as his deposition, does not have any mention of Devender. From the circumstances, we are of the opinion that Imran's identification (of Devender) was most likely the result of his father telling him the names of the accused. Even if his testimony about Devender is assumed to be correct, it does not implicate him in any way as the only fact deposed to therein is that he was taken to Devender's factory. Devender's presence at the factory at that time, and any role played by him in the commission of the crime in question cannot be assumed. Thus, we hold that Devender's involvement in the crimes charged does not stand proved by child Imran's testimony.

16. It was, also, contended that the fact that Imran's statement under section 164, CrPC was recorded after three months – a factor suggestive of false implication of the accused. This appears to be due to substandard investigation on part of the investigation agency, and there appears no justification for it. Be that as it may, it would be unjust to give the appellants the benefit of improper investigation when otherwise, there exists incriminating evidence against them. In any case, a statement under Section 164, CrPC is not substantive evidence and can only be used for

corroboration, under Section 157, Indian Evidence Act. During the trial, PW-14 Bhupesh Kumar, the magistrate who recorded Imran's statement under section 164, CrPC, was also examined. He deposed that upon making certain enquiries from the child Imran, he was satisfied about his competence to get his statement recorded. It is noteworthy that if the entire prosecution case was a fabricated one, and Imran's statement to the magistrate tutored, then he would have implicated Devender too, as he was already in custody by that time. However, this is not the case. Thus, in our opinion, Imran's statement to the magistrate can be used for corroboration, and in the circumstances of the case, we cannot hold that merely because it was recorded three months later, the case against Vijay and Jagbir is fabricated to the extent spoken to by PW-3.

Proof of recovery of child from the custody of appellants Vijay and Jagbir

17. PW-19 Inspector R.K. Singh testified about the recovery of the child. He stated that upon having received secret information about the presence of a kidnapped child at the house of appellant Vijay in village Sehjalpur, District Ferozabad, he led a police team to that house. There, upon seeing the police, appellant Jagbir shouted "*police-police*" and simultaneously fired at the police party with a country made pistol. In the meanwhile co-appellant Vijay came out and he also fired a shot at the police, but eventually both were overpowered by the police without any of them getting hurt. Upon interrogation of the two, it was revealed that Imran was in another room towards the eastern side of the house. The child was sleeping in the said room; he was woken up and upon being asked he told PW-19 that his name was Imran and he lived in Sultan Puri, Delhi. Further, upon being asked,

Imran told PW-19 that he had been brought to Sehjalpur by Jagbir. PW-19 further testified that appellant Jagbir was interrogated, and made disclosures pursuant to which a mobile phone was seized; both Vijay and Jagbir were taken to the Police Station, and FIR No. 78/05 under Section 307, IPC, FIR No. 79/05 u/s 25/27, Arms Act and FIR No. 80/05 u/s 25/27/54/59, Arms Act were registered against them. The two appellants were correctly identified by PW-19 during trial. We have considered the submissions assailing the recovery of child Imran from the custody of appellants Vijay and Jagbir. Appellants Vijay and Jagbir were acquitted by the Sessions Court at Ferozabad in the above cases filed against them u/s 307, IPC and section 25/27/54/59 of the Arms Act. It was contended before us that their acquittal casts doubts on the recovery of the child from their custody. This is a misplaced inference. The Ferozabad Court's judgment did not render any finding on whether or not the child was recovered from the custody of Vijay and Jagbir. It merely held that the said accused were not proved beyond reasonable doubt to have been possessing unlicensed arms (section 25/27, Arms Act) using which they fired at the police with an intention to cause death (section 307, IPC). The main reasons for disbelieving the prosecution story there were that Inspector R.K. Singh and one Sudhir Kumar, who under PW-19's direction recorded the disclosure statements, were not examined; PW-3 Imran was not examined; no police person was injured even though two shots were fired from an apparently close distance; neither the fired bullets, nor any ballistic report was produced. The facts-in-issue in those proceedings were whether or not the two shots fired at the police party were with intention to cause death, and whether or not they possessed unlicensed pistols; these facts were held not proved. The question in the

present case is whether the child was recovered from the possession of the appellants Vijay and Jagbir. Significantly, during the trial of this case, both Imran as well as Inspector R.K. Singh were examined. Thus, as regards this case, the findings of the Firozabad Court are irrelevant, and the appellants' acquittal there has no bearing on the inferences that are to be drawn by this Court. This Court shall consider only the evidence brought on record before it.

18. It was also contended by the appellants that PW-19's deposition is false because, during his examination-in-chief he deposed that he had information about kidnapping of the child, whereas during his cross examination, he stated that he did not recall whether he did or not. We are of the opinion that nothing to discredit PW-19's testimony can be inferred from this. In fact, during his examination in chief, the witness stated that he had information about presence of a kidnapped child in village Sehjalpur. In his cross examination, he deposed that he did not remember whether he had information of any child having been kidnapped from Jahangir Puri by the accused persons. This is not of much consequence, as he certainly had information that a kidnapped child was in the house they raided in village Sehjalpur. This Court, thus, does not find any merit in this argument. It was also urged that PW-19's testimony is contradictory in as much as he stated that no public persons gathered at the spot, while he also said that public persons were requested to join the raiding party, but they refused. There is no contradiction in the aforesaid account. It is clear from reading his deposition that public persons had been requested to join the police party before the house was raided, but none gathered at house after or during the raid. Thus, this contention is also negated as being meritless.

19. The prosecution version of the recovery was further challenged on the ground that there was no public witness to prove the recovery of child from accused Vijay and Jagbir, and that if the prosecution story of the incident were true, members of the public would have gathered on hearing the sound of firing. Admittedly, there is no public witness for the incident; however, this by itself is not a ground to disbelieve PW-19's testimony. PW-19 was cross examined searchingly but he stated nothing based on which the Court would suspect his version that the child was not recovered from the custody of Vijay and Jagbir. Further, the fact that no public persons gathered near the house after the firing may actually cast doubt on whether any firing actually happened, but that by itself does not disprove the recovery of the child from the custody of Vijay and Jagbir. This reasoning also applies to their contention wherein the firing is disputed, as also the fact that the child Imran kept sleeping during the raid. On an overall consideration of PW-19's testimony, the Court finds no reason to believe that the child was not recovered from custody of Vijay and Jagbir.

20. Learned APP urged that the testimonies of PW-15 Brij Mohan Verma and PW-16 SI Sehdev Diwedi corroborate the account given by PW-19. PW-15 testified that he was the constable at P.S. Shikohabad who kept the custody of child Imran for a day till the time his father Mohd Irshad along with Inspector C.L. Meena took over his custody. PW-15 did not state that he was a part of the police party that raided the house in village Sehjalpur. He, however, still stated that the child was recovered from the custody of Vijay and Jagbir, both of whom were arrested in respect of FIR No. 78-80 of 2005. Since PW-15 was not part of the raiding party, his assertion about the recovery of Imran from custody of Vijay and Jagbir amounts to hearsay

evidence, and is thus not admissible. His testimony is relevant only to the extent that the child was handed over to Mohd Irshad by him. PW-16 SI Sehdev Diwedi, on the other hand, was the IO for the cases FIR No. 78/05, 79/05 and 80/05. He deposed that he interrogated the two accused persons and one mobile phone bearing no 9897722166 was recovered from the possession of Jagbir. PW-19 also deposed that a mobile phone was recovered from accused Jagbir and was sealed and seized in a pullanda. Thus, it is evident that the mobile phone was recovered by PW-19 immediately upon arrest of the said two accused. PW-15 testified that he made the entry in the Malkhana register for depositing the seized mobile phone. During the trial, a sealed *pullanda* having an illegible seal and apparently bearing PW-19 and appellant Jagbir's signatures was produced and identified by PW-19; the Nokia mobile phone seized was identified by PW-19 as Ex. P-2. Thus, it is clear that none of their accounts corroborate the testimony of PW-19. Even though it does not assist the prosecution case, it does not help the defence/appellants as well.

21. During the examination in chief of PW-2 Mohd Irshad conducted on 24.10.2005, he stated that after he informed the police about the ransom calls, the police organized several raids. He deposed that he too accompanied them. It is not clear whether he accompanied them in all the raids or any one or more. In this context, he stated that when he reached with the police party at P.S. Shikohabad he saw the appellants Vijay and Jagbir there; since he knew them, he identified them and also disclosed to the police that Pappi, after kidnapping his son, gave him to Jagbir, who is Pappi's brother; that 3-4 days later his son was recovered on 28.02.2005. Based on this part of PW-2's deposition, the appellant argued that Vijay and

Jagbir were already in custody at the time of recovery of the child, and the recovery of the child from their custody on 27.02.1005 is a contrived circumstance, which never happened. However, PW-2's testimony must be examined as a whole, and not parts of it in isolation. During his examination in chief on 24.10.2005, he stated that the child was rescued on 28.2.2005. However, later during his cross examination conducted on 11.9.2006, he stated that his son was recovered on 5.3.2005. Later again he told that ACP conveyed to him the message about the recovery of his child on 3rd or 4th March, 2005. PW-2, during his examination, identified his signature at point A on this document. He even identified his signature on appellant Devender's arrest memo Ex.PW2/C, who as per the prosecution story, was arrested on 1.3.2005.

22. As regards having seen Vijay and Jagbir at P.S. Shikohabad, PW-2 subsequently stated in his deposition that he saw accused Jagbir at PS Shikohabad before the recovery of his child, the date he said was either before 28.2.2005 or 3/4/3005; that he and his son Imran accompanied the police back from Shikohabad to Delhi where they reached on 4/5.03.2005. His confusion and poor recollection of the chronological order of events is again evident from his subsequent statement made during his cross examination; he stated that he saw Jagbir and Vijay together, and saw them when he went to P.S. Shikohabad to get the custody of his recovered child. He admitted that he could not remember the exact date on which he had gone to P.S. Shikohabad with the police, but he nevertheless stated that they had left from Delhi for Shikohabad on the day of Muharram. He, however, denied the suggestion that the child was handed over to him on 28.02.2005. However, if we read his testimony along with the testimony of other

prosecution witnesses, it becomes clear that for each incriminating circumstance that is part of the prosecution story, he has supported that stand, and for a few of those circumstances, at places during his testimony, he has brought in some inconsistencies. His two biggest confusions are firstly, about the date on which he saw Vijay and Jagbir at P.S. Shikohabad; and secondly, the date on which his child Imran was handed over to him. However, the prosecution version on these points is that the child Imran was recovered and accused Vijay and Jagbir arrested by U.P. (Shikohabad) police on 27.2.2005, Imran's custody was handed over to his father PW-2 on 28.02.2005. It must be noted that there exists overwhelming evidence, both oral (testimonies of PW-6, PW-15, PW-16, PW-18 and PW-19) and documentary to support these versions. For the recovery of the child from custody of appellant Vijay and Jagbir, and for their arrest, there are the testimonies of PW-19 Inspector R.K. Singh. PW-6 deposed that Imran was at P.S. Shikohabad on 28.02.2005, when his custody was handed over to his father (who had come along with police team from P.S. Sultan Puri). This witness was part of the police team from P.S. Sultan Puri., PW-15 Brij Mohan Verma (who was entrusted Imran's custody for the intervening period of 27th night till Imran's custody was handed over to his father PW-2 on 28th), and PW-18 C.L. Meena (the IO) too testified as to this fact. Even PW-2, on one occasion during his examination, stated that the child was placed in his custody at P.S. Shikohabad on 28.2.2005. He also identified his signature on Imran's Seizure/Recovery Memo Ex.PW-2/B. Moreover, it is the prosecution story that the police got to know about the role played by Devender only after the police recorded Imran's statement. Thus, according to the prosecution story, Devender could not have been arrested before

Imran's recovery; in fact, PW-18 testified that Devender was arrested on 01.03.2005; this is revealed from his arrest memo Ex.PW-2/C, search memo Ex.PW-2/D, disclosure statement Ex.PW-2/H, and pointing out and seizure memo Ex.PW-2/G. The said documents even contain PW-2 Mohd. Irshad's signatures and he identified the same during his examination.

23. Based on the above analysis, this Court finds that child Imran was, in fact, recovered on 27.2.2005, and his custody was handed over to PW-2 the next day. The overwhelming evidence cannot be ignored merely because of the confusing and inconsistent deposition of PW-2, who himself stated that he was not sure about the dates.

24. PW-2 also deposed that some conversations were recorded on CD and mobile phone. The mobile phone, he stated, belonged to ACP Kushwaha. However, no such record was brought in evidence during the trial. On this basis, the counsel for the appellants argued that the case was a fabricated one. PW-18 C.L. Meena, the IO of the case, stated during his examination that no such phone conversation was recorded either on mobile phone, or on any CD. ACP Kushwaha was not examined. Relying on PW-18's testimony, the Trial Court noted that the question of production of such mobile phone or CD did not arise. We agree with his reasoning, and thus, reject this argument.

25. It was also contended that the prosecution failed to confirm whether or not the house from which Imran was allegedly recovered belonged to appellant Vijay. The ingredients for the offence of 363/364-A do not require that the kidnapped child be kept in the house of the offender. Thus, whether or not the house belonged to any of the appellants is irrelevant.

26. PW-2 in his testimony stated that he received ransom calls after about 17 days of his son's disappearance; that on 30.1.2005, he received an STD call on his mobile and the caller only asked his name stating that he would call again the next morning; that on 31.1.2005, at around 11:00 am he received another call when the caller informed him that his son Imran was in his custody, and that they would release him if they were given Rs. 3 lakhs; that in the same call, he was threatened that if he would try to lodge a complaint to the police, they would kill his son. PW-2 further deposed that the same evening he went to the police station, and informed them about the ransom calls. PW-4 SI Azad Mohd., who was initially handling Imran's case, confirmed that PW-2 had gone to the Police station on 31.1.2005 and reported about the ransom calls received by him. The call details of the mobiles and STD/PCO booth phones from which allegedly the ransom calls were made, and the call details of the mobile and landline number of Mohd Irshad were sought to be proved during trial to connect the appellants with the crime in question. Mohd Irshad deposed to having received ransom calls on his mobile number bearing No 9818221486, and on his Tata Indicom landline bearing no 55766129. The prosecution version was that these ransom calls were made from STD/PCO booths, and also from mobile bearing no 9897721166, which was allegedly recovered from possession of Jagbir. The Nodal officer of Tata Tele Services, PW-6 M.N. Vijayan and of Bharti Airtel, PW-11 R.K. Singh were examined in this regard both of whom stated that upon request made by the police, they handed over call details to the police. While PW-6 stated that the call details were as per their record, PW-11 stated that the call details were computer generated. The Trial Court, however, after noting the requirements for proving computer generated

electronic evidence prescribed by Section 65B of the Indian Evidence Act, 1872, held that none of the call details were proved. This Court affirms the said findings that the call details were not proved as required under section 65B of the Evidence Act. Neither was any certificate, as required under sub-section (5) was produced, nor did any witness testify that the conditions specified under sub-section (2) were met with.

27. During trial, several STD/PCO booth owners/operators were also examined at trial in an attempt to prove that calls were in fact made by the appellants to PW-2. PW-7 Rajbir Singh and PW-10 Manish Jain turned hostile and did not identify appellant Devender. Nothing incriminating emerged from their testimonies. PW-8 Rameshwar Singh correctly identified Devender, and deposed in his examination-in-chief that Devender made a telephone call from his booth. However, in the cross-examination he deposed that except this incident, he admitted that he did not know Devender, and that generally, he would be unable to remember the name of a person who used his PCO after two days (of use). He also stated that Devender had made the call from his PCO 3-4 days before he was brought by the police. The pointing out memo Ex.PW-8A reveals the date of pointing out the booth as 5.3.2005. Thus, 3-4 days prior to that would have been 1/2.03.2005. However, as per the prosecution story, by this time the child had already been recovered. Thus, the PW-8's testimony is unreliable.

28. PW-9 stated in his examination in chief that Jagbir made calls from his booth, and did not mention appellant Devender. Upon being cross examined by learned APP, (with Court's permission) he admitted that Devender did come to his booth and that he "*might have*" made a call from

his booth. He also admitted in his cross examination by defence counsel that he generally would not remember who came to his shop even two days before. The Trial Court finding that PW-9's testimony is not trustworthy therefore does not call for interference.

29. Lastly, PW-12 Ajay Yadav, who had his STD booth at Harganpur village, deposed that he knew appellant Devender as he used to call from his STD No 252315 and used to request him to call his brother Shyam Singh to attend his call at the booth; that Devender's family members used to call him at Delhi from his booth. The Court does not find anything inculpatory in this, and therefore, his testimony is of no assistance to the prosecution.

30. Thus, having analysed all evidence, this Court finds that there is lack of any evidence against Devender. Even if the prosecution version regarding his arrest is assumed to be true, that alone does not prove any guilt. We are thus, of the opinion, that the Trial Court's decision to base Devender's conviction merely on Imran's testimony, that part most likely being an improvement from his earlier statement under section 164, CrPC cannot be relied on. Moreover, there being no evidence against him, it was improper to convict him merely because he was known to the other appellants. PW-2 in his testimony stated that he had a helmet factory, and that he knew Devender, as they had worked together for a few months in the past. The suggestion that Devender, who too had a helmet factory, was framed later due to his rivalry with PW-2, though denied by PW-2 during his cross examination, cannot be ruled out. Moreover, the Trial Court's inference of the offence of conspiracy in the absence of any evidence against Devender was also wrong. Concededly, there exists no direct evidence about

conspiracy, and this crime is usually inferred, based on the circumstances. However, the Trial Court's conclusions were not based on proven circumstances, but mere conjectures. Consequently, we set aside the conviction of Devender.

31. As far as Vijay and Jagbir are concerned, we hold that against them the following circumstance stand proved: that the child was kidnapped by one Puppy, who handed him over to appellant Jagbir, who took him to Vijay; Imran was recovered from their custody from village Sehjalpur; that PW-2 received ransom calls in which he was threatened that the child would be killed if they (the kidnappers) were not paid Rs. 3 lakhs. Despite having failed to prove call records and the prosecution version about calls having been made from several STD booths, we hold that there is no infirmity with the finding that the accused were involved in the making of the ransom calls. The ingredients of the offence under section 364-A, IPC require the prosecution to prove that accused kidnapped the child and kept him under detention after such kidnapping and that the kidnapping was for ransom. Furthermore, it must be proved that there was either a threat to cause death or hurt to the kidnapped child given by the person who has made such demand for ransom or that by such person's conduct there was a reasonable apprehension that he may be hurt or put to death. The child also deposed about the beating given to him during his detention. The deposition of PW-3 proves that indeed he was a recipient of such ransom demand calls. The child was recovered pursuant to the arrest of Vijay and Jagbir and their disclosures. Furthermore, there is no convincing reasonable explanation by the accused about these circumstances. Once these adverse circumstances were proved by the prosecution, the onus of explaining them shifted to the

accused, under Section 106 Evidence Act. In this case, the accused had no explanation much less reasonable explanation to offer.

32. This Court is of opinion that as against Vijay and Jagbir, all the ingredients necessary to make out the offence under Section 364-A IPC were proved. The fact that Jagbir took the child to Vijay's village where he was kept for around two months, and that the child was recovered from their custody clearly points to the agreement between them. Their acts, which have been proved, also establish ingredients of a criminal conspiracy, which have not been rebutted by their arguments or evidence.

33. In view of the above reasoning, this Court is of the opinion that the offences that the appellants Vijay and Jagbir were charged with were proved beyond reasonable doubt. We accordingly confirm the Trial Court's finding of their guilt under Section 363/364A, IPC read with 120B, IPC, and find no reason to interfere with the impugned judgment. As regards Devender, we set aside his conviction, and direct that he be released forthwith, if not required in any other case. His appeal (Crl.A 690/2011) is allowed. The appeals of Vijay and Jagbir (Crl. A. Nos 1530 and 1439 of 2011 respectively) are for the above reasons, dismissed.

S. RAVINDRA BHAT
(JUDGE)

S.P.GARG
(JUDGE)

JULY 20, 2012