

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

Date of decision: 22nd May, 2013

+ **CRIMINAL APPEAL No.1162 of 2012**

JABIR ALI @ SONU Appellant
Through: Mr. Ajay Verma, Advocate.

Versus

STATE ...Respondent
Through: Ms.Richa Kapoor and Mr. Sanjay Lao,
Additional Public Prosecutors.

+ **CRIMINAL APPEAL No.1189 of 2012**

ARVIND KUMAR Appellants
Through: Mr. Avninder Singh, Advocate.

Versus

STATE Respondent
Through: Ms.Richa Kapoor and Mr. Sanjay Lao,
Additional Public Prosecutors.

+ **CRIMINAL APPEAL No.451 of 2013**

ABDUL MANNAN @ AZAD Appellant
Through: Mr. Avninder Singh, Advocate.

Versus

STATE (GOVT OF NCT) OF DELHI Respondent
Through: Through: Ms.Richa Kapoor and Mr.
Sanjay Lao, Additional Public Prosecutors.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE VED PRAKASH VAISH

SANJIV KHANNA, J.: (ORAL)

1. These three appeals by Jabir Ali @ Sonu, Arvind Kumar and Abdul Mannan @ Azad question a common judgment dated 10th April, 2012 convicted them under Section 120-B and Section 302/364-A /363 IPC read with Section 120-B Indian Penal Code, 1860 (IPC).

2. By order on sentence dated 16th April, 2012, they have been sentenced as under:

1. **Section 120-B IPC**: Imprisonment for life and fine of Rs.10, 000/-, in default of which, they have to undergo Rigorous Imprisonment for one year.

2. **Section 302 IPC read with Section 120-B IPC**: Imprisonment for life and fine of Rs.10, 000/-, in default of which, they have to undergo Rigorous Imprisonment of one year.

3. **Section 364-A IPC read with Section 120-B IPC**: Imprisonment for life and fine of Rs.10, 000/-. In default of payment of fine, they have to undergo Rigorous Imprisonment of one year.

4. **Section 363 read with Section 120-B IPC**: Rigorous Imprisonment for three years and fine of Rs.5, 000/-, in

default of which, they have to undergo Rigorous Imprisonment for six months.

3. The factum that Aruf Mandal, son of Shankar Mandal, aged about five years died a homicidal death remained unchallenged in arguments and is undisputed and has to be accepted in view of the post mortem report proved by Dr. B.N. Mishra (PW-3). On external and internal examination, the following injuries were noticed:-

“1. The ligature marks were present all around the neck at the level of thyroid cartilage with horizontally placed (more marked it anterior) with 2-3 cm. in number but superimposed each other with radish brown colour with abraded margins without parchmentisation on section underneath the ligature marked under cited tissue appeared bruised with multiple haemorrhagic spots (suggestive of strangulation). The total length of the ligature marked was measure 20 cm. in length $\times$ 2-2.5 cm. in width.

2. One bruise of size 3 $\times$ 2 cm present in medial aspect of right arm with greenish in colour.

Internal Injuries:

1. The brain and meninges were found highly congested with engorged blood vessels.
2. Both cornua of the hyoid bone fractured with collection of blood clots in dark red colour.
3. The muscles of neck were found bruised at the level of ligature mark.
4. The tracheal mucosa found congested
5. Blood mixed with froth present within the lumen of trachea.
6. Both lungs appeared highly congest, suffused and edematous.”

4. The cause of death, as opined, was asphyxia caused by forceful and sustained constriction of neck by using ligature material. All injuries were ante mortem in nature and injury No.1 was sufficient to cause death. The said post mortem was conducted on 6th January, 2008 between 12.15 p.m. to 2.55 p.m. Time since death, as opined, was about 5 days prior to the post mortem. The Post Mortem Report (Ex.PW3/A) records that rigor mortis had passed off and decomposition had set in. Bloody discharge was present on nostrils and mouth and signs of marbling were present. We shall in subsequent portion of the judgment refer to the statement of witnesses on how Aruf Mandal went missing on 2nd January, 2008 and his dead body was recovered on 5th January, 2008. At this stage, it is suffice to notice the main contention raised by the Appellants Counsel is that the impugned judgment wrongly records that the three appellants were the perpetrators, who were involved in kidnapping and murder of Aruf.

5. On the question of kidnapping of Aruf Mandal, his father Shanker Mandal (PW1) has stated that on 2nd January, 2008 at about 3 p.m. Aruf aged about 5 years was playing outside the house but thereafter did not return home. As he was untraceable, a phone call was made to police at number 100. Police came and recorded his statement (Ex.PW1/A). At about 6.30 p.m. and 7.40 p.m. PW-1 received two telephone calls demanding Rs.2 lacs for release of Aruf.

The caller claimed that Aruf was with him and threatened that if his instructions were not followed, Aruf would be killed and thrown in a Nala. PW-1 thereupon informed the police, who tried and located the address from where the phone calls were made. PW-1 accompanied the police officers to Badarpur and went to the STD booth. The lady, and her son operating the STD booth, were questioned. However, no clues were forthcoming and PW-1 returned back at 2.00 A.M. PW-1, thereafter received several phone calls on his mobile number 9873837741 from the kidnappers demanding ransom. The kidnappers required him to board Vaishali Express, reach Kanpur and follow instructions to take a train to another destination. On 5th January, 2008, another phone call was received with further instructions to come to Kanpur with Xeroxed copy of a currency note. On 15th January, 2008 the police and PW-1 again made a search for the culprits and appellant Abdul Mannan was apprehended and confessed his crime. He made a disclosure statement and led them to a room on the third floor of house number 337-338, Raghbir Nagar, Delhi. The door lock was broken. On pointing out of the appellant Abdul Mannan, dead body of Aruf was found inside a blue bag. PW-1 identified that the dead body was of his son Aruf. Crime Team was called and the dead body was taken to the hospital. PW-1 has deposed that the appellants Abdul Mannan and Jabir Ali had earlier worked with him and they

were introduced by the third appellant Arvind Kumar. Appellants Abdul Mannan and Jabir Ali had left their job on 19/20th December, 2007. Appellant Arvind Kumar was a known person and on occasions PW-1 used to give him the charge of his factory. PW-1 averred that he had received threatening telephone calls from mobile number 9873107159. The voice of the caller appeared to be as that of Jabir Ali.

6. Mahender Singh (PW-16), Owner of House number 337-338, Raghubir Nagar, Delhi has stated that on 1st January, 2008 he had rented out the said room to three persons. In his court deposition he named two of them as Abdul Mannan and Arvind but could not name the third person. PW-16 claimed that they had paid advance of Rs.300/- and the rent fixed was Rs.1,200/- per month. On 5th January, 2008 appellant Abdul Manan, who was present in the Court, had come to his house with police officers. Police had broken the lock of the room from where the dead body of a child was found, in a bag. The child was aged about 5 years and identified by his father Shanker Mandal, who was present. PW-16 identified the three appellants in the Court as the persons who had taken the room on rent. In his cross-examination he has accepted that in his statement under section 161 Cr.P.C. (Ex.PW16/A) recorded by the police on 5th January, 2008 he had not given the names of Arvind and Jabir Ali. He has clarified that the room in question was located on the third floor and not on the

second floor and when the possession was handed over to the appellants they had put their own lock. The lock was broken by the police officers. He has accepted that PW-1's house was one Gali (street) away from his house and he knew PW-1 from before. He has denied the suggestion that Jabir Ali had never approached him for taking the room on rent.

7. The Investigating Officer, Inspector Vijay Singh Chandel (PW-22) has deposed that on 4th January, 2008 he took over the investigation of the case and on 5th January, 2008 he was informed that the appellant Abdul Mannan was seen roaming in Block A, Raghubir Nagar. He along with ASI Sri Krishan, HC Ashok Kumar and other staff searched for Abdul Mannan. Complainant i.e. PW-1 was with them and on identification made by PW-1, appellant Abdul Mannan was apprehended and his disclosure statement (Ex.PW18/B) was recorded. The disclosure statement was signed by PW-22 at point B. On the basis of the disclosure statement, dead body of Aruf was recovered from the room on the third floor of house No.337-338, Raghubir Nagar. When the police team reached the said house, the room was found to be locked. Lock was broken to gain entry and inside the room a blue colour bag was found. The appellant Abdul Mannan disclosed that dead body was in that bag. PW-1 identified the body as that of his son Aruf. Crime team was called and photographs

were taken. The dead body was shifted to the mortuary. Site plan (Ex.PW22/B) was prepared and the appellant Abdul Mannan was arrested vide arrest memo Ex.PW1/E. On 7th January, 2008, the appellant Abdul Mannan led the police team to Mitthapur and identified the appellant Arvind. The appellant Arvind was apprehended and interrogated and subsequently was arrested vide memo Ex. PW18/C. Jabir Ali, the third appellant, who was also named by appellant Abdul Mannan, remained untraceable and could be apprehended on 10th January, 2008 from Garhi Main Market, Lajpat Nagar. PW-22 had gone there along with staff and the two appellants. The appellant Jabir Ali was arrested vide memo Ex.PW14/A. On personal search of Jabir Ali, one mobile phone Nokia 1600 of black colour was recovered with purchase bill/ receipt of Sharma Communication (Ex.PW14/D).

8. PW-18, ASI Shri Krishan was present when the dead body of Aruf was recovered on 5th August, 2008. He has stated that he was involved in the investigation of the case from 2nd January, 2008 and had also gone to Badarpur where they had spoken to Bishan Wati, owner of the STD booth from where ransom call was made. They also met booth operator Rakesh and had made inquiries about the caller but did not succeed in getting any clues. On 3rd January, 2008, he and HC Ashok had spoken to Jagdish Nagar (PW-2) and Mohd. Ajhar, friends

of PW-1 and their statements were recorded. He has deposed about the telephone calls demanding ransom received by PW-1. On verification, it was revealed that the telephone SIM number 9873107159 was issued in the name of one Rakesh Kumar, Block No.3, Dakshin Puri Extension. They met Rakesh Kumar at the said address, but he denied having obtained the said number. Somebody had misused his I-card. During investigation, details of ex-employees of PW-1 were obtained and employees were interrogated but on verification nothing incriminating came to light. On 5th January, 2008, complainant informed that he had seen the appellant Abdul Mannan, his ex-employee, in Raghubir Nagar area and Abdul Mannan may have kidnapped his son. PW-18 along with PW-22, HC Ashok Kumar and Constable Shodan Singh went to A-Block, Raghubir Nagar and on pointing out of the PW-1, the appellant Abdul Mannan was overpowered and interrogated. The appellant Abdul Mannan made a disclosure statement (Ex.PW18/B) and led the police team to the room on the third floor of house No.337-338, Raghubir Nagar from where the dead body of Aruf was recovered. The room was initially locked but the same was broken by PW-22. Crime team came, inspected the spot and took photographs. On 7th January, 2008, appellant Arvind was apprehended and arrested from Mithapur at the instance of appellant Abdul Mannan. In the cross-examination PW-18 has

deposed that House No.A479 belonging to PW-16 was a three storey building. He had not procured or seized the call details of the STD booth. They had gone to the house of Rakesh, the registered subscriber of SIM number 9873107159, but on the said date no record was seized. Rakesh on inquiry informed that he was not using the said SIM. PW-18 has further deposed that a police team had been sent to Lucknow in connection with the case and on 4th January, 2008 he along with complainant (PW-1) had gone to the Badarpur area, but no clue was found. Appellant Abdul Mannan was apprehended at about 4 p.m. but at the time of arrest no public person had joined. Appellant Abdul Mannan was arrested at about 5.30 p.m. and was thoroughly interrogated and made a disclosure statement, which was recorded between 5.30 p.m. to 6 p.m. Owner of House No.337-338, Raghubir Nagar, Mahender Singh (PW-16) met them when they reached the third floor of the house. There were two rooms on the third floor and both were locked. Lock of the room in question was broken at about 6.00-6.15 p.m. PW-18 could not depose whether brick/stone/hammer was used for breaking the lock. Message was sent to the crime team before breaking the lock, but they arrived after the lock was broken. Dead body of Aruf was shifted from the room at about 7.30-8.00 p.m. but he did not remember under whose supervision the dead body was shifted.

The crime team reached the spot at about 6.00/6.15 p.m. and inspected the spot till 7.00 p.m.

9. Learned counsel for the appellants have highlighted the discrepancies and differences in the statements of Shankar Mandal (PW-1), ASI Shri Krishan (PW-18) and Inspector Vijay Singh Chandel (PW-22). It is highlighted that the time given by the said witnesses do not tally or match with the arrest memo (Ex.PW1/E) of appellant Abdul Mannan and the time when the dead body of Aruf was received in the mortuary i.e. 5 p.m. as per Ex.PW3/B and as stated in the testimonies of PW-3 and PW-22.

10. There are some variations or differences in time when the appellant Abdul Mannan took the police party and PW-1 to the room on the third floor of house No.337-338, Raghbir Nagar, Delhi, when he was apprehended or when the dead body was received in the mortuary. However, this slight variation in time is natural and can be easily explained since the court depositions of PWs-1, 18 and 22 were recorded after one year or more. It is humanly impossible to remember the precise time when a particular fact was discovered or steps were taken. Lapse and failure to precisely recollect the exact time is possible and such or extra photogenic memory should not be expected. PWs-1, 18 and 22 have made identical and similar depositions on core and material aspects relating to the factum that the appellant Abdul Mannan

was apprehended on 5th January, 2008, he made a disclosure statement and thereupon the police team which included PWs-18, 22 and the complainant (PW-1) went to the room on the third floor of House No.337-338, Raghbir Nagar, Delhi from where dead body of Aruf was recovered. On these facts, the witnesses are in seriatim, support and corroborate each other. These facts are not contradicted by any of the three witnesses mentioned above. PW-16 the landlord also supports their testimonies. In *Neelam Bahal v. State of Uttarakhand* (2010) 2 SCC 229, it has been observed that some minor discrepancies in the testimonies are immaterial, rather a parrot like deposition after a long time smacks of tutoring and some differences in fact advance credibility of witnesses. Recently Supreme Court in *Sunil Kundu and Anr v. State of Jharkhand* (2013) 4 SCC 422 it was reiterated that minor contradictions or inconsistencies which do not go to root of prosecution version can be ignored.

11. The contention that the body of the child was received in the mortuary on 5th January, 2008 at 5.00 p.m. does not contradict the Crime Team Report (Ex.PW17/A) or the statement of PWs-1, 18 and 22. Ex.PW17/A mentions that the Crime Team reached the spot at 4.30 p.m. and had remained there till 6.30 p.m. Thus, the Crime Team had reached the spot before the dead body was received in the mortuary. The dead body was decomposing. In these circumstances, it

is possible and we accept that the dead body was immediately sent to the mortuary, while Crime Team continued with the task of collecting incriminating material. There is variation and difference in the statements of prosecution witnesses as to the time when the dead body was sent to the mortuary, but this does not defeat or negate the prosecution case that the body was recovered pursuant to the disclosure statement. Similarly, the objection of the learned counsel for the appellant Abdul Mannan that there is no consistency how and who had located the appellant Abdul Mannan and how the police team had apprehended him. This minor discrepancy again should not be understood in the light of the position that the statements were being recorded after a considerable delay

12. Aruf had gone missing on 2nd January, 2008 at about 2 p.m. There is ample evidence and material to show that PW-1 and the police had made all efforts to trace him but were unsuccessful till the evening of 5th January, 2008. After the appellant Abdul Mannan was apprehended and pursuant to the disclosure statement Ex PW-18/B, the dead body of Aruf was recovered from the room on third floor of premises of House No.337-338, Raghbir Nagar, Delhi. Till the disclosure statement was made by the appellant Abdul Mannan, the complainant PW-1, the police were completely unaware and had no knowledge that the dead body of Aruf was lying in the said room. In

fact they did not know whether Aruf was alive or dead or whether he was in Delhi or outside Delhi. A police team was also sent outside Delhi for investigation. Section 27 of the Evidence Act, therefore, has been rightly invoked and referred to by the trial court. Recovery of the dead body of Aruf from a secured place i.e. the room on the third floor, which was locked, is a highly incriminating fact against the appellant Abdul Mannan. He had knowledge and was aware that Aruf had died and his body had been kept in a bag inside the said room, which was locked. Supreme Court in *State of Maharashtra Vs. Suresh*, JT 1999 (9) SC 513 noticed that there are three possibilities when an accused points out the place where a dead body or an incriminating material is concealed. Firstly, he could have himself concealed it. Secondly, he could have seen somebody concealing it. Thirdly, the said fact may have been told to him by a third person. Once recovery is made and the accused declines to tell the criminal court that his knowledge was an account of the last two possibilities, a criminal court can presume that the concealment was by the accused himself. To take benefit of last two possibilities, the accused should offer an explanation as to how he came to know and if he chooses to remain quiet and refrains from telling the court about how he came to know, the presumption is that the concealment was made by the accused himself.

13. Earlier in *Suresh Chander Bhari Vs. State of Bihar*, 1995 Supp

(1) SCC 80 the Supreme Court while discussing the essentiality of

Section 27 of Evidence Act, it was 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 CrI.A.Nos.744/2011, CrI.A.835/2011 & 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.”

14. In *Deepak Chandrkant Patil Vs. State of Maharashtra*, (2006) 10 SCC 151, the Supreme Court upheld the conviction as the dead body of the deceased and his motorcycle were recovered at the instance of the accused. Similarly in *Ningappa Yallappa Hosamani and Ors. Vs. State of Karnataka and Ors*, (2009) 14 SCC 582

recovery of the dead body from the canal pursuant to the disclosure statement in the absence of any explanation, it was observed, was sufficient to sustain conviction. The natural presumption was that the persons at whose behest the dead body was recovered, were the perpetrators when no explanation was forthcoming how the accused persons were aware and had knowledge.

15. Referring to the principles of Section 27 of the Evidence Act in ***Geeta Vs. State of Karnataka***, 2000 (10) SCC 72 it has been elucidated that recovery of the dead body from the room of the accused requires an explanation from the accused. When an accused gives false and misleading explanation on being questioned by the Court or by a third person before his arrest, the said circumstances amount to corroboration. Further, the appellant's answers in his/her statement under Section 313, Code of Criminal Procedure, 1973 (Cr.P.C.) are relevant and significant. A false statement can lead to conviction of the accused and supply the missing link in the chain of circumstances.

16. It has been contended by the learned counsel for the appellant that statement of PW-16, the landlord, that the said room was taken on rent by the three appellants is somewhat debatable as there is no written document and proof and PW-16 did not name appellants Arvind and Jabir Ali in his statement under Section 161 Cr.P.C. It is highlighted that the appellant Abdul Mannan was present and shown to

PW-16 on 5th January, 2008 when the dead body was recovered. There is part merit in the said contention insofar as the appellants Arvind and Jabir Ali are concerned as they were not named or identified by description by PW-16 in his statement under Section 161 Cr.P.C. It is difficult to perceive that the landlord would not know and recollect names of his tenants. Normally, a person would keep some record and note his details. However, as far as appellant Abdul Mannan is concerned he had taken the police team and PW-1 to the room in question. The said room was on the third floor of the house and was locked. The natural assumption is that the appellant Abdul Mannan was aware of the said room and also had access to the said room as he was aware what was inside the room. Section 27 of the Evidence Act, it has been explained, does not relate only to the recovery of the physical object, but the knowledge of the accused as to the place where the said physical object was lying and can be recovered. In ***Pulukuri Kottaya & Ors Vs. Emperor*** AIR 1947 PC 67 it has been observed as under:-

“9. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon

so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be 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 accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to Section 26, added by Section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the

"fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

17. As far as the appellant Abdul Mannan is concerned, statement of PW-16, Mahender Singh is relevant and fully supports the prosecution case that the said appellant is the perpetrator of the crime in question.

18. PW-1 has deposed, and in our opinion the said assertion should be accepted, that the appellant Abdul Mannan had worked with him till 19/20th December, 2007. In the same building, where PW-1 resided, he had his industrial unit. The appellant Abdul Mannan was, therefore, aware that PW-1 had a child named Aruf. He was aware of the financial position of PW-1 and had knowledge about the telephone numbers on which he could contact PW-1.

19. In view of the aforesaid position, we have no doubt that the prosecution has been able to satisfactorily prove beyond doubt that the appellant Abdul Mannan had committed the said crime under Sections 363/364-A and 302 IPC.

20. The next question relates to involvement of appellants Arvind and Jabir Ali. As far as the appellant Arvind is concerned, there is hardly any evidence to implicate him. PW-1 has deposed that the appellants Abdul Mannan and Jabir Ali were employed in his factory by the appellant Arvind. This is not a relevant fact directly implicating Arvind in the crime. This only shows that Arvind knew Jabir Ali and Abdul Mannan. PW-1 has not stated that during employment, conduct of the appellants Abdul Mannan and Jabir Ali were suspicious or raised doubts. PW-1 has not deposed or stated that appellant Arvind had ceased to be in his employment or was removed due to any reason. On the other hand, PW-1 has averred that he had faith in Arvind and on occasions used to leave charge of his factory with Arvind.

21. This brings us to the statement of Jagdish Nagar (PW-2), a friend of PW-1. He has deposed that on 2nd January, 2008 at about 2.30 p.m. he had gone to the house of Shankar Mandal (PW-1) but could not meet him. He made a call on his mobile number but the mobile phone was lying in PW-1's house. He has further stated that when he came out, he saw Arvind taking Aruf with him at about 2.00-2.30 p.m. Next

day in the morning he came to know that Aruf was missing. Thereupon he informed PW-1 that he had seen Aruf with appellant Arvind. We have grave doubts on the testimony of PW-2 for several reasons. His statement purportedly was recorded on 3rd January, 2008, but there is no material or evidence that the police had interrogated Arvind on that basis or leads in the said statement on 3rd January, 2008. It is not urged or stated that Arvind was missing on 3rd January, 2008 or 4th January, 2008. PW-1 and the police officers, including the investigating officer PW-22 statement have not alleged abscondence. It is natural to assume that Arvind was not absconding and was present on or after 2nd January. PW-1 has stated that he had about 7-8 laborers [see cross-examination on 7th October, 2010] working in his factory or 5-6 employees/ karigars [as mentioned in the cross-examination on 7th January, 2009] and they had also searched for Aruf on the date of occurrence itself. Arvind used to stay in the same house where PW-1 was residing. PW-1 has not alleged that Arvind or his belongings were missing. Thus, we are not inclined to accept the statement of PW-2 that he had seen Arvind and Aruf together at 2.00-2.30 p.m. on 2nd January, 2008. If this was correct, Arvind would have been the first person to be interrogated and questioned. Possibly Arvind has been implicated as he had got the appellant Abdul Mannan employed with PW-1.

This is not sufficient to hold or establish that the Appellant Arvind was involved.

22. On the question of last seen, we would like to reproduce the following observations made by the Supreme Court in ***Mohibur Rahman Vs. State of Assam***, 2002 (6) SCC 715:-

“10. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own he liability for the homicide. In the present case there is no such proximity of time and place.

23. On involvement of the appellant Jabir Ali, we feel that the evidence is debatable. He should be given benefit of doubt. Jabir Ali was arrested on 10th January, 2008, five days after appellant Abdul Mannan was arrested. As noticed above, PW-22 has deposed that from Jabir Ali, a mobile phone and a receipt (Ex.PW10/A) for purchase of the mobile phone was recovered as recorded in seizure memo Ex.PW14/D. Ex.PW14/A records that appellant Jabir Ali was arrested on 10th January, 2008 at 6 p.m from Ghari Main Market, Lajpat Nagar.

One can understand that he was carrying with him a mobile phone but it is improbable that Jabir Ali would also be carrying the mobile phone purchase receipt (Ex.PW10/A) dated 3rd November, 2007 with him in his pocket or in his wallet. It is an accepted position that the mobile phone did not have any SIM card and was not activated at the time when it was seized. The prosecution however claims that the mobile phone, which was marked Ex.P-12 had IMEI No.358654016642482 (it is an accepted position that the first 14 digits are relevant). It is submitted that Shankar Mandal (PW-1) had received ransom calls from telephone number 9873107159 on 3rd January, 2008 at 14.49, 18.10 and 21.18 hours and on 4th January, 2008 at 7.15 hours and on 5th January, 2008 at 23.32 hours. It is claimed that these calls using the mobile SIM number 9873107159 were made from telephone instrument having IMEI number 35865401664248. Thus, it is claimed that it can be safely stated that Jabir Ali had made the ransom calls. Reliance is placed upon the call records (Ex.PW20/A) of telephone number 9873107159 and call details records (Ex.PW20/E) of telephone number 19873837741 (the said number belongs to PW-1, Shankar Mandal).

24. Call details (Ex.PW20/E) relating to telephone number 9873837741 does record the telephone call received from 9873107159 on 3rd January, 2008, 4th January, 2008 and 5th January, 2008. We

notice that the last call made from the said number on 5th January, 2008 was recorded at 23.32 hours i.e. after dead body of Aruf had already been recovered. Possibly the caller did not know that the dead body Aruf had been recovered. As per the prosecution case, the said calls were made from outside Delhi.

25. Ex.PW20/A, the call details of telephone number 9873107159, however tells a different story. It does not tally with the call records (Ex.PW20/E) of telephone number 9873837741. The call records of telephone number 9873107159 do not reveal or mention that any calls were made from the said SIM between the period 1st January, 2008 to 4th January, 2008. Thus, as per call records (Ex.PW20/A) relating to 9873107159 no calls were made on 2nd and 3rd January, 2008. The IMEI number of instrument in which SIM card number 9873107159 was used is not mentioned in the call records on or after 1st January, 2008. Thus, for the period 2nd January, 2008 onwards it cannot be said with any certainty that the mobile instrument having IMEI No.358654016642481 was being used with SIM card with telephone number 9873107159. The possibility that the said SIM card may have been used in any other instrument, therefore, cannot be denied and ruled out. As already noted above, the SIM card could not be recovered by the police. The appellant Jabir Ali knew Abdul Mannan

but that fact itself does not mean that he was involved in the crime in question.

26. The Additional Public Prosecutor submitted that the call records (Ex.PW20/A) pertain to local calls or calls made from Delhi and not calls made from the said SIM from outside Delhi. We do not find any justification to accept the said submission, in the absence of cogent and material evidence. The call records of telephone number 9873107159 were asked vide letter (Ex.PW20/B) dated 21st January, 2008. The said letter required the Nodal Officer or the service provider to provide call details records with effect from 1st October, 2007 till that date. No exception was carved out or stated in the letter. Anuj Bhatia (PW-20), the Nodal Officer, Vodafone Mobile Services Ltd. in his deposition has stated proved Ex.PW20/A as the detail records of telephone number 9873107159. He did not state that these call records pertain to Delhi circle and not calls made from outside Delhi circle. It was for the prosecution to clarify the position and one cannot presume that Ex.PW20/A pertains to call records of Delhi Circle only and not outside Delhi.

27. Even if we accept the said contention of the Addl. Public Prosecutor, the case of the prosecution still fails against Jabir Ali. What was important and has to be ascertained is the mobile instrument which was used for making the ransom calls and whether the mobile phone

instrument recovered from Jabir Ali was used to make the said calls on 3rd, 4th and 5th January, 2008. This is not forthcoming and cannot be ascertained from Ex.PW20/A. IMEI number of the mobile instrument is not mentioned in EXPW20/A. Thus, Jabir Ali cannot be connected with the ransom calls made from mobile SIM number 9873107159.

28. Telephone number 9873107159 has been issued to Rakesh. The said Rakesh has appeared as PW-7 and has stated that he had not got the said SIM card issued and someone had misused his voter I-card. The subscriber form (Ex.PW7/A) mentions the name of the subscriber as Rakesh and not Jabir Ali or Abdul Mannan. Statement of PW-7, therefore, leads to further confusion and doubt. PW-7 does not incriminate the appellant Jabir Ali. Prosecution, in these circumstances, has relied upon statement of Gulshan Kumar (PW-8). He has stated that two years back the appellant Abdul Mannan had purchased the said SIM card from him by using photocopy of the voter I-card of Rakesh. Abdul Mannan had claimed that Rakesh was his brother. The said statement was recorded on 2nd September, 2009. The SIM card was purchased on 7th October, 2007. Thus, as per the prosecution version and even if we accept the deposition of PW-8, SIM card number 9873107159 was purchased/procured by appellant Abdul Mannan and not Jabir Ali. The said SIM card was not recovered from appellant Jabir Ali.

29. The call details Ex.PW20/A at best would show that SIM card number 9873107159 was installed/used in mobile phone instrument having IMEI number 35865401664248 during the period 10th November, 2007 till 1st January, 2008. It is an accepted position that during this time no ransom call was made to PW-1 on his mobile phone. In fact Aruf was kidnapped on 2nd January, 2008. Ex. PW20/A, the call details do not show that mobile instrument bearing IMEI number 35865401664248 was used with SIM card number 9873107159 thereafter or 2nd January, 2008 onwards. There cannot be any assumption that telephone instrument bearing IMEI number 35865401664248 was used when the ransom calls were made from the SIM number 9873107159. The said inference is not safe and should not be drawn. Moreover, it is a case of the prosecution that the ransom calls from SIM card number 9873107159 were made from outside Delhi. There is no evidence or proof that Jabir Ali had gone outside Delhi and was not in Delhi during the period 2nd January, 2008 onwards.

30. Mobile call details Ex.PW20/A in respect of SIM card number 9873107159 from 4th January, 2008 onwards shows a number of calls being made to telephone number 9899299940. Police did not verify or pointed out the person to whom the said calls were made and whether the said person had spoken to Jabir Ali.

31. Ex.PW20/A shows that SIM card number 9873107159 was put under surveillance and call forwarding facility was adopted to intercept/hear the conversations. However, telephone conversations were not recorded and there is no forensic report. It cannot be assumed that Jabir Ali had made the said conversations. Shankar Mandal (PW-1) has stated that he recognized the voice of Jabir Ali and Jabir Ali was making telephone calls using SIM card number 9873107159. We are not inclined to accept the said oral assertion by PW-1. Jabir Ali had worked with PW-1 for about a week and it is difficult to believe that he could have recognized his voice on telephone. PW-1 has not stated or given any distinct characteristic, words or phrases used by Jabir Ali which helped him to identify the voice. In Ex.PW1/A, the first report made by PW-1, he has not stated that the caller's voice resembled the voice of Jabir Ali. It will be improper and incorrect to implicate and hold that Jabir Ali had made the telephone calls on the basis of this testimony of PW-1, Shankar Mandal.

32. We have already upheld conviction of Abdul Mannan. PW-8 obviously had committed an error and had wrongly and incorrectly issued SIM card on the basis of the identity proof of a third person. We have some doubts whether PW-8 could have recognized the appellant Abdul Mannan to whom he had purportedly sold the SIM card in October, 2007, in his court testimony recorded on 2nd

September, 2009 nearly two years after the sale. However, this doubt does not affect our findings on involvement of the appellant Abdul Mannan for the reasons recorded above.

33. In view of the aforesaid discussion, conviction and sentence of appellant Abdul Mannan under Section 120-B IPC is set aside. His (Abdul Mannan's) conviction u/s 363,364A and 302 IPC are sustained and sentences maintained. Appellants Arvind and Jabir Ali are acquitted and their conviction and sentence are set aside. Appellants Arvind and Jabir Ali will be released forthwith unless required to be detained in any other case. Arvind and Jabir Ali will comply with Section 437-A Cr.P.C. and furnish personal bonds of Rs.10, 000/- each with one surety in the like amount to the satisfaction of trial court. The appeals are disposed of.

(SANJIV KHANNA)
JUDGE

(VED PRAKASH VAISH)
JUDGE

May 22nd, 2013
NA