

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

Judgment reserved on: 09.04.2018

% **Judgment delivered on: 02.07.2018**

+ **CRL.A. 959/2017**

VIKAS

..... Appellant

Through: Mr.Sanjeev Panda, Mr.Neeraj Kant
Singh and Mr.Sumit Shukla,
Advocates.

versus

THE STATE NCT OF DELHI

..... Respondent

Through: Ms.Aashaa Tiwari, APP for the State
with SI Sonu PS S.P. Badli.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT BY THE COURT

1. The present appeal has been filed by the appellant-Vikas under Section 374 Cr.P.C. against the judgment of conviction dated 03.07.2017 and order on sentence dated 07.07.2017 passed by learned Additional Sessions Judge, North District, Rohini Court, Delhi whereby the appellant has been convicted under Section 364A and 302 IPC and sentenced to undergo rigorous imprisonment for life and fine of Rs.10,000/- and in default of payment of fine, to further undergo simple imprisonment for one year for the offence under Section 302 IPC; and to undergo life

imprisonment and fine of Rs.10,000/- and in default of payment of fine to further undergo simple imprisonment for one year for the offence under Section 364A IPC.

2. The factual matrix emerging from the record is that on 15.06.2012, the complainant Rajbir came in the police station and got recorded his statement that he was residing on rent at B-97, Gali No.2, Raja Vihar, Badli Industrial Area, Delhi. On 14.06.2012, his son Raunak aged about 5 years went to the park to play but did not return back to his house. He was wearing red coloured vest, underwear and blue coloured slippers. Despite search, he could not be traced and he raised suspicion that somebody had taken his son away under allurement. On the basis of statement of the complainant, FIR vide Ex. PW-15/B was registered under Section 363 IPC. Investigation of the case was assigned to SI Ajay, who went to the house of the complainant where Rukmini— sister of the missing child, met him and who informed that a call was received on her father-Rajbir's mobile phone no.8512069677 from mobile phone no.9899705589. The caller told her that her brother Raunak-the deceased, was with him and he had been kidnapped and the caller demanded ransom of Rs.5,000/- to be delivered at Badli Railway Station, else the child would be killed. Thereafter, SI Ajay along with police staff in civil dress laid a trap near Badli Railway Station but nobody came there. Penal Section 364A IPC was added in the case. IO obtained the Call Detail Record of Rajbir's-PW5 mobile phone vide Ex.PW13/A. It was revealed that on 15.06.2012, four calls were made from phone no.9899705589 on mobile phone no.8512069677 at four different times: (i) 10:33:50 (ii) 11:12:40 (iii) 11:14:45 (iv) 12:26:15. The mobile phone

no.9899705589 was found switched off. The owner of the SIM no.9899705589 was found to be one Ramji-PW7. It was revealed that the owner of the mobile instrument which was used to call the number 8512069677 belonged to Ram Kumar-PW4 and it was taken from him at 10.30 a.m. by one Vikas, resident of the adjoining room. Statements of Ramji-PW7 and Ram Kumar-PW4 were recorded. On enquiry, Ramji told that the SIM of his mobile no.9899705589 was taken out by Vikas and he inserted one rejected SIM in it, and that Vikas was resident of B-10, Raja Vihar, Gali No.2, B.I.A., Delhi and his co-worker as a labour at Samaipur. Raid was conducted at the residence of Vikas but he was found absconding.

3. On 22.06.2012, on the basis of a secret information, accused Vikas was apprehended from Raja Vihar Park and on interrogation, he confessed his guilt that he had kidnapped Raunak and committed his murder by smothering him with a handkerchief and threw his dead body in a drain near Sanjay Colony. He also disclosed that he can get recovered the part of a toy, which the deceased child was carrying. Accused was arrested and his disclosure statement was recorded. Penal Sections 302/201 IPC were added in the case. The accused got recovered the dead body of the child vide Ex.PW-5/B from the drain, who was identified by the complainant as that of his son. Dead body of the deceased was seized and sent to the mortuary. In pursuance of his disclosure statement, accused got recovered the toy vide Ex. PW-3/A of the victim from his house which was seized in the presence of the owner of the house-Krishan Kumar PW-3. The accused was got medically examined and his blood sample was got preserved Ex. PW-21/D. During police remand, accused disclosed that after kidnapping the child, he

took him to the shop of Surender PW-6 and got him a packet of biscuit. Toy speedometer of the deceased was identified by the mother and sister of the deceased during TIP proceedings. Blood sample of the accused, anal swab and femur bone of the deceased and blood sample of the mother of the deceased were got deposited in FSL Rohini. During investigation, crime team report and photographs were obtained. Site plan was prepared. Call details of the mobile phones were called. After completion of investigation, charge sheet was filed in the Court.

4. Charge for the offence under Section 363, 364A, 302 and 201 IPC was framed against the appellant, to which he pleaded not guilty and claimed trial.

5. To prove its case, the prosecution examined 25 witnesses, including, Smt.Mithlesh (PW1)-Mother of the deceased, Rakmani @ Kirti (PW2)-Sister of the deceased, Krishan Kumar (PW3)-Landlord, Ram Kumar (PW4)-Phone instrument owner, Rajbir (PW5)-Father of the deceased, Ramji (PW7)-SIM owner(9899705589).

6. After completion of prosecution evidence, statement of the accused under Section 313 Cr.P.C. was recorded, in which he claimed innocence and denied the entire case of the prosecution. The appellant examined one defence witness, namely, DW1-Rajdeep Mehto.

7. On appreciation of evidence and material brought on record, the trial court convicted the appellant under Section 364A and 302 IPC vide impugned judgment dated 03.07.2017 and order on sentence was passed on

07.07.2017. Feeling aggrieved of the same, the appellant has preferred the instant appeal.

8. Learned counsel for the appellant has argued that the present case is based upon circumstantial evidence and the prosecution has failed to prove the complete chain of circumstances to establish that the same leads to only one conclusion viz. of the guilt of the accused. Ld. counsel argues that there is no eye witness to the taking away of the child by the appellant and that there is no recovery of the handkerchief with which the deceased was allegedly smothered. He submits that PW6, the shopkeeper, from whom the appellant had allegedly bought a packet of biscuits for the deceased, has turned hostile and not supported the case of the prosecution. Ld. counsel further argued that there is no call record except the call records of the mobile phone of the complainant to establish that any ransom call was made by the appellant. He submitted that the mobile phone used to make ransom calls was not recovered from the appellant, nor at his instance and the said mobile phone was owned by PW4. He further argued that even the said mobile phone was even produced in the Court in unsealed condition. Ld. counsel submitted that the CDR of the mobile phone no.9899705589 is not admissible in evidence without the certificate under Section 65-B of the Indian Evidence Act. He argued that even PW2 had not deposed that the voice of ransom caller was the same as that of the appellant. He further argued that the secret information was not shared with the senior officers nor it was reduced into writing. No public person was associated with the arrest of the accused. With regard to the recovery of the toy, Ld. counsel submitted that no public person was joined as a witness. He submits that

the story is not plausible that after committing the murder, the appellant would keep the toy in his own house. further argued that the parents and sister of the deceased were not called at the time of recovery of the dead body, and no public witness was joined at the time of its recovery. He also argued that PW8 had not signed the recovery memo of the dead body. A dispute with regard to the place of recovery of dead body has also been raised by the Ld. counsel for the appellant.

9. Per contra, learned APP for the State has argued that there is enough evidence on record to connect the appellant with the kidnapping and murder of the deceased. From the evidence brought on record, it is convincingly proved that the appellant made the ransom call from the sim/ mobile number of PW7, by using the phone/ mobile instrument of PW4 on the mobile phone of Rajbir-the father of the deceased, which was picked up by PW2-Rukmani. All the circumstances i.e. recovery of dead body of the deceased at the instance of the appellant; recovery of the toy of the deceased from the house of the appellant; and the Post- mortem report of the deceased conclusively establishes the case of the prosecution beyond reasonable doubt against the appellant.

10. We have heard the submissions advanced by learned counsels for the parties. We have also gone through the evidence led by the parties and given our thoughtful consideration to the matter.

11. PW1-Smt.Mishlesh is the mother of the deceased. She deposed that on 14.06.2012, her son Raunak aged about 5 years had gone to play outside the house in the evening but he did not return. He used to play in the park in

Raja Vihar which was near to their house. Her son was wearing red colour vest and underwear. Raunak was carrying in his hand one broken toy, which was having a motor and the toy used to give sound of “kir-kir” when it used to be rolled. On the toy, some numbers were also written. She searched for her son in the locality, but could not trace him. Her daughter Rukmani informed PW1 next day that she received a phone call from someone on her mobile and the caller told her that her brother Raunak was with the caller and demanded Rs.5,000/- for the release of Raunak, else he would be killed. The caller told to bring Rs.5,000/- at Badli railway station. PW1 along with her husband went to the railway station in search of her son and the caller, but the caller did not come. On the ninth day of the incident, dead body of her son was recovered from a drain. She had identified the dead body vide identification memo Ex.PW1/A. On 29.08.2012, she came to Rohini court and before the Judge she identified the toy of her son with which he used to play when he left the house as Ex.P1 and its garari (cogwheel) was rolled in the Court which produced the sound of “kir-kir”. PW1 identified her thumb impression on TIP proceedings Ex.PW1/B. Witness identified the accused as the one, who used to reside in the tenanted room in the same house in which they were residing. She also identified the clothes of her son as Ex.P2 as the same which the deceased was wearing when he went missing.

12. During cross-examination, PW1 stated that she and her husband were working as labourers. Her daughter Rukmani was 10th pass and her sons were not studying. She admitted that mobile phone no.8512069677 used to remain at home with her daughter and whenever any call was made by anyone, PW1 used to talk on the phone. She could not tell the numbers from

which the calls were received on her mobile. Both of her sons had gone to play in the park together. PW1 had also gone to the park with her sons and daughter Rukmani. She had left the park at 4.30 p.m. for her room, but she did not find her son there. They were sitting on the benches and her sons were playing in the nearby area. When they were about to leave for home, they found Raunak missing. They searched for him till 12.00 midnight and then they intimated the police. She further stated that she did not tell the police that her son was wearing black clothes. She came to know on the 9th day that her son had died, through police. Police visited her house and took her to the police station and showed her the dead body of her son. She admitted that in the premises Vikas and Ram Kumar were also residing. They were not on visiting terms with the accused Vikas. Accused Vikas did not come to their house. She denied that accused used to come to their house as they were having good relations. She further denied that accused used to talk to her daughter on phone. She further denied that as they did not like the visits of accused to their house and having relations with their daughter, they vacated the tenanted premises and shifted to other room. She denied that police tutored her to identify the toy with the sound of “kir-kir” in the Court. Only her family members had gone to the railway station in search of the deceased. Police had also gone to the railway station with them at about 5-6 p.m. She denied that her daughter was talking with the accused frequently, or that accused has been falsely implicated with the connivance of police and her husband.

13. PW2-Rukmani @ Kirti is the sister of the deceased child. She deposed that the deceased Raunak was her youngest brother. On 14.06.2012

at about 4-4.30 p.m., Raunak went outside the house to play with other children near Raja Park. His age was five years. When Raunak went to play, he was carrying in his hand one broken toy, which was a having motor and the toy used to make sound of “kir-kir”, when it was rolled. They searched for her brother in the locality but he could not be traced. PW2 further deposed that on 15.06.2012, she received a phone call on her mobile phone no.8512069677, and the caller told her that Raunak was with the caller and he wanted Rs.5,000/- for the release of Raunak or otherwise Raunak would be killed. PW2 informed her father and mother about the call. PW2 along with her parents and police went to the railway station in search of her brother and the caller, but the caller did not come. Dead body of her brother was recovered after nine days. She further deposed that on 29.08.2012, she came to Rohini Court and identified the toy of her brother. She identified her signatures on the TIP proceedings vide Ex.PW1/B. She further deposed that the mobile phone which she was using was in the name of her father Rajbir. PW2 identified the accused Vikas in the Court. She also identified the toy as Ex.P1 as that of her deceased brother with which he used to play. She further identified the clothes of her brother as Ex.P2 which he was wearing when he went missing.

14. During cross-examination, PW2 stated that during the period of incident, she used to remain at home. Raunak also used to remain at home. Her parents did not know how to dial and use the phone. She did not know Vikas and she never met him. She saw accused Vikas first time in the house of the landlord-Krishan Kumar PW3 where her family and Vikas were tenants. She used to see the accused occasionally by chance in the evening.

They used to sleep on the roof. Witness Ram Kumar and accused Vikas also used to sleep on the roof. She did not know whose telephone number was 7897354209. She did not remember if she ever talked to the caller of 7897354209. She denied that she was aware of the caller of the phone no.7897354209, as she used to talk to him frequently. She denied that she used to talk to accused Vikas frequently on his mobile no.7897354209. Her brothers used to play in the room and in the park located in front of the house. On 14.06.2012, when her brother went to play in the park, PW2, her other brother and her mother also accompanied him to the park. Raunak went missing from the park and they searched for him but could not find him. She did not see anybody taking Raunak from the park. At that time, accused was standing in the gallery of the house of Krishan Kumar. She denied having stated to the police that her brother was wearing black clothes. She voluntarily stated that he was wearing the clothes having red and *matiyali* strips. He was wearing underwear and vest. Police made enquiries from her on three dates. A police person came at their house and informed about the death of her brother. Dead body of her brother was shown to them in the police station. She denied that she and Vikas were having an affair which came to the knowledge of her father, due to which, he snubbed Vikas. She further denied that she used to talk with accused in day time and at night also. She further denied that she had relations with accused Vikas and they used to visit his room. She further denied that the police had already told her that a toy producing “*kir-kir*” sound shall be shown to her in the Court and she had to identify that toy.

15. Father of the deceased child is Rajbir (PW5), who deposed that on 14.06.2012, his son Raunak aged about five years had gone to play outside the house in the evening but did not return. He used to play in the park in Raja Vihar which was near to his house. His son was wearing T-shirt, underwear and blue colour slippers. Raunak was carrying one broken toy in his hand and the toy used to give the sound of “kir-kir” when it was rolled. They searched for his son in the locality but he could not be traced. He went to the police station on 15.06.2012 and lodged the report. His statement Ex.PW5/A was recorded. At the time of the incident, he was having mobile no.8512069677 and the said mobile was with his daughter, Rukmani- sister of the deceased. Rukmani informed him that she received a call from someone and that the caller was telling that Raunak was with the caller and demanded Rs.5,000/- for the release of Raunak, else he would be killed. That call was received from mobile no.9899705589. His daughter received phone calls from the same number four times. The caller demanded that Rs.5,000/- be brought to the Badli railway station. PW5 along with his wife, daughter and police went to the railway station in search of his son and the caller but the caller did not come there. On 22.06.2012, PW5 was called by the police and he reached Sanjay Colony drain near CNG pump, from where the dead body of his son was recovered. The same was taken into possession vide memo Ex.PW5/B. PW5 identified his photograph on the Customer Application Form (CAF) of Idea mobile phone no.8512069677 vide Ex.PW5/D and his documents along with the CAF. He identified the accused Vikas in the Court. PW5 further deposed that accused Vikas used to reside in the house on rent near to his house. Witness identified his mobile phone make Micromax X116 as Ex.P3 and clothes of his deceased

son as Ex.P2 which he was wearing at the time of his missing. PW5 was cross-examined at length.

16. PW3-Krishan Kumar deposed that he was the owner of House No.B-10, Raja Vihar and some rooms of the house were given on rent. In one room, Vikas used to reside with his brother and father. In another room, Rajbir used to reside with his family. In the month of June, 2012, he came to know that his tenant Vikas had killed the son of other tenant Rajbir. Police brought Vikas to the house of PW3. PW3 also reached there. Accused Vikas got recovered one broken piece of toy which was a speedometer of some toy car which was seized vide memo Ex.PW3/A bearing his signatures. PW3 identified the said toy as Ex.P1. During cross-examination, PW3 stated that he did not remember the date and month of the year 2012 when accused Vikas was inducted as a tenant. Rajbir started residing in his house in the month of May. Rajbir used to reside with his wife, two daughters and two sons, including the deceased. PW3 used to reside at B-71, Raja Vihar and his house B-10 was at a distance of 500-600 feet from B-71. Room of Vikas was in front of the room of Rajbir. He denied that Rukmani had developed intimacy with accused Vikas and Rajbir had objection to their relation, or that, for this reason, Rajbir had left the house of PW3. He denied that he knew about the quarrel between Rajbir and Vikas. PW3 further stated that the police called him at house no.B-10 after completion of proceedings and obtained his signatures on some papers. He did not know the description or title of those papers. One tenant Ram Kumar was sent by the police to call him.

17. PW4-Ram Kumar deposed that he was having a mobile phone no.8130637898. He was having a mobile in which two SIM cards could be inserted. He knew the accused Vikas, who used to reside in one of the rooms of Krishan. On 15.06.2012, accused borrowed his mobile phone at about 10.30 a.m. and told that he had to make a call. Accused returned his mobile SIM card. Accused inserted his SIM card in the mobile phone of PW4 and had a long conversation. Accused returned his mobile handset after about an hour. Police came to him and inquired about his mobile phone. His mobile phone and SIM card were seized by the police vide seizure memo Ex.PW4/A. He identified his mobile phone as Ex.P3. During cross-examination, PW4 stated that he knew the accused as he was also residing in a rented room in the same house. The mobile set was of his brother, Phool Singh. Accused Vikas had taken his mobile phone 5-7 times. He knew the accused 1- 1½ months prior to the incident. The room of the accused was in front of his room after a gap of 4-5 rooms. He denied that he had not given his phone to accused Vikas, or that accused never took his phone for his use.

18. PW7-Ramji deposed that he used work in the area of Samaipur. He knew accused Vikas who also used to work as labour with them at Samaipur. In the year 2012, accused Vikas took the mobile phone of PW7 and after sometime, returned the phone saying that it was not working. PW7 checked his mobile and found that the SIM of the mobile phone was removed by the accused. Police came to him in June, 2012 and recorded his statement. He had handed over his mobile phone make Nokia with battery and rejected SIM to the IO which were seized vide seizure memo

Ex.PW7/A. He identified his mobile phone as Ex.P4 with mobile number 9899705589. During cross-examination, PW7 stated that he knew the accused. Accused used to use the mobile phone of PW7 daily to make calls to his wife. Accused had taken his mobile phone in April, 2012 and did not return the same. Accused had removed the SIM and left the tenanted room. PW7 and accused were at the work place till 5.00 p.m., when the accused removed his SIM. He denied that the SIM did not belong to him. He stated that he never called Rukmani. He further denied that he used to talk to Rukmani, by using the phone number which was handed over to the police.

19. PW8-Rajiv and PW9-Suraj are the witnesses to the recovery of the dead body of the deceased. PW8 deposed that on 22.06.2012, police took out a dead body of one 4-5 years old boy from a drain near Sanjay Colony at the instance of the accused Vikas. Dead body was wearing a red colour vest and an underwear. The condition of the dead body had deteriorated and it was identified by the relatives and parents of the deceased. He identified the accused in the Court. Similarly, PW9 deposed that on 22.06.2012, a dead body of 4-5 years male child was recovered by the police from the drain, Sanjay Colony. At that time, the dead body was identified by the relatives of the deceased at the place of recovery.

20. PW13-Sh.Pawan Singh, Nodal Officer, Idea Cellular Limited had proved the ownership of mobile phone no.8512069677. He deposed that the said mobile number was issued in the name of Rajveer and documents in that regard were proved as Ex.PW5/D, Ex.PW5/E. He proved the call details for the period from 10.06.2012 to 20.06.2012 as Ex.PW13/A,

certificate under Section 65B of the Evidence Act as Ex.PW13/B and cell ID chart as Ex.PW13/C.

21. PW14-Sh.Israr Babu, Alternate Nodal Officer, Vodafone Mobile Service Limited had proved the ownership of mobile phone no.9899705589. He deposed that the said mobile number was issued in the name of Ramji. He proved the documents as Ex.PW14/A and Ex.PW14/B. The call details for the period 10.06.2012 to 16.06.2012 was proved as Ex.PW14/C, and Ex.PW14/D and certificate under Section 65B of the Evidence Act as Ex.PW14/E and Ex.PW14/F. He also proved the Cell ID chart as Ex.PW14/G.

22. PW17-Dr.V.K. Jha, conducted postmortem over the dead body of the deceased, Raunak aged 5 years. As per PW17, the cause of death of the deceased was *“asphyxia as a result of manual smothering to ward off cries.”* Time since the death was approximately 10 days. The clothes of the deceased, left femur and anal swab of the deceased were preserved and handed over to the IO. He proved the postmortem report as Ex.PW17/A.

23. PW16-Dr.Brajesh Narayan Singh deposed that on 28.08.2012, one patient Mithlesh- mother of the deceased, was brought by SI Ajay Kumar for collection and preservation of blood sample for the purpose of matching of DNA profile. Blood sample of the patient was collected and preserved. He prepared the MLC Ex.PW16/A.

24. PW20-Sh.Sandeep Gupta, the then learned Metropolitan Magistrate, proved the TIP proceedings conducted on 29.08.2012. He proved the

application of the IO as Ex.PW20/A, TIP proceedings as Ex.PW1/B, and certificate given as Ex.PW20/B.

25. PW24-Ms.Monika Chakravarty, Sr.Scientific Assistant, FSL Rohini had proved the report of Biological Analysis/DNA examination as Ex.PW24/A. PW24 also proved the Annexure-I i.e. date on the basis of which the report was prepared, as Ex.PW24/B.

26. The present case is based upon circumstantial evidence as there is no direct evidence of taking away of the deceased by the accused and commission of his murder by the accused. The circumstances brought on record by the prosecution to connect the accused with the commission of the offence are: (i) ransom call made by the accused by using the mobile sim card of PW7 and the mobile phone instrument of PW4, on the mobile phone of PW5- the father of the deceased, attended to by PW2-the sister of the deceased; (ii) recovery of dead body at the instance of the accused, and; (iii) recovery of toy of the deceased child from the house of the accused.

27. So far as the first circumstance i.e. making of ransom call by the accused is concerned, PW2-Rukmani, inter alia, deposed that her deceased brother Raunak went missing from 14.06.2012 when he went to play in the park. On 15.06.2012, she received a phone call on her mobile phone no.8512069677, asking for a ransom of Rs.5,000/- for release of Raunak, else he would be killed. As per the testimony of PW5-father of the deceased, the mobile phone no.8512069677 was in his name vide customer application form Ex.PW5/D. PW5 identified his photograph on the said form and proved the copy of the voter ID card which was annexed with the

application form. The call detail of the said mobile phone was proved on record as Ex.PW13/A for the period 10.06.2012 to 20.06.2012. As per call details, calls were received on the said mobile phone at 10:33:50, 11:12:40, 11:14:45 and 12:26:15 hours from the mobile phone no.9899705589. As per the customer application form Ex.PW14/A of the mobile phone no.9899705589, the said number was issued in the name of Ramji (PW7). PW7 has categorically deposed that in the year 2012, accused Vikas had taken his mobile phone and removed his SIM from the same and thereafter the phone was returned by the accused. Police seized the said mobile phone vide seizure memo Ex.PW7/A. The IMEI number of the said mobile phone was 354303040709530.

28. As per the testimony of PW4-Ram Kumar, accused Vikas took his mobile phone on 15.06.2012 at about 10.30 a.m. on the pretext of making call and talked on the same by inserting his SIM card. The said mobile phone Ex.P3 was seized by the police. The call details of the mobile phone no.9899705589 for the period 10.06.2012 to 16.06.2012 was proved as Ex.PW14/D and according to the same, the said mobile number was used in the dual SIM phone having IMEI Nos. 910001501096380 and 910001501296385. PW2-Rukmani categorically stated that she had received the ransom call from the mobile no.9899705589. From a combined reading of the testimony of PW2-Rukmani, PW4-Ram Kumar and PW7-Ramji, it is conclusively established on record that the mobile phone No. of PW7 (9899705589) was used by the accused in the mobile instrument of PW4 at the relevant time and period, for making a ransom call on the mobile phone of the complainant, PW-5, which was received by PW2-Rukmani.

29. Learned counsel for the appellant has argued that the mobile phones were produced in unsealed condition. PW4-Ram Kumar identified the mobile phone as Ex.P3, but PW5-Rajbir identified the same phone which was identified by PW7-Ramji as Ex.P4. It is also argued that the certification under Section 65B of the Evidence Act proved by PW14 was not reliable, as it was not duly proved. So far this plea of the appellant is concerned, it is not in dispute that the mobile phone no.8512069677 was issued in the name of PW5-Rajbir, father of the deceased, which fact has also been established from customer application form Ex.PW5/D. As per the testimony of PW5, the said mobile phone used to remain with his daughter Rukmani (PW2) all the time. So far the mobile phone/ SIM no.9899705589 is concerned, it has been proved on record that the same was issued in the name of Ramji (PW7). As per the testimony of PW7, accused took the mobile phone of PW7 and his SIM card was removed by the accused. The mobile phone Ex.P4 of PW7-Ramji was seized. As per the call details record Ex.PW14/D, the mobile SIM no.9899705589 was used in the mobile phone having IMEI No.354303040709530 till 11.06.2012, and the said IMEI number was of the mobile phone Ex.P4 belonging to PW7-Ramji.

30. The customer application form Ex.PW14/A of the mobile phone no.9899705589 shows that the said mobile phone was issued in the name of PW7-Ramji. The call detail record Ex.PW14/D of the said mobile phone, shows that on 14.06.2012, it was used in the phone having IMEI No.910001501096380, which was the IMEI number of the mobile instrument of PW4-Ram Kumar. From the evidence produced on record, it

is established that the SIM of mobile phone no.9899705589, which was earlier used by PW7-Ramji in his mobile phone, was used from 14.06.2012 in the mobile phone of PW4-Ram Kumar. As per the evidence brought on record, the call from mobile phone no.9899705589 was made on the mobile phone no.8512069677 only on 15.06.2012, and not before that. Thus, from the totality of the evidence discussed, we are of the view that during the relevant time and period, the appellant used the mobile phone no.9899705589 in making calls on the mobile phone no.8512069677 belonging to PW5-Rajbir, which was in use of PW2-Rukmani who specifically deposed that she had received ransom call on her mobile phone from the mobile phone no.9899705589.

31. So far the contention of the appellant regarding non-proving of the certificate under Section 65-B of the Indian Evidence Act, Ex.PW14/E is concerned, the same is unfounded and without any basis as the same has duly been proved by PW14 while entering into the witness box. Even otherwise, as per the decision in the case of **Anwar P.V. v. P.K. Basheer** (2014) 10 SCC 473, the said certificate is duly admissible in evidence. In the said decision, it was observed as under :

“The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the

statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

32. As discussed above, the prosecution has successfully established the circumstance that ransom call was made by the appellant on the mobile phone of the complainant which, at the relevant period was used by PW2-Rukmani.

33. Next circumstance brought on record by the prosecution is the recovery of dead body of the deceased from a drain at the instance of the appellant. The case of the prosecution is that the dead body of the deceased was recovered at the instance of the accused from a drain near Sanjay Colony. The dead body of the deceased was recovered on 22.06.2012 and the witnesses PW5-Rajbir, PW8-Rajiv, PW9-Suraj, PW18-Ct.H. Raju and PW22-SI Ajay Kumar have established the recovery of dead body at the instance of the accused, and its identity.

34. To prove this circumstance, PW18-Ct.H. Raju deposed that on 22.06.2012, accused was apprehended and arrested vide arrest memo Ex.PW18/A and his disclosure statement Ex.PW18/C. In pursuance of his disclosure statement, accused Vikas pointed towards ganda nala in Sanjay Colony, behind CNG pump as the place where he threw Raunak. The dead

body was recovered and Rajbir identified the dead body to be of his son Raunak. Rajbir also identified the clothes worn by the dead body to be of his son. A recovery memo Ex.PW5/B was prepared in this regard. Similar deposition has been made by PW22-Insp.Ajay Kumar with regard to recovery of dead body of the accused at the instance of the accused.

35. PW8-Rajiv is the independent witness to the recovery of the dead body. He deposed that on 22.06.2012, police took out dead body of one 4-5 years boy from the ganda nala near Sanjay Colony at the instance of the accused Vikas. Dead body was wearing red colour baniyan and underwear at the time of recovery and condition of the dead body was deteriorated and it was identified by the relatives and parents of the deceased. He identified the accused Vikas in the Court. During cross-examination, PW8 stated that at about 4 p.m., police officials reached his shop and thereafter he was joined in the investigation and then he was taken to the drain. There were three police officials and one of them was Ajay and accused was in their custody. He admitted that the body was in a decomposed condition. He denied that he was tutored or that he was deposing falsely at the instance of SI Ajay.

36. PW5-Rajbir also deposed that the dead body of his son was recovered from the drain on the pointing out of the accused. He duly identified the dead body of his son. The presence of parents of the deceased at the spot of recovery of dead body has also been established from the testimony of PW8 and PW9.

37. The recovery of dead body by the accused establishes the fact that the accused was aware of its location. He has not explained when, how, and under what circumstances he learnt of the same if, as claimed by him, he did not dump it there. The identity of the deceased was conclusively established by the clothes found on the said body which had been described by the parents of the deceased at the time of making the initial complaint, and also by the DNA profiling. It is matter of record that the blood sample of Smt.Mithilesh was taken vide MLC Ex.PW16/A for the purpose of isolating the DNA to get it matched with the DNA profiling of the deceased. As per the report Ex.PW24/A of the DNA Expert, Smt.Mithilesh is the biological mother of the deceased, which rules out any doubt that the dead body recovered was of the son of Raunak and none else. The testimony of witnesses, who remained associated with the recovery of dead body and its identification by the parents of the deceased remained unchallenged and uncontroverted. Thus, this circumstance was also established beyond any reasonable doubt.

38. From the testimony of PW17-Dr.V.K. Jha and the postmortem report Ex.PW17/A, it is apparent that the death of the deceased was a homicidal death. As per the report Ex.PW17/A, the cause of death of the deceased was asphyxia as a result of manual smothering.

39. Next circumstance brought on record was the recovery of toy of the deceased by the accused from his house. Learned counsel for the appellant disputed the recovery of any such toy at the instance of the appellant. He submitted that the said recovery was a planted one. Ld. counsel further submitted that there is no independent public witness to the recovery of toy.

Ld. counsel also submitted that the witnesses identified the said toy in the Court at the instance of the police officials.

40. From the testimony of Smt.Mithlesh (PW1), Rukmani @ Kirti (PW2) and Rajbir (PW5)– who are the mother, sister and father of the deceased respectively, it has been well established that the toy Ex.P1 which they identified during their testimony, was the same toy with which the deceased used to play and the same used to make “*kir-kir*” sound when it used to be rolled/played. There is no cross-examination of these witnesses to suggest that the toy Ex.P1 was not the toy with which the deceased used to play. So far as the contention of the appellant that the witnesses identified the toy Ex.P1 at the instance of the police is concerned, this fact is negated from the judicial TIP proceedings Ex.PW1/B of the toy. Ex.PW1/B shows that the witness identified the toy as that of the deceased when it was mixed with several other toys.

41. Ct.H. Raju (PW18) and Insp. Ajay Kumar (PW22) have deposed that the toy Ex.P1 was got recovered by the accused from his room. PW3-Krishan Kumar is the owner of the room where the accused used to reside. He is an independent witness. PW3 also deposed that, the accused got recovered the toy from his room, in his presence and he also signed the seizure memo Ex.PW3/A. PW3 also established the fact that the accused was living as tenant in the said room. Thus, the prosecution has duly established the recovery of toy Ex.P1 belonging to the deceased from the room and at the instance of the accused.

42. The toy Ex. P1 was recovered from the custody of the accused. It was for him to explain how he got it from the deceased, or when he found the same. He has failed to give any explanation for the same. This recovery shows that the deceased was with the accused after he went missing and before he died, as he had gone missing with the toy Ex.P1.

43. The defence taken by the accused is that he has been falsely roped in the present case since he was in love with the daughter of the complainant. He has also taken the plea that at the time of the incident, he was at his work place and to substantiate the said plea, he had examined DW1-Rajdeep Mehto. DW1 deposed that the accused Vikas is son of his sala (brother-in-law) and that he worked with DW1 in Yadav Nagar, Badli from 11.06.2012 to 16.06.2012.

44. PW2 has denied having an affair with the accused. If they had an affair, as claimed by the accused, like the four calls made by him on the fateful day, there would have been other calls from the same or some other number, but he has not set up any such plea, or led any other evidence on this aspect. This defence is not probalised also on account of the fact that several independent witnesses have deposed against the appellant, including PW4 and PW7. They had no axe to grind against the accused.

45. So far as the plea of alibi is concerned, apart from the testimony of DW1, the accused has not produced any evidence on record, either of his employer, or the employment record to show that he was working at the place as deposed by DW1. Even otherwise, no time has been given by DW1 during which, the accused remained at the work place. No evidence had

been produced by the accused which could make his presence near the place of incident– from where the deceased went missing, doubtful. He had not produced any material on record to show that it was almost impossible for him to be present at the place of incident at the relevant time. So, in our considered view, there is no basis in the plea of alibi taken by the appellant/accused.

46. We do not find any force in the appellants submission with regard to the non-recovery of the handkerchief used by the appellant to smother the deceased and that the case of the prosecution is undermined on account of PW6-the shopkeeper turning hostile. So far as the non-recovery of the handkerchief is concerned, it was only in the disclosure statement of the accused that he is alleged to have claimed that he had used a handkerchief to smother the minor victim. This is a fact which was known only to him. It is not that the prosecution cited any other eye witness who claims to have seen the accused smother the child with a handkerchief. Therefore, non-recovery of the handkerchief is not fitted to the case of the prosecution.

47. So far as the shopkeeper PW6 is concerned, his turning hostile is neither here nor there. Whether or not the accused bought a packet of biscuit from the shop of PW6 is not an essential part of the chain of circumstances relevant for the purpose of establishing the charge against the accused. Pertinently, there is no statement to this effect made by the accused in his disclosure statement.

48. From the above discussion, it is clear that all the incriminating circumstances have been proved by the prosecution, which implicates the

appellant/ accused. These circumstances complete the chain and lead to only one conclusion i.e., of the guilt of the accused in the commission of the offence of kidnapping for ransom and of the murder of the deceased child. The accused was a neighbor, residing in the room opposite where the deceased resided with his family. He had the occasion to kidnap the said child. He used the sim card of PW7 and the mobile instrument of PW4 to make the ransom calls on four occasions. On 15.06.2012 i.e., the day following the deceased child going missing, why would anybody take the sim card of one neighbor, insert in the mobile instrument of the other, and then make a call. This itself raises suspicion. Both PW4 and PW7 are independent witnesses and have clearly implicated the accused. The accused also got recovered the dead body of the deceased in the presence of independent witnesses after nine days of the deceased going missing. He has not explained as to why he was aware of the fact that the missing child was dead and that his dead body was lying at a particular spot in the ganda nala. The failure of the accused to explain the aforesaid circumstance leads to one and only one conclusion that it is the accused who had kidnapped the deceased for ransom and killed him. Pertinently, this was a threat issued by him through his ransom call on 15.06.2012 which was attended to by the sister of the deceased PW2 and the same was also reported to the police.

49. This is an extremely serious and damning circumstance. The accused also got recovered the toy of the deceased with which he was playing at the time when he went missing. The same was recovered from his possession in his room. He has not explained as to why he came into the possession of the same.

50. These circumstances, in our view, sufficiently and conclusively nail the accused. Thus, we agree with the finding of the Trial Court that the accused is guilty of, firstly, kidnapping of the deceased child for ransom and, secondly, of committing his murder.

51. Consequently, we find no merit in the present appeal and we dismiss the same.

(VIPIN SANGHI)
JUDGE

(P.S. TEJI)
JUDGE

JULY 02, 2018

सत्यमेव जयते