

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

**RESERVED ON : 03.01.2012
DECIDED ON: 09.01.2012**

+ **CRL.A.Nos. 1315/2011, 1381/2011, 1/2012 & 2/2012**

Crl.A.1315/2011

DEEPAK KUMAR @ BITTOO Appellant

CRL.A.1383/2011

MUKESH KUMAR @ TITU Appellant

CRL.A.1/2012

SUKHRAM PAL Appellant

Crl.A.2/2012

MOHD. RIHAN KHAN Appellant

Versus

State Respondent

Appearance :

Mr. K.B. Andley, Sr. Advocate with Mr. M.Shamikh, Advocate
for appellant in Crl.A. Nos.1315 & 1383/2011

Mr. Bhupesh Narula, Advocate for appellant in Crl.A. No.1/2012

Ms. Stuti Gujral, Advocate for appellant in Crl.A. 2/2012

Mr. Sanjay Lao, APP on behalf of the State in all the matters.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S. P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. In these appeals, common judgment and order on sentence dated 17.09.2009 of learned Additional Sessions Judge SC No.15/2009 has been challenged. The Appellants were convicted for committing offences punishable under Sections 364-A/34 IPC, and sentenced to undergo life imprisonment, with fine.

2. The prosecution case was that on 07.6.2002 Nitin Aggarwal (PW-2) lodged a complaint to ASI Phool Chand in P.S. Dilshad Garden regarding kidnapping of his father Jai Narayan Aggarwal. In this complaint, he mentioned that he resided with his parents at Model Town. His shop was in Sikriwalan, Delhi and their factory was at B 16/6, Jhilmil Industrial Area. He claimed, that, he had earlier informed the police of a call he had received on the factory telephone, on 31.12.2001, wherein the caller had threatened to kidnap him and had demanded ₹ 5,00,000/-. In the present instance, he stated that his father, Jai Narayan Aggarwal had left for the house from the factory in his Maruti Car (No. DL 6CD 2817) at around 09.30 PM. Since his father had not reached home even at 10.30 P.M., he had called him on his mobile phone, but the call was not answered. He called his father again, at about 12.30 A.M. but his call was answered by an unknown man who told him that his father was in their custody and their “Bhai” would talk to him in the morning. PW-2 further stated that the informer had warned him that in case the police was informed, the body of Lalaji (his father) would be found in the drain. He suspected that

his father had been kidnapped by some gang. On the basis of this statement, a case under Section 365 IPC was registered and the investigation was marked to SI Brij Mohan.

3. It was alleged that the kidnappers had demanded ₹ 15 lakhs for the release of Lalaji. On 13.6.2002, for securing safe release of his father, PW-2 arranged the ransom amount (30 bundles, with hundred notes of the denomination of Rs. 500 in each) and the I.O. and Nitin Aggarwal (PW-2) signed on some of the notes in ten of these bundles, and the currency notes in these bundles were then mixed up in the other twenty bundles. The kidnapper did not disclose the exact location where the ransom was to be handed over. The bag containing the ransom amount was given to Pramod Kumar Aggarwal (the uncle of PW-2 who deposed as PW-4), Surender Kumar (the brother-in-law of PW-2 who deposed as PW-9) and Kamal Kant (PW-2's friend who deposed as PW-8) who assumed false identities, and as directed by the kidnappers boarded the Delhi-Saharanpur train and sat in the last bogie of the train. When the train crossed the New Ghaziabad Railway Station they were asked to throw the bag containing the ransom money, which they did. On 14.06.2002, PW-2's father was released. Thereafter the investigation of the case was handed over to Inspector C.S. Rathi. In the course of the investigation, he got the telephone numbers used by the kidnappers for demanding ransom and the addresses, where these telephones were installed were traced. The I.O. also met the victim PW-1 Jai Narayan and obtained descriptions of the kidnappers. The IO, along with his staff, then visited the address from

where these calls had been made, which turned out to be a house in Khatoli, Muzaffar Nagar (where Telephone No. 73119 was installed). There, they met one Rakesh who told them that Titu@ Mukesh Verma used to receive and make calls from that number to Deepak. They were also told that Deepak was related to Pradhan Ram Naresh. The IO met Pradhan Ram Naresh and enquired about Deepak after disclosing all the facts to him. He admitted that Deepak was his brother-in-law and resided in Lajpat Nagar, Ghaziabad. Thereafter, the IO along with the staff and the Pradhan reached Deepak's house, where they found him. On seeing the police party, Deepak tried to flee; however, he was nabbed and interrogated. During interrogation, Deepak confessed his involvement in the offence and his disclosure led to recovery of a sum of ₹ 9,49,500/- which was kept in a black colored suitcase lying in the almirah. The notes were sealed and seized; Deepak was arrested. At his instance, Sukram Pal was caught who led to recovery of a *desi katta* and two cartridges which were used in the commission of the offence. A sum of ₹ 9,000/- was also recovered from his possession; it was seized. Sukram Pal and Deepak led the police to Mukesh's house where a scooter was parked. Deepak allegedly revealed that the said scooter was used to receive the ransom amount. The scooter was taken into possession; Mukesh, however was untraceable. Sukram Pal and Deepak also pointed out Rihan's house (No. 112, Devi Dass Mohalla, Khatoli) where Jai Narayan was kept captive, after his abduction. Rihan was not present in the house. However, his wife Samina was there. The police party searched the premises and recovered

cash of ₹ 60,000/- in the denomination of Rs. 500/-. On 25.06.2002, accused Deepak was interrogated and he revealed that he had deposited ₹ 9000 in Citi Bank. He withdrew this amount using his ATM card in denominations of ₹ 100. This money was seized. On the same day Rihan and Mukesh Verma @ Titoo were arrested by the police; they made disclosure statements. On 26.6.2002 at the instance of Mukesh, one charger along with one mobile, a police uniform were recovered from his house. He also assisted in the recovery of ₹ 2,67,500/- which was taken into possession by the I.O. Sukram Pal assisted in recovery of ₹ 10,000/- from his house. Rihan's disclosure led to recovery of ₹ 31,000/- from his house which was also taken into possession.

4. After completion of investigation charge sheet for the offences punishable U/s 365/364A/34 IPC was filed against the accused before the Trial Court. Upon being charged, the accused claimed that they were not guilty. The Trial Court, after considering the evidence led by the prosecution – which included testimony of 25 public witnesses and the exhibits produced in the case, concluded that the Appellants were guilty as charged, and sentenced them, in the manner described above.

5. Crl. Appeals Nos.1315/2011 & 1383/2011, though filed in 2011, involved individuals who were in jail for about 9 years (Deepak and Mukesh); consequently the matters were set down for hearing. At the stage of final hearing, on 03.01.2012 it was noticed that the co-accused, Rihan and Sukhrampal had not preferred appeals. Consequently, the Court directed Delhi High Court Legal Services Committee to contact them, and

ascertain if they wished to file appeal. The DHCLSC did contact them; their appeals were filed, as CrI. Appeal Nos. 1 and 2 of 2012. The appeals were admitted, and heard with the appeals of the co-accused (Cr. Appeals 1315 and 1383 of 2011) on 03-01-2012. At the outset, this Court wishes to record its appreciation and acknowledgement to counsel assigned by the DHCLSC, i.e., Shri. Bhupesh Narula, and Ms. Stuti Gujral (who appeared and argued on behalf of Shri Siddharth Agarwal). They were fully prepared with the matter, and rendered meaningful assistance to the Court and, as shall be seen hereafter, their contribution was invaluable.

6. Counsel for Appellants urged that the findings in the impugned judgment are unsustainable. It was urged, on behalf of Deepak that there was no evidence to connect him with the crime. Arguing in his appeal, Mr. K. B. Andley, learned Senior counsel, submitted that Deepak was not identified by the victim PW-1, nor was the prosecution able to identify him as one of those who had either participated in his abduction, or demanded any ransom amount. It was submitted that the two individuals, through whom Deepak's role was ascertained, i.e., Rakesh and Pradhan Ram Naresh, were deliberately not examined during the trial. They could have given valuable information about the role, if at all, played by Deepak, in the episode.

6. It was urged that admittedly, according to PW-1's testimony, two individuals had abducted him; one pointed the *katta* at him, and later muffled his face with a towel, and the other was in a police uniform. Deepak was not among these two. Furthermore, Deepak was not shown to

be connected with any of the co-accused. It was submitted by the learned senior counsel that the disclosure or confessional statement made by Deepak could not have been used, except to the extent that it supported recovery of an article, or knowledge of some fact. In this case, therefore, the alleged knowledge attributed to Deepak about the place where PW-1 had been kept captive- after his abduction, was inadmissible, as it did not fall within the excepted category, so as to be looked at by the court.

7. It was argued that the only substantial evidence led against Deepak was the alleged recovery of over ₹ 9 Lakhs. Here, it was urged by the learned senior counsel (for Deepak) that the entire story about the notes having been marked, as well as their being thrown from the train, according to a pre-arranged signal, was unbelievable. Learned counsel submitted that even though the prosecution claimed that the entire phone records were available, there was no proof about the conversation between PW-2 and the abductors, when the latter boarded the train, and was asked to throw the bags containing currency notes. Moreover, though the witness mentioned the currency notes, the prosecution had not proved their seizure, as the originals were not produced in court; only photocopies were relied on. This, according to the counsel was unacceptable, and did not amount to proof of such fact.

8. It was argued that even if it was assumed that Deepak had currency notes which he could not explain or account for, that circumstance, in the absence of positive evidence linking him with the abduction, threat to PW-1's life, or apprehension of his bodily injury, and in the absence of any

demand (by Deepak) could not have led the Trial Court to find his guilt for the offence under Section 364-A, IPC, especially when there was no charge of conspiracy under Section 120-B IPC.

9. Arguing for Mukesh, Shri Andley submitted that in his case too, the entire conviction was based on the testimony of PW-1. The recovery of notes from him, like in the case of Deepak, was of no consequence, because the original notes were not produced. Counsel also argued that the alleged ransom demand – which is an integral part of the ingredient for proving the offence punishable under Section 364-A IPC had not been established. Here it was urged that the Trial Court fell into error in accepting the evidence of PW-2 with regard to the tape recording of the demands made through mobile phone calls. The tape recordings were not proved in accordance with established norms; even the transcripts were not produced. The Trial Court, urged counsel, assumed that the document – i.e., the tape recordings were admissible, and proceeded to act on them, without ensuring that the safeguards necessary to bring them on record, had been satisfied. For all these reasons, urged counsel, Mukesh's conviction deserves to be set aside.

10. Mr. Bhupesh Narula, Advocate (appearing for the Delhi High Court Legal Services Committee) on behalf of appellant Sukh Rampal submitted that the impugned findings against that appellant cannot be sustained. Elaborating, it was urged that the said appellant was not even mentioned by PW-1 in the statement recorded by him, under Section 161, immediately after he was freed. He did not ascribe any special role, i.e. his

standing guard over him, when he was held captive, after abduction. Mr. Narula argued that unlike in the case of other co-accused, the victim was not sure about the role played by Sukhram Pal. It was urged in this regard, that the victim had been confined after his abduction for quite some time; had this accused been keeping guard over him, all the while, PW-1 would have named him, or mentioned his role, in the statement recorded during investigation, immediately after he was set free. Such was not the case. Furthermore, the possibility of Sukhram Pal having visited the family (of Rihan) as an acquaintance once during that period, in such capacity could not be ruled out. If that were the position, in the absence of more clinching material, about his involvement in the kidnapping, threat to life or body of PW-1, or in the demand, he could not have been convicted of any offence at all. It was argued that as far as recovery of the *katta* from his house was concerned, there was no question of its being linked with any offence. Besides, this Appellant was not even charged with committing any offence under the Arms Act. Mr. Narula lastly argued that Sukhram Pal could not be said to have been a party to the crime, merely because of the recovery of ₹ 19,000/- at his behest. Most importantly, urged Mr. Narula, none of the notes recovered were marked, or signed, as alleged by the prosecution.

11. Ms. Stuti Gujral (appearing for Mr. Siddharth Aggarwal, assigned the case by the DHLSC) on behalf of Rihan submitted that the prosecution version was full of serious gaps and inconsistencies which the Trial Court ought to have been wary of accepting. Elaborating on this aspect, she argued that the prosecution's inability to link Rihan with any demand for

ransom is fatal to the conviction recorded against him. Even though the Trial Court believed the story about notes having been marked after their production by PW-2, as a bait to nab the abductors, there was no explanation why the police did not accompany PW-2 in the train, and attempted to nab the offenders at the spot, after the currency notes were thrown down. Furthermore, the prosecution could not explain why it took about a week *after* the notes were thrown, and after release of PW-1, to gather vital clues, and arrest Deepak, who in turn allegedly led to the arrest of others. It was also argued that the prosecution version about Titu going and using a phone, (which was registered in the name of one Angoori Devi) and its story that the police contacted Rakesh and later, Pradhan Ram Prakash, was unbelievable; they were pure fiction. In fact, there was no story; the entire sequence of its events commenced with Deepak's arrest.

12. Counsel for Rihan also argued that the prosecution version about recovery of ₹ 91,000/- from him, in two lots was unbelievable. Here, it was argued that none of the notes bore any markings or signatures, as alleged during the trial. The entire conviction hinged on the testimony of PW-1 who could not have identified the appellant, as he saw him fleetingly at night.

13. Learned APP for the State, Sh. Sanjay Lao argued that the impugned judgment does not call for interference. He contended that the omission to examine Rakesh and Pradhan Ram Naresh was not fatal; on the contrary, they merely assisted the police, during the course of

investigation to arrest the accused in this case. Learned counsel highlighted that PW-2 had deposed about a threat six months prior to the incident, i.e. 31.12.2001 whereby a call demanding ₹ 5 lakhs as ransom and a further threat to kidnap had been made-out. The complainant had alerted the police about this fact. The threat was not an empty one as later events proved; his father, PW-1 was in fact abducted on 06.06.2002. The truthfulness of the testimonies of PWs-2 and 19, Inspector Brij Mohan was evident from the fact that Ex. PW-2/B, which is prepared on 13.06.2002, clearly described the currency notes which were marked. Learned counsel submitted that the relative series on the currency notes were noted and countersigned by PW-2 and PW-19. PW-4 deposed having witnessed that 30 packs of cash in denominations of ₹ 500/- each, totaling ₹ 15 lakhs had been seen and that the police official, PW-19 had signed on the 10th, 20th and 30th note of each of ten bundles and that ten bundles were then mixed with 20 bundles. The signed currency notes were in 10 bundles. The recoveries made pursuant to the disclosure statement of Deepak, (who was arrested on 20.06.2002) established that several of those signed notes were taken into custody; these were evidenced by the Memo, Ex. PW-12/E. Deepak failed to explain these and merely denied having possessed them, in his reply to the queries put under Section 313 Cr.PC. Learned APP argued that the case was in fact solved after Deepak's arrest since he led to the place where PW-1 had been confined, i.e., Rihan's house. Further, currency notes were seized from that place. They were the subject matter of Ex. PW-12/Q.

14. It was argued that the involvement of Mukesh and Rihan was proved beyond reasonable doubt because the abducted man, PW-1 positively identified them. Learned APP urged here that the these accused were in fact arrested much later on 25.06.2002; they had refused to participate in the Test Identification Parade (TIP) proceedings as deposed to by PW-18, who recorded his observations in the documents marked during the trial as Ex. PW-18/A to PW-18/D. It was argued that besides the recoveries made on 20.06.2002 from Rihan's house, aggregating ₹ 60,000, a further amount of ₹ 31,000/- was recovered pursuant to his disclosure statement, after his arrest. Furthermore, the belt which belonged to the abducted person, PW-1 was also recovered and produced during the trial; it was seized under Memo Ex. PW-11/E.

15. Like in the case of Rihan, Mukesh too was identified by PW-1; he too was arrested on 25.06.2002; his disclosure statement, assisted the police in the recovery of currency notes to the tune of ₹ 2,69,500/-. These also contained some marked notes; photocopies of all the notes and some of the original notes were produced during the trial. Apart from these two, urged the learned APP, the chance prints lifted from the Maruti Car DL 6CD 2817 were seized by PW-13 on 14.06.2002. Another chance print was seized from the house of Rihan on 21.06.2002. It was urged that during the course of investigation, specimen finger prints of the accused were taken. The specimen print, S-2 (belonging to Mukesh), part of Ex. PW-22/B-3 matched with the specimen of left thumb, designated as

chance prints Q-2 and marked as S-2 in the report, which was produced as Ex. PW-22/L. Similarly, the chance print developed by the finger print expert, PW-22, i.e. Q-3 was identical with the right thumb mark, S-3 from the finger print specimen of Rihan, according to the report, Ex. PW-22/F and 22/M. These recoveries, coupled with the positive identification by PW-1, of Mukesh and Rihan established beyond reasonable doubt that they were involved in the offence alleged against them.

16. It was submitted that as regards Sukhram Pal, two recoveries of ₹ 9,000/- and ₹ 10,000/- (Ex. PW-12/L and Ex. PW-11/C), and the recovery of *katta*, Ex. PW-12/N proved his involvement. Furthermore, the evidence of PW-1 revealed that Sukhram Pal guarded the premises when the victim was in custody of the abductors.

17. The above discussion shows that PW-2 had deposed to having received a threat sometime in end December 2001. At that time, the callers had threatened to resort to abduction and demanded ₹ 5 lakhs. On the day of the incident, i.e. on 06.06.2002, the witness was worried since his father did not return at the scheduled time from his factory. At 12.30 AM, he made a telephone call to his father's mobile; it was received by someone else, who stated that his father had been abducted; a ransom demand was made thereafter. PW-2 reported the incident immediately to the police which lodged the FIR on 07.06.2002, Ex. PW-2/J; it was registered at 02.30 AM in the morning of 07.06.2002. PW-1 further deposed having received another call at his residence, later on 07.06.2002, by which the

caller asked him to arrange ₹ 25 lakhs. He was thereafter allowed to talk to his father at 10.00 PM that night. Apparently there was a lull after this and on 13.06.2002, PW-2 arranged for ₹ 15 lakhs and had them marked by the police; PW-4, his uncle, Pramod Kumar supports this statement. After 30 bundles containing ₹ 500/- denomination notes, aggregating to ₹ 15 lakhs, (of which 10 bundles were marked and signed by PWs-19 and PW-2 at serial numbers 10, 20 and 30 of each bundle), all currency bundles were mixed. PWs-4, 8 and 9 went along with the bundles, on the last bogie of the train from Shahdara Railway Station. According to a pre-arranged plan with the abductors, the bundle was thrown near the New Ghaziabad Railway Station. This latter event happened on 13.06.2002. The next day, i.e. on 14.06.2002, PW-1, Jai Narayan was released. The investigation thereafter proceeded and the police traced the calls somewhere to Khatoli in U.P. According to the prosecution version, initially Rakesh and subsequently Pradhan Ram Naresh were questioned; this led to the arrest of Deepak and Sukhram Pal on 20.06.2002 and subsequent arrests on 25.06.2002, of Mukesh and Rihan, and the recoveries alleged in this case.

18. Now, as far as the testimony of PW-1 is concerned, he is consistent with the version recorded immediately after his release on 14.06.2002. During the trial, all the accused had refused to participate in the TIP (testified by the concerned Magistrates – PW-18 and 21). However, the victim, PW-1 was able to identify Mukesh and Rihan during the trial, without any difficulty. The role attributed to Mukesh was that he initially

asked PW-1 to give him a lift till a turning (bend in the road). Mukesh was dressed in a police uniform which too was also seized pursuant to the disclosures made by him after his arrest. Rihan, who too was identified by PW-1, accompanied Mukesh. Both of them had approached PW-1's car. Rihan sat at the back. Mukesh sat apparently along-side PW-1. When the car reached the turning, the accused were asked to get-down; they, however, requested PW-1 to cross the bridge. PW-1 further stated that when the car reached the middle of the bridge, Rihan pointed a country made pistol to his temple and asked him to stop. Jai Narayan snatched the pistol and threw it on the road. Mukesh took out a knife and pointed it at his abdomen and pushed him. Rihan, in the meanwhile, took-out a towel and threw it on Jai Narayan's face. Both of them pulled him out and kept him in the back seat of the car; Mukesh took over the wheel and drove it for about 2-2 ½ hours. It is also stated that Rihan lifted the country made pistol which had been thrown down by Jai Narayan. He further deposed being taken to the accused's house, and identified Rihan's wife as Shamina and his eldest daughter's name as Shibbo. PW-1 could recount all the events which took place when he was in the custody of the abductors. Apparently, his statements was recorded on 16.06.2002 and 21.06.2002. He had led the police to the house where he had been confined.

19. It can be seen from the evidence of PW-1 that he was clear as regards the identification of Mukesh and Rihan. He was also well oriented

at the time of his abduction and conscious of his surroundings at the time of his captivity, i.e. between 06.06.2002 to 14.06.2002. He could identify the family members as well as the location of Rihan's house. The police was taken there on 21.06.2002. This, in the opinion of the Court, is direct evidence by a victim about the incident itself. Though PW-1 was cross-examined, on the behalf of the accused, nothing significant could be elicited to discredit his testimony.

20. A submission on behalf of Mukesh was that the prosecution could not establish how the investigation in fact commenced. It was strongly urged that the omission to summon and record the testimonies of Rakesh as well as Pradhan Ram Naresh were serious omissions which the Court should take into consideration. Added to these were two other circumstances, according to counsel, which falsified the prosecution story. One was the ownership of the telephone which was used to communicate with PW-2. Here it was urged that the police witnesses deposed to having having ascertained the call details as well as the ownership of the telephone number and yet omitted to bring that material evidence during trial, on record. Two, the entire story about the currency notes being handed-over to the police for marking on 13.06.2002 and being dropped at a pre-arranged destination on that day itself is unsupported by any objective material. It was urged that no call details were proved, to establish that in fact any of the witnesses, who had boarded the train were contacted at the relevant time, signaling them to throw the bags of

currency. Furthermore, argued counsel, the easiest thing that the police could have done was to follow the train or try and nab those who tried to pick-up the currency notes. These omissions, according to the counsel for Mukesh and Rihan, are fatal to the prosecution story.

21. This Court is conscious that the prosecution did not examine Rakesh and Pradhan Ram Naresh, though, according to its version, the case could be solved after the arrest of Deepak. The prosecution has no doubt urged that Deepak could be traced after clues were secured from the two individuals. The question is whether their absence during their trial is fatal and undercuts the entire prosecution story. As far back as in the decision reported as *Vadivelu Thevar v. State of Madras* (AIR 1957 SC 614)- and subsequently followed in other later decisions (*Jagdish Prasad v. State of M.P.* AIR 1994 SC 1251 and *Sunil Kumar v. State Govt. of NCT of Delhi* 2003 (11) SCC 367) the Supreme Court had categorized witnesses as either wholly reliable; or wholly unreliable, or neither reliable nor unreliable. That being the standard of judicial scrutiny, ultimately the court has to satisfy itself with the evidence presented whether the accused standing trial before it, is guilty beyond reasonable doubt. It is quite possible that in a given case, despite availability of an individual, he is not cited as a witness and that may become fatal to the prosecution; in another given case, though the witness may be material, there may be other evidence, oral or circumstantial, to establish the guilt of the accused beyond reasonable doubt. Therefore, the omission to examine a given

witness cannot invariably result in the entire prosecution story getting vitiated. Here, having regard to the clear and unambiguous identification of Mukesh and Rihan, by PW-1, the omission to examine two witnesses, or even explain why the police did not adopt a particular course during investigation to solve the crime, cannot be determinative. In hindsight, it is possible to fault a line of investigation; yet, one has to keep in mind that as on 13-06-2002, no one was sure that PW-1 would actually return safely. Possibly, in order to avoid any complication or harm to him, the investigators did not pursue the abductors immediately after the currency notes bag was dropped, on 13-06-2002.

22. As far as the recoveries from Rihan and Sukh Ram Pal are concerned, the witness who primarily deposed about it is PW 11 HC Anil Kumar. He deposed that on 26.6.2002 accused Mukesh led the police to a house; this led to recovery of a police uniform, Panasonic make mobile phone and a charger. Mukesh's statement also led to the recovery of ₹ 2,67,500/-. PW-11 testified that currency notes as well as the articles were seized by Memo Ex. PW 11/A and PW 11/B. He also stated that Sukhram Pal led them to his own house and assisted in recovery of ₹ 10,000/- which was taken into possession Memo Ex. PW 11/C. He further deposed that accused Rihan also led to the recovery of ₹ 31,000/- as well as a belt which belonged to victim PW-1; these were taken into possession by Memos Ex. PW 11/D and PW 11/E.

23. PW 13 HC Sushil Kumar lifted five chance prints from the Maruti Car, bearing No. DL-6CD -2817. He deposed that the rear view mirror had been taken out, and seized through Memo Ex. PW 13/A. He proved his detailed report Ex. PW 13/B. He deposed that on 21.06.2002 he and other crime team members went to House No. 112, Devidas Mohalla, Khatauli; the premises were checked. A chance print from a mirror was lifted and handed over to Inspector C.S. Rathi. He proved his report in this regard as Ex. PW 13/C. PW 22 N.K.Sharma is the finger print expert who examined the chance prints and gave his detailed report Ex. PW 22/C. The report states that one of the chance print matched the specimen signature of Rihaan, and another print matched the specimen print of Mukesh, taken during the investigation.

24. This court notices that the impugned judgment had relied upon the tape recordings made by PW-2 and handed over to the police during investigations. The Appellants, particularly Mukesh and Rihaan, had argued that this evidence was inadmissible, because the safeguards mandated by law, had not been complied with. In this regard, it has to be noticed that the judgments reported as *R.M. Malkani v. State of Maharashtra*, AIR 1973 SC 417; *Ziyouddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra*, AIR 1975 SC 1788 and *Ram Singh v. Col. Ram Singh*, AIR 1986 SC 3 show what are the material tests for a tape recording to be admissible, as evidence. The Court had indicated that the fulfillment of the following preconditions was essential for a tape recording to be admissible in a trial:

- a) the voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. Where the maker has denied the voice it will require very strict proof to determine whether or not it was really the voice of the speaker.
- b) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence direct or circumstantial.
- c) Every possibility of tampering with or erasure of a part of a tape recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.
- d) The statement must be relevant according to the rules of Evidence Act.
- e) The recorded cassette must be carefully sealed and kept in safe or official custody.
- f) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbance.

25. In the present case, the testimonies of no witness – PW-2, PW-19 or any other police witness, reveals that any thought was given about the need to comply with the above safeguards. Moreover, the proceedings before the Trial Court also show that even transcripts of contents of the tape-recordings were not produced. In view of these facts, the Trial Court could not have relied on the tape recordings to conclude that any of those contained conversations with the Appellants.

26. It has been urged – on behalf of the Appellant Mukesh – that the evidence regarding marked notes and their recovery is inadmissible, since original notes were not produced in court, during the trial. We notice that when the articles were produced in court, photocopies of the notes, containing the relevant series, were shown to the witnesses; furthermore, some notes (Ex. P-3, Ex. P-5, Ex. P-11 to Ex. P-33) were original currency notes produced during the trial. In this context, it would be useful to notice that during criminal trials, courts are called upon to release movables particularly jewelry and valuables, even perishable commodities. If such a course were not adopted, the party – most often the victim, would be exposed to undue hardship. To balance the interests of the victim and the accused, the Supreme Court devised some useful safeguards in this regard. They have been indicated in the decision reported as *Sunderbhai Ambalal Desai v. State of Gujarat*, (2002) 10 SCC 283 in the following terms:

"Valuable articles and currency notes

11. With regard to valuable articles, such as, golden or silver ornaments or articles studded with precious stones, it is submitted that it is of no use to keep such articles in police custody for years till the trial is over. In our view, this submission requires to be accepted. In such cases, the Magistrate should pass appropriate orders as contemplated under Section 451 CrPC at the earliest.

12. For this purpose, if material on record indicates that such articles belong to the complainant at whose house theft, robbery or dacoity has taken place, then seized articles be handed over to the complainant after:

- (1) preparing detailed proper panchnama of such articles;*
- (2) taking photographs of such articles and a bond that such articles would be produced if required at the time of trial; and*

(3)after taking proper security.

13. For this purpose, the court may follow the procedure of recording such evidence, as it thinks necessary, as provided under Section 451 CrPC. The bond and security should be taken so as to prevent the evidence being lost, altered or destroyed. The court should see that photographs of such articles are attested or countersigned by the complainant, accused as well as by the person to whom the custody is handed over. Still however, it would be the function of the court under Section 451 CrPC to impose any other appropriate condition.

14. In case, where such articles are not handed over either to the complainant or to the person from whom such articles are seized or to its claimant, then the court may direct that such articles be kept in bank lockers. Similarly, if articles are required to be kept in police custody, it would be open to the SHO after preparing proper panchnama to keep such articles in a bank locker. In any case, such articles should be produced before the Magistrate within a week of their seizure. If required, the court may direct that such articles be handed back to the investigating officer for further investigation and identification. However, in no set of circumstances, the investigating officer should keep such articles in custody for a longer period for the purposes of investigation and identification. For currency notes, similar procedure can be followed."

In this case, the Trial Court correctly adopted the procedure indicated by the Supreme Court. We therefore, find no infirmity in its approach, in allowing the currency notes to be released to the complainant, and keeping photocopies, and allowing them to be produced during the trial. Also, some original currency notes were produced during the trial. They were marked, and signed by PW-2 and PW-19, and recovered pursuant to disclosure statements made by Mukesh, Deepak and Rihan.

27. The above circumstances – identification of Mukesh and Rihan by PW-1; the arrest and disclosure statements leading to the recovery of marked currency notes (in the case of Mukesh) and the finger print report – PW-22/F, are proved. The report proved that the finger prints on the Maruti car matched with the specimen finger prints of Mukesh and Rihan. Apart from bald and general denials, these Appellants could not give any reasonable explanation to these incriminating circumstances. In the opinion of this court, the prosecution was able to prove PW-1's abduction, and circumstances under which he was forcibly taken away – by threat of bodily harm or injury- at the instance of Mukesh and Rihan. It also established that the victim was held in captivity in Rihan's house, till he was released on 14-06-2002. Although the prosecution cannot be said to have proved the tape –recordings, yet the depositions of PW-2, PW-4 and PW-19 prove that ransom was demanded, and marked notes were used to satisfy the demand. Many such marked notes were also recovered. In view of these findings, the prosecution proved all the ingredients necessary to convict Mukesh and Rihan, for the offence punishable under Section 364-A/34 IPC.

28. So far as appellant Deepak is concerned, no doubt a huge amount - ₹ 9,49,500/- was recovered pursuant to his disclosure statement. However, the prosecution allegation that his disclosure led to the arrest of the other accused, or that his statements led to recoveries from Rihan's premises, cannot be the basis of concluding that he too was guilty for the offence

under Section 364-A IPC. It is a fact that some of the notes recovered pursuant to his disclosures, were marked and signed by the prosecution witnesses. However, these, without further material, are insufficient to lead to his guilt for the offence. In this context, it would be useful to notice that Section 364-A talks of "Kidnapping" as well as "Abduction". Section 359 defines Kidnapping. It envisions two types of kidnapping i.e. (1) kidnapping from India; and (2) kidnapping from lawful guardianship. Abduction (defined by Section 362) envisages two types of abduction i.e. (1) by force or by compulsion; and/or (2) inducement by deceitful means. The object of such compulsion or inducement must be the removal of the victim from any place by force (involuntarily) or by deceit (voluntarily, through false promises or representations).

29. In the judgment reported as *Vishwanath Gupta v State of Uttaranchal* 2007 (11) SCC 633, the Supreme Court held that for the prosecution to prove the offence, three facts had to be established. The court held that:

“According to Section 364A, whoever kidnaps or abducts any person and keeps him in detention and threatens to cause death or hurt to such person and by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, and claims a ransom and if death is caused then in that case the accused can be punished with death or imprisonment for life and also liable to pay fine.

6. The important ingredient of Section 364A is the abduction or kidnapping, as the case may be. Thereafter, a threat to the

kidnapped/abducted that if the demand for ransom is not made then the victim is likely to be put to death and in the event death is caused, the offence of Section 364A is complete. There are three stages in this Section, one is the kidnapping or abduction, second is threat of death coupled with the demand of money and lastly when the demand is not made, then causing death. If the three ingredients are available, that will constitute the offence under Section 364A of the Indian Penal Code. Any of the three ingredients can take place at one place or at different places....”

In the decision reported as *Suman Sood v State of Rajasthan* 2007 (5) SCC 634, it was held that:

“57. Before the above section is attracted and a person is convicted, the prosecution must prove the following ingredients;

(1) The accused must have kidnapped, abducted or detained any person;

(2) He must have kept such person under custody or detention; and

(3) Kidnapping, abduction or detention must have been for ransom.

[see also Malleshi v. State of Karnataka, (2004) 8 SCC 95]

58. The term 'ransom' has not been defined in the Code.

59. As a noun, 'ransom' means "a sum of money demanded or paid for the release of a captive". As a verb, 'ransom' means "to obtain the release of (someone) by paying a ransom", "detain (someone) and demand a ransom for his release". "To hold someone to ransom"

means "to hold someone captive and demand payment for his release". (Concise Oxford English Dictionary, 2002; p.1186).

60. Kidnapping for ransom is an offence of unlawfully seizing a person and then confining the person usually in a secrete place, while attempting to extort ransom. This grave crime is sometimes made a capital offence. In addition to the abductor a person who acts as a go between to collect the ransom is generally considered guilty of the crime.

61. According to Advanced Law Lexicon, (3rd Edn., p.3932); "Ransom is a sum of money paid for redeeming a captive or prisoner of war, or a prize. It is also used to signify a sum of money paid for the pardoning of some great offence and or setting the offender who was imprisoned".

62. Stated simply, 'ransom' is a sum of money to be demanded to be paid for releasing a captive, prisoner or detenu."

The prosecution's duty to establish all the ingredients, particularly the use of force, or threat to do so, to cause death or bodily injury, to the victim, coupled with the demand for ransom, was highlighted in an earlier decision, reported as *Anil v Administration of Daman & Diu* 2006 (13) SCC 36. In this case, this court also notices that no charge was framed under Section 120-B, for conspiracy; instead, the charge under Section 34 IPC, as a participant, was made. There is nothing to link Deepak, either with the demand, or the use of force, or threat of use of force, which led to PW-1 apprehending threat to his life, or bodily injury. Therefore, clearly, he could not have been convicted for the offence punishable under Section 364-A IPC. At the same time, the court is not oblivious to the fact that an

unduly large amount, which included marked notes were recovered pursuant to Deepak's arrest, and disclosure statement. He owed a duty to explain how he possessed the cash, by virtue of Section 106 Evidence Act. The court would also be justified in taking aid of Section 114 of the Evidence Act, and saying that this omission was glaring, and pointed to his culpable mind, or at least knowledge and awareness that the money was obtained by unlawful means. On an application of Section 222 Cr PC, the court can hold that though Deepak was not guilty for the offence punishable under Section 364-A, IPC, on the facts proved, he would be punishable under Section 365 IPC, as well as under Section 411, IPC.

30. As far as Sukrampal is concerned, this court finds merit in his appeal. The argument that he was not named in the initial statement, by PW-1, is entirely correct; the witness conceded as much in the course of his cross examination, in court. Apparently, there was no mention of someone guarding the premises when PW-1 was detained after his abduction, in his statement recorded by the police, during investigation. Furthermore, none of the currency notes recovered at his instance contained signatures or markings; what is more, the prosecution case was that he acted as a guard, during the time PW-1 was kept in captivity, and had been paid ₹ 10,000/-. Yet ₹ 19,000/- was recovered at his behest. He was not a party to any covert or overt act, threatening PW-1; nor was he a party to his abduction and illegal confinement. There is some merit in his submission that even if he visited the family of Rihan, at the relevant time,

unless he was present during a major part of the day, and guarded the abducted person, he could not be convicted for the offence.

31. As in the case of Deepak, no charge under Section 120-B was framed against Sukram Pal. The Trial Court, in our opinion, got carried away by the recovery of cash at his instance. There also appears to be some prejudice against him, because of the recovery of a *katta* at his instance. That, in the opinion of this court, is of no consequence, because no charge under the Arms Act, was framed against this appellant. Further, it is not the prosecution's case that this *katta*, was used to abduct PW-1. On the other hand, it is alleged that Rihan was armed with such a weapon. Having regard to the distinct requirements of Section 364-A, none of which was proved by the prosecution, during the trial, this court is of the opinion that Sukhram Pal's conviction and sentence for the offence has to be set aside.

32. In view of the above discussion, the impugned judgment is affirmed so far Mukesh and Rihan are concerned. Their appeals, CrI.A. Nos. 1383/2011 and 2/2012 are consequently dismissed. The conviction of Deepak, is, for the reasons discussed above, modified to one under Section 365/34 IPC read with Section 411 IPC. He is sentenced to undergo RI for seven years, for the offence under Section 365/34 IPC. The sentence of fine, is left undisturbed. He is further sentenced to undergo 3 years RI for the offence under Section 411 IPC. Both sentences shall run concurrently. Deepak shall be entitled to set off the period of detention undergone as an

undertrial, as well the period undergone by him, after his conviction, during pendency of his appeal. Deepak's appeal, CrI.A. No.1315/2011 is allowed partly, to this extent. Sukhram Pal, is, for the reasons mentioned above, acquitted of all charges; his appeal CrI. A. No.1/2012 is allowed.

(S.RAVINDRA BHAT)
JUDGE

9th January, 2012

(S.P. GARG)
JUDGE