

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 121 of 2010

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Sudhir Mahto @ Sudhir Kumar son of Bishundeo Mahto, resident of village-
Dumari, P.S.-Bharahiya, District-Lakhisarai

.... Appellant

With

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Criminal Appeal (DB) No. 1051 of 2009

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Gauri Mahto @ Gauri Kumar S/O Late Yamuna Prasad R/O Vill.- Dumri, P.S.-
Barahiya, Distt.- Lakhisarai

.... Appellant

Versus

The State of Bihar

.... Respondent
(In both the appeals)

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Appearance :

For the Appellants : Shri Praveen Kumar, Advocate

For the Respondent : Shri Dilip Kumar Sinha, A.P.P.

Sushri Shashi Bala Verma, A.P.P.

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 22-07-2015

The two appellants Sudhir Mahto @ Sudhir Kumar and

Gauri Mahto @ Gauri Kumar were indicted of committing an offence

under Section 364A of the Indian Penal Code by the learned 1st

Additional Sessions Judge, Barh for being tried in Sessions Trial No.

1046 of 2004 and by judgment dated 27th of October, 2009 were held

guilty of committing the said offence. The learned trial Judge after

hearing the appellants on sentence on 02.11.2009 directed each of them

to suffer rigorous imprisonment for life and to pay an amount of Rs.5,000/- as fine, else to suffer imprisonment for three months. Thus, the learned trial Judge did not indicate as to whether the three months' imprisonment as to be undergone by the appellants in case of having defaulted in making the payment of fine was to be simple or rigorous. At any rate, the appellants have preferred separate appeals as appears from the title head of the judgment and we heard them together so as to disposing them of by this judgment.

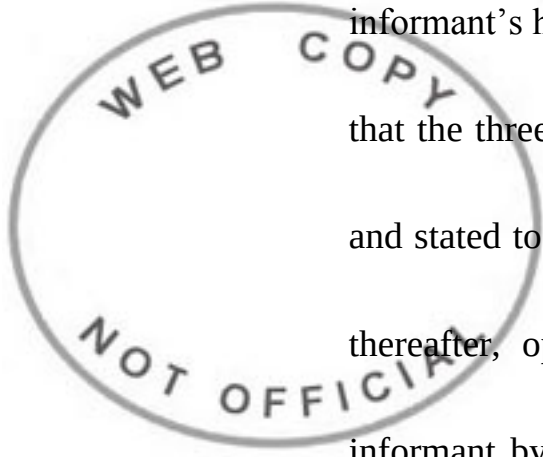
2. P.W. 12 Unnat Raj on 24.10.2002 was aged about eight or ten years. His father Rajendra Kumar (P.W. 13), as appears from evidence, was employed in the State Bank of India and he was residing with his two sons, i.e., Unnat Raj and a little one in a rented house in Mohalla Chandmari in Mokama. At about 8.30 P:M. on 24.10.2002 one of the boys of the neighbouring house knocked at the doors of the house of P.W. 13 Rajendra Kumar and woke him as the entire family had retired to their beds after having taken their dinner. P.W. 13 opened the doors and found three young well built persons carrying country made guns, pistol and *Chhura* standing at the door who immediately came

inside. One amongst them was of about 25-26 years of age and had sported a full-pant, a full-shirt of white colour and was about 5' - ½" to 5' - 8" in height and appeared to be the ring master of the three. The other was yet another young man 17-18 years of age sporting a half shirt with a *Gamacha* tied around his waist and was of wheatish complexion while the third had concealed his identity by camouflaging his face, but, he appeared to be 18-20 years of age and had only put on a short and a red shirt over it. None of the three was known to the informant P.W. 13 who claimed that if he had the occasion of seeing the three or any of them, he would pick them up correctly.

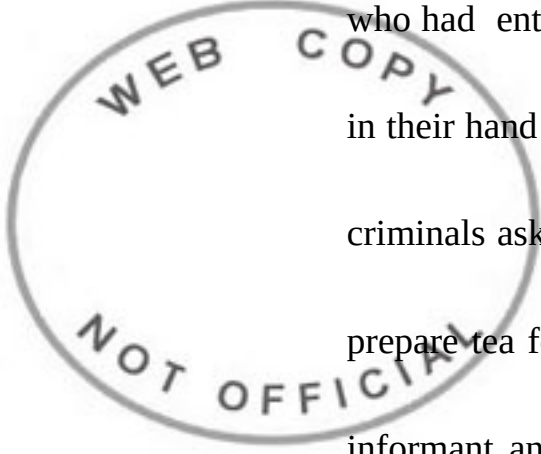
3. As soon as the three had entered inside the room of the informant, they had dimmed the light of the lamp which was kept burning there and started operating by flashing the green colour Chinese torch light.

4. It was also stated by the informant that the three had scaled the wall to reach the roof top of the house and then had reached the staircase and had come down into the courtyard of the house to enter into the house of his neighbour Subodh Kumar and at the point of pistol,

after getting his doors opened, had forced his son to get the doors of the informant's house opened so as to entering inside it. The informant stated that the three criminals had taken him and his family members captives and stated to him that if he had raised an alarm, he would be killed. He, thereafter, opened the outer exit doors and started talking with the informant by pointing out that the three were the cohorts of one Naga Singh and one Chandra Saheb was chasing them and they had come inside the house of the informant only for about 20 minutes so as to passing of the crucial time whereafter they would exit the house. The criminals also stated to the informant that some of the men of Naga Singh had concealed themselves in the house of one Jeewan Das who was employed in the Nazarath hospital and was residing nearby. The three criminals, thereafter, occupied three chairs kept in the room and the chief among the three went up the stairs into the roof to an take over all view of the surrounding areas outside which he did for about three-four times whereafter he enquired from the informant as to whether he had any quarrel with Lalden. The informant stated that he had some dispute with him in respect of some land and that Laldeen had held out threats of



killing the informant as also of kidnapping his son. Two of the criminals who had entered into the rooms were also carrying country made pistols in their hand besides they also had put a *Chhura* in their waist band. The criminals asked the wife of the informant, i.e., P.W. 15 Suma Kumari to prepare tea for them and one of them went out of the house, telling the informant and others that he was going to look for his men. He came back a little later and by using the knife, he was carrying, he cut the green colour printed *Saree* hanging there into pieces and by using the pieces of the *Saree* tied the hands of the informant and his wife as also their mouths and when his wife P.W. 15 Suma Kumari had attempted to resist their attempt, she was given blows by the belt of guns on her shoulders and was also threatened that if she ever raised any protest, every one shall be killed. The criminals told the informant that he had become a *Rangdar* of Chandmari Road and was holding out threats to *Netajee* and thereafter, picking up the keys of the house searched every nook and corner of it to take away Rs.30,000/- which was kept in the hand bag of P.W. 15 which she had brought from her brother. Another amount of Rs. 700-800/- rupees which was lying in the bag of the



informant which was hanging there, also was taken away by the criminals. Another amount of Rs.9,000/- was picked up by the criminals from a box along with the ornaments belonging to P.W. 15. The criminals also snatched the chain which was around the neck of P.W. 15 and thereafter, picked up the sleeping P.W. 12 Unnat Raj from his bed, gagged his mouth by using the piece of the same *Saree* and also attempted to lift the younger ones who was sleeping but on protest by the informant and his wife as also at the intervention of one of the criminals, spared the child sleeping there. The criminals, thereafter, ejected from the house of the informant, but before that they put the wife of the informant P.W. 15 into another room and locked her.

5. After the criminals had left, the informant opened the back door of the room in which he had been locked and came out and went to the room in which his wife had been locked to trace her. He then came out of his house to see that the criminals were trading away in the lane and they disappeared with the child Unnat Raj, they had carried with them.

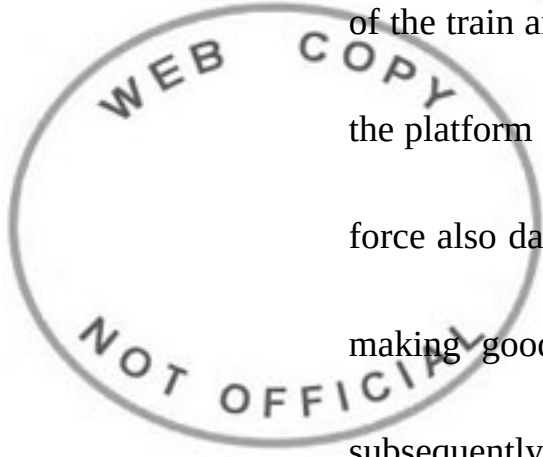
6. The report, i.e., *fardbeyan* was given by P.W. 13 to

A.S.I. Rajendra Kumar who was posted as Assistant Sub-Inspector of Police in Mokama police station and the investigation was also taken up by the said Assistant Sub-Inspector of police who drew up the First Information Report.

7. It appears from the evidence of P.W. 11 S.I. Krishna

Chandra, the Officer-in-Charge of Mokama police station, that for any particular reason he took over the investigation of the case from the above noted Assistant Sub-Inspector and what appears further from his evidence is that the parents of P.W. 12 had been asked by the kidnappers to send Rs.4,00,000/- through a person, who should wear a white shirt, a full-pant and must carry a *Gamacha* and come to Barahiya railway station for delivering the money only when P.W. 12 was to be released. Accordingly, after informing the senior police officers a team was formed by P.W. 11 and they came to Barahiya police station. As per the instructions of the kidnappers, the persons dressed up as per their wishes should travel by Vikramshila Express. The police force reached Barahiya station by synchronizing its arrival there with the time of arrival of Vikramshila Express and found that a man dressed up in the way noted

above and carrying a *Gamacha* had alighted from the last compartment of the train and was carrying a raxine bag. As soon as he put his steps on the platform near a temple, three persons rushed towards him. The police force also dashed towards the three persons out of whom two succeeded making good their escape, but the third was caught by them who, subsequently, disclosed his name as Pramod Kumar Mahto, resident of village Pitauihi, Police Station Bhadaur, District Patna and on questioning pointed out that kidnapping of Unnat Raj (P.W. 12) had been committed by Gauri Mahto (appellant), Nandan Mahto, Md. Aajam, Awadhesh Yadav @ Gama Yadav, Diwakar Yadav, Dhurba Yadav. He further pointed out that the kidnapped child was confined in the house of appellant Gauri Mahto @ Gauri Kumar situated at village Dumari within police station Barahiya. Accordingly, the police force being accompanied by the informant P.W. 13 and the arrested accused Pramod Kumar came to the house of appellant Gauri Mahto @ Gauri Kumar but did not find the child or anything from that house. The arrested accused Pramod Kumar, thereafter, pointed out that the child was indeed confined in the old house of appellant Gauri Mahto @ Gauri

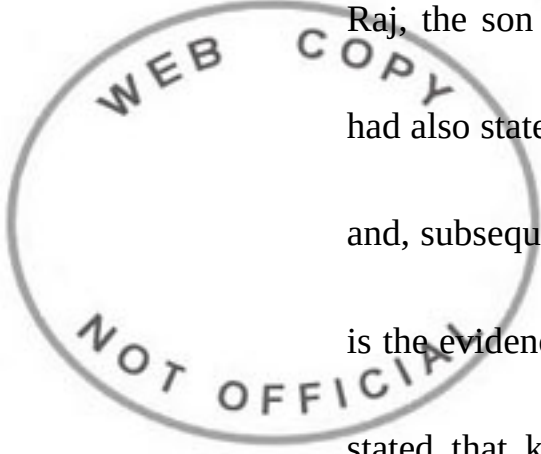


Kumar and, accordingly, the police force along with the informant Rajendra Kumar (P.W. 13) came to the old house of Gauri Mahto @ Gauri Kumar situated in the same village and from one of the rooms of the upper floor of the house recovered the child who was sleeping there. The appellant Sudhir Mahto @ Sudhir Kumar was also there in the same room and he was arrested by the police along with the appellant Gauri Mahto @ Gauri Kumar. P.W. 11 would say that he handed over the charge of the investigation after submitting charge-sheet against the appellants.

8. This is how the two appellants were put on trial.

9. Fifteen witnesses were examined by the prosecution in support of the charges. P.W. 1 Sanjay Mahto and P.W. 2 Sadanand Kumar were witnesses to seizure as also the making over of the child to his father. P.W.3 Jitendra Kumar was yet another witness to seizure P.W. 4 Bimla Devi was residing in the same house, in another room as tenant and P.W. 5 Raman was also a tenant in the same house. Both Bimla Devi and Ram had stated that they were watching television show when criminals entered their room and asked them to sit quietly and the

criminals put off the television and, subsequently, they learnt that Unnat Raj, the son of P.Ws. 13 and 15 had been kidnapped. P.W. 6 Serofina had also stated that a criminal had come and closed the door of her house and, subsequently, she also learnt that Unnat Raj was kidnapped. Similar is the evidence of P.W. 7 Imanul and P.W. 8 Pramod Chandra who have stated that kidnapping of Unnat Raj had taken place in the night on 24.10.2002. P.W. 9 Agyat Kumar was the child who was forced by the criminals to knock at the door of the informant so as to getting the doors opened and he testified to those facts and also to the fact that the criminals had taken away P.W. 12 Unnat Raj in that night. P.W. 10 Mahesh Das was yet another witness to the seizure as also the document prepared by the police in token of handing over the recovered child Unnat Raj to his father P.W. 13. P.W. 11, we have already pointed out, was the investigating officer of the case who had recovered the child. P.W. 12 was the victim of the offence itself. While his father Rajendra Kumar was examined as P.W. 13. P.W. 14 Panna Devi was the mother of Suma Kumari (P.W.15) the mother of Unnat Raj. Unnat Raj the victim, his father Rajendra Kumar (P.W. 13) and his mother Suma Kumari

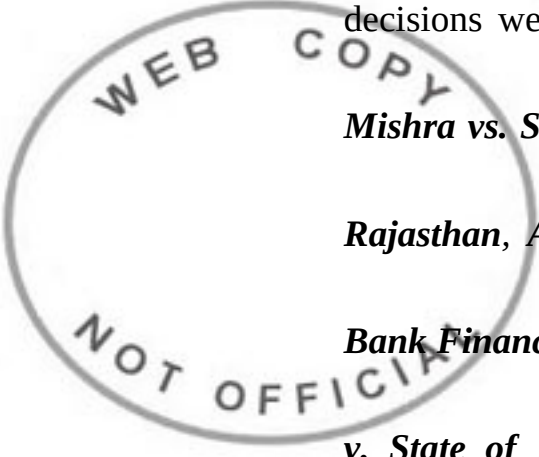


(P.W.15) along with P.W. 14 Panna Devi, the mother of P.W. 15 stated that Unnat Raj was taken away by the criminals in the night on 24.10.2002.

10. While Rajendra Kumar and Suma Kumari, the parents of Unnat Raj had given eye witness account of the occurrence as regards the manner of lifting the child and taking him away, Unnat Raj had stated that he did not indeed know that he had been taken away and when he woke up in the morning, he found himself at an alien place subsequently to know that he had been captivated by some persons whom he could not identify nor he could know their names and thus, the reason he did not identify any of the two appellants during trial. In spite of having supported the taking away of Unnat Raj (P.W. 12) by criminals Rajendra Kumar (P.W.13), the informant and his wife Suma Kumari (P.W.15) also refused to identify any of the criminals during the course of trial. P.W. 13 Rajendra Kumar had stated that he had accompanied the police up to the house from where his son Unnat Raj had been recovered by the police and the accused had been arrested. But, in spite of that he was not identifying either of the two appellants and was going to the extent by

saying that he had appeared in the test identification parade and had not identified any of them. In spite of this evidence regarding refusal of the witnesses who were very material as regards taking away of Unnat Raj and his recovery as also the arrest of the two appellants, the witnesses had equivocally supported the fact that Unnat Raj (P.W.12) had been taken away which fact also appears supported by the child Unnat Raj (P.W.12) in his evidence.

11. The learned counsel who appeared on behalf of appellant Sudhir Mahto @ Sudhir Kumar was emphatically arguing before us that there might be the evidence that Unnat Raj had been kidnapped but who were the persons who had committed the offence and how appellant Sudhir Mahto @ Sudhir Kumar had participated in kidnapping of the child remained to be established by the prosecution to be hilt. Submission was that the evidence was completely lacking as regards the identification of persons who had participated in commission of the offence, firstly, of taking the child away and thereafter his wrongful confinement or other parts of the offence. It was contended, as such, that there was no direct evidence of the nature to establish the

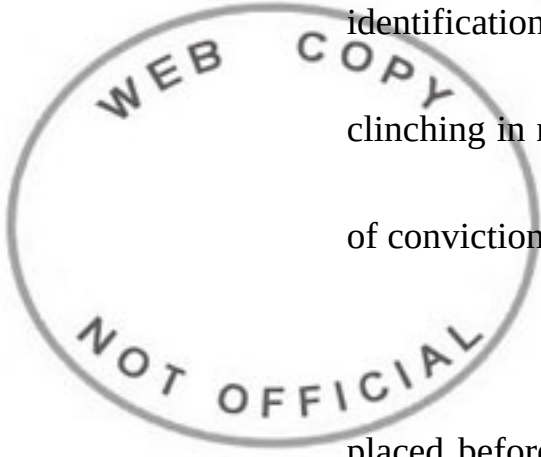


participation of appellant Sudhir Mahto @ Sudhir Kumar. A huge line of decisions were placed before us, like, **2008(2) PLJR 764 Vivekanand Mishra vs. State of Bihar, AIR 2004 SC 2865 Antar Singh v. State of Rajasthan, AIR 2006 SC 3626 Standard Chartered Bank v. Andhra Bank Financial Services Ltd. & Ors., AIR 2007 SCW 2609 Hatti Singh v. State of Haryana, AIR 2007 SCW 158 Jagjit Singh v. State of Haryana & Ors., 2002 Cr.LJ 2645 (SC) Krishna Mochi and others v. State of Bihar, 2002 SC 1659 Food Corporation of India Workers Union v. Food Corporation of India and another.** It was contended that in fact there was complete lack of evidence as regards appellant Sudhir Mahto @ Sudhir Kumar and he deserved to be acquitted.

12. Sushri Shashi Bala Verma, the learned Additional Public Prosecutor appearing on behalf of the State has drawn the attention of the Court to the evidence of all witnesses especially to that of P.W. 12 Unnat Raj, the victim of the offence in paragraph - 3 and submitted that at the time of recovery by the police, the child was still sleeping and that signifies the recovery had been made in the wee hours of the day of recovery. Sushri Verma submitted that there was consistent

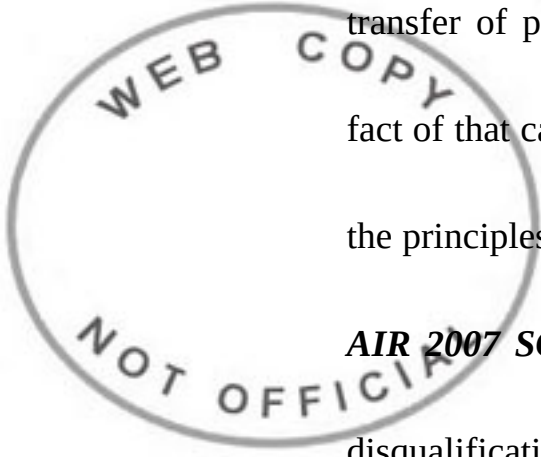
evidence as regards taking away of the child and as regards the identification of the appellants the very evidence of P.W. 11 could be clinching in nature and that could be enough for upholding the judgment of conviction which was passed by the learned trial Judge.

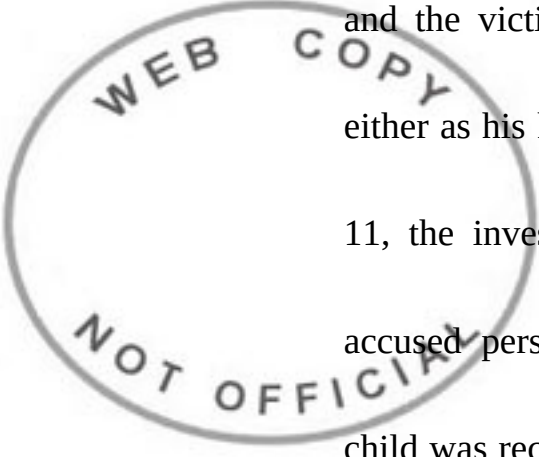
13. We have noted down the citations stands which were placed before us for our consideration and before we state anything as regards the application of those decisions to the facts of the present case we want to point out that a decision lays down a law only under the peculiar facts of that case. No decision could be universally applicable and that appear applicable to the present situation as well. **AIR 2004 SC 2865** (supra) is a judgment on the recovery of a pistols consequent upon the discovery statement made by a co-accused and it has been pointed out in that judgment that in view of the shortcomings which were appearing from the evidence available on record of that case the discovery evidence in that case was not convincing. So far as the decision in **AIR 2006 SC 3626** (supra) is concerned that was a case under some provisions of the Specific Reliefs Act as also under the Companies Act and issue of *res judicata* was involved, besides other issues which



were involved in that dispute in a company affairs matter along with the transfer of property through some assured transactions. Thus, the very fact of that case appears quite different from that of the present case and the principles laid therein could not be used by us in the present context.

AIR 2007 SCW 158 (supra) was a judgment of the Supreme Court on disqualification of some member of the Legislative Assembly in the State of Harayana and we are again to note that that particular judgment in Jagdish Singh's case did not have any application in the facts and circumstances of the present case. So far as the two decisions reported in **2002 Cr.L.J 2645(SC)** (supra) is concerned, we are of the view that this judgment helps the prosecution more than the appellants. In **Krishna Mochi**, the Supreme Court had considered the desirability of upholding the conviction recorded by the trial Court and by this Court, merely, on the basis of identification evidence of a single witness. After analyzing many previous decisions of the Supreme Court, it was ultimately held that even if there was a solitary identifying evidence which was found trustworthy, then in that case also a conviction on the basis of a single identification could be sustainable. Here in the present case, witnesses





who had been the family members of the victim, like, P.Ws. 13, 14, 15 and the victim himself (P.W. 12) did not identify the two appellants either as his kidnappers or his confiners. However, the evidence of P.W. 11, the investigating officer of the case who was led by one of the accused persons, namely, Pramod Kumar appears indicating that the child was recovered from one of the rooms at the first floor of the house of appellant Gauri Mahto @ Gauri Kumar and appellant Sudhir Mahto @ Sudhir Kumar was very much present in that house as a result of which appellants Gauri Mahto @ Gauri Kuma and Sudhir Mahto @ Sudhir Kumar both were arrested by the police. Thus, as regards the identification of the accused persons, the evidence was solitary, that is of P.W. 11 Sub Inspector of Police Krishna Chandra, who on the relevant date was posted as Officer-in-Charge of Mokama police station.

In *AIR 2007 SCW 2609 Hatti Singh v. State of Haryana*, the evidence was of recovery of certain articles said to be the belonging to the victim of the offence at the behest of appellant **Hatti Singh**, but what the Supreme Court found was that the evidence of recovery of articles said to be belonging to the deceased was not free from doubt and

the dead body which was recovered after fourteen days of the occurrence was also not identifiable. The colour of the clothes of the deceased had also faded and those were not tallying with the details of the clothes given in the First Information Report and inquest report in **Hatti Singh's** case. On these grounds, the mere evidence of the accused being seen last with the deceased of the appellant was held to be of no consequence and the accused was acquitted. We want only to point out that we do not have those evidences which were considered by the Supreme Court in **Hatti Singh's** case and, as such, that judgment is also not applicable to the facts of the present case.

14. The learned counsel appearing for the appellants attempted to inject Article 21 of the Constitution of India into the facts of the present case, it appears to us a futile attempt to influence over mind, because the procedure for trial are recognized and just fare under which all accused persons were tried in the sessions case. The appreciation of the evidence is also made under the recognize principles of law as per the time tested provisions of the Indian Evidence Act. The principles of fair trail are adhered to under which at every stage of the

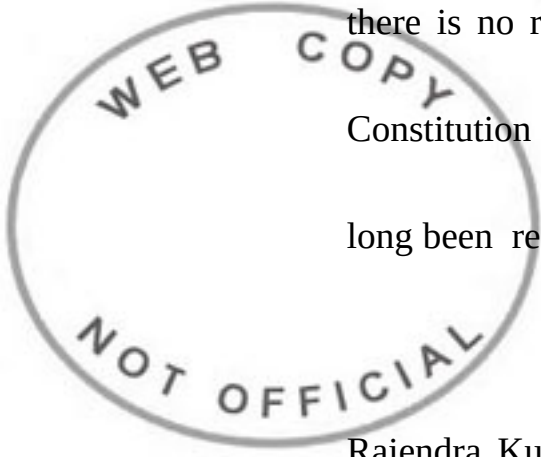
trial the accused is afforded an opportunity of being heard. He is heard at the time of framing of charges. He has the opportunity of cross-examining the witnesses, then he had yet another important opportunity of explaining the circumstances appearing against him from evidence when he is questioned under Section 313 Cr.P.C. Before arguments are heard an accused gets the opportunity of leading his evidence in defence.

The Courts have been vested ample powers of summoning or recalling any person for his evidence or for further cross-examination and the power is so wide that a Judge may put any question of any witness even inadmissible and irrelevant if he feels so to do necessary for the ends of justice and also for the just decision of the case. Thus, no accused could complain of being tried by undermining the fair and reasonable procedures which have been set down by the Cr.P.C. or allied Acts or by the recognized practice prevailing in Courts in criminal trials. I want simply to borrow the words of **Justice H.R. Khanna** that criminal trials are not fairy tales. And to us, if the criminal trials are not fairy tales, then no one is entitled to put tails to it by injecting constitutional aspects which could not be relevant to the trial or post trial proceedings. A trial

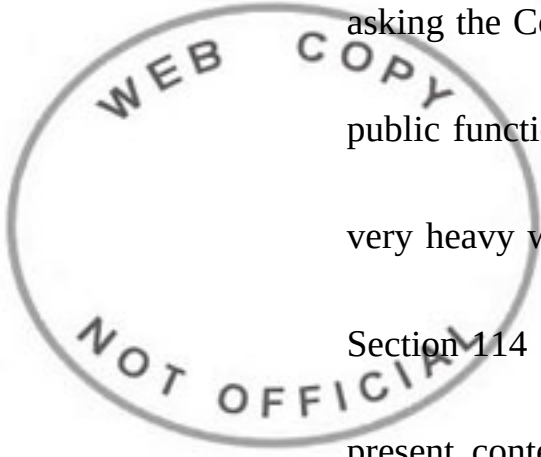
has to be concluded as per the procedure laid down by law and as such, there is no room to inject the principles underlying Article 21 of the Constitution in a Sessions trial as those practices and procedures have long been recognized to be constitutionally approved procedures.

15. Coming to the facts of the case, it is true that

Rajendra Kumar (P.W.13) who was very well present at the time of recovery of his son at the house of appellant Gauri Mahto @ Gauri Kumar was not supporting the fact that it was appellant Sudhir Mahto @ Sudhir Kumar who had been arrested from there, but the very fact that his son was recovered from a particular house by P.W. 11 Krishna Chandra gets support from him. That support also comes from the documents, like, the seizure memo in respect of seizure of a charger from that particular room from where P.W. 12 Unnat Raj recovered. Unnat Raj also said that he had been recovered in the wee hours of the day when the police had found him sleeping in the room of a particular house. Search and recoveries are made as per procedure laid down by Section 100 of the Cr.P.C. and, as such, every step which is taken or performed by a police officer in making the search so as to recovering anything from any



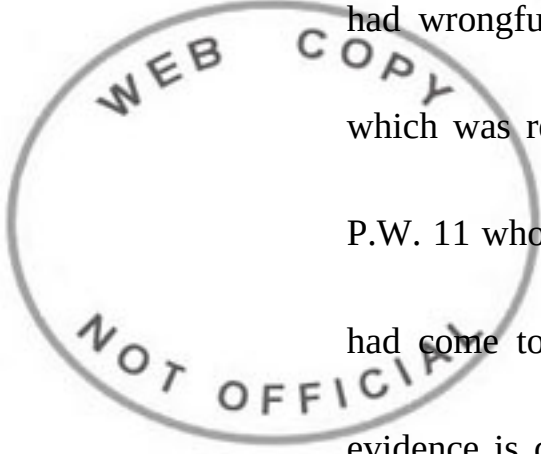
place is the part and partial of his official duties and if some one was asking the Court to draw an inference adverse to those acts of discharge public functions by a public servant, then, in our opinion, the burden is very heavy which lies upon such a person to discharge it. Not only that Section 114 of the Evidence Act could be very well come handy in the present context as the victim was recovered from the very conscious possession of the two appellants. Appellant Gauri Mahto @ Gauri Kumar was very much the proprietor of the house and appellant Sudhir Mahto @ Sudhir Kumar was very well present therefrom where the child was recovered. Provisions of Section 114 of the Evidence Act requires the Court to draw such inferences considering the facts and circumstances of the case in tandem with ordinary human behaviour and natural events and then illustrates the provision by different illustrations. If a person is found in possession or in custody of a child, like, P.W. 12 Unnat Raj, immediately, or almost, immediately, after the commission of the offence, he has to be presumed either to be the kidnapper or the wrongful confiner of that child. The recovery was, after about fifteen days of incident and we may be aware that it may not be “immediately” after the



occurrence. But, should not we point out that an offence of kidnapping for the purpose of realizing ransom is a continuing offence so long as either the kidnapped person has been recovered or a definite conclusion has been drawn on the fate of the victim. Every second of the incident till Unnat Raj was recovered was followed immediately by the other second, and, as such, Section 114 of the Evidence Act, to our mind, is fully applicable to the facts of the case.

16. The meaning of direct evidence is that evidence which finally decides an issue. The direct evidence could be coming from a single witness or the evidence could be direct after taking into account the evidences of many witnesses. The evidence as regards the kidnapping of Unnat Raj is direct when it was coming from himself as also his parents Rajendra Kumar (P.W. 13) and his mother Suma Kumari (P.W. 15) with the evidence of other witnesses. As regards the direct evidence regarding the participation of the two appellants it comes from P.W. 11 and that raises two inferences. The first inference, we have already pointed out is that on account of being found having the custody of P.W. 12 both the appellants have either to be presumed as the

kidnappers of P.W.12 Unnat Raj or have to be presumed as persons who had wrongfully confined the victim for realizing the sum of money which was required to be paid by their parents as per the evidence of P.W. 11 who had stated that a man as per the direction of the appellants had come to the Barahiya railway station to deliver the money. One evidence is direct as regards the wrongfully confining the victim; the other is circumstantial in nature raising the inference of participation of the two appellants in commission of the offence of kidnapping for the purpose of realizing ransom. We want further to point out that if one could have considered the provision of Section 364A of the Indian Penal Code one could find that the very provision indicates the compartmentalization of activities which are indulged into by different persons of a gang which is engaged in kidnapping or abducting persons for realizing ransom. It first speaks of kidnapping. Thereafter, it speaks of wrongfully confining the person. Then it indicates that by kidnapping and wrongfully confining the person there might be some initiation for realizing of the ransom amount and in connection with the negotiation for the payment of ransom amount there might be threats of causing



murderous hurt or even death to the victim. whoever, as such, indulges in any of the above acts which are associated with an offence of kidnapping in our opinion, is very well covered by Section 364A Indian Penal Code and could not escape the liability under that provision.

17. We find on the analysis of the evidence of the prosecution that the solitary evidence of P.W. 11 in tandem of all evidences including that of P.W. 12 was sufficiently indicating that the two appellants had definitely indulged in the commission of the offence under Section 364A Indian Penal Code.

18. In the result, we do not find any merit in the two appeals. The same are dismissed.

(Dharnidhar Jha, J.)

(Gopal Prasad, J.)

Brajesh Kumar/Kundan
A.F.R.

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