

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

+ **CRIMINAL APPEAL NO.680/2009**

% Date of decision: 27th August, 2012

RAJU Appellant
Through Ms. Purnima Sethi, Advocate.

versus

STATE Respondent
Through Ms. Richa Kapoor, APP for the
State.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE S.P.GARG

SANJIV KHANNA, J. (ORAL):

Raju impugns his conviction under Sections 302 and 364 of the Indian Penal Code, 1860 (IPC) vide judgment dated 2nd May, 2009. By order dated 4th May, 2009, the appellant has been sentenced to rigorous imprisonment for a term of 10 years for the offence under Section 364 IPC and fine of Rs.500/- and in default thereof, to undergo simple imprisonment of one month. For the offence under Section 302 IPC, the appellant has been sentenced to undergo imprisonment for life and to pay fine of Rs.500/- and in default of payment of fine, simple imprisonment for one month.

2. As far as homicidal death of Bablu is concerned, the same stands proved by the statement of PW-9, Dr. Arvind Kumar, Senior Resident, Department of Forensic Medicine, AIIMS, New Delhi. He has proved on record the postmortem report given by Dr. Prashant Kulshrestha and Dr. Varun Dixit. As per the postmortem report Ex.PW 9/A, the deceased had sustained the following injuries:-

“1. Dark reddish brown irregular, near to oval shape abrasion mark of size 1×1.5 cm over angle of left mandible.

2. 1×1 cm abrasion of same nature placed about 4 cm below and inwards to the first abrasion mentioned on the left side.

3. 1×2.5 cms sized abrasion of same nature on upper part of neck on right side placed about 3 cms from the mid line.

4. Neck injury- on cut section maggots were seen inside and in the areas sowed no clear distinction as regard to subcutaneous and muscular place. The area had reddish pink hue, though no frank blood or injuries to the muscles be appreciated because of being eaten by maggots and in continuity the subcutaneous tissues and the muscle of chest wall had pale green dis coloration.

3. Body was in a highly decomposed stage having foul smell, maggots over the eyes, mouth, armpit etc. were present. Liquid blood could not be recovered because of decomposition. Cause of death, as per the postmortem report, was asphyxia as a result of manual strangulation.

4. In the death report-unnatural death by violence, Ex.PW 11/B, it is stated that dead body of a small boy aged 10 years called Bablu was recovered from Wild Life Santury, Satbani. He was wearing blue check shirt and greyish nicker, which were rotten due to decomposition of the dead body. The lower limbs and upper limbs were decomposed and appeared to have been eaten by animals. Statement made by PW-11, Head Constable Shamim Ahmad to this extent remained uncontroverted and unchallenged.

5. Learned counsel appearing for the appellant, however, submitted that DNA test of the said body was not undertaken and, therefore, it cannot be said certainly that the body was of Bablu. The second contention raised is with regard to involvement of the appellant in the commission of the said offence. The said contentions will be examined when we consider and evaluate the evidence produced and relied upon by the prosecution. The present case is one of circumstantial evidence as there is no eye witness.

6. PW-3, Shobha Ram is the father of the deceased child Bablu. He has stated that he had made a complaint to the police on 29th October, 2001, Ex.PW 4/A, regarding his missing child Bablu. In the said complaint which was made at 9.30 A.M., it was stated that his son

Bablu aged 10 years about 4 feet in height was missing from 4 p.m. since the evening before. They had searched for him but could not locate him. In the statement in the court, PW-3 had stated that he suspected involvement of Raju. One Yogender had informed him that he had seen his son Bablu with the appellant-Raju and both had gone to pluck palm (Ber) in the jungle. He had further stated that on Diwali in 2001, the appellant-Raju had visited his house where he had misbehaved and teased his wife and threatened them. When Bablu did not return, he went and spoke to the owner of the farm house, where he was working as a Chowkidar, and with him reported the matter to the police. Raju was interrogated by the police and he made a disclosure statement, Ex.PW 1/A. PW-3, Shobha Ram had put his thumb impression on the disclosure statement at point X. After the disclosure statement, on the pointing out of the appellant-Raju, dead body of Bablu was recovered from the jungle. Investigating Officer had prepared pointing out memo of the spot and of the way (Ex. PW 1/C and D). PW-3 had put his thumb impression at point X. He identified the dead body as that of his son Bablu in his statement, Ex.PW 3/B. He identified Raju in the court and stated that he had put his thumb impression at point X on the personal search memo of Raju, Ex.PW

know about kidnapping of his son next day and Yoginder (sic. Yogender) had told him that his son was taken away by Raju. Yoginder was a Chowkidar in one of the farm houses near his residence. He was illiterate and put his thumb impression wherever required. Some police officials,(PW-6) Ranjeet Singh and his employer Sindhi Sahib (PW-1) were with him when Raju was taken and participated in the recovery proceedings. Raju was residing near to his residential house at his native village.

7. PW-1, Tejender Singh is the employer of PW-3, Shobha Ram and owner of the farm house. He has stated that PW-3, Shobha Ram was working a gardener in his farm house. On the day of incident, he had seen Raju with the son of his gardener, PW-3. At about 8.00/9.00 p.m. when he was going back, his gardener told him that his son was missing and could not be traced out. He had, then, told PW-3 to wait for his child as he might be watching television in the neighbourhood. On the next day at about 8.00/9.00 a.m., PW-3 informed him on phone that his son could not be traced in the neighbourhood farm houses and he had called him for help. He reached his farm house at about 8.00/9.00 a.m. and met Shobha Ram and other gardeners of neighboring farm houses. One of the gardeners had stated that he had

seen the appellant-Raju with the child of Shobha Ram in the Palm (Ber) bushes and they were plucking Palm (Ber). After 2-3 hours, Raju returned alone and the child was not seen with him. PW-1, Tejender Singh asked PW-3, Shobha Ram to make inquiries from Raju regarding his child. If the child was not found, then they would lodge a complaint with the police. On the next day they lodged a complaint with the police and the police reached the farm house to trace Raju, but Raju was missing from the date of incident. On the next day, police apprehended Raju. PW-1 was called to the police station where he reached along with PW-3, Shobha Ram, 2-3 other gardeners and Sarpanch Ranbir Singh (PW-6). Police conducted proceedings in their presence and proceedings were videographed. The appellant made a disclosure statement Ex.PW 1/A, which was signed by him at point A. The appellant took the police to the spot where the dead body of the child in the bushes was recovered. Pointing out memo, Ex.PW 1/C was signed by him at point A. The route by which the appellant took the child inside the jungle was also pointed out and the pointing out memo was marked as Ex. PW 1/D. Dead body of the child was in decomposed condition. The dead body was identified by him and PW-3, Shobha Ram. Recovery memo of the dead body was prepared and marked as Ex.PW 1/E and was signed by him at point A. The appellant

was arrested vide arrest memo Ex. PW1/B, which was signed by him. In the cross-examination, he stated that he had not accompanied PW-3, Shobha Ram at the time of lodging of the complaint and he did not speak to the police officials. He clarified that the word “we” used in the examination in chief referred to the gardeners or Malis. However, he was present in the police station when Raju was interrogated on 30th October, 2001 and made disclosure statement leading to the recovery of the dead body.

8. PW-2, Yogender Rishidev was working as a gardener. He had stated that he knew the appellant, who was working in a workshop near his farm house. On 28th October, 2001 at about 1.30/2.00 p.m. Raju was plucking Palm (Ber) along with the son of PW-3, Shobha Ram and after plucking Palm (Ber), Raju took the child towards the bushes. After two and a half hours, Raju returned alone from the jungle. Child-Bablu was not with him. In the cross-examination, he had stated that Raju was alone when he was going to pluck Palm (Ber). PW-3, Shobha Ram, father of the child had come to him and had made inquiries about his child. He told him that he had seen his child with Raju.

9. PW-6, Ranjeet Singh was then the Sarpanch of the village. He had stated that on 1st November, 2001 at about 4 p.m., PW-1, Tejender Singh had informed him that the son of his gardener Shobha Ram was missing. He had gone to the police station with PW-3 and PW-1 and one boy, namely, Raju was there. Raju disclosed that he had throttled to death the son of PW-3, Shobha Ram. He had also stated that he could identify the place where he had murdered the son of PW-3. He had led the police, PW-1, PW-3 and PW-6 to the place of occurrence, where dead body of the child was recovered. The distance was one and a half kilometer from the farm house and it was located in a thick forest area. The dead body was decomposed. He was accompanied by Additional SHO, some police officials, Tejender Singh (PW-1) and Shobha Ram (PW-3). He had not signed the papers as he was not having his spectacles with him. He had correctly identified the photographs marked Ex.PW 6/1-9, which depicted the place where the body of the child was recovered on the pointing out of the appellant. In the cross-examination, he had stated that no other public person was present at the place from where the dead body of the child was recovered. He denied the suggestion that appellant had not confessed and pointed out the place from where the dead body was recovered or

that he was deposing on the direction of the police and Tejender Singh (PW-1).

10. PW-10, Inspector Diwan Chand Sharma has stated that he was posted as Additional SHO at police station Mehrauli and the appellant-Raju was produced before him by SI Jitender Kumar, who was the Investigating Officer. Appellant confessed having committed murder of the child of PW-1, Shobha Ram. PW-1 Shobha Ram, PW-3 Tejender Singh, PW-6 Ranjit Singh and two constables Satender and Shamim also reached the police station and in the presence of the said persons, Raju confessed and thereafter took them to the place from where the dead body of the child-Bablu was recovered. The appellant confessed that he had strangled the child in the Wild Life Sanctuary. The dead body was decomposed and worms infested. He identified the photographs marked Ex.PW 6/1-9. He had also identified the video cassette, which was thereafter marked as PW 10/A. In the cross-examination he had stated that the jungle in question was substantially big in size. He denied the suggestion that recovery of body was already effected by him and the place of incident was in his knowledge before the recovery of the dead body.

11. PW-11, Head Constable Shamim Ahmad had stated that the appellant was apprehended for interrogation from Ansal Work Shop, Sushant Lok, Gurgaon, where he was working. He confessed to the crime after he was interrogated by PW-10, Diwan Chand Sharma. PW-1, PW-3 and PW-6 also reached there. The interrogation was video graphed and disclosure statement marked Ex.PW 1/A, which bears his signature at point A, was recorded. The entire episode was video graphed. The dead body was identified by Shobha Ram and thereafter the same was sent for postmortem. In the cross-examination he had stated that the place of recovery of dead body was at a distance of about one kilometer from the wall of Wild Life Sanctuary. The Wild Life Sanctuary was a big area and he had remained there till 3-4 p.m. He had denied the suggestion that the police had recovered the dead body first and thereafter planted the same against the appellant to strengthen the case. He had also denied the suggestion that the videography was done only to fill up lacunas.

12. PW-12, Sub Inspector Jitender Kumar had stated that on 31st October, 2001, the case was marked to him for further investigation. He had recorded statements of PW-1, PW-2 and PW-3. PW-11, Constable Shamim Ahmad produced appellant-Raju before him on 1st

November, 2001. Raju was interrogated and made disclosure statement marked Ex.PW 1/A in the presence of the public witnesses, which was signed by him at point X. Videography of the disclosure statement was done by the videographer Brijvir. Dead body was recovered pursuant to the disclosure statement and was identified by the witnesses. Thereafter the appellant was arrested. The dead body was sent to the mortuary of AIIMS and the request for autopsy was made vide memo Ex. PW 11/A. He proved the endorsement made by ASI Birsa Oraon on DD No. 6-A, on the basis on which FIR marked Ex. PW 7/A, was registered. Rukka was also marked as Ex. PW 11/K. PW-12, SI Jitender Singh was again examined on 22nd August, 2008, when it was noticed that the CD was not available in the judicial file. PW-12 had stated that the CD was annexed with the judicial file. Ahlmad of the court however had stated that the CD was not received by him but by the Ahlmad of another Judge. The court, however, did not adjourn the matter for want of CD as the appellant had been on trial for 7 years and was languishing in jail. PW-12 thereafter was cross-examined. He had stated that this was the first case when they had arranged for a videographer. Photographs were also taken. He had stated that no foot prints or chance prints were taken from the nearby place where the dead body was recovered. He volunteered and clarified

that it was a jungle and there was no possibility to collect the chance prints. He stated that he did not ask other public witnesses to join as no public witnesses were available in the jungle. He admitted that DNA test was not done.

13. Learned counsel for the appellant has submitted that there are material and distinct contradictions in the statements of PW-1, Tejender Singh PW-3, Shobha Ram and PW-6 Ranjit Singh. These contradictions and other contentions are as under:-

- (i) The witnesses have given different depositions with regard to the colour of the shirt and nicker worn by the child.
- (ii) There is discrepancy in the statement of PW-10, PW-11 and PW-12 on the one hand and PW-1, PW-2 and PW-3 on the other hand on how and when the appellant was arrested.
- (iii) Evidence of PW-1, Tejender Singh regarding statement made by a gardener that he had seen the appellant with the child of PW-3, Shobha Ram and Raju had taken the child to the jungle is hearsay and unbelievable. Name of the gardener was not given by PW-1. PW-1 had also stated that he had seen the appellant with the son of PW-3, Shobha Ram, but to this extent there is a contradiction.

(iv) Statement of PW-2, Yogender is inherently unbelievable because he claimed to have seen the entire episode from the window of his house and he had remained quiet.

(v) PW-3 had tried to impute motive to falsely implicate the appellant. The prosecution has not been able to establish that the appellant had committed murder because PW-3 had protested against misbehavior by the appellant with his wife and had objected.

(vi) Presence of PW-6, Ranjeet Singh is debateable as he had not signed documents/proceedings either relating to disclosure or recovery.

(vii) There was no reason or cause for the police to videograph the interrogation, disclosure and recovery. The resort to videography itself creates a suspicion about the entire prosecution story. The Videographer Brijvir was not produced and, therefore, the CD could not have been marked Ex.PW 11/D.

14. We have considered the said contentions, but do not find any merit in the same. PW-10, 11 and 12 had stated that PW-11 was asked to search and produce the appellant for interrogation. PW-11 thereafter went to Ansal Work Shop, Gurgaon and brought the appellant to the police station for interrogation. It is during the course of interrogation

that the appellant had made the disclosure statement leading the police party, PW-1, 3 and 6 to the jungle where the dead body of the child was recovered. There is therefore no material contradiction in the statement of the said witnesses. The alleged discrepancy as to the colour of the clothes worn by the deceased is a minor matter or issue which does not and cannot be regarded as destructive of the case put up and stated by PW-1, 3, 5 and 6. PW-1, 3 and 6 were examined long after the incident and they might not have properly recollected the colour of the clothes worn by the child. Photographs of the child with the clothes are available and have been exhibited as PW-6/1-9 and show the colour of the clothes. Statements of PW-1, 3 and 6 are identical and similar on all material and relevant aspects/facts.

15. Non-examination of the Videographer Constable Brijvir can be explained as the CD itself could not be located and found on the judicial file as recorded in the order dated 22nd August, 2008. On the question of motive, we only record that the motive was stated and narrated in the disclosure statement. Motive in cases of circumstantial evidence is an important element as it reflects the cause for commission of the offence by a particular person. However it is not mandatory for the prosecution to prove motive in all cases. Even in

cases of circumstantial evidence, guilt or commission of offence by a particular person can be proved without establishing motive.

16. Regarding non-joining of public witness, we record that PW-6, Ranjeet Singh was the Pradhan of the village and was a public witness. PW-1, Tejender Singh, employer of PW-3, Shobha Ram, can be regarded as a public witness in the present case. The contention that the police should have explained and stated as to why they had engaged a Videographer is to be rejected. In the present case the police had taken precaution to engage a videographer to ensure that the interrogation, disclosure and recoveries were proved and should not be challenged in the Court. In fact, taking these precautions and videography makes the prosecution case stronger. This cannot be a ground to disbelieve the case of the prosecution. However as held above, the videographer was not produced and therefore cannot be relied upon. We also do not find any merit in the contention that DNA test was not conducted. The body of the child was recognized by PW-1, Tejinder Singh, and PW-3, father of the child. PW-5, Sukhlal, who is the grandfather had identified the dead body of the child in the mortuary of the AIIMS hospital. Failure to get conducted DNA test in view of the said evidence cannot be a ground to hold that the

prosecution has failed to prove that the dead body was not of Bablu, son of PW-3, Shobha Ram. The said factum has been proved beyond the doubt.

17. We also do not agree with the contention that the statement of PW-1, Tejender Singh is unbelievable and untrustworthy as he had not mentioned the name of the gardener. It is apparent that PW-2, Yogender was the gardener and he had himself appeared in the witness box and narrated how the appellant was plucking Palm (Ber) with the child and had taken him into the jungle. He had stated that the appellant returned from the jungle after two and a half hours, but Bablu was not with him. We also do not agree with the contention that PW-1, Tejender Singh has contradicted himself as he has stated that he had seen the child of his gardener Shobha Ram with Raju and at the same time, he had stated that a gardener had seen the child with Raju while plucking Palm (Ber). What PW-1 has stated was that on the day of incident at about 2.00/2.30 p.m., when he was going to his farm house, he saw Raju going with the child of his gardener. The second part is hearsay and not admissible.

18. What is clear from the statement of PW-1,2 and 3 is that the child was seen in the company of the appellant in the afternoon on 28th

March, 2001. Both of them were plucking Palm (Ber). Thereafter, the child could not be seen. PW-2, Yogender has stated that the child had gone with Raju inside the jungle. Appellant returned from the jungle after two and a half hours later but child was not with him. There may be some differences in the statement of PW-1 and 2, but these are minor contradictions and do not lead to the conclusion that the statement made by the said witnesses are not trustworthy or reliable. Statements of PW-1 and PW-2 make it clear that the police apprehended the appellant and thereafter interrogated and questioned him. Upon interrogation, the appellant made the disclosure statement marked Ex.PW 1/A. Confessional statement leading to recovery is admissible under Section 27 of the Evidence Act. Two facts are apparent. Firstly, the appellant had stated that the child was strangled and murdered by him in the jungle and had left his body in the jungle. Secondly, he had stated that he could take the police to the place where the child was killed. Till that time, police, PW-1, PW-3 and PW-6 were not aware that the child had been strangled or had died. They were also not aware where the child or his body was lying. It has come on record that the body was found deep inside the jungle about one and a half kilometer away from the farm house. Only a person, who knew about the dead body, could have furnished the said

information. Recovery was affected pursuant to the disclosure statement made by the appellant. The jungle in question is substantially big in size starting from Mehrauli and ending on Haryana border. The dead body was highly decomposed and body parts were mutated. As per the post mortem report Ex. PW 9/A, there were several abrasions on the body. Left ear, left thumb and index finger, right thumb and distal phalx of ring and little finger were missing. We may record that the post mortem report with regard to lower limbs of the child is inconclusive, though it is stated in the said report as under:-

“As mentioned above, penis and scrotum missing and the area showed live-crawling maggots and margins of wound were clear with no extravasation of blood in the region and extended deep up to the pelvic cavity.”

The post mortem report confirmed that the death was due to asphyxia as a result of manual strangulation, a fact which was stated for the first time by the appellant. Post mortem report states that death had taken place about 5 days back. Recovery of the dead body deep inside the jungle is to be attributed to the special knowledge of the appellant-accused. PW-3, Shobha Ram had been searching for his son for 4 days

and was not able to locate him. The appellant in his statement under Section 313 Code of Criminal Procedure, 1973 had not stated how and in what circumstances, he had acquired the knowledge of the dead body of the child of PW-3 deep inside the jungle. If he had acquired knowledge of the dead body of the child, why he did not inform, PW-3 and others, who were looking for him. It is amply clear from the evidence on record that the appellant was friendly with the son of PW-3, Shobha Ram and was known to PW-3 and others.

19. In the case of **State of Maharashtra v. Suresh** (2000) 1 SCC 471, the Supreme Court examined the case law and the provisions of Sections 27, 106 and 114 of Evidence Act and held as under:

“We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to

know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.”

20. In another case titled ***Suresh Chandra Bahri v.State of Bihar*** 1995 Supp(1) SCC 80 the Supreme Court while discussing the essentiality for invoking of Section 78 of Evidence Act, held as under:-

“71. The two essential requirements for the application of Section 27 of the Evidence Act are that (1) the person giving information must be an accused of any offence and (2) he must also be in police custody. In the present case it cannot be disputed that although these essential requirements existed on the date when Gurbachan Singh led PW 59 and others to the hillock where according to him he had thrown the dead body of Urshia but instead of the dead body the articles by which her body was wrapped were found. The provisions of Section 27 of the Evidence Act are based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false. In the present case as discussed above the confessional statement of the disclosure made by the appellant Gurbachan Singh is confirmed by the recovery of the incriminating articles as said above and, therefore, there is reason to believe

that the disclosure statement was true and the evidence led in that behalf is also worthy of credence.

72. In the light of the facts stated above we are afraid the two decisions mentioned above and relied on by the learned counsel for the appellants have no application to the facts of the present case and do not advance the case of the appellants challenging the discovery and seizure of the incriminating articles discussed above. In Nari Santa the accused of that case was charged for the theft and it is said that in the course of investigation the accused produced certain articles and thereafter made a confessional statement and it was in these facts and circumstances it was held that there was no disclosure statement within the meaning of Section 27 as the confessional statement was made only when the articles were already discovered having been produced by the accused. Similarly the decision rendered in Abdul Sattar also does not help the appellants in the present case. In the case of Abdul Sattar recovery of wearing apparels of the deceased is said to have been made at the instance of the accused of that case more than three weeks after the occurrence from a public place accessible to the people of the locality and, therefore, no reliance was placed on the disclosure statement and recovery of the wearing apparels of the deceased. But in the present case it was soon after the arrest of appellant Gurbachan Singh that he took the Police Officer while in custody to the place where according to him he had thrown the dead body of Urshia wrapped by the incriminating articles. Those articles were not found lying on the surface of the ground but they were found

after unearthing the Khad gaddha dumping ground under the hillock. Those articles were neither visible nor accessible to the people but were hidden under the ground. They were

discovered only after the place was pointed out and it was unearthed by the labourers. No fault therefore could be found with regard to the discovery and seizure of the incriminating articles.”

21. In ***Ram Lochan Ahir v. State of West Bengal*** AIR 1963 SC 1074, it has been observed that recovery of the dead body at the instance of the accused is a highly incriminating evidence. The only thing which is required to be seen in such cases is whether the prosecution has successfully proved that it could lay its hand or recover the body only with aid of the accused.

22. In Criminal Appeal No. 979/2010 titled ***Harvinder Singh v. State*** decided on 2nd June, 2011, a Division Bench of this Court has referred to the judgments of the Supreme Court in ***Deepak Chandrakant v. State of Maharashtra*** (2006) 10 SCC 151, ***Ningappa Yallappa Hosamani and Ors. Vs. State of Karnataka and Ors.*** (2009) 14 SCC 582, ***State of Maharashtra v. Suresh*** (2000) 1 SCC 471 on the question of recovery pursuant to disclosure statement and the weight and evidentiary value attached. In the case of ***Deepak Chandrakant*** (supra), the Supreme Court has observed that recovery of the dead body is a highly incriminating circumstance if it is satisfactorily and

clearly established that the police could not have traced out or recovered the body except on the basis of the disclosure statement.

23. Looking at the nature of the evidence, we are fully satisfied that the dead body of the child was recovered only on the basis of the disclosure statement made by the appellant and the police, PW-1, 3 and 6 did not have any knowledge about the death of the child and location of the dead body. The dead body was concealed. Photographs marked Ex.PW 6/1-9 and statement of witnesses clearly indicate that no one had seen the dead body. We are fully satisfied that the trial court was justified in convicting the appellant under Section 302 IPC.

24. The next question relates to conviction of the appellant under Section 364 IPC. We have referred to the statements of PW-1, 2 and 3. From the said statements it cannot be inferred or held that the prosecution has proved or established the charge of kidnapping. As noticed, alleged motive has not been proved by the prosecution. No allegation or facts to show and establish kidnapping have been made by any witness. PW-2, Yoginder had stated that appellant and the child of PW-3, Shobha Ram had gone to the jungle and they were plucking Palm (Ber). This does not indicate that the appellant had kidnapped the child at that time. PW-2, Yoginder did not suspect or plead that the child of PW-3 was abducted or taken away by the appellant. In

these circumstances, we are of the view that conviction of the appellant under Section 364 IPC cannot be sustained and his conviction to this extent is set aside on the ground of benefit of doubt.

25. Conviction of the appellant under Section 302 IPC, sentence and fine imposed by the trial court under the said section are confirmed.

SANJIV KHANNA, J.

S.P. GARG, J.

AUGUST 27, 2012
NA