

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI**

CRIMINAL APPEAL No.1103 OF 2010

J U D G M E N T

(Per Hon'ble Sri Justice Sanjay Kumar)

This appeal under Section 374(2) Cr.P.C. is directed against the judgment dated 14.09.2009 of the learned I Additional Sessions Judge, Chittoor, in Sessions Case No.315 of 2007, whereby the appellant/A2 was convicted of offences under Sections 363 and 364A IPC and was sentenced to suffer imprisonment for life apart from payment of a fine of Rs.500/-, in default of which, he was to suffer rigorous imprisonment for three more months. This sentence related to the offence punishable under Section 364A IPC and no separate sentence was imposed on him for the proved charge under Section 363 IPC as it was a lesser offence. The other accused, A1, was acquitted of both charges.

The case of the prosecution before the Sessions Court, in brief, was as under:

PWs.1 and 2 are the parents of Harshad (PW.7), the kidnapped child. They lodged Ex.P1 report with the Sub-Inspector of Police, Pakala Police Station (PW.10), on 03.02.2007 at about 2.50 PM wherein PW.1 stated that PW.7, aged about 5 years, was taken away from Infant Jesus School in Pakala at 11.00 AM by a person described as lean, tall and bearded. PW.1 stated in the report that he identified the person from the said description as Manjunath (A1), who had worked for him about three months prior thereto. He further stated that the perpetrator called up their home and informed his wife (PW.2) that if the matter was reported to the police, PW.7 would not be seen alive. Thereupon, PW.10 registered a case in Crime No.12 of 2007 under Section 363 IPC. Ex.P6 is the FIR. She then examined PWs.1 and 2 and recorded their statements. Basing upon the contents of these statements to the effect that ransom had also been demanded, PW.10 added Section 364A IPC. She then proceeded to the scene of the offence in Pakala town, at a distance of one kilometre from the police station. There, she secured the presence of PW.3, PW.4 and Aveshakeela (LW.5). A rough sketch of the scene was also drawn up by PW.10. Ex.P.7 is the rough sketch. PW.10 then examined and recorded the statements of V.Jayaramaiah (LW.6) – an auto

driver, A.Sathyanarayana (LW.7) and R.Usha Rani (LW.8) – employees of PW.1, who had worked along with A1 in his shop. PW.10 then informed all police stations of the kidnap of PW.7. Upon verifying the caller ID facility in the landline telephone number of PWs.1 and 2, PW.10 collected the number from which the call had been made threatening PWs.1 and 2 and demanding a ransom. PW.10 found that the said number pertained to Madanapalle jurisdiction and alerted the Sub-Divisional Police Officer, Madanapalle, to check the landline telephone number there. PW.10, along with the Sub-Inspectors of Police, Kallur, Penumuru and Central Crime Station, Chittoor, went to Madanapalle at about 10.00 or 10.30 P.M. PW.10 secured the presence of the Sudhakaraiah (PW.8), Mandal Revenue Inspector, and R.Ramamurthy Chetty (LW.12) and took them along to Madanapalle. There, they spoke to PW.6, the owner of Alankar Hotel, Madanapalle, who gave them information of PW.7. While they were waiting at Alankar Hotel, Madanapalle, on 04.02.2007 at 1.25 A.M., A2 came there along with PW.7. A2 tried to escape upon seeing them but was apprehended. His confession statement was recorded in the presence of witnesses. Ex.P8 is the admissible portion of the confession statement. PW.10 also recorded the statement of PW.7, the kidnapped child, in question and answer format. PW.10 and others searched for A1 but could not find him. They then returned to Pakala along with A2 and PW.7 and reached Pakala police station on 04.02.2007 at 6.00 A.M. A2 was sent for remand and PW.10 handed over PW.7 to PWs.1 and 2 under receipt dated 04.02.2007 (Ex.P9). On 18.02.2007, PW.10 got information of A1 over telephone and went to V.Kota along with PW.8, Sidda Reddy (LW.13) and other staff members. They found A1 standing near Doddipalle cross roads of V.Kota Mandal and he attempted to flee when he saw them. He was however apprehended and his confession statement was recorded in the presence of panch witnesses. PW.10 arrested A1 at 2.10 P.M. on 18.02.2007 and brought him to Pakala police station at 6.30 P.M. He was then sent to judicial custody. PW.10 gave a requisition to the V Additional Judicial First Class Magistrate, Chittoor, to conduct a Test Identification Parade of the accused. Ex.P10 is the original requisition. PW.10 received transfer orders on 04.04.2007 and handed over the case to the Head Constable/Station House Officer, Pakala Police Station (PW.9), for further investigation. PW.9 laid a charge sheet against the accused.

Thereupon, the Sessions Court framed the following charges against A1 and A2.

‘FIRSTLY, that A.1 and A/2 of you on 3-2-2007 at about 11=00 A.M. at Infant Jesus English Medium School, Pakala, kidnapped Harshad a minor boy aged about 5 years from the lawful guardianship of R. Muni Bhaskar Babu by A.2 of you took Harshad from the school on the pretext of taking photos by the father of Harshad on the directions of A.1 of you, and subsequently both of you took the minor boy Harshad to Sodam and from there to Madanapalle and thereby committed the offence punishable under Sec. 363 of the Indian Penal Code, and within my cognizance.

SECONDLY, that A.1 and A.2 of you on the above mentioned date, time and place of offence, committed the offence of kidnapping of a minor boy by name Harshad and detained him with you and A.1 of you telephoned to the father of the kidnapped boy i.e. R. Muni Bhaskar Babu for ransom for release of the minor boy from your hands and thereby you have committed the offence punishable under sec. 364 (A) of the Indian Penal Code, and within my cognizance.’

The accused pleaded not guilty of the charges and claimed to be tried. During the trial, the prosecution examined 10 witnesses and marked 10 exhibits. The accused did not lead any oral evidence but marked in evidence Ex.D1, a portion of the statement of PW.1 recorded under Section 161 CrPC.

The Sessions Court found that there was no satisfactory evidence against A1 that he, along with A2, had hatched a plan to kidnap PW.7 for ransom and acquitted him of both charges. In so far as A2 is concerned, the Sessions Court held that all the required ingredients to make out an offence under Section 364A IPC were duly proved and convicted and sentenced him.

The salient points emerging from the evidence may now be discussed. PW.1, the father of PW.7, stated as under: That he was a resident of Pakala and maintained a provision shop; that his house and shop were located in one premises; that R.Vanaja (PW.2) was his wife; that he had two daughters and one son, R.Harshad (PW.7); that his children were studying in Infant Jesus School at Pakala which was at a distance of about one kilometre from his house; that about 1½ years prior thereto, his three children went to school at about 9.00 A.M. in the auto of Vinayaka Babu; that his children did not return home at the usual time of 1.00 P.M. for lunch and being afraid, he went to Pakala police station and presented Ex.P1 report. He further stated that his children returned home at 5.30 P.M. on that day and

he was of the view that nobody had kidnapped his son. At this stage, PW.1 was declared hostile and was cross-examined by the prosecution. Therein, he admitted that six months prior to Ex.P1 report, A1 had worked in his shop for about a year; he denied that he knew A2 as he was a friend of A1 and used to meet him; that on 03.02.2007 at about 9.15 A.M. while he was taking tiffin at home, somebody telephoned and told him that his son, PW.7, had fallen down while jumping from a wall; that upon receiving the said call, he went to the school and enquired with the class teacher, Seena Mary (PW.3), and she told him that nothing had happened; that at about 11.45 A.M., his wife (PW.2) received a phone call while they were in the shop asking whether PW.7 was her son whereupon the call was disconnected; that PW.1 and his wife were afraid and went to the school and were informed by PW.3 that at about 11.00 A.M., one person had come to the class and told her that he worked in PW.1's shop and had been asked to bring PW.7 for taking photographs. PW.3 described this person as tall, lean and bearded. PW.1 stated that he identified that the person might be A1 at that time. PW.1 further stated that at about 1.00 P.M. on that day somebody telephoned to his shop and his wife (PW.2) lifted the phone and the caller informed her that if they revealed anything to the police, their son would not live. PW.1 further stated that at about 2.50 P.M., he presented Ex.P1 report to the police and at about 4.00 P.M., somebody telephoned him and told him that his son was safe and to pay a sum of Rs.5,00,000/-, otherwise he would kill his son. PW.1 admitted that he had fixed caller ID facility to his phone at 1.30 P.M. and that the phone call received at 4.00 P.M. showed the STD code of Madanapalle. PW.1 further stated that after receiving the said call, he came to the firm conclusion that A1 had committed the act and accordingly informed the police authorities to that effect. He further admitted that on 04.02.2007 at about 1.25 A.M., the police arrested A2 and at that time, PW.7 was with A2 and the police took custody of his son and subsequently handed him over to him. PW.1 concluded by stating that he was afraid of the accused and had given false evidence to some extent in his chief-examination. In his cross-examination by the counsel for the accused, PW.1 stated that the police handed over his son to him at Pakala Police Station at about 1.30 A.M. on the intervening night of 03/04.02.2007. He admitted that he knew A2 as he worked in his neighbouring shop. PW.1 was confronted with Ex.D.1, a portion of his statement under Section 161 CrPC and he denied that he had

stated therein that A1, who worked for him, kidnapped his son to extract Rs.5,00,000/- from him. PW.2, the wife of PW.1 and the mother of Harshad (PW.7) confirmed the relevant particulars of the deposition given by her husband. She was also declared hostile. In her cross-examination by the accused, she stated that her son was handed over to her by the Pakala Police at about 11.30 P.M. and at that time her husband was also present.

Seena Mary (PW.3), a teacher in Infant Jesus English Medium School, Pakala, stated that she was the class teacher for LKG students and that Harshad (PW.7) was one of her students. She further stated that on 03.02.2007, after assembly of the students for prayer, at about 9.30 A.M, PW.1 came to her class and asked her whether she had telephoned to inform him that his son had fallen down from a wall. She stated that she told him that she had made no such call. Noticing that his son was in the class room, PW.1 went away. She further stated that at about 11.00 A.M. on the same day, one person came and asked her whether PW.7 was in the classroom and stated that his photographs had to be taken and that his father had asked him to bring him along with him. PW.3 stated that she then asked PW.7 as to whether he knew him and upon PW.7 informing her that he did, she sent PW.7 along with the said person. At about 11.45 A.M., PW.1 and PW.2 were stated to have come to the classroom and informed them of what had happened. PW.3 identified A2 as the person who took PW.7 along with him on that day. She further stated that PW.7's parents had asked whether a person by name Manjunath (A1) had taken PW.7 and she told them that she did not know the name of the person but could identify him. In her cross-examination, PW.3 stated that PW.1 had asked her for the descriptive particulars of the person who took PW.7 along with him and she told him that the said person was a short and fair complexioned person. PW.4, the Head Master of Infant Jesus High School, Pakala, stated that at about 12.00 noon on 03.02.2007, PW.3 informed him about the kidnapping of PW.7 and as to what had happened.

PW.5, the auto driver, stated that on the fateful day when he went to pick up the children at about 1.00 P.M., he found only Ankitha and Likitha, the daughters of PWs.1 and 2, and not PW.7. In his cross-examination, he stated that he used to take PW.7 to school in his auto for two years prior to 03.02.2007.

PW.6, the Manager of Alankar hotel, Madanapalle, stated that on

03.02.2007, one person brought a small boy to the hotel at 8.30 P.M. to give him tiffin. He however could not identify the person who came there with the boy but confirmed that the police took away the boy and the said person by 9.00 P.M.

Harshad, the kidnapped child, was examined as PW.7 but admitted in his cross-examination that he had been tutored by the police as well as his father, PW.1, as to what he should state in Court. His evidence is therefore of no practical utility.

PW.8, the Mandal Revenue Inspector, Sodam, stated that at about 1.25 A.M. on 04.02.2007, PW.7 was traced out at Madanapalle and was found in the custody of A2. He stated that he accompanied the police to Madanapalle on that day and that A2 confessed to bringing PW.7 from Pakala. Ex.P5 is the mahazar prepared on that day in which PW.8 identified his signature. In his cross-examination, P.W.8 stated that he was called on 04.02.2007 at about 6.00 P.M. by the police and that he went along with the police to Madanapalle at 10.00 P.M. Pws.9 and 10 are the investigating officers who spoke of the steps taken by them.

At the outset, it may be noted that the aforestated oral and documentary evidence manifests several shortfalls in the case of the prosecution. It appears that the parents of the kidnapped child, PWs.1 and 2, turned hostile out of fear. However, certain facts that emerged from their testimony are relevant as they are borne out by the testimony of others and the record. Their son, Harshad (PW.7), was taken away from the custody of the school teacher, PW.3, at about 11.00 A.M. on 03.02.2007. Though PW.1 stated that PW.3 had described this person to be tall, lean and bearded, PW.3 contradicted this by stating that she had described the said person as short and fair complexioned. She further identified A2 as the said person. There is no reason to suspect the evidence of PW.3, an independent witness, who has nothing to do with PWs.1 and 2 or the accused. She was the class teacher, in charge of the kidnapped child on the fateful day, and saw the person who took him away. Significantly, her identification of A2 as the person who took the child away from school on that day remained unshaken. PWs.1 and 2, on the other hand, seem to have suspected the involvement of A1, a former employee, and gave shape to their suspicions accordingly. He therefore finds mention in Ex.P1 report. This was at variance with the description of the perpetrator given by PW.3. Though PW.1 denied

the suggestion that A2 was known to A1 and used to come to the PW.1's shop to visit him and thereby, PW.1 also knew him, the fact that PW.7, the kidnapped child, told PW.3 that he knew the person who came to school on that day lends credibility to the acquaintance of PW.1 with A2. Though PW.1 attempted to make out a case that there was no kidnapping at all and that his son returned along with his sisters on the fateful day at 5.30 P.M., the evidence of PW.5, the auto driver, also disproves this apart from the testimony of PWs.3 and 4. Varying versions have been put forth by all concerned as to the time at which PW.7 was found and returned to the custody of his parents. Different times have been mentioned by each of the persons involved in this exercise. PW.1 stated that the child was handed over to him at 1.30 A.M. on 04.02.2007 at Pakala Police Station whereas PW.10, the investigating officer, stated that PW.1 had, in fact, accompanied her and others to Madanapalle. PW.2 stated that the child was handed over to her at Pakala Police Station at about 11.30 P.M. on 03.02.2007 itself. According to PW.10, after returning to Pakala Police Station on 04.02.2007 at about 6.00 A.M. she handed over the kidnapped child to PWs.1 and 2 under receipt dated 04.02.2007 (Ex.P9). Ex.P9 bears the date 04.02.2007 but does not indicate the time at which the child was actually handed over to the father who signed the receipt in proof of custody being given to him. Though confession statements were stated to have been recorded, not only of A2 but also of A1, the second confession statement was not even marked in evidence. Ex.P8, a portion of the confession statement of A2 (part of Ex.P5) cannot be accepted as the said confession is hit by Section 25 of the Indian Evidence Act, 1872.

It also emerges from the record that by the time Ex.P1 report was given to the police, PWs.1 and 2 had not received any demand for ransom that is the reason why only Section 363 IPC was incorporated in Ex.P6 FIR. Though PW.10 stated that she added Section 364A IPC thereafter, there is no indication of it and no altered FIR was placed on record. There is also no evidence adduced as to who made the call at 4.00 P.M. which was answered by PW.2, during the course of which, a demand was made for Rs.5,00,000/- towards ransom to release PW.7. Though PW.10 stated that the landline telephone number at Madanapalle from which the ransom call was made at 4.00 P.M. was traced out due to the caller ID facility installed by PW.1 on his landline phone at 1.30 P.M. on 03.02.2007, it appears that no

steps were taken to identify the location of this number and as to whom it belonged to and who made the said phone call on that day. In **MD.FAIZAN AHMAD @ KALU V/s. STATE OF BIHAR**^[1], three children were kidnapped and the police failed to trace out the call said to have been made but on the basis of the said call, involvement of the accused was sought to be proved. Faced with the situation, the Supreme Court observed that the seriousness or gravity of a crime should not influence the Court to punish a person against whom there is no credible evidence and held that if a telephone call was received making a ransom demand, the police should have traced the call and identified the caller. As the police had failed to do so, the benefit of doubt was given to the accused.

As matters stand, there is no material placed before this Court whereby, it can be held beyond a shadow of doubt, that A2 made the said ransom call at 4.00 P.M. Without evidence of this particular act, A2 ought not to have been convicted under Section 364A IPC, which stands on a higher footing than an offence under Section 363 IPC. That being said, in the light of the untarnished testimony of PW.3, an independent witness, that it was A2 who took away the kidnapped child from the school and her custody on the fateful day, we find sufficient proof of the offence of kidnapping punishable under Section 363 IPC. Though varying versions have been given by all the parties involved as to the time at which the custody of PW.7 was recovered at Madanapalle, it was consistently brought out by all concerned, that PW.7 was in the custody of A2 at that point of time. It is therefore proved beyond reasonable doubt that A2 committed the offence punishable under Section 363 IPC but there is no evidence to hold him guilty of the charge under Section 364A IPC. Mere suspicion, however strong, cannot take the place of actual proof, which is totally missing. The Sessions Court failed to appreciate the crucial fact that there was no evidence whatsoever to connect A2 with the ransom call said to have been made at 4.00 P.M. on the fateful day. He is therefore entitled to the benefit of doubt so far as this offence is concerned.

The conviction of the appellant/A2 under Section 364A IPC therefore cannot stand and is accordingly set aside. In consequence, the sentence of life imprisonment visited upon him in relation to this charge must also go. However, as this Court finds that the appellant/A2 was rightfully convicted of the offence under Section 363 IPC, he would have to be punished for that

charge. The sentence visited upon him is accordingly modified to that of rigorous imprisonment for a period of seven years and payment of a fine of Rs.500/-, in default of which, he shall suffer rigorous imprisonment for three more months. In the event the appellant/A2 has already suffered imprisonment for such period, taking into account the period of detention upon remand, he shall be set at liberty forthwith if his confinement is not required in any other case.

The appeal is accordingly allowed in part.

SANJAY KUMAR, J

M.SEETHARAMA MURTI, J

12th AUGUST, 2016

PGS

Note: Operative portion to be communicated forthwith.

B/o PGS/Svv

[\[1\]](#) 2013 (2) ALD (CrI.) 103 (SC)