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

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Reserved on: 05.07.2022

Pronounced on: 20.10.2022

+ **CRL.A. 297/2009**

NAYAB & ANR.

..... Petitioners

Through: Mr. Sumeet Verma, Advocate
with Mr. Mahinder Pratap
Singh, Advocate

versus

STATE

..... Respondent

Through: Mr. Panna Lal Sharma, Ld.
APP for State with Inspector
Manish Verma

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

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SWARANA KANTA SHARMA, J.

1. By way of present Criminal Appeal, the appellants have challenged the impugned judgment dated 16.03.2009 and the order on

point of sentence dated 23.03.2009, passed by learned District Judge-VII/ North-East-Cum-Additional Sessions Judge, Karkardooma Courts, New Delhi against the present appellants in case FIR no. 528/2007, under Sections 366/368/376(2)(g)/109/34 of the Indian Penal Code, 1860, (“IPC”) which was registered at PS Gokulpuri.

FACTUAL BACKGROUND

2. Briefly, the facts of the present case are that FIR bearing no. 528/2007 under Section 363 IPC, Police Station Gokulpuri was registered on 08.07.2007 on the complaint of one Mr. Habib Ahmed. In the complaint, he had stated that his daughter Nazia (*name changed*) had gone missing and there was no clue about her whereabouts.

3. During the course of investigation, on 26.07.2007, the victim was recovered and produced before the Police Station where her statement was recorded under Section 161 Code of Criminal Procedure, 1973 (“Cr.P.C.”) and her medical examination was also conducted. The statement of victim was also recorded under Section 164 Cr.P.C. on the next day i.e., 27.07.2007.

4. Thereafter, the appellants were charged for offences punishable under Sections 366/368/34 IPC. Charge for offences punishable under Sections 366/368/34 IPC was framed against all the three accused persons, besides a separate charge for an offence punishable under Section 376(2)(g)/109 IPC was framed against accused Nayab and Khushnuma (the appellants herein) and another charge for an offence punishable under Section 376(2)(g) IPC was framed against accused Shafiq. Accused persons pleaded not guilty to the aforementioned

charges and claimed trial.

5. By way of impugned judgment dated 16.03.2009 and order on the point of sentence dated 23.03.2009, the learned Trial Court held the appellants guilty and sentenced them to rigorous imprisonment for three years and a fine for sum of Rs. 5,000/- for the offence punishable under Section 368 IPC. The reasoning of the impugned judgment dated 16.03.2009 reads as under:

“...14. Nazia projects that about one year ago, she had gone to fetch water at public hydrant, where Jubair met her. She presents that she accompanied him, as Jubair claimed that he will marry her. She was taken to the house of his father's sister (fufi), where accused Nayab and Khushnuma met her. She was kept there for about four or five days. Facts projected by Nazia, on issues referred above, are true in main, which facts get re-affirmation from facts detailed by Habib Ahmed and Shahida, who had deposed that their daughter Nazia went missing from their house. Habib Ahmed goes a step ahead and declared that since he had suspicion over Jubair @ Raja, hence he lodged his report Ex.PW3/A against him. In her statement, recorded under Section 164 of the Code, Nazia reiterate those facts. When she was produced before Dr. Madhu Bageria for her medical examination on 27.07.07, she projected a story of being taken away by Jubair @ Raja. Consequently, it is emerging over the record that events unfolded by Nazia are truthful. Though she had tried to provide embroidery to facts on issues as to whether Shafiq had coitus with her or not, yet story of her kidnapping by Jubair @ Raja and her wrongful concealment by Nayab and Khushnuma are true in main. There are no reasons to discard facts unfolded by Nazia on those issues. May be haunted with a feeling of being disbelieved, Nazia had tried to back up her story with concocted facts on the issue whether she went to house of Shafiq, along with Jubair @ Raja. In view of these reasons, I am of the considered opinion that facts projects by

Nazia are to be accepted, which project gravamen of her testimony.

15. As detailed by Nazia, Jubair met her at public hydrant, where she had gone to fetch water. He asked her to accompany him, since he wanted to marry her. He took her to the house of his father's sister in Mustafabad, where Nayab and Kushnuma were present. Habib Ahmed presents that in the year, 2007 during morning hours, Nazia had gone out of his house and did not return. He went to police station and lodged his report, which is Ex.PW3/A. He had suspicion that Jubair @ Raja had kidnapped his daughter. Mst. Shahida gives confirmation to facts detailed by Habib Ahmed. She projects that about ten months ago at about 6 am, Nazia had gone for micturition. She did not return and her husband lodged a report with the police. Om Prakash ASI projects that on 08.07.07 at about 10.50pm, Habib Ahmed came in the police station and lodged a missing report detailing that his daughter Nazia was missing from the house. DD No. 32A was recorded in that regard, copy of which is Ex.PW5/A. Therefore, facts unfolded by Nazia get confirmation from testimony of Habib Ahmed, Mst. Shahida and Om Prakash ASI. It came over the record that on 08.07.07 at about 7am, Nazia went missing.

19. Habib Ahmed had testified that on the date of incident, Nazia was 13 years of age. He projects that date of birth of Nazia is 12th of March, 1994. Mst. Shahida gives confirmation to facts unfolded by her husband on that count. She declares that Nazia was of 13 years of age at the time of incident. Much hue and cry was raised by the defence, arguing that Habib Ahmed and Shahida are not reliable on that issue. Defence tried to project that these two witnesses are illiterate and they have given age of Nazia by approximation. There is no substance in the contention advanced by the defence. Facts projected by these two witnesses get reaffirmation by circumstances unfolded by Dr. Madhu Bageria. She examined Nazia on 27th of July, 2007. Before her Nazia unfolded that she reached the stage of

minarche about three months back. She had recorded age of Nazia as 13 years in MLC Ex.PW8/A. Testimony of Dr. Madhu Bargeria was not at all assailed by the defence over that issue. Therefore, it came to light that when Nazia was examined by the lady doctor on 27.07.07, she unfolded that she attained puberty three months back. It is a matter of common knowledge that a girl attains puberty at the age of 13 years.

20. Therefore, circumstances detailed in MLC Ex.PW8/A gives confirmation to facts unfolded by Habib Ahmed and Mst. Shahida. Nazia also projects herself to be of 13 years of age. Out of facts unfolded by the aforesaid witnesses and contents of MLC Ex.PW8/A, it emerged over the record that Nazia was about 13 years of age on the date, when she went missing. Date of birth unfolded by her father in his testimony highlights her age as 13 years and about four months, on the date of incident. These facts are sufficient to conclude that Nazia was less than 18 years of age, when she went missing.

24. Out of these facts, it came to light that accused Nayab and Khushnuma were well aware that Nazia was kidnapped by Jubair and brought to the house of accused Nayab, located at Mustafabad, Delhi. Facts unfolded by Nazia, on those counts were not dispelled by the defence. Presence of accused Khushnuma at the aforesaid house, during the period when Nazia was kept there, is suggestive that she knew it well that her son had kidnapped Nazia. Utterances of Khushnuma and Nayab, to the effect that they will marry Nazia to Jubair, bring their knowledge over the record to the effect that they were aware that Nazia was kidnapped by Jubair and then brought to the house of Nayab. After having knowledge of Nazia being kidnapped, Nayab and Khushnuma wrongfully concealed her there for four or five days. Their advice to Jubair that he should take Nazia to some other place, so that her parents may not be able to trace her, fortify the fact that they knew that Nazia was brought to that house by Jubair after kidnapping her. Their state of

mind, entertained by them with regard to facts referred above, make it clear that they were aware of factum of Nazia being kidnapped and existence of their knowledge on that issue was communicated by them to Nazia as well as to Jubair. Consequently, it is clear that the prosecution has been able to establish that accused Nayab and Khushnuma had wrongfully concealed Nazia in that house for four of five days, knowing well that she was kidnapped by Jubair. All ingredients for an offence punishable under section 368 of the Penal Code had been established by prosecution against accused Nayab and Khushnuma.

25. Nazia nowhere speak even a single word against accused Shafiq, either as the person, who took steps for her kidnapping, wrongful concealment after her kidnapping or assisting Jubair @ Raja in her sexual exploitation. She had not attributed any accountability to Shafiq as the person, who sexually exploited her. Not even a word has come over the record against accused Shafiq to adjudicate his accountability for the charge. When Nazia had given clean chit to Shafiq, there is no other evidence over record to adjudicate his accountability for the charge. Consequently, it is evident that prosecution has not been able to prove charge against accused Shafiq.

26. Jubair @ Raja faces trial before the Juvenile Justice Board. Nazia had not testified any fact to the effect that Nayab or Khushnuma assisted or abetted Jubair @ Raja for her sexual exploitation. Not even a word has been spoken by the girl that when she was wrongfully concealed in her house by Nayab, at that juncture she was subjected to rape by Jubair @ Raja. It is evident that no material is there over record to show that accused Nayab and Khushnuma were aware that accused Jubair @ Raja had developed physical relations with Nazia. Consequently, evidence brought over record is deficient to prove accountability of accused Nayab and Khushnuma towards the charge of abetting Jubair @ Raja for sexual exploitation of Nazia.”

SUBMISSIONS OF LEARNED COUNSELS

6. Learned Counsel for the appellants states that it is evident from the judgment that there is no scientific proof or evidence to show that the victim/prosecutrix was less than eighteen years of age. The learned counsel further submits that the testimonies of the witnesses are contradictory in nature and such contradictions are sufficient to declare the impugned judgment and order a nullity.

7. *Per contra*, the learned Additional Public Prosecutor for the State submits that PW-3 (father of prosecutrix) and PW-4 (mother of prosecutrix) have stated that they were married 20 years back on the date when they were examined in court and not on the date of the incident in question. It is submitted that the learned Trial Court has rightly convicted the appellants, and the impugned judgment and order on sentence do not suffer from any infirmity.

OFFENCE UNDER SECTION 368 IPC

8. Since the appellants have been convicted under Section 368 of IPC and the contentions of learned counsel for appellants are premised upon the non-fulfillment of the ingredients of said offence, I deem it appropriate to refer to Section 368 IPC, which reads as under:

“...368. Wrongfully concealing or keeping in confinement, kidnapped or abducted person.—Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement...”

9. A cursory reading of Section 368 reveals that only once the offence of kidnapping is committed can there emerge a knowledge of kidnapping or such knowledge could be wrongfully concealed by someone. Thus, the first essential under Section 368 is the commission of the offence of kidnapping by someone. The second element for the commission of offence under Section 368 would be the 'knowledge' to the accused about kidnapping of a person. The third element would be wrongful concealment or confinement of the person concerned.

10. The Hon'ble Supreme Court in the landmark judgement of ***Saroj Kumari v. State of U.P., (1973) 3 SCC 669***, has laid down the following ingredients, essential to constitute an offence under Section 368: -

"...10. To constitute an offence under Section 368, it is necessary that the prosecution must establish the following ingredients:

(1) The person in question has been kidnapped.

(2) The accused knew that the said person had been kidnapped.

(3) The accused having such knowledge, wrongfully conceals or confines the person concerned..."

(emphasis supplied)

11. The Decision of the Hon'ble Supreme Court in ***Om Prakash vs. State of Haryana, (2011) 14 SCC 309***, while reiterating and applying the decision in the ***Saroj Kumari***(supra), observed as under: -

"...30. In Saroj Kumari v. The State of U.P. (1973) 3 SCC 669, this Court while explaining the constituents of an offence under Section 368 of the IPC clearly held that when the person in question has been kidnapped, the accused knew that the said person had been kidnapped and the accused having such knowledge, wrongfully conceals or confines the

person concerned then the ingredients of Section 368 of the IPC are said to be satisfied.

31. The prosecution evidence and particularly the statement of the prosecutrix shows that the act of kidnapping with the intention to rape and actual commission of rape of the prosecutrix were completed by Jai Prakash himself. The Appellant had rendered the help of providing a room but there is nothing on the record, including the statement of the prosecutrix, to show that she overheard Jai Prakash telling the Appellant that he had kidnapped her and/or that the Appellant had any knowledge of the fact that she had been kidnapped. The possibility of the Appellant being informed by the Jai Prakash that she had come of her own will and had travelled a long distance of 15-20 km without protest does not appear to be unreasonable. As noticed, according to the prosecutrix, it was under threat but the prosecution was expected to produce evidence to show that the factum of kidnapping as well as intent to commit a rape was known to the Appellant either directly or at least by circumstantial evidence.”

12. It is thus clear that for commission of an offence under Section 368 of IPC, the victim must have been kidnapped. Kidnapping means ‘kidnapping from lawful guardianship’ as provided under Section 361, and for Section 361 to come into play, a minor of less than 16 years of age if male and 18 years of age if female should have been enticed away from their lawful guardian.

13. Another crucial element to prove offence under Section 368 is that the accused should have ‘knowledge’ of the kidnapping of the victim. A similar observation was made by the Hon’ble Supreme Court in **Puran Singh & Ors. v. State of Bihar, JT 2001 (8) SC 647**, wherein the Court observed that: -

“4. The sine qua non for attracting provisions of Section 368, Indian Penal Code is that a person who either wrongfully conceals or confines the victim, must have the knowledge that, the victim had been kidnapped or had been abducted and on proof of that, the accused can be punished in the same manner as if he had kidnapped or abducted the victim with the same intention or knowledge, or for the same purpose as that with which he concealed or detained the victim...”

(emphasis supplied)

14. Further, while deciding the case of ***State v. Tapan Kumar Mandal (2012) SCC OnLine Del 2422***, the Division Bench of this Hon’ble Court found that the prosecution had failed to produce enough evidence to support an inference that the respondent had specific knowledge that the child brought to the house was kidnapped for ransom. The relevant portion of the judgment is as under: -

“5. In order to invoke Section 368 IPC, three ingredients must be proved i.e., (a) a person has been kidnapped or abducted; (b) the accused was knowing about that fact and (c) the accused must have concealed or confined such person. In the instant case, the prosecution failed to adduce reliable evidence to support an inference of the specific knowledge of the Respondent that the child brought to his house was kidnapped for ransom. PW-Akash, in his testimony, did not claim that he overheard any conversation whereby the co-accused informed the Respondent about his kidnapping. Since the child used to be taken away by the co-accused, the alleged abductors, it cannot be inferred that the victim was wrongfully concealed or confined in the house by the Respondent. Primarily the act of concealment refers to the withdrawal from the actual observation of others, by removal or otherwise, of the person kidnapped or abducted. Where an accused has no knowledge of the victim having been kidnapped or abducted, he does not render himself liable to punishment under Section 368

IPC.

6. The Trial Court made observations on the testimony of the kidnapped child showing his reluctance to identify the Respondent as the person in whose house he had been kept. The prosecution failed to produce convincing evidence that the accused had requisite knowledge about the kidnapping of the child and had deliberately assisted the co-accused in concealing or confining the child to accomplish the purpose for which he was kidnapped. Since the alleged kidnappers belonged to the same village as the Respondent, their mere visits along with the kidnapped child or the mere staying of the victim at the Respondent's house is not sufficient to attract Section 368 IPC. No belongings of the child were recovered from the Respondent's house to show that he had been kept there for a certain duration in his house.”

FINDINGS & OBSERVATIONS

(i) Age of the prosecutrix

15. In the present case, a bare perusal of the testimony of PW-3 (father of prosecutrix) and PW-4 (mother of prosecutrix) makes it clear that they got married about 20 years back. Furthermore, it is also admitted that their first child was born a year after their *Nikah*, and the prosecutrix, being the second child, was born a year after the birth of their first child.

The relevant portion of the testimony of PW-3 reads as under: -

“At the time of my marriage, I was 15/16 years of age. About 20 years have passed now, since my nikah. My first daughter was born after about one year of my nikah. Nazrin is my second daughter. My all children were born in my house and not in the hospital. I have no record of date of birth of my children from MCD or any other Govt.”

The relevant portion of the testimony of PW-4 reads as under: -

“...I have 9 children. I cannot tell their date of birth. None of my child was born in the hospital. After one year of my marriage, one daughter was born. Prosecutrix is my second child and there is difference of one year of the prosecutrix and my first child. Birth was not registered with the MCD... I cannot tell date of birth and year of my daughter...”

Thus, considering the date of testimony being 13.05.2008 and the date on which the victim allegedly went missing being 08.07.2007, it can be inferred that the age of the victim was about 18 years on the date of the incident as it emerges from these testimonies that the first child was born a year after their *Nikah*, and the prosecutrix, being the second child, was born a year after the birth of their first child.

16. The learned Trial Court in the impugned judgment also relied upon the MLC Report of the prosecutrix to determine the age of the victim to be around 13 years, wherein Nazia had disclosed that she had reached the stage of puberty about three months back,

17. The doctor concerned i.e., PW-8 has, however, categorically stated in the MLC Report that she cannot comment upon the age of the prosecutrix. Further, no ossification test was conducted in this case. Also, there is no birth certificate issued by the hospital or the MCD as the prosecutrix was born at home. As far as the reasoning of the learned Trial Court in concluding the age of prosecutrix to be around 13 years is concerned, the determination of age as per menarche cannot be a conclusive criterion as relied upon in the impugned order. The Division Bench of this Court in ***The State of NCT Delhi v. Sumit Kumar 2018 SCC OnLine Del 11843*** had observed that the age of the menarche might vary.

18. Therefore, this is a case where there is nothing on record which could prove the age of prosecutrix with certainty. A combined reading of the testimonies of PW-3 and PW-4 reflects the age of prosecutrix to be around 18 years at the time of incident. There is nothing to show that the prosecutrix was 13 years of age at the time of the incident, except the statement of prosecutrix to the effect that she attained menarche 3 months prior to the incident. The said facts have been completely ignored in the impugned judgment. In case the prosecution could not prove that the prosecutrix was less than 18 years of age, the essential ingredient for the commission of the offence of kidnapping itself would not be made out.

(ii) Wrongful Concealment and Contradictions in Testimonies

19. Now, the testimonies of the witnesses have to be assessed in order to determine whether there was “*wrongful concealment*” about kidnapping of the victim, and whether there exist any material contradictions in the testimonies of the witnesses.

20. It is a settled position of law that evaluation and credibility of testimonies cannot be in isolation, rather needs to be in totality for judicial evaluation. In *Inder Singh & Anr. v. The State (Delhi Administration)* (1978) 4 SCC 161, the Hon’ble Supreme Court observed that,

“Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect.”

21. Thus, while deciding a case, it is imperative to look into the contradictions in the testimony and the nature of contradictions. The weightage of the contradictions amongst testimonies would be dependent on the consideration of ‘material contradictions’, which refers to contradictions acting beyond the contours of minor discrepancies. In ***State of Rajasthan v. Smt. Kalki & Anr., (1981) 2 SCC 752*** the Hon’ble Supreme Court explained the difference between normal and material discrepancies in the following manner: -

“8. ...In the depositions of witnesses there are always normal discrepancies, however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person...”

22. In ***Sunil Kumar Sambhudayal Gupta (Dr.) and Ors v. State of Maharashtra, (2010) 13 SCC 657***, the Hon’ble Supreme Court observed as follows: -

“21. While deciding such a case, the Court has to apply the aforesaid tests. Mere marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.”

23. Similarly, in ***Syed Ibrahim v. State of Andhra Pradesh, (2006) 10 SCC 601***, the Hon’ble Supreme Court while examining discrepancies between the testimonies made the following observations:

“10. ...The courts have to label the category to which a

discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so..."

24. In the present case, there are glaring contradictions between the testimony of PW-2 and testimonies of PW-3 and PW-4, which if found to be material contradictions would amount to shaking the edifice of prosecution case. The relevant portion of the testimony of PW-2, i.e., prosecutrix reads as under: -

"At about one year ago, I had gone to fetch water from a water tap near my house, where. I met Jubiar. He told me that I should accompany him as he wanted to marry me. He took me to the house of his Fufi present in the court. (Witness has pointed out towards accused Ms. Nayab present in the court). Accused MS. Khushnama present in the court was also present there. Ms. Khushnama is mother of Jubiar. I was kept in the house for 4-5 days. After leaving me. in the house Jubiar went back."

Further during cross-examination, PW-2 states as follows: -

"It is correct that earlier also I had visited Karkardooma court where my statement was recorded by a Magistrate. (At this stage a sealed. - envelope with the seal of NK is opened and original statement of the witness u/s 164 Cr.P.C.. is taken out). - Ex. PW-2/A bears my signatures at point A. It is correct that the place where Jubiar @ Raja had taken me was situated in Mustafabad. It is correct that fufi and mother of Jubiar had told me that they will get me married with the Jubiar. It wrong to suggest that accused Jubiar had taken me to his friend Shafiq. It is correct that I had stated to the Id. MM that accused Jubiar had taken me to his friend Shafiq. It wrong to suggest, that Jubiar @ Raja and Shafiq raped me several times. ·It wrong to suggest that I had stated so before the Id. MM. Confronted with portion A to A wherein it has been so recorded. It is wrong to suggest that Jubiar @ Raja ·and shafiq used to harass me in night. I 'had not stated so before the Ld. MM. Confronted with portion B to B wherein it has been so recorded. It is correct that I was kept in the house of fufi and mother of Jubiar against my wishes. It is

correct that accused Nayab and Khushnuma told Raja @ Jubiar that he should take me to some other place so that my parents may not be able to trace me.”

“I do not know as to how many fufis Jubair is having. I cannot tell where the fufis of the Jubair had been residing.”

“It wrong to suggest that Jubiar did not take me to the house of Nayab., It wrong to suggest that I was not kept in her house by Nayab. It wrong to suggest that Nayab did not tell that she will get me married with the accused Jubiar”

“It wrong to suggest that Khushnuma was not present in the house. It wrong to suggest that I never met accused Khushnuma present in the court. It wrong to suggest that Khushnuma never asked me to marry Jubair. It wrong to suggest that I am deposing falsely at the instance of my parents”

(emphasis supplied)

25. However, contrary to the statement of prosecutrix, PW-3 i.e., father of the prosecutrix states that the appellants themselves had come to their house and informed the whereabouts of the victim. The relevant portion of PW-3, reads as follows: -

“...On the same day, when my daughter went missing my house, accused Nayab present in the court today, came to my house and told that my daughter was with her and if I am able to take her back from her, let I may take her back. After about 10- 15 days, my daughter was recovered from a place towards Azadpur and at that time she was with accused Raja @ Jubair”

(emphasis supplied)

Further during cross examination, PW-3 states as under: -

“..It is correct that on 16.7.2007, accused Nayab and accused Khushnuma present in the court today, had come to my house

and told me that my daughter was in their possession.”

26. The testimony of PW-3 is supported by PW-4 during cross-examination. The relevant portion of the *cross-examination* is reproduced as below:

“It is correct that after about one week of missing of my daughter, accused Nayab and Kushnumba both present in the court today, came to my house 'and told that my daughter were in their possession and if I was able to cause any harm to them, I may harm to them. It is also correct that they told that if was able to take back my daughter, let I take back my daughter from their possession. It is incorrect to suggest that both these accused persons told me that they would get marry my daughter with Raja.”

27. The ‘*concealment*’ to be covered under Section 368 IPC must be coupled with an intention to hide the whereabouts of the victim. However, cross-examination of PW-3 and PW-4 reveals that they have clearly stated that it was the appellants who had come and informed them about victim’s whereabouts.

28. The prosecutrix however in her cross-examination has stated – “It is correct that accused Nayab and Khushnama told Raja @Jubiar that he should take me to some other place so that my parents may not be able to trace me.” Apparently this is material contradiction on record, as the appellants as per testimony of PW3 and PW4, did not try to hide the whereabouts of the prosecutrix. The appellants themselves had revealed the whereabouts of the prosecutrix by going to the house of victim’s parents. Thus, inconsistencies in the testimonies of the prosecution witnesses creates doubts in the case of the prosecution.

29. It is vital to appreciate the proximity between the time she was

recovered and the time when she gave her statement. It was on the very same day that the victim had given her statement after being recovered, yet no information concerning wrongful concealment was disclosed by the victim.

30. Moreover, the prosecutrix raised no alarm during the entire period of almost 14 days though she travelled to different places, which were residential areas. In such circumstances, the trustworthiness and reliability of the statement of the prosecutrix is questionable.

31. It is also significant to note that at no instance has the prosecutrix identified the place where she was taken, after being kidnapped. There is no pointing out memo regarding the place where the prosecutrix was allegedly kept by the appellants i.e., the house of accused Nayab. The prosecutrix has neither identified or named, nor has described the place where she was kept. Investigating Officer has also not investigated the case from this angle and has also not filed any record in this regard in the charge sheet. In the charge sheet, no investigation was carried out concerning the place where the prosecutrix was allegedly kept by the appellants.

32. Considering the above observations, it is worthwhile to mention that this is “*not a case of concealing the whereabouts, but of rather revealing the whereabouts*” of the victim. The appreciation of evidence is crucial to do justice. A casually written judgment and casually appreciated evidence is a causality to justice. A judgment is the nectar explaining every aspect of the facts & circumstances and the reason to reach a decision.

33. A Court has to appreciate the testimony of the witnesses as a

whole while deciding a case and reaching its conclusion. In the present case, the testimony of PW-3 and PW-4 points out that the appellants had stated that the victim was with them and had asked the prosecutrix's parents to take her back if they can, which at no instance portrays any nature of concealment of information. It was missed out by the learned Trial Court, that while reaching the conclusion the testimony of the witnesses should be read in entirety. Further, the Learned Trial Court failed to note that the victim on the same day of being recovered gave statement stating nothing regarding concealment of information by the appellants herein.

34. In view of the foregoing discussion, this Court is of the view that the prosecution has failed to prove the existence of the essential ingredients required to secure conviction under Section 368 of IPC beyond reasonable doubt. There are serious and material contradictions between the testimony of the victim and testimonies of victim's parents, with regard to the concealment of whereabouts of the victim, which cannot be overlooked. The age of the victim has not been proved to be less than 18 years on the day of incident. In view thereof, this Court is of the opinion that the appellants are entitled to the benefit of doubt. Accordingly, the present appeal is allowed and impugned judgment dated 16.03.2009 and order on sentence dated 23.03.2009 are set aside.

35. Bail bonds cancelled. Surety is discharged.

36. The appeal is disposed of.

SWARANA KANTA SHARMA, J.

OCTOBER 20, 2022/kss