

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

% Date of Decision : 6<sup>th</sup> January, 2010

+ **CRL. A. No. 738/2003**

SURENDER KUMAR @ RAJA ..... Appellant  
Through: Mr. Rajesh Mahajan, Advocate

versus

STATE ..... Respondent  
Through: Mr. M.N. Dudeja, APP

**CORAM:**  
**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**  
**HON'BLE MR. JUSTICE SURESH KAIT**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

**PRADEEP NANDRAJOG, J.** (Oral)

1. With reference to the testimony of Ram Chander PW-1, Mukesh PW-2 and Raj Kumar PW-3, the learned trial Judge has returned a finding that the prosecution has successfully established that the appellant has committed the offence punishable under Section 364-A IPC. For the offence held committed by the appellant, he has been sentenced to undergo imprisonment for life and pay fine in sum of Rs. 1000/-; in default of payment of fine it has been directed that the appellant shall undergo RI for further six months.

2. Conceding that there is no blemish in the testimony of

PW-1 and PW-2, learned counsel for the appellant points out a serious procedural infirmity during conduct of trial which has considerable bearing on the testimony of Raj Kumar PW-3 and the commission of the offence punishable under Section 364-A IPC.

3. To appreciate the submissions urged at the hearing of the appeal by Sh.Rajesh Mahajan learned Amicus Curie who has been nominated by the Delhi High Court Legal Service Committee to argue the appeal on behalf of the appellant, it may be noted that Ram Chander PW-1 who is the father of the child kidnapped; namely Mukesh PW-2, while deposing in Court has not uttered any word of any threat conveyed to him pertaining to the kidnapped child of causing death or bodily injury to the kidnapped child. There is no reference in the testimony of Ram Chander of any conduct of the accused where from an apprehension would arise in the mind of Ram Chander that if ransom was not paid, his child would be hurt or killed. We note that Ram Chander has simply stated that when he received a call from the appellant he was told to bring money. He categorically stated that no specific amount to be paid as ransom was conveyed to him.

4. The kidnapped child i.e. Mukesh PW-2 has simply stated that the appellant had kidnapped him and when he wept he

was beaten.

5. Raj Kumar PW-3, who runs a milk dairy in front of the tea shop belonging to Ram Chander stated that at his telephone number 2634918 when ransom call was received by him to be conveyed to Ram Chander, he was categorically informed that the police should not be told anything, otherwise the kidnapped child would be killed.

6. In the back drop of the evidence afore-noted, submission made by learned counsel for the appellant is that, as held in the decision reported as JT 2007 (5) SC 48 Vishwanant Gupta Vs. State of Uttranchal (as held in para 6), an essential ingredient of the offence of kidnapping for ransom i.e. Section 364-A IPC is threat to cause death or hurt to the victim or conduct which gave rise to a reasonable apprehension that the kidnapped person would be hurt or killed.

7. Counsel submits that neither PW-1 nor PW-2 have deposed any such fact. With reference to the testimony of PW-3, learned counsel points out that PW-3 was examined on 08.08.2002 and was partially cross-examined on said date. Counsel submits that as recorded by the learned trial Judge, since no further time was left on 08.08.2002, further cross-examination was deferred. Order sheet shows that the matter was listed for further evidence on 28.10.2002. On said date,

recording in the order sheet that till 3:35 PM the accused could not call his counsel, opportunity of further cross-examination was given to the accused who failed to cross-examine PW-3. Learned counsel points out that the appellant was in custody on 29.10.2002 and was produced before the Court from the police lock-up in the Court premises when the case was called. Counsel wonders as to how could the appellant go in the Court complex to search for his lawyer. Not only that. With reference to the record, counsel draws our attention to the order dated 30.10.2002 which records that the accused told the Judge he was a poor man and that his counsel was not appearing and he be provided with the service of a counsel at the State expense. On the same date Sh.Sanjiv Goel, Advocate was appointed as Amicus Curie. Learned counsel further points out that the Amicus Curie moved an application to recall PW-1 and PW-3 for further cross-examination pointing out to the Court that PW-1 and PW-3 could not be examined because counsel for the accused did not appear on 29.10.2002. Vide order dated 30.10.2002 the application was allowed and it was directed that PW-1 and PW-3 would be summoned for further cross-examination.

8. At this stage, we may note that PW-1 was not cross-examined on 29.10.2002 i.e. the date fixed for his cross-

examination for the reason counsel for the accused was absent. We further note that the examination-in-chief of PW-1 was completed on 09.08.2002, meaning thereby, that the accused had not cross-examined either PW-1 and PW-3 till 31.10.2002.

9. On 31.10.2002 PW-1 appeared and was cross-examined. In spite of being served PW-3 did not appear. Unfortunately, the learned trial Judge lost sight of said fact resulting in further witnesses being examined and cross-examined, but PW-3 remained uncross-examined pursuant to the order dated 30.10.2002.

10. What has happened as a result of the afore-noted fact is that a valuable right of the accused to cross-examine PW-3 on a very vital aspect of the matter has been violated. The vital aspect of the matter is the cross-examination of PW-3 with respect to his testimony in Court that when a call was received by him at his telephone number the caller told him that if police was informed the kidnapped child would be killed.

11. Two options are open to us. First is to set aside the impugned judgment and remit the matter for further evidence with directions that Raj Kumar PW-3 be summoned and tendered for further cross-examination. The other is to close the chapter in the appeal noting that the appellant has

remained in custody since the day he was arrested i.e. 13.08.2001. As of today the appellant has served an actual sentence of 8 years 4 months and 20 days.

12. Learned counsel for the State urges that the former course be chartered. Learned counsel for the appellant prays that latter course be chartered.

13. Learned counsel for the appellant draws our attention to the statement of Raj Kumar recorded under Section 161 Cr.P.C. Counsel points out that in the said statement Raj Kumar has nowhere stated that when a call was received by him at his telephone, the caller said that if police was informed the child kidnapped would be killed. Learned counsel urges that if PW-3 directed to be re-summoned for further cross-examination the accused i.e. appellant would confront Raj Kumar with his statement under Section 161 Cr.P.C. to highlight that Raj Kumar has made material improvement while deposing in Court vis-à-vis his statement recorded under Section 161 Cr.P.C. Counsel submits that at the remanded stage, what is going to happen is a foregone conclusion and thus urges that taking note of the poverty of the appellant and his continued incarceration the matter may be closed at the stage of appeal.

14. As held by a co-ordinate Division Bench of this Court, in

the decision reported as 149 (2009) DLT 306 Rafiq & Anr. Vs. State , an essential ingredient of the offence of kidnapping for ransom is to give threat for death or hurt to the victim or evidence of such conduct of the accused as would give rise to a reasonable apprehension that the victim would be put to death or hurt.

15. Same view has been taken by the Supreme Court in *Vishwanath's* case (Supra).

16. Learned counsel for the State refers to the decision reported as AIR 2004 SC 4865 Mallesi Vs.State of Karnataka to urge that to constitute the offence punishable under Section 364-A IPC it is enough to establish that the accused kidnapped the victim and demanded ransom.

17. This Bench had a occasion to consider the said decision cited by learned counsel for the State. Our decision is dated 09.12.2009 disposing of Criminal Appeal No. 980/2005 Imran Ansari Vs. State. In para 13 to 17 of our decision afore-noted we had held as under :-

“13. It is important to note that in the first segment of Section 364-A IPC, as fragmented hereinabove; ‘*and threatens to cause death or hurt to such person*’ is an inseparable part of kidnapping or abduction. It is apparent that the disjunction takes place firstly at the stage the sentence ‘*or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt*’. Further disjunctions take place as afore-noted.

14. It is settled law that a penal statute has to be construed strictly.

15. Learned counsel for the State cites AIR 2004 SC 4865, Mallesh vs. State of Karnataka to urge that to constitute the offence of kidnapping or abduction it is enough to establish that the accused abducted/kidnapped the victim and demanded ransom.

16. We note that the issue which has arisen for consideration in the instant appeal did not arise for consideration in Mallesh's case (supra) and for said reason we do not find that the court has analyzed the various ingredients of Section 364-A IPC.

17. From a perusal of the decision of Supreme Court, it is apparent that what was being urged before the Supreme Court was that the evidence does not show complicity of the accused in the abduction of the victim i.e. PW-2, a student of S.J.M. College. We note that the Supreme Court has categorically noted the testimony of PW-2 that after he was put in a Trax jeep and after crossing Challakera gate, he was threatened not to raise his voice, otherwise he will be murdered. There was evidence of threat being given to the victim being put to death. Thus, there was no scope for the issue to be debated for the Supreme Court on the interpretation of Section 364-A IPC."

18. Thus, we hold that PW-3 has made a considerable improvement vis-a-vis his statement recorded by the police under Section 161 Cr.P.C. relating to the threat extended to the life of the kidnapped child. Removing said testimony of PW-3 as untrustworthy, we are left with the simple testimony of PW-1 and PW-2 as per whom only ransom was demanded. No threat whatsoever was extended to the life or the person of the kidnapped child.

19. It may be noted that while putting the incriminating

evidence to the accused when he was examined under Section 313 Cr.P.C. it has not been put that the accused extended any threat to the life or person of the kidnapped child when ransom was claimed or acted in a manner wherefrom an apprehension of causing such threat or injury could arise in the mind of any third party. Thus said circumstance has to be ignored while considering the incriminating circumstances against the appellant.

20. We concurred with the plea urged by the learned counsel for the appellant that the evidence on record establishes the commission of offence punishable under Section 363 IPC and no more.

21. Noting that the maximum sentence for the offence punishable under Section 363 IPC is seven years imprisonment; noting further that as of today the appellant has undergone an actual sentence of 8 years and 5 months, we partially allow the appeal.

22. The conviction of the appellant for the offence punishable under Section 364-A IPC is set aside. The appellant is convicted for the offence punishable under Section 363 IPC. Since the appellant has undergone a sentence in excess of the prescribed period for the maximum term under Section 363

IPC, we direct that unless required to be kept in custody in some other case, the appellant be set free forthwith.

23. Copy of this order be sent to the Superintendent Central Jail, Tihar for compliance.

**PRADEEP NANDRAJOG, J**

**SURESH KAIT, J**

**JANUARY 06, 2010**  
**'mr'**