

\$~Part-A (R-19)

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

+ CRIMINAL APPEAL NO. 1275/2010

Date of decision: 29th April, 2014

MADAN GOPAL AND ANOTHER

..... Appellants

Through Mr. S.S. Ahluwalia, Advocate.

versus

STATE

..... Respondent

Through Ms. Rajdipa Behura, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE G.P. MITTAL

SANJIV KHANNA, J. (ORAL):

By the impugned judgment dated 22nd July, 2010, appellants- Madan Gopal and Bahadur @ Deepak stand convicted under Section 364A as well as Section 120B of the Indian Penal Code, 1860 (IPC, for short). By order on sentence dated 24th July, 2010, they were sentenced to imprisonment for life and fine of Rs.1,000/- each under Section 364A IPC and in default they are liable to undergo Simple Imprisonment for one month. The two were sentenced to imprisonment for life and fine of Rs.1,000/- each under Section 120B

IPC and in default shall undergo Simple Imprisonment for one month. Benefit of Section 428 Cr.P.C. was directed to be extended.

2. By order dated 17th January, 2014, Bahadur @ Deepak was held to be juvenile on the date of occurrence, i.e., 23rd April, 2007 to 8th May, 2007 and entitled to benefit under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000. Bahadur @ Deepak had then made a statement that he accepts his conviction but the order on sentence should be quashed. The said prayer was accepted. Bahadur @ Deepak was directed to attend counselling session at Prayas Juvenile Aid Centre Society once a week for the next three months after the date of his release. Hence, now in the present appeal, we are only concerned with conviction of appellant-Madan Gopal under Sections 364A and 120B IPC.

3. There is ample evidence and material to show that Master Ashish (PW-5) went missing at about 9.45 P.M. on 23rd April, 2007. He could not be located by his parents Virender Kumar (PW-2) and Madhu Soni (PW-7) in their house, i.e., E-2/53, Shastri Nagar, Delhi. Madhu Soni (PW-7) deposed that she went to the police station at about 11 P.M. to complain that Ashish (PW-5) was missing and could not be traced in spite of best efforts. FIR No. 162/2007 was registered on 25th April, 2007 on a complaint made by her husband. Virender Kumar (PW-2) husband of PW-7, in his court deposition has stated that

on 23rd April, 2007 in spite of their best efforts they were unable to trace Ashish. His brother-in-law Rajender had informed him that he had seen Ashish with Madan Gopal, (PW-2's elder brother) going towards the railway station at about 10.15 P.M. Thereafter, they searched for Ashish near the railway station but did not succeed. The matter was reported to the police at 11.15 P.M., who then recorded missing report vide DD entry No. 12A (Exhibit PW-2/A). PW-2 also suspected involvement of Deepak, a resident of Bihar, who was residing with his elder brother Madan Gopal. PW-2 accepted that his statement was recorded by the police on 25th April, 2007.

4. At this stage, we would like to refer to the testimony of SI Laxman Singh (Retd.), who has deposed as PW-11. On 24th/25th April, 2007 PW-11 was posted as duty officer from 1 A.M. to 9 A.M. at Police Station Sarai Rohilla. At about 2.35 A.M., Virender (PW-2) had come to the said Police Station and stated that his son Ashish Kumar, aged about 5 years, was missing from home since 9.45 P.M. from 24th April, 2007. He recorded DD No. 12A marked Exhibit PW-2/A. The said DD entry No. 12A (Exhibit PW-2/A) specifically mentions that Virender (PW-2) suspected involvement of the appellant- Madan Gopal and that his brother-in-law Rajender Kumar (PW-4) had informed him that he had even seen Ashish with Madan Gopal at about 10.15 P.M. It mentions that Madan Gopal was missing

from his residence.

5. Virender Kumar (PW-2) has deposed that his brother Madan Gopal and Bahadur @ Deepak were both missing during the said period. In these circumstances, we do not think the appellant derives much advantage or benefit from the fact that Rajender Kumar, who has deposed as PW-4, was declared hostile and had claimed that he had not informed PW-2 that he had seen the appellant taking Ashish towards Sarai Rohilla Railway Station at about 10.15 P.M. It is, however, noticeable that Rajender Kumar (PW-4) accepted that he had received a call and was informed that Ashish was missing. Thereupon, he had gone to the house of Virender (PW-2) and made efforts to trace Ashish.

6. After the FIR was registered, the police came into action and we would straightway to refer to the deposition of ASI Inderjeet Singh (PW-13), who had carried out the rescue operation. He has deposed that on 24th April, 2007 after DD entry No. 12A (Exhibit PW-2/A) was recorded, he started making efforts to locate and trace Ashish. He along with Constable Narender had departed for Khagaria, Bihar after obtaining permission from the Deputy Commissioner of Police as they had received information from the SHO that the ransom calls detected were being made from district Jamui, Bihar. They went to Jamui, Bihar and sought assistance of police officers there. Consequent and thereupon Ashish was recovered from the possession/custody of the

appellants-Madan Gopal and Bahadur @ Deepak. Ashish and the accused were produced before the Chief Judicial Magistrate Jamui, Bihar for transit remand and they returned to Delhi. The arrival entry was made vide DD No. 59B marked Exhibit PW-13/C. They had earlier made departure entry at Police Station Kashmiri Gate, which was marked Exhibit PW-13/B.

7. ASI Inderjeet Singh (PW-13) had deposed that Mahender Kumar (PW-3) brother of Virender Kumar (PW-2) was with them when Ashish was rescued from district Jamui, Bihar and had identified the said child as his nephew. He identified Bahadur @ Deepak as he had worked as a servant with the appellant-Madan Gopal. Identification and recovery memo of Ashish was prepared and marked Exhibit PW-1/A. PW-13 had signed Exhibit PW-1/A. From appellant-Madan Gopal one mobile phone of Nokia make with SIM No. 9971771397 was recovered and was taken into possession vide seizure memo Exhibit PW-3/A. The appellants- Madan Gopal and Bahadur @ Deepak were arrested vide memo Exhibits PW-1/B and C. The appellants were produced before the CJM, Jamui, Bihar for transit remand and the said order was marked (Exhibit PW-13/D). Meanwhile, another team of police officers from Delhi reached district Jamui, Bihar to assist them and the two teams came back to Delhi with the appellant-Madan Gopal and Bahadur @ Deepak. Statement of

Ashish (PW-5) under Section 164 Cr.P.C. (Exhibit PW-13/E) was recorded on 24th May, 2007. Jyotish Mohrana (PW-8) had collected the call details of phone No. 9911771397 of the appellant-Madan Gopal and telephone No. 9873209422 of the complainant Virender Kumar (PW-2) and the same were marked Exhibits PW-9/D and PW-8/B1 to B5 respectively.

8. ASI U.N. Jha (PW-12) was posted in Police Station Sikandra, District Jamui, Bihar as Assistant Sub-Inspector and on 7th May, 2007 had participated in the rescue operation resulting in arrest of the appellant and recovery of Ashish. He deposed that Madan Gopal was present in the house at village Mohammadpur along with Ashish and Bahadur @ Deepak was on the first floor roof. Recovery memo (Exhibit PW-1/A) was prepared and signed by him. The child Ashish was identified by Mahender, who had also reached and mobile phone Nokia was recovered but he did not remember the number. He identified the seizure memo (Exhibit PW-3/A), which was signed by him at point B and the arrest memos (Exhibits PW-1/B and PW-1/C), personal search memos, etc. He identified mobile phone and the same was marked Exhibit P-1. In addition to these two witnesses, i.e., PWs-12 and 13, we have statement of Inspector Ashok Tyagi (PW-10), who had deposed that he was posted as SHO Police Station Sarai Rohilla on 3rd May, 2007 and investigation of the case was being handled by ASI

Inderjeet Singh (PW-13). Ashish had been kidnapped and ransom of Rs.20 lacs was demanded on the mobile of his father. He had information regarding the mobile number and location, i.e., place from where the calls were made. It was learnt that the calls were being made from district Jamui, Bihar. Accordingly, ASI Inderjeet Singh (PW-13) had gone to Jamui, Bihar. It was ascertained that the calls were being made from Madanpur (sic Mohammadpur), Jamui, Bihar. ASI Inderjeet Singh (PW-13) had conducted a raid, which led to the recovery of Ashish and, therefore, PW-10 had gone to Bihar along with the team. He, however, had no personal knowledge of what had happened and transpired at Jamui, Bihar as he was not in the raiding team.

9. Constable Narender (PW-1) had gone with the ASI Inderjeet Singh (PW-13) to Bihar and has also referred to the fact that Mahender Kumar had accompanied them. They had gone to village Mohammadpur, Police Station Sikandra, District Jamui to the house of Bahadur @ Deepak, whom he identified. Appellant-Madan Gopal, who also was identified by PW-1 as the person, who was present there along with Ashish. He proved the recovery memo (Exhibit PW-1/A), arrest memo of the appellant- Madan Gopal (Exhibit PW-1/B) as well as recovery of the mobile phone of Nokia make from the appellant- Madan Gopal, which was identified by him as Exhibit P-1. They had

left for Bihar on 4th May, 2007 and the boy Ashish was recovered on 7th May, 2007.

10. Learned counsel for the appellant has referred to the testimony of Master Ashish (PW-5) wherein he has identified the appellant as his 'chacha' but denied that he had any knowledge of being taken by anyone from Delhi or by the appellant-Madan Gopal. He also claimed ignorance whether police from Delhi had come to the house of Bahadur @ Deepak at Bihar; whether he was produced before the Magistrate for recording of his statement under Section 164 Cr.P.C. Similarly, our attention was drawn to the testimony of Mahender Kumar (PW-3), especially his cross-examination, the re-examination by the Additional Public Prosecutor and further cross-examination.

11. The appellant-Madan Gopal is brother of Virender Kumar (PW-2) and Mahender Kumar (PW-3). Ashish is the nephew of the appellant. This important fact has to be kept in mind when we examine testimony of PW2 and PW3.

12. A careful and indepth examination of the statement of Virender Kumar (PW-2) reveals that he has named the appellant-Madan Gopal, but had tried to put maximum blame and project that Bahadur @ Deepak was the main culprit. PW-2 being the father and also being the complainant, somewhat reluctantly narrated the true facts implicating the appellant. PW-2 accepted that on 3rd May, 2007 at about 9.20

A.M., he had received a call on his mobile No. 9873209422 from a caller, who had asked if he had lost something and had also asked him to recharge the mobile number from which the call was made. He claimed that he had received another call from Bahadur @ Deepak after half an hour. On 4th May, 2007, a call was made warning that the matter should not be reported to the police, otherwise it would be bad and he should arrange for the money. Thereafter, he had informed the SHO, who had asked him to arrange for recording equipment, which he duly procured. On 5th May, 2007, Virender Kumar (PW-2) had received a telephone call and was asked to arrange for Rs.20 lacs for the release of Ashish and on failure, harm would be caused to Ashish. Virender Kumar (PW-2) deposed that the call was made by Bahadur @ Deepak. In fact, PW-2 has stated that no call was made from appellant-Madan Gopal rather all calls were made by Bahadur @ Deepak. He was informed that Bahadur @ Deepak used to reside in Khagaria, Bihar and police went there in search of his son Ashish. He had told the caller that he would arrange for money and assured that the amount would be arranged soon. Later on after recovery, his son Ashish Kumar was handed over to him on 8th May, 2007. His brother Mahender Kumar had gone to Bihar for recovery of his son and had also gone to the house of Bahadur @ Deepak.

13. PW-2 Virender Kumar was declared hostile and examined by the

Additional Public Prosecutor. PW-2 refused to accept that the appellant-Madan Gopal had made the call and he had identified his voice. However, PW-2 accepted that on the direction of the SHO, ASI Inderjeet Singh had gone to Bihar from where he had received a phone call. On 6th May, 2007, he had received 5 telephone calls at different times and he had assured the caller that he shall arrange for Rs.20 lacs in cash and he kept the caller in confidence. He was in touch and talking with the SHO. He strongly suspected that Ashish had been kidnapped by Madan Gopal and his servant Bahadur @ Deepak, who had entered into a conspiracy and had demanded ransom of Rs.20 lacs. He also accepted as correct that on 7th May, 2007, it was confirmed that his son had been kidnapped by his brother appellants Madan Gopal and Bahadur @ Deepak. The above examination was recorded on 29th November, 2007 and his cross-examination by the appellant was deferred.

14. The said cross-examination of PW-2 was conducted after about nine months on 17th September, 2008 and he had stated that he was in a disturbed state of mind and, therefore, was unable to identify the voice of the person, who had demanded ransom. Appellant-Madan Gopal used to reside in the same house on a different floor and the house belonged to the third brother. Both of them had separate business. PW-2 agreed that he did not suspect Bahadur @ Deepak in his first

complaint and he was not aware whether Bahadur @ Deepak was carrying any mobile phone. As noted above, Viraender (PW-2) somewhat hesitatingly accepted the involvement of his brother, the appellant herein. The dilemma, contrariety and irreconcilability is apparent and perceptible. He was aware that his son Ashish at a tender age of five years was kidnapped and taken to a far away place in Bihar for almost 12/13 days, yet the appellant-Madan Gopal, one of the accused, was his brother.

15. Mahender Kumar (PW-3), the other brother of the appellant in his examination-in-chief had supported the prosecution's case on material aspects. He had accepted that Ashish his nephew was missing and attempts made to trace him were futile. He went to Bihar and Ashish was recovered from the house of Bahadur @ Deepak, where the appellant-Madan Gopal was also present. He proved the recovery memo of Ashish (Exhibit PW-1/A) but was not signed by him. A mobile phone was recovered from the appellant-Madan Gopal vide memo (Exhibit PW-3/A) and he identified the mobile phone as Exhibit P-1. However, in his cross-examination by the counsel for the accused, including appellant Madan Gopal, he completely changed his position and stated that he did not remember the village/city of Bihar from where Ashish was recovered and who else had gone to Bihar. He voluntarily added that Ashish was not recovered from Bihar in his

presence. So, he also denied that he had gone to Bihar with the police. He denied contents of recovery memo of the mobile (Exhibit PW-3/A), which had his signatures. He was re-examined by the Additional Public Prosecutor but he did not affirm his statement in the examination-in-chief. When confronted, he deposed that whatever he had deposed in the examination in chief was voluntary but today he was made to read and depose according to the statement. Hence, he had stated facts as per statement recorded by the police. He, however, accepted as correct that he had spoken to appellant-Madan Gopal, his brother in the court. In the cross-examination by the Additional Public Prosecutor, he did not reiterate what was stated by him in the examination in chief.

16. We are inclined to accept and rely upon the statement of Mahender Kumar (PW-3) as made in the examination-in-chief. The said version should be accepted in view of the contemporaneous documents in the form of seizure memo of the child (Exhibit PW-1/A), seizure memo of the mobile phone (Exhibit PW-3/A), testimony of the police officers ASI U.N. Jha (PW-12), ASI Inderjeet Singh (PW-13) and Constable Narender (PW-1).

17. We need not refer to the testimony of Rajinder Kumar (PW-4) once again as we have already examined his court deposition along with the contemporaneous documents prepared in form of DD entry,

complaint, etc.

18. The prosecution has also relied upon call record details of mobile number of Virender Kumar (PW-2) and two mobile numbers, which were used by the appellant. On the said aspect, Virender Kumar (PW-2) had deposed that he was using telephone No. 9873209422 and he had received phone calls for ransom with threats that Ashish would be harmed. Jyotish Moharana (PW-8), Nodal Office Vodafone Mobile Service has deposed that mobile No. 9873209422 was subscribed to by Virender Kumar, resident of E-2/53 Shastri Nagar and had also proved call records for the period 1st May, 2007 to 31st May, 2007, which was marked Exhibit PW-8/B1 to B5. The subscriber application form was marked Exhibit PW-8/A. Learned counsel for the appellant is correct that certificate under Section 65B of the Evidence Act was not filed and proved by the prosecution. This does not mean that we should disregard the call records (Exhibit PW-8/ B1 to B5) of phone No. 9873209422. In *State (NCT of Delhi) versus Navjot Sandhu @ Afsan Guru*, (2005) 11 SCC 600, it has been observed as under:-

“**150.** According to Section 63, secondary evidence means and includes, among other things, “copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies”. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the

court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.

151. The learned Senior Counsel Mr Shanti Bhushan then contended that the witnesses examined were not technical persons acquainted with the functioning of the computers, nor do they have personal knowledge of the details stored in the servers of the computers. We do not find substance in this argument. Both the witnesses were responsible officials of the companies concerned who deposed to the fact that they were the printouts obtained from the computer records. In fact the evidence of PW 35 shows that he is fairly familiar with the computer system and its output. If there was some questioning vis-à-vis specific details or specific suggestion of fabrication of printouts, it would have been obligatory on the part of the prosecution to call a technical expert directly in the know of things. The following observations of the House of Lords in the case of *R. v. Shephard* [1993 AC 380 : (1993) 1 All ER 225 : (1993) 2 WLR 102 (HL)] are quite apposite: (All ER p. 231*b-c*)

“The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.”

Such a view was expressed even in the face of a more stringent provision in Section 69 of the Police and Criminal Act, 1984 in the UK casting a positive obligation on the part of the prosecution to lead evidence in respect of proof of the computer record. We agree with the submission of Mr Gopal Subramaniam that the burden of prosecution under the Indian law cannot be said to be higher than what was laid down in *R v. Shepard* (supra).

152. Above all, the printouts pertaining to the call details exhibited by the prosecution are of such regularity and continuity that it would be legitimate to draw a presumption that the system was functional and the output was produced by the computer in regular use, whether this fact was specifically deposed to by the witness or not. We are therefore of the view that the call records are admissible and reliable and rightly made use of by the prosecution.”

19. Similarly, we can rely upon the statement of R.K. Singh (PW-9), Nodal Officer Bharti Airtel Limited, who had produced the application form for mobile No. 9971771397 and 9971354318, which were issued to in the name of Gopal resident of E-2/53 Shastri Nagar, Delhi, i.e., the appellant. He had proved the scanned copy of pre-paid enrolment form for the mobile number 997177379, which was marked Exhibit PW-9/A. He had also proved the call record details for mobile No. 9971771397 for the period 3rd May, 2007 to 7th May, 2007 marked Exhibit PW-9/C and call records for mobile No. 9971354318 for the period 1st April, 2007 to 23rd April, 2007 marked Exhibit PW-9/D. The said call records show exchange of calls between the telephone numbers of the appellant and Virender Kumar (PW-2). The call

records also indicate and corroborate the prosecution version on how the investigation proceeded to disentangle and decrypt the crime and recover the child Ashish. Even if we completely disregard and do not take the call records into consideration, there is sufficient material and evidence to implicate the appellant-Madan Gopal as a perpetrator who had committed the offence under Section 364A.

20. Conspiracy as defined under Section 120A IPC is punishable under Section 120B IPC. Charge of conspiracy postulates an agreement between at least two parties to do an illegal act or do an act which is legal but by illegal means. Criminal conspiracy is a separate offence, distinct and independent from the offence which is committed. In *State of Bihar vs. Srilal Kejriwal* AIR 1960 Pat.459, reference was made to the judgment of Madras High Court In re *Venkataramiah*, AIR 1938 Mad 130 and it was observed that when an offence is actually committed, the perpetrator who commits the actual offence should be charged with the substantive offence and for him the charge of conspiracy is irrelevant. This was because conspiracy is a form of abetment (see Section 107 IPC) and when an accused actually commits an offence he is no longer an abettor. Bombay High Court in *Emperor v. Karamalli Gulamalli*, AIR 1938 Bom 481, takes a contrary view. The two distinct views were noticed by the Supreme Court in *Pramatha Nath Talukdar vs. Saroj Ranjan Sarkar* AIR

1962 SC 876(1) (see dissenting opinion on conclusion given by S.K. Das, J), wherein reference was made to *State of Andhra Pradesh vs. Kandimalla Subbaiah* AIR 1961 SC 1241. S.K. Das J in his opinion drew distinction between abetment as defined in second clause of Section 107 IPC and criminal conspiracy under Section 120B by elucidating that in the former mere combination of persons or agreement is not enough, an act or illegal omission must take place. In other words for abetment by conspiracy, *actus reus* must take place in pursuance of the conspiracy in order to do a thing conspired for. In the latter, i.e. the offence of criminal conspiracy under Section 120A, the very agreement or plot is an act in itself and is a gist of the offence, though for illegal means, some act besides the agreement is necessary. In the present case, as per the prosecution, there were only two persons involved and the appellant herein Madan Gopal was involved from the stage one till the very end. The second person Bahadur @ Deepak was also directly involved as per the prosecution version as the child was found at his residence in village Mohammadpur, Distt. Jamui and he was arrested from the spot. However, the issue is not free from controversy and debate but in the facts of the present case, conviction/sentence of the appellant Madan Gopal under Section 120B IPC was not required in view of conviction under Section 364A IPC. Further the sentences awarded by the trial court were/are to run

concurrently. This is in accord with proviso clause (a) to sub-section (2) to Section 31 of the Criminal Procedure Code, 1973.

21. In view of the aforesaid discussion, we partly allow the present appeal and set aside the conviction/sentence of the appellant under Section 120B, but hold that the appellant-Madan Gopal directly indulged and had participated in kidnapping of his nephew Ashish on 23rd April, 2007 till he was recovered from village Mohammadpur, District Jamui, Bihar on 7th May, 2007. The order on sentence passed by the trial court in respect of punishment under Section 364A is maintained. The appeal is disposed of.

SANJIV KHANNA, J.

G.P. MITTAL, J.

APRIL 29, 2014
VKR/kkb