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

+ CRL.A. 714/2012 & CrI.M.B.3069/2015

% *Judgment dated 20.05.2015*

RAJBIR & ANR Appellant
Through: Mr.D.B. Goswami, Advocate

versus

STATE Respondent
Through: Mr.Feroz Khan Ghazi, APP for State
with Insp. Kamal Kishore, P.S. Civil Lines.

+ ***CRL.A. 1242/2012***

BHARAT @ BHARTA Appellant
Through: Mr.Chetan Lokur, Advocate

versus

STATE Respondent
Through: Mr.Feroz Khan Ghazi, APP for State
with Insp. Kamal Kishore, P.S. Civil Lines.

+ ***CRL.A. 797/2012 & & CrI.M.B.3313/2015***

NEERAJ Appellant
Through: Mr.S.B. Dandapani, Advocate

versus

STATE Respondent
Through: Mr.Feroz Khan Ghazi, APP for State
with Insp. Kamal Kishore, P.S. Civil Lines.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

1. The above three appeals arise out of a common judgment dated
07.3.2012 and order on sentence dated 31.3.2012, by which all the

CRL.A. 714, 1242 & 797/2012

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appellants were sentenced to undergo rigorous imprisonment for life for the offence punishable under Sections 120-B/364-A and 368 IPC and to pay fine of Rs.10,000/- each, in default thereof further simple imprisonment for four months each. In addition thereto, appellant Rajbir was also sentenced, for the offence punishable under Section 411 IPC, to undergo rigorous imprisonment for two years and to pay fine of Rs.2000/-, in default thereof simple imprisonment for fifteen days.

2. The case of the prosecution is that the victim Om Prakash left his home on 26.10.2010 at about 9:00 p.m. informing his wife that he would return within 2 – 3 days. As the victim did not return, his wife lodged a report with the Police, which was recorded vide DD No.27 on 31.10.2010 and subsequently on 4.11.2010, an FIR was registered on the statement of the wife of the victim (Nanhi). It is also the case of the prosecution that the wife of the victim, Nanhi received demands for ransom through mobile phone of her husband; and the kidnappers asked her to reach Dhaulpur petrol pump with the ransom money; upon which Nanhi and her son went to Dhaulpur on 5.11.2010 along with the police party. While appellants, Rajbir and Damodar came to collect the ransom money, they were apprehended. The motor cycle on which they came to collect the ransom money was also seized; the mobile phone of the victim was recovered from them and on interrogation, they named Neeraj and Bharat for having kidnapped and confined Om Prakash at Muraina. Thereafter on 9.11.2010 a police party was organized, they reached Muraina and recovered the victim, Om Prakash, from the appellant, Bharat @ Bharta. On 12.11.2010, Neeraj was also apprehended. The prosecution examined 15 witnesses in all, however, no evidence was led by the defence.
3. Counsel for the appellants submit that the appellants have been falsely

implicated in the case. It is contended that the judgment is based on surmises and conjectures, there is no evidence which would point towards the guilt of the appellants and to the contrary there are material contradictions in the testimonies of the material witnesses being PW-1 (wife of the victim), PW-3 (neighbour), PW-14 and PW-15.

4. Counsel for the appellants submit that as per PW-1 the wife of the victim, her husband left the house on 26.10.2010. Counsel further submit that although in her testimony in court no date has been given but in the complaint made to the police being DD No.27, it has been stated that her husband left the house on 26.10.2010 at about 9:00 p.m. While according to the victim PW-4, he had left the house on 27.10.2010. It is further submitted that as per the victim, he had made a phone call to his wife, informing her about his kidnapping on 29.10.2010, whereas surprisingly PW-1 did not inform the police either when DD no.27 was recorded on 31.10.2010 or on 4.11.2010 when the FIR was registered that she had received a phone call on 29.10.2010 from her husband informing her that he had been kidnapped. Counsel for the appellants contend that this is a very vital piece of information, which was either withheld or no phone call was ever received, as surely in case a phone call with regard to kidnapping of her husband had been received, she would have informed the police about the same.
5. It is next contended by counsel for the appellants that the testimonies of the witnesses are unreliable for the reason that as per the victim on 27.10.2010 he was contacted by a person by the name of Sunil Tyagi from Muraina, Madhya Pradesh on his mobile phone and requested for a meeting as he wanted to get some *Puja* done with regard to the ill-health of his Aunt (*Tai*). PW-4 has also testified that he had asked Mr.Sunil Tyagi to meet him at 2:30 p.m. at Mother Dairy, Majnu Ka Tila; after

meeting him PW-4 had agreed to conduct the Puja, PW-4 took him to his house where both he and Sunil Tyagi had lunch together and Sunil Tyagi gave him Rs.700/- out of which he gave Rs.200/- to his wife (Again said that he had given Rs.300/- to his wife instead of Rs.200/-) and thereafter both of them left for Muraina.

6. Counsel for the appellants further submit that this vital piece of information with regard to victim last seen in the company of Sunil Tyagi is not reflected either in the DD entry, or in the FIR or in the testimonies of PW-1 or her son PW-10. It is contended that it is highly improbable that PW-1 would not disclose this fact to the police or she would overlook the same, as Sunil Tyagi was in their house for about 4 hours and PW-1 served him lunch as well. Counsel further contends that as per PW-4 he had called up his wife on 29.10.2010 from his mobile. However, this fact does not find mention in the testimony of PW-1, although, PW-1 has testified that a ransom call was received on the phone of her son (PW-10), a demand of Rs.20.0 lacs was raised; and the caller had asked her to bring Rs.20.0 lacs at Dholpur, Rajasthan.
7. Counsel contend that call records have been filed on record by the prosecution, as per which no call was made from the mobile phone of the victim to the phone of his wife or son on 29.10.2010. Counsel further submits that PW-4 has testified that his phone was taken away from him on 29.10.2010, whereas, as per the testimony of PW-3 he had received phone calls from the mobile of the victim, Om Prakash and the caller wanted to talk to Nanhi, who was handed over the phone which was used to talk to the caller. The call details show that calls were made to PW-3 on 27th, 28th, 30th, 31st of October, 2010 and on 1st, 2nd, 3rd and 4th of November, 2010. In case the testimony of PW-3 is to be believed then there is no explanation as to why up to the date of registration of the

FIR the wife of the victim did not inform the police about the same. No explanation has been given by wife of the victim to this effect.

8. It is also contended by counsel for the appellants that there are also material contradictions with regard to the manner in which the appellants (Rajbir and Damodar) were arrested. It is contended that as per the testimony of PW-1, she along with her son and police team went to Dhaulpur, Rajasthan at the petrol pump. After they reached the petrol pump she received a phone call from the mobile of her husband, seeking confirmation as to whether they had reached the petrol pump or not. Thereafter two persons (Rajbir and Damodar), whom she identified in court, came on a motorcycles they showed her the mobile phone of her husband. She apprehended Rajbir and her son apprehended Damodar. Police party also reached over there. She has also testified that she was carrying a blue coloured bag containing papers in the form of packets, which fell down. Some third person came there and fled with the bag. The testimony of PW-10, step son of the victim, is completely silent with regard to his accompanying his mother or the police party to Rajasthan or his apprehending Damodar.
9. Counsel further submit that as per PW-1, blue bag was taken away by some unknown person, whereas as per PW-14, Inspr. Rakesh Kumar and PW-15, SI Rakesh Kumar, the bag was coloured (red and blue), which was seized and the seizure memo was signed by PW-1. Counsel further contend that as per the testimony of PW-14, the team reached Dhaulpur, Rajasthan. The caller kept on calling PW-1 and demanding Rs.20.0 lacs for release of her husband. The caller and also informed PW-1 to reach Kali Mata Mandir, RAC Dhaulpur, with the ransom amount. PW-14 further goes on to testify that they reached the spot in a private Qualis but none was present. Thereafter Nanhi was instructed to reach

Dhaulpur bus Adda, but none was present there as well and thereafter Nanhi was directed to reach the petrol pump near the bus Adda. She was also informed that two boys would come on a motor-cycle to collect the ransom amount. Thereafter two boys came on a motorcycle they took the bag from the hands of the complainant and tried to escape. ASI Harpal Singh came in front of the motor cycle to stop them, however, he was hit due to which he fell down and the boys tried to speed away when PW-14 with head constable Subhash came in front of the motor cycle, pushed the riders due to which the motor-cycle fell down and the boys were caught.

10. Counsel submits that the manner of arrest of Damodar and Rajbir is in sharp contrast to the sequence of events narrated by the PW-1. Counsel appearing for the appellant (Neeraj @ Sunil Tyagi) submits that in the testimony of PW-1 and PW-10 it has nowhere been stated that Neeraj @ Sunil Tyagi had lunch with the victim and stayed in their house for 4 – 5 hours. It has also been contended that at the time when Neeraj @ Sunil Tyagi was arrested a Nokia phone without SIM card was seized having IMEI No.355353005759350. It is contended that there is nothing on record to connect this mobile phone with appellant (Neeraj @ Sunil Tyagi). It is also contended that Neeraj @ Sunil Tyagi was arrested on a disclosure statement made by the co-accused Anil (who was then discharged). Anil had given the mobile number of Neeraj @ Sunil Tyagi as 7869027729. It is contended by counsel that the identification sheet with respect to this mobile number shows the owner of the mobile phone to be Atar Singh and the call details which have been placed on record do not show that any call was made from this number to the victim (Om Prakash) on any date. Thus the testimony of the victim is unreliable that he had received phone call from Neeraj @ Sunil Tyagi on 27th October,

2010 and they had decided to meet at Mother Dairy, Majnu Ka Tila. Moreover, as per the testimony of PW-4 in his cross-examination he had deposed that since he did not know Neeraj @ Sunil Tyagi, he and Neeraj @ Sunil Tyagi identified each other at Mother Dairy while talking with each other on the mobile phone which would clear the doubt that the first call received from Sunil Tyagi to the victim was from a landline or that Neeraj @ Sunil Tyagi did not possess a mobile phone on 27.10.2010. It is contended that the testimony of PW-4 is unreliable also for the reason that PW-4 has testified that he called his wife on the 29.10.2010. This fact is not acknowledged by his wife, nor it turns out to be confirmed from the call record.

11. Counsel for the appellant (Bharat @ Bharta) has additionally argued that the conduct of this appellant would show that he is innocent and has been falsely implicated as according to the prosecution he was arrested from his house on 9.11.2010. It is contended that it is against human conduct that in case he was part of the conspiracy and he would be aware that two persons being Rajbir and Damodar had gone to collect the ransom money on 5th of October, 2010, and in case they did not return by 9th of October, 2010, he would have smelt danger and would have absconded. Counsel further contends that the evidence of the witnesses are unreliable and there is contradiction even to the extent that as per PW-5 (brother of PW-1), mobile phone was given to her by PW-5, whereas as per PW-10 the son of PW-1 owner of the mobile phone is one Irfan who is his friend.
12. Counsel for the appellants further submit that the entire sequence of events are unbelievable as it has nowhere been testified by the victim that he was tied with any rope or he was shown any weapon and in fact he has testified that he was given food; but he did not run away out of

fear of his life. Counsel submits that the victim had ample opportunity to run away from his abductors, as he was kept in a field which was surrounded by *Bajra* stick (*Bambo hut*).

13. Mr.Feroz Khan Ghazi, learned APP for the State submits that the prosecution has been able to prove its case beyond any shadow of doubt; the victim PW-4 Om Prakash has identified Neeraj @ Sunil Tyagi as the person, who had contacted him on telephone and requested him to conduct Puja for his Aunt (*Tai*). He met him on 27.10.2010 and had left for Muraina with him.
14. Learned APP for the State also contends that PW-4 has vividly stated that after leaving Majnu Ka Tila a bus was taken from Mall Road to Sarai Kale Khan and thereafter a bus from Sarai Kale Khan to Agra was taken; and from Agra they boarded on a train and reached Muraina at 8:45 a.m.. Counsel further submits that this witness has also identified appellants Rajbir and Bharat @ Bharta. He has also testified that he had made a phone call to his wife on 29.10.2010 and thereafter mobile was snatched away from him. He has also given a description how he was rescued on 9.11.2010 in the presence of the appellant Bharat. It is also contended that PW-4 has withstood the cross-examination.
15. Learned APP further contends that the call chart would show that repeated phone calls were made by the victim or the kidnappers from his mobile to the wife of the victim and neighbour, which would show that he was desperate for his release and the kidnappers were desperate to recover the ransom money. APP for the State also clarifies that merely because the wife of the victim did not inform the police that she had received a phone call from her husband that he had been kidnapped and ransom has been demanded, is not fatal to the case of the prosecution. He also contends that the contradictions which have been pointed out by

counsel for the appellants are minor contradictions and they do not go to the root of the matter. It is also contended that all the witnesses have given a clear description of the manner in which Damodar and Rajbir were arrested and how victim (PW-4) was rescued in the presence of Bharat and the Neeraj was arrested from his house. Counsel for the State also contends that the call records would show the location and movement of the victim which would also show that he was moved from one place to another so that the police could not locate them.

16. The first submission of learned counsel for the appellants is that the testimonies of the material witnesses do not inspire confidence, there are material contradictions which go to the root of the matter and in view there of it would be highly unsafe to uphold the judgment of conviction.
17. We have heard learned counsel for the parties and also carefully examined the testimonies of the material witnesses. PW-1, Nanhi is the wife of the victim. She has testified that her husband, Om Prakash, is a Pandit by profession. In the month of October, 2010, around Deepawali her husband had left the house at about 9.00 p.m. informing her that he was going for puja and would return after two-three days. As her husband did not return, she tried to contact him on his mobile phone and since she could not contact him, she lodged a missing report with the Police. Thereafter a ransom call was received by her on the telephone of her son and a demand of Rs.20.00 lakhs was raised. The caller had informed PW-1 to bring Rs.20.00 lakhs at Dhaulpur, Rajasthan, otherwise her husband would be killed. PW-1 has further testified that the call was made from the mobile phone of her husband. She has also testified that her neighbour, Jitender Kabari, PW-3, has also received a telephone call in connection with the ransom amount. She had also talked from the phone of Jitender Kabari and the caller had threatened

her not to inform the Police otherwise her husband would be killed. She along with her son and Police team went to Dhaulpur, Rajasthan, at petrol pump. It is also testified that there she received a phone call from the mobile of her husband to confirm whether she had reached the petrol pump or not. Thereafter two persons came on a motorcycle (PW-1 pointed out towards Rajbir and Damodar), they showed the mobile phone of her husband and thereafter she apprehended Rajbir and her son apprehended Damodar. Police team also reached there. PW-1 has also stated that she was carrying a blue coloured bag, containing papers in the form of packets, which fell down and some third person came there and fled away with the bag. Both, Rajbir and Damodar, were apprehended and brought to Delhi. Their disclosure statements were recorded, which were signed by her. The mobile phone of her husband and the motorcycle were seized by the Police vide memos, Exhibits PW-1/D and PW-1/E respectively.

18. PW-2, Ct.Shokin Pal, has testified that on 31.10.2010 at about 5.45 p.m. PW-1 came to the Police Post and lodged DD No.27 PP regarding missing of her husband.
19. PW-3, Jitender Kabari, has testified that his mobile number is 9312884103. He has further testified that Om Prakash used to reside in front of his house and Nanhi was his wife. He had received phone calls on his mobile and the caller wanted to talk to Nanhi. The phone call was received on 28.10.2010 and thereafter as well. He used to hand over his phone to Nanhi, who used to talk to the caller.
20. The star witness in this case is the victim, Om Prakash, PW-4. He has testified that he is a Pandit by profession. On 27.10.2010 he was at Adarsh Nagar when he received a call on his mobile phone from a person called Sunil Tyagi from Muraina, Madhya Pradesh. He wanted to

meet him in connection with puja for his aunt, who was unwell. PW-4 had fixed a meeting with him at Mother Dairy Majnu Ka Tilla. The said person met him at 2.30 p.m. Om Prakash (PW-4) agreed to perform puja at Muraina. Thereafter PW-4 took him to his house where both had lunch. Om Prakash was given Rs.700/- by Sunil Tyagi out of which he gave Rs.200/- to his wife and thereafter they both left for Muraina. The person was identified in Court as Neeraj. PW-4 has further testified that thereafter a bus was taken by them from Mall Road to Sarai Kale Khan and from Sarai Kale Khan to Agra. They reached Agra after midnight. From the railway station, a passenger train was boarded at 6.00 a.m., which reached Muraina at 8.45 a.m. After crossing railway line a person on a motorcycle met them, who was referred to Sunil Tyagi as Neeraj and Sunil Tyagi called him as Rajbir. All three sat on the motorcycle. After crossing two villages they reached a dense forest. Both, Neeraj and Rajbir, made him sit as a hostage. Thereafter at 7.00 p.m. Rajbir took him on his motorcycle to a field of bajra crop where one person named Bharat was present. Rajbir handed over PW-4 to Bharat, who kept him as a hostage for two-three days, forced him to call his wife or family from his mobile and asked for Rs.20.00 lakhs as ransom. Accordingly, PW-4 called up his wife on 29.10.2010 and while talking to his wife, his mobile phone was snatched by Bharat, who kept the phone with himself. After two-three days Neeraj also came. PW-4 was kept there for several more days when on 9.11.2010 at about 9.00 p.m., Police came and apprehended appellant Bharat, PW-4 was rescued and brought to Delhi. PW-4 was again taken to Muraina by Police on 12.11.2010 when appellant Rajbir and one Anil were also with them, who led them to a Village from where Neeraj was got arrested. PW-4 correctly identified his mobile.

21. During his cross-examination, PW-4 has testified that Sunil Tyagi @ Neeraj remained in his house for about 4-5 hours and his wife had also served meals to them. She had also seen Sunil Tyagi @ Neeraj at that time. PW-4 also stated that Neeraj Tyagi had taken Rs.200/- from him as he was short of funds. PW-4 has further testified that he had called his wife and sister in the night intervening 27/28.10.2010 on the way to Agra and thereafter the call was made by him at the instance of the accused persons. He has further testified that after reaching Muraina, he was taken to a dense forest and kept in the open. It is further testified by him that he was not tied with any rope. Around the bajra field, there were bushes, forest area as well as the plain space. He was given meals only once a day and sometimes offered tea. Meals consisted of one or two chapattis, sometimes with chutney and sometimes with vegetables. He did not try to run away as he had fear of his life, although the accused did not show any weapon to him. He was kept by appellant Bharat @ Bharta inside the field at a small place surrounded by bajra sticks and no one had come to meet him except Neeraj. Bharat did not allow him to come in the open and used to threaten him. Further during cross-examination PW-4 has testified that his wife knew that he was going with Sunil Tyagi @ Neeraj.
22. PW-5, Gulfam, has testified that he had handed over mobile with number 8750452169 to his sister, Nanhi, the wife of Om Prakash.
23. PW-10, Deen Mohd. @ Guddu, is the step son of the victim. He has testified that on 26.10.2010 his father had left the house at 9.00 p.m. to perform puja paath. Since his father did not return the next morning, they searched for him. On 31.10.2010 his mother lodged a Police report. PW-10 disclosed his mobile number as 8750452169 and that of his father as 9718355298. He has further testified that on 31.10.2011 a call

was received from the mobile of his father on his mobile number. The caller demanded Rs.20.00 lakhs and told them to bring the amount at Dhaulpur, failing which his father would not be spared and killed. The caller had also talked to his mother.

24. In his cross-examination, PW-10 has testified that the owner of the mobile phone no.8750452169 is Irfan, who is his friend.
25. PW-12, ASI Harpal Singh, and PW-14, Inspr.Rakesh Kumar, as also PW-15, SI Rakesh Kumar, have testified on similar lines. PW-15, SI Rakesh Kumar, has testified that on 5.11.2010 he along with SI Harpal Singh, Inspr.Rakesh Kumar, HC Subhash, HC Sushil, W/Ct. Varnika, complainant Nanhi and her son left for Dhaulpur, Rajasthan, in a Qualis vehicle. The ransoms call were continuously being made on the way. The caller was demanding Rs.20.00 lakhs for the release of the husband of the complainant. The caller had asked the complainant to reach Kali Mata Mandir, RAC, Dhaulpur, with the ransom amount but none was waiting there. Thereafter the caller asked the complainant to reach Dhaulpur Bus Adda (Stand) but none was present there as well. Thereafter the complainant was told to reach petrol pump near bus adda. The caller instructed her that two boys would come on a motor cycle to collect the ransom amount and on seeing the complainant's husband mobile, ransom amount of Rs.20.00 lakhs would be given to them and only then the husband of the complainant would be freed. This witness has further testified that then they reached at the petrol pump, discussed the action to be taken, took position near the surrounding areas and instructed the complainant to stand at the petrol pump with the bag in which newspapers had been kept. Within 15-20 minutes two boys came on one Honda Splendour motorcycle. The driver of the motorcycle showed the mobile phone to the complainant, the pillion rider took the

bag from the hands of the complainant and they immediately tried to escape by speeding on their motorcycle. ASI Harpal Singh immediately came in front of the motorcycle to stop them but they hit him, due to which ASI Harpal Singh fell down and the boys again tried to speed away. Then Insp. Rakesh along with HC Subhash came in front of the motorcycle and pushed the riders. The motorcycle fell down and the boys were caught. Mobile phone was recovered from the possession of Rajbir and identified by the complainant as the one belonging to her husband. The bag was recovered from the possession of Damodar. Thereafter this witness has described the proceedings, which were conducted by them. This witness has also testified that on 9.11.2010 accused Anil (since discharged) was arrested. On 11.11.2010 he along with Police team, accused Rajbir, Anil and the victim Om Prakash went to Amba Moraina when Neeraj was apprehended on 12.11.2010 from his house at the instance of accused Anil. Neeraj was also identified by the victim Om Prakash. Thereafter the witness has described the proceedings taken by him.

26. We have carefully analysed the testimonies of the material witnesses, which have been discussed hereinabove. We find the testimonies of PW-1, wife of the victim; PW-10, son of the victim; and PW-4, victim himself to be unreliable. According to the testimony of the victim phone call was made from his mobile to his wife on 29.10.2010 whereas call records placed on record would show that no phone call was made from the phone of the victim to his wife on 29.10.2010. The records in fact would show that PW-1 wife of the victim had made one phone call on 2.11.2010 at 11.30 a.m. to PW-4 and thereafter on 2.11.2010 and 3.11.2010. There were phone calls from PW-4 to PW-1 as also on 4.11.2010 and 5.11.2010. PW-1 has also made a phone call to PW-4 on

3.11.2010 at 9.20 a.m.; on 5.11.2010 at 9.46 a.m., 10.30 a.m., 10.40 a.m. and 10.51 a.m.

27. We find it highly unusual that the wife of the victim did not inform the Police when DD No.27 was recorded on 31.10.2010 that she had received a ransom call informing her that her husband had been kidnapped. Call details show that there have been calls upto the date of registration of FIR but no mention has been made by PW-1 in her complaint that she had received ransom calls, which casts a serious doubt in the testimony of PW-1 and her husband, PW-4.
28. There are contradictions between the testimonies of PW-1 and PW-10 with regard to arrest of Damodar and Rajbir. As per PW-1 she apprehended Rajbir and her son, PW-10, apprehended Damodar, whereas the testimony of her son PW-10 is completely silent with regard to apprehending of Rajbir and Damodar. PW-1 has also testified that based on the instructions of the kidnappers she along with the Police party reached the petrol pump at Dhaulpur, Rajasthan, whereas there is no mention of these sequence of events in the testimony of PW-10.
29. It may also be noticed that the three Police witnesses i.e. PW-12, PW-14 and PW-15 have testified in their testimonies the manner in which Damodar and Rajbir were arrested by them, and how they initially were asked to reach Kali Mata Mandir, RAC, Dhaulpur; thereafter to Dhaulpur bus adda and thereafter the petrol pump, whereas all of the above have not been testified either by PW-1 Nanhi or her son, PW-10.
30. There are also material contradictions in the testimonies of PW-1 and PW-4. As per the testimony of PW-1 her husband went missing on 26.10.2010 as informed by her while recording DD No.27, while PW-4, victim Om Prakash, has testified that he had left the house on 27.10.2010. As per PW-4, he had received a call from Sunil Tyagi

requesting him to perform certain puja for the ill health of her aunt (tai), he agreed to meet him at mother dairy, Majnu Ka Tilla, thereafter he kept talking to him in the phone to identify him, but the call records of the victim do not show any telephone call from the mobile phone of Sunil Tyagi. While PW-4 has testified that he brought Sunil Tyagi to his house and spent 4-5 hours with him; his wife also provided them with lunch; and Sunil Tyagi had given Rs.700/- to him, out of which he gave Rs.300/- to his wife, the testimony of PW-1 is completely silent with regard to presence of Sunil Tyagi at their house on 27.10.2010 for 4-5 hours and her providing lunch to him and her husband or that her husband had informed her that he is accompanying Tyagi to Muraina, which would have been a very vital clue to the Police. It may also be noticed that PW-1 neither informed the Police about her husband last seen in the company of Sunil Tyagi nor his performing Puja for the aunt of Sunil Tyagi nor having received Rs.300/- from her husband before leaving. There is no explanation in the testimony of PW-1 with regard to aforesaid facts.

31. It has repeatedly been held that the contradictions which do not go to the root of the matter cannot dent the case of the prosecution but in case the evidence is incredible and cannot be accepted by the test of prudence then it may create a dent in the prosecution version. In case of *Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr.*, reported at (2013) 12 SCC 796, the Apex Court held as under:

“As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot

be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (See *Leela Ram vs. State of Haryana* and another, *Rammi alias Rameshwar v. State of M.P.* and *Shyamal Ghosh v. State of West Bengal*).”

32. In another case of *State of Gujarat vs. Kishanbhai etc*, reported at (2014) 5 SCC 108, it was held that glaring inconsistencies and infirmities in statement of witnesses render their statements unreliable. Hence benefit of doubt must be given to the accused.
33. We may also notice that during cross-examination PW-4 has testified that his wife knew that he was going with Sunil Tyagi. We find the testimony of PW-4, the victim, to be neither trustworthy nor reliable. As per the testimony of PW-4, after leaving his house Sunil Tyagi and he took a bus from Mall Road to Sarai Kale Khan and another bus was taken from Sarai Kale Khan to Agra. From Agra Railway Station a passenger train was boarded at 6.00 a.m., which reached Moraina at 8.45 a.m. Thereafter they crossed the railway line and from an open space one person on motorcycle called Rajbir met them, they sat on the motorcycle and Rajbir took them to the forest after crossing two villages. Both, Neeraj and Rajbir, had made him sit as a hostage. Thereafter Neeraj left leaving the victim with Rajbir. In the evening at 7.00 p.m., Rajbir took him on his motorcycle to a field of Bajra crop where one person, namely, Bharat met him and handed over the victim to Bharat. Bharat had kept him hostage for 2-3 days and forced him to call his wife.
34. It is extremely improbable that once the victim had learnt that he had been kidnapped, he did not try to escape. It may be noticed that initially

the victim was sitting on a motorcycle with Rajbir and Suil Tyagi but thereafter he was handed over by Sunil Tyagi to Rajbir, who had taken him to a forest after crossing two villages. When the victim was sitting on the motorcycle he could have escaped or at least drawn the attention of the public.

35. During cross-examination, PW-4 the victim has testified that he was not tied with any rope or any other thing; he was kept in a field surrounded by bushes and forest area; and he was not shown any weapon but he was under fear. Further during cross-examination he has testified that “*the accused Bharat was always with me and he had kept me inside the field at a small place surrounded by bajra sticks (like bamboo hut)*”. A reading of the testimony of PW-4 would show that PW-4 was not confined to any room but was kept in an open space surrounded by bajra sticks; further he was not tied with any rope or other thing; and he was not shown any weapon except that he was threatened by Bharat.
36. We find it extremely unusual and improbable that from 27.10.2010 upto 9.11.2010 when most of the time he was along with Bharat surely either of the two would have gone to attend the call of nature in which case it would give ample opportunity to the victim to escape.
37. It may also be noticed that it was an open field where the victim was kept. Thus, there was no kitchen, which shows that the meals, which comprises of chapattis, sometimes with chutney and sometimes with vegetables, which have been provided to the victim, were arranged from a local area, however, it has nowhere been testified by PW-4 from as to where and how the meals were provided by Bharat. Thus making the entire testimony of PW-4 to be not believable.
38. It has repeatedly been held that suspicion, however, strong, cannot take the place of proof. In the case of **State of Punjab Vs. Bhajan Singh &**

Ors., reported at AIR 1975 SC 258, wherein the Apex Court has observed it was held as under:

“..... The circumstances of this case undoubtedly create suspicion against the accused. Suspicion, by itself, however strong it may be, is not sufficient to take the place of proof and warrant a finding of guilt of the accused.....”

Also see [*Kali Ram Vs. State of Himachal Pradesh* reported at AIR 1973 SC 2773 as also AIR 1973 SC 2622 and 2003 (3) JCC 1358]

39. For the reasons stated hereinabove and having regard to the material contradictions in the testimonies of the victim, his wife, his son, and further the manner of arrest of the appellants, the telephone calls regarding ransom having not been mentioned by PW-1 either in DD No.27 dated 31.10.2010 or in the FIR, no reference having been made of Sunil Tyagi with regard to his having spent four hours with the husband of PW-1 and PW-1 serving lunch to them on the date of her husband's disappearance, we find it highly unsafe to uphold the judgment of the trial court. Resultantly, the present appeals are allowed. Bail bonds stand cancelled. Let trial court record be sent back.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

MAY 20, 2015 ssn